

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Family Practice Medical Center,)	Date: July 16, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-226
)	Decision No. CR1819
Centers for Medicare & Medicaid)	
Services.)	
_____)	

Decision Dismissing Request for Hearing

The Centers for Medicare & Medicaid Services (CMS) moved to dismiss Petitioner Family Practice Medical Center's (Petitioner) December 13, 2007 hearing request for untimeliness.¹ CMS filed a motion on March 17, 2008, seeking dismissal of Petitioner's hearing request, accompanied by a memorandum of law (CMS Br.) and 10 proposed exhibits. I have admitted these into evidence as CMS Exhibits 1-10 (CMS Exs. 1-10), without objection. On May 6, 2008, Mr. Thomas Pliura, filed an appearance on Petitioner's behalf, after the deadline to respond to CMS's motion to dismiss had passed. Nonetheless, I allowed counsel until May 30, to file a response. Petitioner submitted a brief (P. Br.) on May 30, 2008, accompanied by a 10-page exhibit, which I have admitted into the record as Petitioner Exhibit 1 (P. Ex. 1), without objection.

I. Background of the case

Petitioner is a physician office laboratory in Georgetown, Illinois, participating in the Medicare and Medicaid programs. As a result of a survey completed on September 13, 2007, CMS notified Petitioner by letter dated September 25, 2007, that, based on findings of condition-level deficiencies that constituted immediate jeopardy, it was imposing the following remedies:

- Suspension of the laboratory's Clinical Laboratory Improvement Amendments (CLIA) certificate effective October 6, 2007, which would

¹ CMS alleged other reasons as a basis for dismissal, but in view of my finding that the request for hearing was untimely filed, it is unnecessary to discuss those additional reasons.

remain in effect until either the immediate jeopardy was removed, or a decision was rendered by an administrative law judge (ALJ), if a hearing were to be requested.

- Cancellation of the laboratory's approval to receive Medicare payments for services effective October 6, 2007, which would continue until removal of the condition-level noncompliance.
- Revocation of the laboratory's CLIA certificate 60 days after receipt of CMS's September 25, 2007 notice letter, if compliance with CLIA requirements had not been attained, and a request for hearing before an ALJ had not been filed.

CMS Ex. 4.

CMS further informed Petitioner that if it disagreed with that determination, a hearing was available before an ALJ, and that the procedures governing this process are set out at 42 C.F.R. § 493.1844 and 42 C.F.R. Part 498. CMS Ex. 4, at 4. Petitioner was also advised that a written request for a hearing had to be filed no later than 60 days from the date of receipt of CMS's notice letter. CMS Ex. 4, at 4. CMS sent the notice via FedEx Express, and it was received by Petitioner on September 27, 2007. CMS Ex. 5.

After consideration of the written arguments and documentary evidence submitted by the parties, I grant CMS's motion to dismiss as to the remedies imposed in the September 25, 2007 notice. In doing so, I find that the hearing request was untimely filed and the time for filing a request for hearing has not been extended as Petitioner has not shown good cause for its failure to file a timely hearing request.

II. Issues

The issues in this case are:

- Whether Petitioner filed a timely request for hearing; and,
- Whether Petitioner has shown good cause for extending the time to file a request for hearing.

III. Applicable law and regulations

In cases involving CMS, a party is entitled to a hearing only if that party files its request within the time limits established by 42 C.F.R. § 498.40(a)(2), unless the period for filing is extended. In order to be entitled to a hearing, a party must file its request within 60 days from receipt of a notice of a determination by CMS to impose a remedy. 42 C.F.R. § 498.40(a)(2). The date of receipt of a notice is presumed to be five days after the date

on the notice, unless there is a showing of actual receipt on an earlier or later date. 42 C.F.R. § 498.22(b)(3). An ALJ may extend the time within which a hearing request may be filed based on a showing of good cause to justify an extension of time. 42 C.F.R. § 498.40(c)(2). An ALJ may dismiss a request for hearing which is not timely filed. 42 C.F.R. § 498.70(c).

IV. Findings and Discussion

I make findings of fact and conclusions of law (Findings) to support my decision to dismiss Petitioner's request for hearing. Each Finding is noted below in boldface italics, followed by a discussion of each Finding.

A. Petitioner did not file a timely request for hearing.

CMS sent Petitioner the notice letter by FedEx Express on September 26, 2007. Petitioner does not dispute that it received CMS's notice on September 27, 2007.² P. Br. at 1. It was not until December 13, 2007, 77 days after Petitioner's receipt of CMS's determination, that Petitioner filed a request for a hearing before an ALJ. *See* P. Br. at 2.

Section 498.40(a)(2) of 42 C.F.R. expressly provides that:

[an] affected party or its legal representative or other authorized official must file the request in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended

The filing of Petitioner's request was clearly beyond the 60 days stipulated in the regulations. Also, 42 C.F.R. § 498.22(b)(3) provides that the receipt of the notice of an initial determination "will be presumed to be 5 days after the date on the notice unless there is a showing that it was, in fact, received earlier or later." The five-day presumption set forth at 42 C.F.R. § 498.22(b)(3) is of no consideration here, not only because Petitioner received CMS's notice two days after its issuance, but also because Petitioner was 17 days late in filing its hearing request.

Petitioner contends that a letter from CMS addressing its "allegation of compliance," dated November 20, 2007, constitutes a "reconsidered or revised determination." Consequently, argues Petitioner, the time to file a request for hearing was no longer 60 days from the date of the September 25, 2007 notice of remedies, but rather, 60 days from CMS's issuance of the November 20, 2007 "reconsidered or revised determination." I find Petitioner's reasoning to be misguided.

² Although Petitioner asserts having been informed of the "Notice of CLIA sanctions" on or around September 25, 2007, delivery of the notice occurred on September 27, 2007. CMS. Exs. 4, 5.

The applicable regulatory provision at 42 C.F.R. § 498.22 provides for the *manner and timing of a petition for reconsideration*. Thus, when Petitioner submitted an allegation of compliance to CMS it knew or should have known that it was not petitioning a reconsideration determination. Instead, Petitioner was responding to CMS's directive as to how the facility would be able to obtain rescission of the proposed sanctions by submitting an allegation of compliance. In this regard, CMS advised Petitioner that: "[your] allegation of compliance is a statement, or documentation, that is made by a representative of a laboratory who has a history of having maintained a commitment to compliance and of taking corrective action when required; is realistic in terms of its being possible to accomplish the required corrective action by the alleged correction date; and indicates that the problem has been resolved." CMS Ex. 4, at 3. In fact, the November 20, 2007 letter made reference to the allegation of compliance being incomplete, not to a request for reconsideration. CMS Ex. 7, at 2. Additionally, in that same letter Petitioner was advised that its appeal rights were set forth in the September 25, 2007 notice letter. CMS Ex. 7, at 2. The November 20 letter was sent to Petitioner "via overnight mail." Had Petitioner paid more attention to its content, it would not have waited until December 13, 2007, to file the request for hearing. Moreover, as CMS points out in its brief, a request for reconsideration is available to a prospective supplier or provider. It is not available to Petitioner as an entity already participating in the Medicare program. CMS Br. at 2; 42 C.F.R. § 498.22(a).

B. Petitioner is not entitled to an extension of time to file a request for hearing.

Petitioner has not filed a request for an extension of time for filing its request for hearing pursuant to 42 C.F.R. § 498.40(c)(1). As stated earlier, it is Petitioner's contention that he has filed a timely request for hearing. Thus, there is no need to further address the issue as to whether Petitioner has established good cause for filing a late hearing request.

V. Conclusion

Based on the applicable law and undisputed facts, I conclude that Petitioner's hearing request as to the survey completed September 13, 2007, was untimely filed, and good cause does not exist to extend the time for filing. CMS's motion to dismiss is granted.

/s/

José A. Anglada
Administrative Law Judge