

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
	)	Date: July 9, 2008
Brookside Living Center,	)	
(CCN: 42-5016),	)	
Petitioner,	)	Docket No. C-08-434
	)	Decision No. CR1813
- v. -	)	
	)	
Centers for Medicare & Medicaid	)	
Services.	)	

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**DECISION**

The May 6, 2008 request for hearing of Petitioner, Brookside Living Center, is dismissed pursuant to 42 C.F.R. § 498.70(c) because it was not timely filed. Petitioner has not shown good cause for an extension of time to file the request for hearing.

**I. Background**

Petitioner, located in Anderson, South Carolina, is certified to participate in the Medicare program as a skilled nursing facility (SNF) and the state Medicaid program as a nursing facility (NF). Petitioner was subject to a survey by the South Carolina Department of Health & Environmental Control (state agency) from January 22, 2008 through February 1, 2008. Centers for Medicare & Medicaid Services Exhibit (CMS Ex.) 1. CMS notified Petitioner by letter dated February 13, 2008, that it was not in substantial compliance with program participation requirements and that CMS was imposing a \$10,000 per instance civil money penalty (PICMP). The CMS notice-letter advised Petitioner that a request for hearing before an administrative law judge (ALJ) must be filed no later than 60 days from receipt of the letter. CMS Ex. 1.

Petitioner requested a hearing by letter dated May 6, 2008. On May 21, 2008, CMS filed a motion to dismiss the request for hearing because it was not timely filed. On May 28, 2008, Petitioner requested a telephone hearing to argue that CMS had not timely handled the informal dispute resolution (IDR) process and that the failure of CMS was good cause to extend the period for requesting a hearing. By Order dated June 2, 2008, I denied Petitioner's request for an oral hearing and gave Petitioner until June 17, 2008 to respond to CMS's Motion to Dismiss. Petitioner responded on June 17, 2008.

## **II. Discussion**

### **A. Findings of Fact**

1. By letter dated February 13, 2008, CMS notified Petitioner it would impose a \$10,000 PICMP based upon the state agency determination that Petitioner was not in compliance with program participation requirements.
2. Petitioner received the CMS notice-letter on February 19, 2008.
3. Petitioner did not file its request for a hearing by an ALJ on or before April 19, 2008, the 60<sup>th</sup> day after Petitioner's receipt of the CMS notice-letter.
4. Petitioner did not file its request for a hearing until May 6, 2008, more than 60 days after its presumed receipt of CMS's notice-letter.

### **B. Conclusions of Law**

1. Petitioner's request for a hearing, dated May 6, 2008, was filed more than 60 days after Petitioner is presumed to have received the February 13, 2008 notice-letter.
2. Petitioner's request for a hearing was not timely filed.
3. A pending IDR proceeding is not good cause for failure to file a timely request for hearing.
4. Petitioner has not shown good cause to extend the time to file a request for hearing in this case.
5. Dismissal of a request for hearing that is not timely filed and for which no extension of time to file has been granted is appropriate. 42 C.F.R. § 498.70(c).

### **C. Issues**

The issues in this case are:

Whether Petitioner filed a timely request for a hearing and, if not,;

Whether Petitioner has demonstrated good cause for the untimely filing and should be granted an extension.

#### **D. Applicable Law**

Petitioner is a long-term care facility participating in the federal Medicare program as a SNF and in the state Medicaid program as an NF. The statutory and regulatory 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.

Pursuant to 42 C.F.R. Part 488, CMS may impose remedies against a long-term care facility when a state survey agency concludes that the facility is not complying substantially with federal participation requirements. 42 C.F.R. §§ 488.406; 488.408; 488.430.

The Act and regulations make a hearing before an ALJ available to a long-term care facility against whom CMS has determined to impose an enforcement remedy. Act, § 1128A(c)(2); 42 C.F.R. §§ 488.408(g); 498.3(b)(13). Pursuant to 42 C.F.R. § 498.40(a)(2), a facility must file a request for ALJ hearing within 60 days of receipt of the notice of initial, reconsidered, or revised determination, unless the period for filing is extended by the ALJ for good cause shown pursuant to 42 C.F.R. § 498.40(c). Pursuant to 42 C.F.R. § 498.40(a)(2), which incorporates by reference 42 C.F.R. § 498.22(b)(3), Petitioner is presumed to receive the notice five days after the date on the notice unless there is a showing that it was, in fact, received by Petitioner earlier or later.

#### **E. Analysis**

##### **1. Petitioner failed to file a timely request for hearing.**

The CMS notice-letter, dated February 13, 2008, is a notice of initial determination by CMS that it would impose a \$10,000 PICMP because Petitioner was not in substantial compliance with program participation requirements. CMS Ex. 1. The CMS notice-letter clearly advised Petitioner that the deadline for filing a hearing request was not more than 60 days from receipt of the notice-letter. CMS Ex. 1, at 3-4.

Pursuant to 42 C.F.R. §§ 498.40(a)(2) and 498.22(b)(3), Petitioner is presumed to have received the CMS notice-letter five days after the date on the notice-letter. Petitioner does not argue and has not shown that the notice-letter was, in fact, received earlier or later than the presumed receipt date. The fifth day after the date on the notice-letter was February 18, 2008. However, February 18, 2008, was a federal holiday and no mail would have been delivered by the United States Postal Service on that date. Accordingly, I find that Petitioner received the CMS notice-letter on February 19, 2008. The 60<sup>th</sup> day following February 19 was Saturday, April 19, 2008 and, out of an abundance of caution, I would treat Petitioner's request for hearing as timely filed if it was post-marked not later than the next business day, Monday, April 21, 2006.

Petitioner's request for hearing is dated May 6, 2008 and it was received at the Departmental Appeals Board on May 7, 2008. Petitioner acknowledges in its request for hearing that it is late but states that it was waiting to receive the results of IDR. Petitioner also admits in its response to the CMS motion to dismiss that its request for hearing was untimely.

**2. The Petitioner has not shown “good cause” for an extension of time to file a request for hearing.**

Petitioner argues in its request for hearing, its request of oral argument, and its response to the CMS motion to dismiss, that the state agency’s delay in issuing an IDR decision should be considered good cause to extend the period for requesting a hearing.

Participation in state IDR has been repeatedly held by the Board and ALJs not to be good cause for granting an extension of time for filing a request for hearing. The IDR process established by 42 C.F.R. § 488.331 does not toll the federal appeal process because it is a separate procedure in addition to the appeal rights provided to facilities under federal regulations. The purpose of the IDR process is to give the affected provider an opportunity to resolve the matter quickly without the need for litigation. 59 Fed. Reg. 56,147 ( Nov. 10, 1994). But IDR does not substitute for the hearing process or constitute good cause for delay of the hearing process. *See Prospect Heights Care Center*, DAB CR802 (2001). Furthermore, as the Board noted in *Cary Health and Rehabilitation Center*, DAB No. 1771, at 27-28 (2001), “(i)f approaching the deadline for termination to go into effect and/or choosing to participate in an IDR process were sufficient to excuse the failure to file a timely request for a federal hearing, the time frame for such appeals would become almost meaningless. *Cary*, DAB No. 1771; *see also*, *Hillcrest Healthcare, L.L.C.*, DAB No. 1879 (2003); *Concourse Nursing Home*, DAB No. 1856 (2002); *Nursing Inn of Menlo Park*, DAB No. 1812 (2002) (IDR is not cause to extend period for filing an appeal).

Petitioner has not shown good cause to extend the period for filing its request for hearing. Accordingly, the CMS motion to dismiss the request for hearing is granted.

**III. Conclusion**

For the forgoing reasons, Petitioner’s request for a hearing is dismissed.

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/s/  
Keith Sickendick  
Administrative Law Judge