Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: June 27, 2007
Brookside Rehabilitation and Care Center,	
Petitioner,	Civil Remedies CR1541 App. Div. Docket No. A-07-54
	Decision No. 2094
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Brookside Rehabilitation and Care Center (Brookside) appeals a December 2, 2006 decision by Administrative Law Judge (ALJ) Richard J. Smith. Brookside Rehabilitation and Care Center, DAB CR1541 (2006) (ALJ Decision). In that decision, the ALJ granted a motion by the Centers for Medicare & Medicaid Services (CMS) to dismiss the case pursuant to 42 C.F.R. § 498.70(c). The ALJ found that Brookside had failed to file a timely request for a hearing on a determination by CMS and that Brookside had not shown "good cause" to extend the deadline for filing the hearing request.

Based on the analysis below, we affirm the ALJ's decision to dismiss the case.

Background

The following summary of the facts is drawn from the ALJ Decision and record and is undisputed.

Brookside is a long-term care facility that participates in the

Medicare and Medicaid programs. On September 21, 2005, the North Carolina State Survey Agency completed a complaint investigation. On October 7, 2005, CMS sent a notice of noncompliance by U.S. Mail and by facsimile addressed as follows: Mr. Wayne Adams, Administrator, Brookside Rehab & Care, 310 Pensacola Road, Burnsville, NC 28714. CMS Ex. 1. The October 7 notice stated that CMS had determined to impose on Brookside: a $5,000 per day civil money penalty (CMP) for the period of July 7 thorough September 4, 2005; a $200 per day CMP effective September 5, 2005 and continuing until Brookside achieved substantial compliance; a denial of payment for new admissions (DPNA) effective December 21, 2005; and a termination effective March 21, 2006 if substantial compliance was not achieved. Id. The notice also advised that Brookside must submit (within 10 days after receiving the Statement of Deficiencies) a Plan of Correction and a Credible Allegation of Compliance and that Brookside would be subject to loss of any nurse aid training programs due to the finding of immediate jeopardy at the facility. Id. In addition, the October 7 notice advised Brookside of its rights under 42 C.F.R. § 498.40(a). That section permits a facility to appeal an initial, reconsidered, or revised determination that results in the imposition of a CMP or other remedy by filing a request for hearing within 60 days after receiving notice of the determination. Id. at 4. Mr. Adams verified his receipt of the fax with his signature. CMS Ex. 8.[1]

On October 12, 2005, CMS sent another letter to the same address by mail and facsimile regarding the remedies CMS was imposing on Brookside. CMS adjusted the dates the $5,000 per day CMP would be in effect to the period from July 29 through September 4, 2005, but the other remedies remained the same as in the earlier notice. CMS Ex. 2. This notice said Brookside had 60 days from the date of receipt of the October 12, 2005 notice to file its request for a hearing.[2] After these notices were sent, Brookside

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[1] Brookside noted that the signature is dated October 6 whereas the fax notation on top of the notice is dated October 7. The ALJ could still reasonably rely on this as evidence of receipt since Brookside provided no evidence that Mr. Adams did not receive this notice by at least October 7 (other than a letter from its new administrator about his inability to find the notice in the facility files).

[2] Although he noted that there was some evidence in the record that the fax was received at Brookside's facility on October 12, the ALJ decided to rely on the regulatory presumption of delivery 5 days after the date on the notice. ALJ Decision at

fired Mr. Adams on October 23, 2005 and hired a new administrator, Christopher Kmet, who began working at the facility on October 25, 2005. Brookside's Reply to CMS's Motion to Dismiss, Attachment (Att.) A. The survey agency completed a revisit survey on November 17, 2005 and determined that Brookside had achieved substantial compliance on October 28, 2005. Therefore, on November 30, 2005, CMS sent another notice by mail and facsimile, this one addressed to Mr. Christopher Kmet, Administrator, Brookside Rehab & Care, 310 Pensacola Road, Burnsville, North Carolina. That notice stated that CMS was rescinding the DPNA and termination remedies and that Brookside "will be notified at a later date of the total amount of civil money penalty due as a result of the period of noncompliance." CMS Ex. 3. That letter also provided a contact name and number should Brookside have any questions regarding this matter. Id.

On January 19, 2006, Brookside's counsel filed a request for hearing on the remedies imposed in CMS's October 12, 2007 notice. In its request, Brookside acknowledged that the request for hearing was being "filed considerably later than 60 days following the date of the CMS notice." Request for hearing at 1. Brookside did not, however, specifically request an extension of time for the filing of its hearing request, pursuant to 42 C.F.R. 498.40(c).

CMS moved to dismiss, arguing that CMS's imposition notice was adequate, that Brookside had failed to file a timely hearing request, and that the time for filing an appeal had not been extended. In response to the motion, Brookside asked that CMS's motion be denied and requested that the ALJ find "good cause" to "accept the appeal notwithstanding its untimely filing." Brookside's Reply to CMS's Motion to Dismiss at 1. To explain its late filing, Brookside pointed to the change in management of the facility in late October 2005 and to the new administrator's failure to find CMS's October 12, 2005 letter in the facility's files. Brookside claimed that it was unaware of CMS's action until after it pursued the State Informal Dispute Resolution process in late December 2005. Brookside's new administrator admitted, however, that he had requested a copy of CMS's October 12, 2005 letter and received it on December 21, 2005. Request for hearing, Att. B.

The ALJ Decision dismissed the case based on the following findings of fact and conclusions of law (FFCLs): FFCL A – CMS sent notice of its actions to Brookside on October 12, 2005; FFCL

3.

B – Brookside received CMS's notice letter on October 17, 2005; FFCL C – Brookside's hearing request was filed on January 19, 2006; FFCL D - Brookside's hearing request was filed more than 60 days after its receipt of CMS's notice letter, and was therefore not timely; and FFCL E - No good cause has been shown for Brookside's failure to file its hearing request timely. ALJ Decision at 3-7.[3]

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ Decision is erroneous. Our standard of review on a disputed issue of fact is whether the ALJ decision as to that fact is supported by substantial evidence on the record as a whole. See Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs (at http://www.hhs.gov/dab/guidelines/); South Valley Health Care Center, DAB No. 1691 (1999), aff'd South Valley Health Care Center v. HCFA, 223 F.3d 1221 (10th Cir. 2000). We review a "good cause" finding under 42 C.F.R. § 498.40(c)(2) for abuse of discretion. See Cary Health and Rehabilitation Center, DAB No. 1771 (2001).

Analysis[4]

In its request for review, Brookside appears to concede at the outset that it did not file a timely request for a hearing (Request for Review at 1), and does not specifically take exception to FFCLs A through D. Brookside nonetheless raises several arguments that go to whether the ALJ properly measured the time period for appeal.

For example, Brookside refers to a CMS State Operations Manual

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[3] In its Request for Review (RR), Brookside stated that the ALJ did not set forth specific "findings of fact" and "conclusions of law." RR at 2. That statement is not accurate. The ALJ did set out (in boldface text) his findings and conclusions on the key issues (although they were lettered and not numbered as he stated). Although the ALJ Decision makes other statements of fact or law, most of those were with respect to undisputed issues. In any event, Brookside did not allege any harm from the alleged failure.

[4] We have fully considered all arguments raised on appeal and reviewed the full record, regardless of whether we have specifically addressed particular assertions or documents in this decision.

provision on sending notices and suggests that CMS should have sent its notice by certified mail. Brookside does not, however, claim that the methods CMS used – regular mail and fax – were invalid. See 59 Fed. Reg. 56,116, 56,200 (Nov. 10, 1994)(discussing why CMS might not always use certified mail).

Brookside also contends that the ALJ Decision did not consider whether CMS had given notice to the "provider," as required by 42 C.F.R. § 488.402(f). Brookside contends that the ALJ should have accepted its inference that the former administrator was a "faithless or feckless employee" who did not have authority to file an appeal on behalf of Brookside and who never shared CMS's notices with his superiors who did have that authority; that CMS never determined or inquired whether it had provided notice to the proper representative of the provider; and that "the provider" did not "knowingly waive its rights [to appeal] if its managers who *were* authorized to exercise such rights never knew of them." RR at 7 (emphasis in original). Brookside uses "provider" synonymously with "decisionmaker" and contends that if the "decisionmaker *never* knows of a Notice within a 60-day appeal period," failure to file within 60 days cannot be characterized as a knowing and voluntary waiver by a provider of its right to appeal. RR at 13(emphasis in original).

We agree that section 488.402(f) refers to CMS giving the "provider" notice. Moreover, the appeals provisions state that CMS mails notice of an initial determination to the "affected party." 42 C.F.R. § 498.20(a). "Affected party" is defined to include a "provider" and the term "provider" includes a skilled nursing facility that has in effect an agreement to participate in Medicare. 42 C.F.R. § 498.2. A provision specific to a CMP imposed on a long-term care facility states that CMS's notice of a CMP must be in writing and sent to the "facility." 42 C.F.R. § 488.434(a).

The ALJ Decision does, however, at least implicitly address the issue of whether the former administrator was authorized to receive the notice on behalf of Brookside, the entity that was participating in Medicare and Medicaid as a skilled nursing facility. The ALJ clearly concluded that sending the notice to the Brookside facility, addressed to the administrator, triggered the regulatory presumption that the notice was received by the "provider" five days after the date on the notice. 42 C.F.R §§ 498.40(a); 498.22(b)(3). Moreover, as the ALJ stated, the regulatory requirements of participation for a facility indicate that each facility must appoint an administrator who is responsible for management of the facility and that the facility must provide written notice to CMS and the state agency if there

is a change in the administrator or the agents or managing employees. See 42 C.F.R. § 483.75(d)(2) and (p). Brookside cites absolutely no evidence that it had informed CMS or the state agency that someone other than the administrator was responsible for receiving notice. The ALJ correctly concluded that in the absence of any such evidence, there is no reason to presume that anyone other than the facility's administrator should receive notice on its behalf.[5] Indeed, Brookside did not and does not specifically argue that the administrator was not authorized to receive the notice on behalf of Brookside, the provider/facility entity that is entitled to the notice under the regulations, but relies on a declaration stating instead that Mr. Adams was not authorized to receive legal process or notice on behalf of Senior Care, the operator of the facility.

The other issue Brookside raises – the authority of the administrator "to file an appeal" - is irrelevant to the issue of whether the administrator could properly receive the notice on behalf of the provider/facility. Similarly, whether there was a "knowing" waiver of an appeal right by a facility's owner or governing body is irrelevant. Brookside cites no authority for its argument that any waiver of a hearing right must be "knowing," and the applicable regulations here specifically permit an ALJ to dismiss a case if the affected party did not file its hearing request timely and the time for filing has not been extended. 42 C.F.R. § 498.70(c). Nothing in this section requires that the failure be a knowing waiver of the hearing right.

Brookside's primary argument is that the ALJ should have exercised his discretion to allow the appeal to proceed and should have found reason to extend the 60-day deadline established by 42 C.F.R. § 498.40(a). RR at 1. Thus, Brookside clearly takes exception to FFCL E. Specifically, Brookside takes issue with the criteria used by the ALJ to determine the

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[5] The State Operations Manual, section 7305D, cited by Brookside, states that "notice shall be in writing and shall be addressed **directly to the provider/facility**; **or** to an individual, an officer, managing or general agent or other agent authorized by appointment **or** law to receive notice." (Emphasis added.) If Brookside had designated an authorized agent other than the administrator for receiving notices, Brookside should have submitted evidence of that, but, in any event, the notice was sent directly to the provider/facility. It was addressed to the person responsible for managing the facility, at the facility address.

existence of "good cause," stating that the ALJ's legal conclusion that "only a natural disaster or manmade emergency . . . constitutes 'good cause' for extending the filing deadline is unduly narrow" and that its showing about its former administrator constitutes good cause. RR at 2. Brookside also takes issue with some of the ALJ's factual findings.[6]

The ALJ Decision states: "The concept of "good cause" has never been defined in this forum or before the Board as anything other than circumstances beyond the ability of the party-litigant to control." ALJ Decision at 2, citing Hillcrest Healthcare, L.L.C., DAB No. 1889 (2003); Glen Rose Medical Center Nursing Home, DAB No. 1852 (2002); Hospicio San Martin, DAB No. 1554 (1996). To the extent the ALJ read these Board decisions as compelling that narrow a reading of "good cause" for purposes of these proceedings, he was mistaken; the Board has read the term more broadly where it was not specifically so limited.[7] Even assuming that the ALJ had more discretion than he thought, however, we would conclude that the ALJ did not abuse that discretion in denying an extension to January 19 and that his

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[6] We note that Brookside's Request for Review is not always accurate in describing the record below or the evidence. For example, Brookside states that "it appears to be undisputed that none of Brookside's current managers (or counsel) ever saw this Notice prior to the time CMS filed its Motion." RR at 3. Yet, in its hearing request, Brookside stated that "those [October] Notices never reached the actual authorized representatives of "the provider" until late December [2005]." Since CMS filed its motion to dismiss on May 1, 2006, it is unclear how Brookside can claim that this assertion is undisputed. Also, Brookside states that the new administrator submitted a "Declaration" with the hearing request in which "he testifies" about when he first saw the October 12th notice. RR at 4. The referenced document is neither a "declaration" nor "testimony," however, and in the hearing request and response to CMS's motion to dismiss, Brookside refers to it merely as a "letter," which is what it is. Request for Hearing at 1; Brookside's Response to CMS's Motion to Dismiss at 3.

[7] Contrary to Brookside's argument, the Board has never attempted to provide an authoritative or complete definition of the term "good cause" in section 498.40(c)(2). See Glen Rose Medical Center Nursing Center, DAB No. 1852, at 7, n.5 (2002). Here, we need not decide exactly the scope of an ALJ's discretion under that section since (under any reasonable definition of that term) the ALJ reasonably determined that Brookside did not show "good cause."

findings are supported by substantial evidence in the record as a whole.

We first note that since Brookside filed the hearing request some 34 days beyond the 60-day period, it needed to show good cause for its delay until that date, rather than merely justifying its failure to meet the 60-day requirement. Brookside relies on the alleged actions of its former administrator as establishing good cause, but acknowledges that its new administrator received a copy of the notice on December 21, 2005. The ALJ's determination that there was no good cause for the delay until January 19, 2006 is supported by other undisputed facts mentioned by the ALJ. For example, the new administrator was aware of the survey and its results, and had received the November 30 letter, which the ALJ found significant because "it reminded Petitioner that a CMP was still to be imposed." ALJ Decision at 5.[8] Specifically, the November 30, 2005 letter stated that Brookside "will be notified at a later date of the total amount of civil money penalty due as a result of the period of noncompliance . . . If you have any questions regarding this matter please contact [CMS employee and telephone number]." CMS Ex. 3.

Brookside provided no adequate explanation for why it did not inquire sooner about whether CMS had issued a notice or why it took until January 19, 2006 to file its request for hearing. Brookside asserts vaguely that it obtained counsel on January 17, 2006 and that the request for hearing was lengthy, but does not explain why it could not obtain counsel sooner or even file its hearing request or an extension request prior to obtaining counsel.

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[8] Brookside mischaracterizes the ALJ's discussion of the November 30th letter. Brookside claims that the ALJ noted that the letter referred to "the *possibility* of a CMP being imposed." RR at 8, citing ALJ Decision at 5 (emphasis in original). That is not what the ALJ said, and certainly the letter speaks for itself and cannot reasonably be construed as implying that the imposition of CMPs was a mere possibility. The only uncertainty the letter conveys is the total amount of the CMP for the period in question.

Conclusion

Accordingly, we affirm the ALJ's decision to dismiss the case pursuant to 42 C.F.R. § 498.70(c).

/s/
Donald F. Garrett

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member