Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Horizon Specialty Hospital,	)	DATE: March 19, 1998
	)	
Petitioner,	)	
	)	
v.	)	Docket No. C-96-354
	)	Decision No. CR524
Health Care Financing Administration.	)	
	)	

DECISION

I decide that Petitioner, Horizon Specialty Hospital, did not timely file its hearing request and has failed to show good cause for extending the time for filing. Consequently, Petitioner has no right to a hearing, and Petitioner's hearing request is DISMISSED, pursuant to 42 C.F.R. § 498.70(c).

PROCEDURAL BACKGROUND

The Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services (DHHS), notified Petitioner in a letter dated April 21, 1996, that "[t]he date on which your hospital's Medicare agreement terminates has been extended to June 25, 1996." HCFA's letter further informed Petitioner that termination was the consequence of Petitioner remaining out of compliance with the following Medicare Condition of Participation: 42 C.F.R. § 482.12 -- Governing Body.

Petitioner requested a hearing in a letter dated July 5, 1996. HCFA filed its Motion to Dismiss Hearing Request and supporting memorandum on August 21, 1996, asserting that Petitioner's hearing request was untimely filed and that no good cause existed to extend the time for filing. Petitioner filed its Response to HCFA's Motion to Dismiss on August 23, 1996.

Based on the written record, I concluded that Petitioner had no right to a hearing and I so advised the parties during a prehearing telephone conference on August 29, 1996, indicating that I would issue a written ruling. Consequently, I canceled the hearing that was scheduled to commence on October 7, 1996, in Dallas, Texas.

By letter dated January 16, 1997 Petitioner requested me to reconsider my oral pronouncement that I would dismiss the case. HCFA requested that Petitioner's December 18, 1996 and January 16, 1997 letters[1] be stricken from the record. I overruled that request, and HCFA submitted its response to Petitioner's letters on March 3, 1997.

Petitioner submitted as attachments to its January 16, 1997 letter an affidavit and two exhibits, designated Exhibit A and Exhibit B. For purposes of uniformity, I have redesignated these documents sequentially as P. Ex. 1 (which Petitioner submitted as "Affidavit of Gloria Jelinek") and P. Exs. 2 and 3 (which Petitioner submitted as "Exhibit A" and "Exhibit B"). HCFA, by moving to strike, objected to Petitioner's exhibits being admitted into evidence. Over HCFA's objection, I admit into evidence P. Exs. 1 through 3. I also admit into evidence ALJ Ex. 1. HCFA submitted six exhibits, HCFA Exs. 1 through 4 with HCFA's Motion to Dismiss and HCFA Exs. 5 and 6 with HCFA's March 3, 1997 response letter. Petitioner did not object to HCFA's exhibits, and I admit into evidence HCFA Exs. 1 through 6.

Petitioner's Medicare agreement was terminated effective June 25, 1996, as had been indicated by the April 21, 1996 notice letter. Effective October 15, 1996, nearly four months later, Petitioner was again eligible to participate in Medicare under a new Medicare agreement, as shown by HCFA's letter to Petitioner dated January 17, 1997. HCFA Ex. 5.

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[1] Although HCFA's request to strike referenced a Petitioner letter dated December 18, 1996, it is not in the record and was apparently never received by the Civil Remedies Division. The parties were informed of this and that there was no need to submit this letter. The parties were also informed that I designated as ALJ Ex. 1 a letter dated February 6, 1997 from Gloria Jelinek to Barbara Altman.

ISSUES

The issues in this case are:

1) whether Petitioner filed its hearing request timely; and, if not,

2) whether good cause has been shown to extend the time for filing.

In determining whether Petitioner filed its request timely, the following issues were raised:

3) whether HCFA's initial determination was made when HCFA sent the April 21, 1996 notice letter; or, as Petitioner asserts, not until Petitioner's provider agreement was actually terminated; and

4) whether a provider's 60 days to request a hearing run from receipt of the notice that termination will occur, or, as Petitioner maintains, from receipt of the notice that termination became effective.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a hospital accredited by the Joint Commission on Accreditation of Hospitals, located in Dallas, Texas.

2. By letter to Petitioner dated April 21, 1996, HCFA gave Petitioner notice that HCFA had imposed the remedy of termination, effective June 25, 1996, of Petitioner's Medicare provider agreement.

3. HCFA makes initial determinations with respect to . . . the termination of a provider agreement . . . . 42 C.F.R. § 498.3(b)(7).

4. HCFA's April 21, 1996 notice letter gave notice of HCFA's initial determination, the termination of a provider agreement [42 C.F.R. § 498.3(b)(7)], regarding which Petitioner could request a hearing in accordance with 42 C.F.R. § 498.40.

5. HCFA's initial determination was made when HCFA sent the April 21, 1996 notice letter, contrary to Petitioner's assertion that HCFA had not made an initial determination until Petitioner's provider agreement was actually terminated.

6. Even though the effective date of a termination is a future event, HCFA has imposed the remedy of termination when it has sent notice that termination will occur, as it did in this case on April 21, 1996.

7. Petitioner received HCFA's April 21, 1996 notice letter on April 23, 1996. HCFA Ex. 3.

8. A provider has 60 days from receipt of the notice of initial, reconsidered, or revised determination to request a hearing [42 C.F.R. § 498.40(a)(2)], not, as Petitioner maintains, from receipt of the notice that the determination became effective.

9. Petitioner had through June 24, 1996, to request a hearing [60 days from Petitioner's April 23, 1996 receipt of HCFA's April 21, 1996 notice letter]. Section 1866(h) of the Social Security Act ("Act"), incorporating section 205(b) of the Act;[2] 42 C.F.R. § 498.40(a)(2).

10. Thus, Petitioner's July 5, 1996 request for hearing, which was due by June 24, 1996, was not timely filed. 42 U.S.C. § 405(b); 42 C.F.R. § 498.40(a)(2).

11. HCFA's April 21, 1996 notice letter specified clearly the requirements for requesting a hearing.

12. Petitioner has failed to show good cause to extend the time for filing.

13. Petitioner's hearing request is DISMISSED, pursuant to 42 C.F.R. § 498.70(c).

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[2] 42 U.S.C. § 405(b).

DISCUSSION

I. HCFA's initial determination was made when HCFA sent the April 21, 1996 notice letter, contrary to Petitioner's assertion that HCFA had not made an initial determination until Petitioner's provider agreement was actually terminated.

HCFA's April 21, 1996 notice letter gave Petitioner notice of HCFA's initial determination,[3] to terminate Petitioner's Medicare agreement:

> [t]he date on which your hospital's Medicare agreement terminates has been extended to June 25, 1996. No payment for patients admitted on or after that date will be made by the Medicare program. For patients admitted prior to June 25, 1996, payment may continue to be made for up to 30 days of covered inpatient hospital services furnished on and after June 25, 1996.

The pertinent regulation, 42 C.F.R. § 498.3(b)(7), states:

> (b) Initial determinations by HCFA. HCFA makes initial determinations with respect to the following matters:
>
> (7) The termination of a provider agreement in accordance with § 489.53 of this chapter . . .

42 C.F.R. § 498.3(b)(7).

The cited subsection, 42 C.F.R. § 489.53(a)(3), states:

> § 489.53 Termination by HCFA.
>
> (a) Basis for termination of agreement with any provider. HCFA may terminate the agreement with any provider if HCFA finds that any of the following failings is attributable to that provider:
>
> (3) It no longer meets the appropriate conditions of participation . . . set forth elsewhere in this chapter.

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[3] 42 C.F.R. § 498.3(b)(7) and see § 489.53(a)(3).

Petitioner's July 5, 1996 request for hearing was not filed within 60 days of receipt of HCFA's April 21, 1996 notice letter, but Petitioner contends that HCFA had not made an initial determination until Petitioner's provider agreement was actually terminated:

> On July 3, 1996, Horizon Specialty Hospital received notice that HCFA determined that based on the surveys conducted by the Texas Department of Health (TDH) on February 15, 1996, April, 1996 and June 14, 1996, the facility's participation in the Medicare program was being terminated based on the facility's continued failure to comply with the Medicare Conditions of Participation. The termination was effective June 25, 1996 and the facility will receive no payment for patients whose plans of care begin on [or] after June 25, 1996.
>
> On behalf of my client, we hereby request a hearing concerning both the termination action and the allegations of noncompliance which lead to the termination action. Although your notice letter of July 3, 1996, reflects that the facility had 60 days from the date of receipt of your April 21, 1996 letter to file an appeal, we believe that you are incorrect. You[r] April 21, 1996 letter extended the date for the proposed termination of Horizon Specialty Hospital's Medicare agreement to June 25, 1996. At this juncture, therefore, the termination action was a proposed action. The termination action did not become effective until June 25, 1996, after the subsequent survey of June 14, 1996, found the facility allegedly continued to be out of compliance with the Conditions of Participation. Until the termination action became effective, there was no initial determination by HCFA from which the facility could appeal. (See 42 C.F.R. § 498.3(b)(7) which defines an [sic] "initial determinations by HCFA" as "the termination of a provider agreement in accordance with § 489.53 of this chapter.")

Petitioner's July 5, 1996 request for hearing.

Petitioner has subtly misstated the definition of initial determination, by quoting the regulation and leaving out the critical words: "HCFA makes initial determinations with respect to the following matters: . . . ."

A HCFA determination has been made when it is expressed in a notice letter. Here, HCFA determined, or decided, to terminate. Contrary to Petitioner's view, the decision to terminate is not a proposal. A decision to terminate might be rescinded prior to the termination effective date if the provider were found to meet the appropriate conditions of participation,[4] but that did not happen here.

HCFA normally gives the provider notice of termination at least 15 days before the effective date of termination of the provider agreement when the deficiencies do not pose immediate jeopardy. 42 C.F.R. § 489.53(c). Even though the effective date of a termination is a future event, HCFA has imposed the remedy of termination when it has sent notice that termination will occur, as it did in this case on April 21, 1996.

Petitioner asks me to consider 42 C.F.R. § 498.3(d)(9), which states:

> § 498.3 Scope and applicability.
>
> (d) Administrative actions that are not initial determinations. Administrative actions that are not initial determinations include but are not limited to the following:
>
> (9) The finding that a hospital accredited by the Joint Commission on Accreditation of Hospitals or the American Osteopathic Association is not in compliance with a condition of participation, and a finding that that hospital is no longer deemed to meet the conditions of participation.

42 C.F.R. § 498.3(d)(9).

Petitioner's July 5, 1996 request for hearing contains:

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[4] A phenomenon occurs frequently with provider cases for which the "notice" of "determination" language was originally crafted that does not occur with typical social security claims cases. The provider, working with HCFA, may be able to change the course of an imposed remedy, by achieving compliance before the effective date of the remedy. A scheduled termination, and/or a scheduled denial of payment for new admissions, may thus not occur.

> [i]t is also clear that the finding contained in your letter of April 22, [sic] 1996 that "Horizon Specialty Hospital remains out of compliance with the following Medicare Condition of Participation: 42 CFR 482.12 Governing Body" is not an initial determination which triggers appeal rights. 42 C.F.R. § 498.3(d)(9) defines "[a]dministrative actions that are not initial determinations" as including "[t]he finding that a hospital accredited by the Joint Commission on the Accreditation of Hospitals or the American Osteopathic Association is not in compliance with a condition of participation, and a finding that a hospital is no longer deemed to meet the conditions of participation." Appeal rights are only afforded to providers that are dissatisfied with "initial determinations." See 42 C.F.R. § 498.5(b). Therefore, the determinations and proposed termination action contained did not constitute an "initial determination" and the 60-day time period for filing appeal did not begin to run until the termination of Horizon Specialty Hospital's provider agreement.

Petitioner's July 5, 1996 request for hearing.

If HCFA's April 21, 1996 notice letter had informed Petitioner only that it remained out of compliance with a condition of participation, I would agree with Petitioner that no initial determination had been made that an administrative law judge has the authority to review.[5] 42 C.F.R. § 498.3(d)(9). HCFA's April 21, 1996 notice letter went farther, though, by imposing the remedy of termination of Petitioner's Medicare agreement, effective June 25, 1996. The issue before me is a termination. Any termination, whether specialty hospital or skilled

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[5] HCFA's finding of noncompliance with a condition of participation, in the case of a hospital accredited by the Joint Commission on Accreditation of Hospitals, such as Petitioner, is not an initial determination that an administrative law judge has the authority to review. 42 C.F.R. § 498.3(d)(9). This contrasts with the case of a skilled nursing facility, for which a finding of noncompliance that results in the imposition of a remedy is an initial determination that an administrative law judge does have the authority to review. 42 C.F.R. § 498.3(b)(12).

nursing facility, is an initial determination, described by 42 C.F.R. § 498.3(b)(7), as discussed above.

II. A provider has 60 days from receipt of the notice of initial, reconsidered, or revised determination to request a hearing, not, as Petitioner maintains, from receipt of the notice that the determination has become effective.

I have carefully considered whether the trigger that begins the running of the 60 days in the case of a specialty hospital, such as Petitioner, should be distinguished from that of a skilled nursing facility.

I conclude, in agreement with HCFA, that Petitioner's 60 days for appeal begin to run when it is given notice of HCFA's decision to terminate--not at the date the termination decision becomes effective. 42 C.F.R. § 498.40. HCFA cites the decision of Administrative Law Judge Steven T. Kessel in Fort Tryon Nursing Home, DAB CR425 (1996). Judge Kessel observed:

> HCFA's practice is to send a notice to a provider informing the provider of HCFA's determination to impose a remedy and to advise the provider of its right to a hearing from that determination, in advance -- at times, weeks, or even months in advance -- of the date that the remedy is to become effective. Under regulations which govern hearings from determinations made by HCFA, the time within which a provider may request a hearing begins to run as of the date that the provider receives notice of HCFA's determination to impose a remedy. 42 C.F.R. § 498.40. Thus, a provider that receives a notice from HCFA in which HCFA announces that it will be imposing a remedy against the provider may have no choice, if it wishes to protect its right to a hearing, than to request a hearing prior to the date that the remedy is to become effective. The consequence is that I and the other administrative law judges who are associated with the Departmental Appeals Board receive many premature hearing requests.

Fort Tryon, at 9.

Moreover, the pertinent regulation, 42 C.F.R. § 498.40(a)(2), states:

> § 498.40 Request for hearing.
>
> (a) Manner and timing of request.
>
> (2) The 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 . . .

42 C.F.R. § 498.40(a)(2).

Thus, Petitioner's position, that the 60 days to request a hearing begin to run from receipt of notice that a remedy has become effective, is contrary to the regulation [42 C.F.R. § 498.40(a)(2)] and to the Act [section 1866(h); 42 U.S.C. § 405(b)].

Instructive here is Administrative Law Judge Mimi Hwang Leahy's Ruling dated December 12, 1997 in Canton Healthcare Center, C-96-266 [a copy of which is enclosed]:

> [h]earings before federal administrative law judges are part of the administrative review and appeals process set forth at 42 C.F.R. Part 498. Such hearings are available only when HCFA, or the Inspector General's Office, takes certain actions specified by the regulations. 42 C.F.R. §§ 498.3, 498.5(b). The regulations governing the requests for hearings, the limitations of hearing rights, and the authorities of administrative law judges were promulgated by the Secretary pursuant to the authorities delegated to her by Congress.
>
> In cases where a determination has been made by or on behalf of the Secretary to terminate an institution's participation in the Medicare program, section 1866(h)(1) of the . . . Act . . . makes available administrative hearing rights "to the same extent as is provided in section 205(b)" of the Act. See also, subsection (b)(2) incorporated in section 1866(h)(1) of the Act. Section 205(b) of the Act states that any request for hearing with respect to an adverse determination issued by the Secretary

"must be filed within sixty days after notice of such decision is received by the individual making such request." (Emphasis added). Moreover, the Act authorizes the Secretary to do as follows:

> [t]he Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proof and evidence and the method of taking and furnishing the same in order to establish the right to benefits thereunder.

Act, section 205(a).

Canton Ruling at 6; see also 30 (especially n.28); 31.

Petitioner argues that, until the effective date, when it becomes apparent what remedy or remedies actually went into effect, a provider cannot know whether to request a hearing. [Indeed, a provider cannot know whether it will even be entitled to a hearing.] If receipt of notice that a remedy has become effective were the triggering event that began the running of the 60 days during which Medicare providers may request a hearing before an administrative law judge to review HCFA's determinations, the provider would more fully know its situation. Nevertheless, many providers may prefer to request a hearing promptly upon being notified that HCFA has determined to impose a remedy. The possibility of scheduling a hearing prior to the effective date of termination would be lost if the request for hearing had to be filed within sixty days after receipt of notice that a remedy had become effective. [Judge Leahy has ruled that the Act provides for requesting a hearing only after an adverse determination has been received, that any document filed in advance of receiving a notice of an appealable determination from HCFA is not a timely filed "request for hearing," as a matter of law. Canton Ruling, supra, at 21, citing the Act, § 205(b).]

Petitioner's arguments state a good case for eliminating as unnecessary some potential requests for hearing. But amendment would be required of not only 42 C.F.R. §

498.40, but also of the Act, regarding Medicare agreement providers. Meanwhile, I am bound by current statute and regulations and they clearly provide otherwise.

III. Petitioner has failed to show good cause to extend the time for filing its hearing request.

If the 60-day deadline for filing a request for hearing is not met, a written request for extension of time is required, stating the reasons why the request was not filed timely, to show good cause for an extension of time for filing. 42 C.F.R. § 498.40(c).

Petitioner has ably and persuasively stated its case under § 498.40(c), both in its request for hearing and its Response to HCFA's Motion to Dismiss. Admittedly, the regulations are complex, and in this case there is the added complication of Petitioner being a specialty hospital instead of a skilled nursing facility. Petitioner has made a strong argument that its interpretation, if found to be erroneous, nevertheless may constitute good cause for extending the time to file its hearing request.

HCFA's April 21, 1996 notice letter, however, specified clearly the requirements for requesting a hearing:

> [a] written request for hearing must be filed no later than 60 days from the date of receipt of this letter.

The clear instruction in the notice letter persuades me that Petitioner has failed to show good cause for extending the time to file its hearing request.

CONCLUSION

Petitioner's hearing request is DISMISSED, pursuant to 42 C.F.R. § 498.70(c).

/s/

Jill S. Clifton

Administrative Law Judge