Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: July 30, 2008
Apple Home Health Services, Inc.,	
Petitioner,	Civil Remedies CR1706 App. Div. Docket No. A-08-51
- v. -	Decision No. 2188
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Apple Home Health Services, Inc. (Apple or Petitioner), a home health agency (HHA), appeals the December 3, 2007 decision by Administrative Law Judge (ALJ) Steven T. Kessel dismissing Apple's request for a hearing on CMS's March 15, 2007 decision to terminate Apple's participation in the Medicare program effective April 2, 2007. Apple Home Health Services, Inc., DAB CR1706 (2007) (ALJ Decision). The ALJ dismissed Apple's request for a hearing pursuant to 42 C.F.R. § 498.70(c) because it was not timely filed, and Apple had not shown good cause for not filing the hearing request on time. On appeal, Apple challenges only the ALJ's finding that it did not file a timely hearing request; Apple does not appeal the ALJ's finding that Apple did not show good cause for the late filing.

For the reasons discussed below, we uphold the ALJ's decision.

Applicable Law

A HHA is eligible to enter into a provider agreement with CMS to provide to Medicare beneficiaries who are under a physician's care, in their residences, certain health services, such as

skilled nursing services. Section 1861(m) of the Social Security Act (Act).[1] To become and remain a Medicare provider of services, a HHA must meet the statutory definition in section 1861(o) and the conditions of participation in section 1891(a) of the Act, as well as the Secretary's requirements at 42 C.F.R. Part 484 (sections 484.10 to 484.55). HHAs participating in Medicare are subject to periodic surveys, conducted by state survey agencies under agreements with CMS, to determine whether they are in compliance with the requirements of participation. Act § 1891(c); 42 C.F.R. § 488.10. The state survey agency makes and documents findings with respect to a HHA's compliance with each of the conditions, and each of the standards in the conditions, governing Medicare participation. 42 C.F.R. §§ 488.11, 488.12, 488.18 – 488.28.

CMS may terminate a HHA that is found noncompliant with one or more condition of participation. Act §§ 1866(b)(2)(B), 1861(o)(6), 1891(e); 42 C.F.R. § 489.53(a)(3). Comprehensive Professional Home Visits, DAB No. 1934, at 3-4 (2004). If CMS decides to terminate a HHA's Medicare provider agreement based on noncompliance with a condition of participation, the HHA has the right to appeal that determination pursuant to section 1866(h) of the Act and 42 C.F.R. Part 498. 42 C.F.R. §§ 489.53(d), 498.1, 498.3(b)(8). The right of appeal includes a hearing before an ALJ of the Departmental Appeals Board (subpart D of Part 498), and, if sought, review of the ALJ decision by the Departmental Appeals Board (subpart E of Part 498). The hearing request must be filed "in writing within 60 days from receipt of the notice of initial . . . determination unless that period is extended . . . [f]or good cause shown . . . ." 42 C.F.R. § 498.40(a)(2),(c)(2). For purposes of determining whether a hearing request is timely, the date a petitioner receives CMS's determination notice is presumed to be five days after the date on the notice absent a showing the notice was actually received earlier or later. 42 C.F.R. § 498.22(b)(3) (incorporated by reference in 42 C.F.R. § 498.40(a)(2)). An ALJ may grant a request for an extension of the time to file a hearing request upon finding, based on a written request, that the affected party has shown good cause for

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table, and the U.S.C.A. Popular Name Table for Acts of Congress.

why the request was not timely filed. An ALJ may dismiss a hearing request that is not timely filed. 42 C.F.R. § 498.70(c).

Case Background[2]

The Florida Agency for Health Care Administration, the Florida State survey agency, surveyed Apple on January 2, February 1, and March 5, 2007 and during each survey found Apple out of compliance with two conditions of participation as well as other Medicare requirements for HHAs. CMS Exs. 1, 2, 3. On March 15, 2007, CMS sent Apple a letter referring to this survey history and notifying Apple that the March 5, 2007 survey revealed that Apple remained out of compliance with two conditions of participation. ALJ Decision at 1, citing CMS Exhibit (Ex.) 4, at 1, P. Ex. 1, at 1. As a result of that continuing noncompliance, the notice continued, Apple's provider agreement would terminate effective April 2, 2007, if Apple was not in full compliance with the Medicare conditions of participation by that date. Id. at 1-2, citing CMS Ex. 4, at 1, P. Ex. 1, at 1. The letter also told Apple that it could submit a plan of correction (POC) and that if CMS found the POC acceptable, CMS would ask the State survey agency to conduct a revisit survey to verify compliance. Id. at 2. The letter also notified Apple that it had a right to request a hearing to contest CMS's termination decision before the Departmental Appeals Board and specifically stated, "A written request for a hearing must be filed no later than sixty days after the date of this letter." Id., citing CMS Ex. 4, at 2, P. Ex. 1, at 2.

Apple submitted a POC on March 19, 2007. ALJ Decision at 2; P. Ex. 2. On March 29, 2007, the State survey agency conducted a survey in order to ascertain whether Apple had attained compliance with participation requirements. ALJ Decision at 2. Based on the results of this survey, CMS determined that Apple remained noncompliant and, in a letter dated April 2, 2007, notified Apple that the termination was taking effect on that date, as scheduled. Id.; CMS Ex. 7. Apple filed a request for hearing before the Departmental Appeals Board on July 20, 2007. ALJ Decision at 2; CMS Ex. 11.

[2] The facts stated in this section are taken from the ALJ Decision and augmented with undisputed record facts, as necessary to adequately present the background.

ALJ Decision

The ALJ made the following findings of fact and conclusions of law (FFCLs):

> 1. Petitioner is not entitled to a hearing because it failed to file a timely hearing request.
>
> 2. Petitioner did not establish good cause for failing to file its hearing request timely.

Standard of Review

The Board reviews a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it is erroneous. Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, http://www.hhs.gov/dab/guidelines/prov.html (Guidelines); Batavia Nursing and Convalescent Inn, DAB No. 1911, at 7 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, 143 F. App'x 664 (6th Cir. 2005). The Board reviews dismissals, where they are authorized by law, under an abuse of discretion standard. Brookside Rehabilitation and Care Center, DAB No. 2094 (2007); Cary Health and Rehabilitation Center, DAB No. 1771 (2001).

Discussion

Apple's appeal to the Board challenges only the first FFCL, that Apple is not entitled to a hearing because it failed to file a timely hearing request. Since FFCL 2 stands unchallenged, we do not discuss it in this decision. The ALJ found that Apple's hearing request, which was dated July 20, 2007, was filed 127 days after CMS's March 15, 2007 notice of appeal rights and 122 days after the presumed date of receipt. ALJ Decision at 3. Thus, the ALJ concluded, Apple's hearing request was untimely by more than two months. Apple does not dispute that its July 20, 2007 hearing request was untimely. However, Apple argues here, as it did below, that a letter and attachments its attorney submitted to CMS on April 20, 2007, within the 60-day window for filing a hearing request, should be found to qualify as a hearing request. The ALJ rejected this argument, and we find no abuse of discretion in his doing so.

Apple's April 20, 2007 submission consists of 166 pages, including a cover letter of slightly more than one page and an

apparent cover page for the remaining 164 pages.[3] P. Ex. 5. The cover letter refers to the entire submission as a "Notice of Representation" and "Submission of CAP [Corrective Action Plan] with Supporting Documentation." P. Ex. 5, at 2. The cover page for the attached documents states in relevant part, "Corrective Action Plan." Id. at 1. The body of the letter states in substantial part –

> As detailed throughout my rebuttal response with supporting documents, I have serious concerns with AHCA surveyor's 3/29/07 allegations of non-compliance. In addition, the 7 sampled records are incorrectly interchanged in terms of record numbers and allegations of non-compliance. A beneficiary listing was never provided to the DON in the exit interview.
>
> As detailed in the attached CAP with supporting documentation, it is my humble request that CMS exercise its discretion in finding that Apple Home Health Services, Inc. is in substantial compliance with federal Conditions of Participation as those G-Tag allegations which were confirmed as accurate were corrected shortly after Linda Palmer's (the surveyor) exit interview and those compliance mandates continued today as part of Apple's corporate culture.
>
> * * * *
>
> Based upon the above information and the attached documentation evidencing a commitment to present and future compliance with Apple Home Health Services, Inc. obligations under CMS's Condition of Participation, we request that CMS exercise its discretion and reverse the April 2, 2007 termination of the Medicare Provider Agreement of Apple Home Health Services, Inc.

Id. at 2-3. The ALJ found "no basis to construe this document [the letter and attachments] as being a hearing request." ALJ Decision at 3. The ALJ concluded that Apple's submission "neither evidences an intent by Petitioner to request a hearing nor does it comply in any respect with the requirements for

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[3] Apple states in its January 30, 2008 notice of appeal that the POC consists of "approximately 500 pages comprised within 36 exhibits . . . ." Petitioner Brief (P. Br.) at 5. However, the POC in Petitioner Exhibit 5 contains only 164 pages (166 counting the cover letter and cover page).

content of a hearing request set forth at 42 C.F.R. § 498.40(b)(1) and (2)." Id.

We find no flaw in the ALJ's analysis and certainly no abuse of discretion. On the issue of intent, the submission quite literally does not request a hearing before an ALJ. While the first paragraph of the cover letter expresses "serious concerns" with "allegations of noncompliance" in the survey report, the letter does not proceed to identify either specific "concerns" or specific allegations of noncompliance. Neither does the letter request a hearing before an ALJ but, rather, asks that CMS "exercise its discretion and reverse the April 2, 2007 termination . . . ." P. Ex. 5, at 2. The letter is more akin to an informal request for reconsideration based, in substantial part, on alleged actions Apple initiated to correct the noncompliance found during the March 29, 2007 survey.[4] As the ALJ put it –

> 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.

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[4] The ALJ noted that in a July 10, 2007 letter responding to this submission, CMS declined to alter its termination decision and, apparently assuming that Apple's submission was a reconsideration request filed pursuant to 42 C.F.R. § 498.22(a), stated that Apple could "[a]t this point . . . request a hearing before the Departmental Appeals Board (DAB) or reapply for Medicare participation." ALJ Decision at 5, citing CMS Ex. 10. The ALJ found that Apple had no right to reconsideration of CMS's termination decision, since that decision is not one of the initial determinations for which reconsideration is available under 42 C.F.R. § 498.22(a). Id. at 5-6. Accordingly, the ALJ also concluded (although Apple had not argued the issue) that Apple could not have received additional appeal rights by way of CMS's July 10, 2007 letter. Id. at 5. On appeal, CMS agrees that the statement about appeal rights in its July 10, 2007 letter was erroneous, CMS Br. at 9, and Apple raises no issue about this aspect of the ALJ Decision.

ALJ Decision at 4. Thus, we agree with the ALJ's conclusion that the document did not express an intent to request a hearing.

We also agree with the ALJ's conclusion that in addition to not expressing any intent to file a hearing request, Apple's April 20, 2007 submission did not meet the content requirements for hearing requests at 42 C.F.R. § 498.40(b)(1) and (2). ALJ Decision at 4. The content regulation states:

> *Content of request for hearing*. The request for hearing must –
>
> (1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
>
> (2) Specify the basis for contending that the findings and conclusions are incorrect.

42 C.F.R. § 498.40(b)(1),(2).

CMS's termination notice stated that CMS's decision to terminate Apple's provider agreement was based on findings of fact indicating Apple's continuing noncompliance with two conditions of participation during the March 5, 2007 survey. CMS Ex. 4. CMS's termination notice also informed Apple that it could avoid termination by achieving compliance with all conditions of participation by April 2, 2007, which meant, in part, correcting the noncompliance found on the March 5, 2007 survey. However, as the ALJ noted, Apple's April 20, 2007 submission "failed to even mention the findings of noncompliance that were made at the March 5 survey." See ALJ Decision at 4. We see no basis for finding that a document that does not even mention the March 5 findings of noncompliance, at least to the extent of alleging that the noncompliance was corrected by the March 29 revisit or April 2 termination date, could meet the content requirements in 42 C.F.R. § 498.40(b)(1),(2).

Furthermore, as the ALJ also noted, "[N]owhere 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 [the date of CMS's termination notice], March 29 [the final revisit date], or April 2, 2007 [the termination date]." Id.[5] The ALJ also cited statements in the submission

[5] Apple asserts on appeal that the ALJ's statement "is (continued...)

evidencing that many of Apple's alleged corrective actions were not completed until after the termination date, and some were ongoing at the time of the submission. Id. at 4, citing P. Ex. 5, at 66-67 (stating that glucose monitoring in-service training sessions were held on April 6, April 13 and April 20, 2007). Thus, far from asserting that it was in substantial compliance with all participation requirements during the relevant time period, Apple's submission makes statements indicating, in effect, that it was not.

Like the ALJ, we find in Apple's lengthy submission no affirmative statement by Apple that it was in compliance at any time during the survey cycle, much less, as the ALJ noted, "that it was complying with all Medicare requirements as of March 29 or between that date and April 2, 2007." ALJ Decision at 5. We also note statements, additional to those cited by the ALJ, that effectively constitute statements that it was not yet in compliance. See, e.g., P. Ex. 5, at 9 (stating that in-service training related to errors in dosage administration were held on "April 6, 2007 . . . and . . . April 13, 2007"); P. Ex. 5, at 10 (stating a completion date of April 6, 2007 for corrective actions involving training and monitoring). Furthermore, we agree with the ALJ that although Apple's submission contains challenges to some of the findings of noncompliance made at the March 29 [final revisit] survey, Apple "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." ALJ Decision at 4-5.

In its January 30, 2008 notice of appeal to the Board, Apple argues that the ALJ "is taking an extremely prejudicial and narrow view of a Medicare provider's rights to appeal the revocation of its Medicare Provider Agreement when such intent is clearly embodied within a timely filed document." P. Br. at 4. Apple further argues that its April 20, 2007 submission as a whole "was of a sufficient legal nature to convey Apple's intent to appeal . . . ." Id. at 5. Apple asserts that while the submission is a "detailed Corrective Action Plan . . . requesting a rescission of the revocation," it also "address[es] [Apple's] disagreement with the factual findings of the State Survey Agency . . . ." Id. Apple also notes the ALJ's acknowledgment that Apple "challenged some of the findings of noncompliance that were

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[5](...continued)
factually untrue" but cites no statements in its submission contradicting the ALJ's finding. P. Br. at 7.

made at the March 29 survey . . . ."[6] Apple further asserts, "Judge Kessel states that there were 'statements that constitute disagreement with findings that were made at the March 29 survey.'" Id.

We have carefully considered Apple's arguments on appeal but find them unpersuasive. Apple's own description of its submission as a "detailed Corrective Action Plan . . . requesting a rescission of the revocation . . . ," rather than a request for a hearing and reversal by an ALJ, is consistent with the ALJ's characterization and findings. Id. at 5. The ALJ did acknowledge that Apple's submission challenged some of the findings of noncompliance made at the March 29 survey. However, the ALJ went on to state that despite that challenge, "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." ALJ Decision at 4-5. While Apple contends that its "detailed Corrective Action Plan . . . indicated 'substantial compliance . . . ,'" P. Br. at 7, Apple points to no statement to that effect in the submission and gives no explanation to justify its bare assertion. We have already noted, as did the ALJ, that the submission contains statements indicating continuing noncompliance, even after the termination date.

Apple's statement that the ALJ "states that there were 'statements that constitute disagreement with findings that were made at the March 29 survey'" is a misquote and takes the ALJ's statement out of context. The ALJ's complete statement is as follows:

> 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.

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[6] Apple asserts that the ALJ's acknowledgment that Apple's submission challenged some survey findings is "greatly understated." P. Br. at 6. We disagree. It is clear on the face of the submission that Apple did not challenge all of the findings from even the one survey addressed in the submission.

ALJ Decision at 4. We find the ALJ's characterization of Apple's lengthy submission accurate. The submission contains scattered statements that dispute the accuracy of some findings from the March 29, 2007 survey. See, e.g., P. Ex. 5, at 49, 51 (denying that a nurse's note stated that the resident was "depressed and anxious"); P. Ex. 5, at 64 (disputing one part of the surveyor's findings regarding wrong insulin dosage). However, the submission in essence constitutes an affirmative statement of corrective actions allegedly taken by Apple after the March 29, 2007 survey, not a statement disputing the deficiencies cited during the relevant surveys and seeking an adversarial hearing on those disputes. Some documents in the submission even contain admissions to deficiencies. See P. Ex. 5, at 20 (letter informing patient's physician that nurse "made an error in the insulin dosage administered to this patient on several dates"); P. Ex. 5, at 22 (notice informing nurse that she was being placed on probation for six months for filling out patient care notes for two patients incorrectly).

In summary, we agree with the ALJ that Apple's April 20, 2007 submission evidences no intent to request a hearing before an ALJ and does not meet the content requirements of 42 C.F.R. § 498.40(b)(1) and (2). While Apple did file a document that it intended to serve as a hearing request on July 20, 2007, that document was filed more than two months after the 60-day period for filing had elapsed and, therefore, was subject to dismissal for untimeliness.[7] 42 C.F.R. § 498.70(c).

[7] The ALJ concluded in a footnote that even this document, while clearly expressing a request for a hearing, "manifestly fails to comply with the content requirements of 42 C.F.R. §498.40(b)(1) and (2)." ALJ Decision at 5, n.3. The ALJ did not need to reach this issue, and neither do we, since there is no dispute that this document was not filed within the time limit for requesting a hearing and there was no showing of good cause for the late filing.

Conclusion

For the reasons stated above, we find that the ALJ did not abuse his discretion in dismissing Apple's hearing request and uphold the dismissal.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member