Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Apple Home Health Services, Inc.,	)	
(CCN: 10-8197),	)	Date: December 3, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-627
	)	Decision No. CR1706
Centers for Medicare & Medicaid	)	
Services.	)	
	)	

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Apple Home Health Services, Inc. Petitioner is not entitled to a hearing in this case because it failed to file its request timely. Furthermore, Petitioner failed to establish good cause for its late filing.

I. Background

Petitioner is a home health agency doing business in the State of Florida. It participated in the Medicare program and its participation in that program was governed by provisions of the Social Security Act and by implementing regulations. Its hearing rights in this case are governed by regulations at 42 C.F.R. Part 498.

On March 15, 2007 the Centers for Medicare & Medicaid Services (CMS) sent a notice to Petitioner advising it that, based on findings made at a compliance survey of Petitioner's agency completed on March 5, 2007, Petitioner had been found out of compliance with two Medicare participation conditions. CMS Ex. 4, at 1; P. Ex. 1, at 1.[1] CMS told

[1] CMS filed 11 exhibits as support for its motion to dismiss, which it identified as CMS Ex. 1 - CMS Ex. 11. Petitioner filed 13 exhibits in opposition to CMS's motion, which it identified as P. Ex. 1 - P. Ex. 13. I admit all of CMS's and Petitioner's exhibits into the record of this case.

Petitioner that it would terminate Petitioner's Medicare participation effective April 2, 2007 unless Petitioner was in full compliance with Medicare participation requirements as of that date. CMS also advised Petitioner that it could submit a plan of correction (POC) to address the deficiencies identified by CMS. It told Petitioner that the POC would be reviewed upon receipt and, if CMS found it to be acceptable, CMS would ask the Florida State survey agency to conduct a revisit survey of Petitioner in order to verify compliance. *Id.* Finally, CMS told Petitioner that it had a right to request a hearing before an administrative law judge of the Departmental Appeals Board if it wished to contest CMS's determination. In advising Petitioner of that right CMS stated:

> A written request for a hearing must be filed no later than sixty days after the date of this letter. . . .

Id., at 2.

Petitioner filed a POC on March 19. A follow-up survey was conducted of Petitioner's facility on March 29, 2007 in order to ascertain whether Petitioner had attained compliance with participation requirements. CMS determined, based on the outcome of the March 29 survey, that Petitioner remained noncompliant and, so, it effectuated termination of Petitioner's Medicare participation on April 2, 2007.

Petitioner did not request a hearing until July 20, 2007. Its hearing request was dated 127 days after CMS's March 15, 2007 notice letter.

The case was assigned to me for a hearing and a decision. CMS moved to dismiss Petitioner's hearing request on the ground that it was not filed timely. Petitioner opposed the motion.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner is entitled to a hearing.

2. Assuming Petitioner is not entitled to a hearing as a consequence of its not having filed a timely hearing request, it nevertheless should be granted a hearing because it established good cause for filing its request untimely.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

1. Petitioner is not entitled to a hearing because it failed to file a timely hearing request.

Regulations governing hearings in cases involving CMS state that, in order to be entitled to a hearing, a party *must* file its request no later than 60 days from the date that it receives a notice of an adverse determination from CMS. 42 C.F.R. § 498.40(a)(2).[2] In this case the notice of adverse determination was CMS's March 15, 2007 letter to Petitioner. CMS Ex. 4; P. Ex. 1. That letter clearly stated CMS's intent to impose a remedy against Petitioner (termination of Medicare participation) for its failure to comply with conditions of participation, and, it explicitly advised Petitioner of its right to request a hearing from that determination.

As Petitioner acknowledges, it did not file a document in which it requested a hearing until July 20, 2007, 127 days after March 15, 2007 and 122 days after the presumed date of receipt. Petitioner's hearing request was in fact untimely by more than two months. Consequently, Petitioner is not entitled to a hearing based on its having filed the July 20, 2007 hearing request.

Petitioner now argues that, if the July 20 request does not entitle it to a hearing, it should be entitled to one based on *another* document, a letter plus attachments which Petitioner's counsel sent to CMS on April 20, 2007. P. Ex. 5, at 1-166. Petitioner contends that I should construe this document to be a hearing request and find it to be timely inasmuch as Petitioner filed it within 60 days of its receipt of CMS's March 15, 2007 notice.

I find no basis to construe this document as being a hearing request. It neither evidences an intent by Petitioner to request a hearing nor does it comply in any respect with the requirements for content of a hearing request set forth at 42 C.F.R. § 498.40(b)(1) and (2).

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[2] The presumed date of receipt of any notice sent by CMS is five days from the mailing date. 42 C.F.R. § 498.22(b)(3).

The April 20, 2007 letter plus attachments that Petitioner's counsel sent to CMS is a request that CMS exercise discretion to rescind its termination of Petitioner's Medicare participation. P. Ex. 5, at 1-166. At no point in either the letter or in the lengthy attachments does Petitioner express any interest in having a hearing to challenge CMS's noncompliance findings. The submission is, rather, an attempt by Petitioner to convince CMS that, as of April 20, 2007, about three weeks after the termination date, Petitioner was in the process of correcting or had corrected the noncompliance findings that were made at the March 29, 2007 survey. Thus:

> • The document fails to discuss the findings of noncompliance made at the March 5, 2007 survey.
>
> • It expresses disagreement with some of the findings made at the March 29 survey but it also acknowledges that some of those findings were accurate. *E.g.*, P. Ex. 5, at 66.
>
> • It does not contend that Petitioner corrected all of its noncompliance prior to the April 2, 2007 termination date. To the contrary, it avers that many of the corrective actions that Petitioner allegedly undertook were "ongoing" as of April 20, 2007, or had been completed after April 2, 2007. *E.g.,* P. Ex. 5, at 66-67.

Petitioner's April 20, 2007 submission not only fails to express an intent to request a hearing but it does not comport with the regulatory requirements governing the content of a hearing request. There are statements here and there in Petitioner's April 20, 2007 submission that constitute disagreements with findings that were made at the March 29 survey. But, nowhere in the document is there a coherent statement by Petitioner of its intent to show that it was, in fact, complying with participation requirements, either on March 15, March 29, or April 2, 2007.

A party requesting a hearing must specify the issues and CMS's findings of fact and conclusions of law with which it disagrees and it must specify the basis for contending that these findings and conclusions are incorrect. 42 C.F.R. § 498.40(b)(1) and (2). But, in its April 20, 2007 submission, Petitioner failed to even mention the findings of noncompliance that were made at the March 5 survey. And, although it challenged some of the findings of noncompliance that were made at the March 29 survey, Petitioner failed to explain how challenging some, but not all, of these findings constituted an assertion that it was, in fact, complying with all Medicare participation requirements as of March

29 or April 2, 2007.[3] Indeed, at no place in its April 20 submission does Petitioner state affirmatively that it was complying with all Medicare requirements as of March 29 or between that date and April 2, 2007.

On July 10, 2007 CMS responded to Petitioner's April 20, 2007 submission. CMS Ex. 10. In this letter CMS stated that it was responding to Petitioner's "request to reconsider" the April 2, 2007 termination of Petitioner's Medicare participation. CMS advised Petitioner that it had concluded that the deficiencies that it had identified were accurate and that the decision to terminate Petitioner's Medicare provider agreement stood.[4] CMS then advised Petitioner that:

> At this point, . . . [Petitioner] may request a hearing before the Departmental Appeals Board (DAB) or reapply for Medicare participation.

CMS Ex. 10. Petitioner has not argued that this letter conferred hearing rights on it that were in addition to those that were conferred by the March 15, 2007 notice from CMS to Petitioner. However, I have considered that issue and I conclude that the July 10 letter conferred no additional hearing rights. Consequently, Petitioner's July 20, 2007 hearing request can relate only to the March 15, 2007 notice. CMS's July 10 letter did not extend Petitioner's deadline for requesting a hearing.

It appears from the July 10 letter's reference to a "request to reconsider" Petitioner's Medicare termination that the author of the letter may have assumed that Petitioner's April 20, 2007 submission was a formal reconsideration request filed pursuant to 42 C.F.R. § 498.22. That regulation narrowly defines circumstances in which a party that is dissatisfied with a determination by CMS may request that CMS reconsider that determination. The regulation allows for reconsideration of:

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[3] In fact, Petitioner's July 20, 2007 hearing request manifestly fails to comply with the content requirements of 42 C.F.R. § 498.40(b)(1) and (2). The request consists of a one-page letter to which Petitioner attached a July 10, 2007 letter sent to it by CMS in which CMS denied Petitioner's April 20, 2007 request for reconsideration of the determination to terminate its Medicare participation, plus a copy of Petitioner's April 20, 2007 letter and attachments. All that Petitioner states concerning its desire for a hearing is that: "We are formally requesting a DAB hearing with regard to . . . [the April 2, 2007 termination of its Medicare participation]." The letter does not evince any challenge to the March 5, 2007 survey findings nor does it express any explanation of Petitioner's disagreement with the determination to terminate its participation.

[4] The letter is somewhat unclear in that it does not specify which deficiencies CMS was referring to. Conceivably, those could include: the deficiencies identified as of March 5; those identified as of March 29; or those that were identified as of both dates.

> any initial determination that affects a prospective provider or supplier, or a hospital seeking to qualify to claim payment for all emergency hospital services furnished in a calendar year . . . .

42 C.F.R. § 498.22(a). Where a right to reconsideration exists a party that is dissatisfied with a reconsideration determination has a right to a hearing to challenge that determination.

Petitioner, a home health agency actively participating in Medicare until CMS's termination of its participation, was neither a prospective provider, a prospective supplier, or a hospital and, consequently, was not entitled to seek reconsideration from CMS's determination to terminate its Medicare participation. Its *only* right to a hearing was directly from CMS's March 15, 2007 determination and, in order to effectuate that right, Petitioner had to request a hearing consistent with the provisions of 42 C.F.R. § 498.40. CMS could not create a right to reconsideration where none existed and, consequently, Petitioner received no additional hearing rights as a consequence of CMS's July 10, 2007 letter.[5]

2. Petitioner did not establish good cause for failing to file its hearing request timely.

Applicable regulations provide that an administrative law judge may extend a party's deadline for filing its hearing request – in effect, giving a party a hearing even though it filed its request beyond the presumed deadline – based on that party's showing of good cause. 42 C.F.R. § 498.40(c)(2). The term "good cause" is not defined in the regulation. However, it has been the subject of much litigation and it has an accepted interpretation.

Good cause is interpreted universally to mean a circumstance beyond a party's ability to control which prevents that party from filing its request timely. *Hospicio San Martin*, DAB No. 1554 (1996).[6]

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[5] At Finding 2 I explain why the July 10 letter did not mislead Petitioner into believing that it could file its hearing request beyond the time frame specified in CMS's March 15, 2007 letter and by 42 C.F.R. § 498.40(a)(2).

[6] Petitioner purports to rely on Federal Rules of Civil Procedure (FRCP) Rule 60(b) as establishing the definition of good cause. It argues that the rule allows a judge to relieve a party from the effect of a judgment, order, or proceeding, based on proof of mistake, inadvertence, surprise, or excusable neglect. Petitioner's opposition to CMS's motion at 8. It asserts, in effect, that the Rule 60(b) standard operates to establish good cause for purposes of 42 C.F.R. § 498.40(c)(2). I disagree with this analysis because this proceeding is not governed by the Federal Rules of Civil Procedure. The rule cited by

The very narrow definition of what constitutes good cause closely limits an administrative law judge's discretion to grant a hearing in the situation where the request has not been timely filed. Good cause might exist in the situation where some outside force causes a facility not to file a request timely. For example, good cause might exist if CMS affirmatively and explicitly misleads a facility into not filing a hearing request within the allotted time or if some intervening natural event makes it physically impossible for a facility to file its request timely. But, good cause never exists where a facility fails to file a request as a consequence of some event or sequence which was in its ability to control but which it failed to control. For example, negligence by a facility's staff is never good cause for failing to file a request timely.

Petitioner's principal argument for asserting good cause is that it operated on the:

> good-faith and well-founded belief that, through its former . . . [chief operating officer Petitioner] had properly and timely responded to CMS's March 15, 2007 revocation notice and simultaneous submission of its Corrective Action Plan.

Petitioner's opposition to CMS's motion at 8. Petitioner's argument is not entirely clear. Petitioner does not aver explicitly that its administrator had assumed, incorrectly, that the chief operating officer filed a hearing request within the requisite limitations period. Rather, Petitioner asserts only that the administrator assumed that the chief operating officer "properly and timely" responded to CMS's March 15, 2007 notice. *Id.*; P. Ex. 7, at 2; *see* CMS Ex. 6. I understand that argument to mean either that Petitioner's administrator assumed, incorrectly, that a hearing request had been filed or, alternatively, that the administrator assumed, also incorrectly, that filing a POC tolled the limitation period for filing a hearing request.

But, neither possible argument is a basis for me to find good cause for Petitioner's untimely filing. First, the possibility that the administrator may have relied to Petitioner's detriment on the performance of a subordinate officer is not an event that was beyond Petitioner's ability to control. The actions of Petitioner's staff are all within the control of Petitioner and, as I discuss above, the negligence of any of these individuals cannot be a basis for finding good cause.

Second, there is nothing to suggest that CMS said or failed to say anything to Petitioner that misled it into believing that it need not file a hearing request timely. The March 15, 2007 notice letter from CMS to Petitioner was unambiguous and explicit. CMS Ex. 4; P. Ex. 1. It plainly told Petitioner that it must request a hearing within 60 days if it wanted

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Petitioner is simply inapplicable.

to contest CMS's determination to terminate its participation in Medicare. Nothing in the letter suggested that filing a POC would serve as a substitute for a hearing request or would toll the period for filing a hearing request.

Nor was CMS's July 10, 2007 letter to Petitioner materially misleading. It is true that the letter inaccurately seems to suggest that Petitioner might have a right to a hearing from CMS's determination not to rescind its March 15, 2007 determination. But, the letter could not possibly have misled Petitioner into missing its deadline for filing a hearing request. That deadline – 60 days after Petitioner's receipt of CMS's March 15, 2007 letter – had elapsed approximately seven weeks *prior to* CMS's July 10, 2007 letter to Petitioner.

Finally, Petitioner argues that the doctrine of "equitable tolling" should serve as a basis to extend the deadline for filing its hearing request. Petitioner relies on a decision issued in Florida State court, which it argues stand for the principle that a party should be allowed to defend a case when equitable circumstances have prevented it from timely filing a jurisdictional document.

State law has no application in this case. It cannot be used to expand the definition of good cause that I must apply in deciding whether or not to give Petitioner a hearing.

/s/
Steven T. Kessel
Administrative Law Judge