Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Green County Care Center,	)	Date: December 19, 2007
	)	
Petitioner,	)	Docket No. C-08-67
	)	
- v. -	)	Decision No. CR1716
	)	
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION AND ORDER DISMISSING CASE

This matter is before me on a motion to dismiss filed by the Centers for Medicare & Medicaid Services (CMS). The motion is based on the untimeliness of Petitioner's request for a hearing before me, the Administrative Law Judge (ALJ) assigned to this case. CMS's motion is accompanied by two exhibits. CMS Exhibits (CMS Ex.) 1 and 2 are admitted. Petitioner did not respond to the motion. For the reasons and bases below, I GRANT CMS's motion and DISMISS Petitioner's request for a hearing.

A. Background and Material Facts

Petitioner is a long-term care facility located in Tulsa, Oklahoma, and is authorized to participate in the Medicare and Medicaid programs. It is required to be in substantial compliance with program requirements to remain a participant. On June 29, 2007, an Oklahoma state agency (state agency) conducted a survey of Petitioner's facility and found that the facility was not in substantial compliance with program requirements. On July 6, 2007, the state agency notified Petitioner of its survey findings. Based on its review of the state agency's survey findings, on July 19, 2007, CMS notified Petitioner that it was not in substantial compliance with program requirements; that Petitioner's provider agreement would be terminated effective December 29, 2007, unless the facility returned to substantial compliance before that date; and that payment for new admissions

would be denied effective August 3, 2007, to continue until the facility achieved substantial compliance or its provider agreement was terminated, whichever occurred first. As monetary sanctions, Petitioner was assessed a civil monetary penalty (CMP) of $10,000 per day for one day of noncompliance at the "immediate jeopardy" (IJ) level on June 28, 2007. CMS determined that although the IJ-level noncompliance was remedied, Petitioner still was not substantially compliant and assessed a CMP of $1000 per day from June 29, 2007, to be in effect until the facility returned to substantial compliance. The regulatory bases for noncompliance findings were 42 C.F.R. §§ 483.10(b)(11) (Resident Rights - Notification of Changes); 483.25 (Quality of Care); 483.25(m)(2) (Quality of Care - Medication Errors); 483.60(a) and (b) (Pharmacy Services - Procedures and Service consultation); and 483.75(j) and (l) (Administration). Petitioner was further advised that the sanction could affect Petitioner's Nurse Aide Training and Competency Evaluation Program (NATCEP) and Competency Evaluation Program. CMS Ex. 1, at 1-2. As noted in CMS's motion, at page 2, n.1, CMS determined that Petitioner returned to substantial compliance on July 30, 2007, and rescinded the proposed termination and denial of payment for new admissions. The per-day CMP imposed from June 29, 2007 remained in effect.

CMS's July 19, 2007 letter informed Petitioner that if it disagreed with the determination of noncompliance and/or substandard quality of care, then Petitioner could request a hearing before an ALJ of the Departmental Appeals Board (DAB) no later than September 17, 2007 (60 days from the July 19, 2007 notice to Petitioner by facsimile), to be addressed to the DAB, Civil Remedies Division (CRD). CMS Ex. 2, at 2-3. Petitioner, by its counsel, requested a hearing by a letter dated October 26, 2007, disputing all noncompliance findings and remedies imposed or proposed, and raising certain due process issues. CMS Ex. 2.

On November 15, 2007, an Acknowledgment and Initial Docketing Order issued by my direction set forth procedures and a schedule for the initial development of the case. In pertinent part, the Order, in paragraph 2a, directed that any potentially dispositive motion, such as a motion to dismiss filed pursuant to 42 C.F.R. § 498.68 (dismissal of request for hearing), must be filed within 30 days of the date of the Order, and that the non-moving party may respond consistent with 42 C.F.R. § 498.17. Also, that paragraph informed the parties that any argument or position not raised by a motion filed consistent with that paragraph would be deemed waived and any unopposed motion will be deemed conceded and granted without further notice.

On November 15, 2007, Petitioner's counsel filed his notice of appearance. On November 16, 2007, CMS counsel filed his notice of appearance and a motion to dismiss for failure to file a timely request for hearing. Petitioner did not respond to the motion.

B. Applicable Law and Regulations

The requirements for participation by a long-term care facility are found at sections 1819 and 1919 of the Social Security Act (Act) and at 42 C.F.R. Part 483. Sections 1819 and 1919 of the Act authorize the Secretary of Health and Human Services to impose remedies against a facility for failure to comply substantially with federal participation requirements. Facilities participating in Medicare are subject to surveys by state agencies on behalf of CMS to determine whether they are complying with participation requirements. 42 C.F.R. §§ 488.10-488.28, 488.300-488.335. Pursuant to 42 C.F.R. Part 488, CMS may impose various sanctions for failure to substantially comply with participation requirements, including a per-instance CMP or per-day CMP against a long-term care facility. 42 C.F.R. §§ 488.406; 488.408; 488.430.

Per-day CMPs fall into one of two broad ranges of penalties. 42 C.F.R. §§ 488.408, 488.438. The upper CMP range, from $3050 to $10,000 per day, is reserved for deficiencies that constitute IJ to a facility's residents and, in some circumstances, for repeated deficiencies. 42 C.F.R. §§ 488.438(a)(1)(i), (d)(2). The lower range of CMP, from $50 to $3000 per day, is reserved for deficiencies that do not constitute IJ, but either cause actual harm to residents, or cause no actual harm, but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). As for per-instance CMPs, the regulations provide for a single range of CMP from $1000 to $10,000, which could be imposed whether or not IJ is found. 42 C.F.R. §§ 488.408(d)(1)(iv); 488.438(a)(2).

A long-term care facility against which CMS has determined to impose a CMP is entitled to a hearing before an ALJ. Act, section 1128A(c)(2); 42 C.F.R. §§ 488.408(g); 498.3(b)(13). A hearing before an ALJ is a *de novo* proceeding. *Anesthesiologists Affiliated, et al.*, DAB CR65 (1990), *aff'd*, *Anesthesiologists Affiliated, et al. v. Sullivan*, 941 F.2d 678 (8th Cir. 1991). The facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. § 488.408(g)(1); *see also* 42 C.F.R. § 488.330(e). However, the choice of remedies by CMS or the factors CMS considered in choosing remedies are not reviewed. 42 C.F.R. § 488.408(g)(2). A facility may only challenge the scope and severity level of noncompliance found by CMS if a successful challenge would affect the CMP amount that could be collected by CMS or impact upon the facility's NATCEP. 42 C.F.R. §§ 498.3(b)(14) and (d)(10)(i). CMS's determination as to the level of noncompliance "must be upheld unless it is clearly erroneous." 42 C.F.R. § 498.60(c)(2). This includes CMS's finding of IJ. *Woodstock Care Center*, DAB No. 1726, at 9, 38 (2000), *aff'd, Woodstock Care Center v. Thompson*, 363 F.3d 583 (6th Cir. 2003). The DAB has long held that the net effect of the regulations

is that a provider has no right to challenge the scope and severity level assigned to a noncompliance finding, except in the situation where that finding was the basis for an IJ determination. *See, e.g.*, *Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion*, DAB No. 1750 (2000). Review of a CMP by an ALJ is governed by 42 C.F.R. § 488.438(e).

CMS is required to notify a long-term care facility provider of the bases for any noncompliance determination, remedy imposed, the effective date of the remedy, and the right to seek review of a noncompliance determination. 42 C.F.R. § 488.402(f); *see also* 42 C.F.R. § 488.434. A CMS finding of noncompliance on which a remedy is based is deemed an initial determination for which ALJ review may be sought. 42 C.F.R. §§ 488.406, 498.3(b)(13). The controlling regulation here is 42 C.F.R. § 498.40(a)(2), which, in pertinent part, provides: "The affected party or its legal representative or other authorized official must file the request [for a hearing] in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended in accordance with paragraph (c) of this section." The 60-day period runs from the date of receipt by the affected party, which is presumed to be five days after the date of the notice unless it is shown that the notice was received earlier or later. 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3). Under 42 C.F.R. § 498.40(c), if a hearing request was not filed within the 60-day period, then the time for filing such a request may be extended if the affected party or its legal representative or other authorized official files with the ALJ a written request for extension of time stating the reasons why the request was not timely. The ALJ may extend the filing deadline if good cause is demonstrated. An ALJ "should not lightly conclude that a petitioner has failed in its effort to take advantage of its opportunity for a hearing." *The Carlton at the Lake*, DAB No. 1829, at 8 (2002).

C. Discussion

Petitioner failed to file a timely request for a hearing and effectively conceded to CMS's motion to dismiss by failing to respond to the motion. It also failed to seek an extension of the filing deadline. I make the following findings and conclusions to support my decision to grant the motion and dismiss the hearing request. Each finding or conclusion is set forth below, numbered and presented in boldface text.

1. CMS notified Petitioner of its action on July 19, 2007.

As evident in CMS Ex. 1, on July 19, 2007, Petitioner was provided notice of CMS's determination of noncompliance with program participation requirements and the remedies to be imposed. The notice is an "initial, reconsidered, or revised determination" by CMS. 42 C.F.R. §§ 488.406, 498.3(b)(13). The notice clearly indicates that it is being

provided by facsimile and that "no hard copy [would] follow." CMS Ex. 1, at 1 and 3. It was this notice that constituted agency action from which Petitioner's right to appeal arose. 42 C.F.R. §§ 498.5, 498.40.

2. Petitioner received CMS's notice letter on July 19, 2007.

The 60-day period for requesting a hearing runs from the date of receipt of notice by the affected party, which is presumed to be five days after the date of the notice unless it is shown that the notice was received earlier or later. 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3). As noted, CMS's notice letter at issue here was sent only by facsimile, and I have no evidence or assertion as to actual receipt on a day other than July 19, 2007, or that the letter was sent in any manner other than by facsimile. Also, in light of *Riverview Village*, DAB No. 1840 (2002), I rely on the regulatory presumption of delivery on that date, by facsimile. Further, I note that nowhere in its hearing request (CMS Ex. 2) does Petitioner discuss when CMS's notice letter was received. It does not assert that the notice actually was received on any day other than July 19, 2007.

3. Petitioner's hearing request was filed on October 26, 2007.

Petitioner's hearing request, sent by Petitioner's legal counsel, is dated October 26, 2007, and was received by CRD on November 1, 2007. Again, nowhere in the request for hearing is there a discussion as to the date of receipt of CMS's notice letter. It does not address timeliness of the request for hearing. In fact, to date, I have no objection or response to CMS's motion to dismiss based on an untimely hearing request, which Petitioner could have filed consistent with 42 C.F.R. § 498.17(b) (20-day rebuttal opportunity). Without any evidence or argument to the contrary, I find that Petitioner's hearing request was filed on October 26, 2007.

4. Petitioner's hearing request was filed more than 60 days after receipt of CMS's notice letter, and was therefore untimely.

To avail itself of a right to an ALJ review, a facility must request a hearing, in writing, within 60 days of notice of the proposed action. Here, the latest date by which Petitioner could have filed a timely hearing request consistent with 42 C.F.R. § 498.40(a)(2) was September 17, 2007, 60 days after July 19, 2007. CMS's July 19, 2007 letter cited 42 C.F.R. § 498.40 and informed Petitioner that it had until September 17, 2007, to file a hearing request with the CRD. Petitioner's hearing request (CMS Ex. 2) is dated October 26, 2007, and was received by the CRD on November 1, 2007. The date of the request is more than five weeks after the expiration of the deadline. As I said in *Brookside Rehabilitation and Care Center*, DAB CR1541, at 6 (2006), a facility "must act by

choosing from many tactical and strategic options" and "do so within regulatory time schemes." Petitioner neither acted within the governing regulatory time scheme, nor requested that I extend the deadline even though it had the opportunity to do so. I therefore conclude that the hearing request was not timely filed.

5. Petitioner has not shown good cause for its untimely hearing request.

I again note the lack of any response or objection to CMS's motion to dismiss for failure to file a timely hearing request. Thus, I have nothing before me that could be construed as an explanation of good cause for the failure to adhere to the filing deadline. My November 15, 2007 Order informed the parties that, with respect to any dispositive motion such as the instant motion filed by CMS, the lack of objection or response to it would be deemed as concession of the movant's arguments. Thus, essentially, what I have before me is an unopposed motion, which, as I said in my Order, would be granted.

I further observe that the concept of "good cause" has not been defined in this forum or before the DAB as anything other than circumstances beyond the ability of the party-litigant to control. *See, e.g., Hillcrest Healthcare, L.L.C.*, DAB No. 1879 (2003). A facility's action or inaction when faced with CMS action creating a right of appeal to this forum is, by definition, not beyond the facility's ability to control, and, thus, cannot constitute good cause for an untimely hearing request.

Based on the foregoing, I need not address further CMS's argument to the effect that the hearing request filing deadline should not be extended and that there is no good cause to extend the deadline.

D. Conclusion

I am authorized to dismiss a request for hearing if it is not timely filed and I have not granted an extension of the time period for filing. 42 C.F.R. § 498.70(c). I have nothing in the record before me that demonstrates a timely-filed request for hearing, or objection to CMS's assertion that there was no timely hearing request, or a request for extension of the filing deadline based on good cause. In fact, Petitioner has filed no response at all to CMS's motion to dismiss, and, therefore, I deem the motion unopposed. I GRANT the motion and Petitioner's request for hearing should be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge