

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Lakeshore Villas Health Care Center,)	
(CCN: 10-5542))	Date: February 11, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-24
)	Decision No. CR1736
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION

This matter is before me on a motion to dismiss filed by the Centers for Medicare & Medicaid Services (CMS). CMS filed a motion to dismiss dated November 26, 2007, accompanied by one exhibit, seeking dismissal of Lakeshore Villas Health Care Center's (Petitioner or facility) October 3, 2007 hearing request. CMS Exhibit (CMS Ex.) 1 is admitted. Also, I will designate Petitioner's hearing request as ALJ Exhibit (ALJ Ex.) 1. Petitioner did not submit a rebuttal to the motion. For the reasons discussed below, I grant CMS's motion and dismiss Petitioner's request for hearing.

I. Background

Petitioner is a skilled nursing facility in Tampa, Florida, and is authorized to participate in the Medicare and Medicaid programs. Petitioner is required to be in substantial compliance with program requirements to remain a participant. On May 8, 2007, the Florida Agency for Health Care Administration completed a Complaint Investigation and found that the facility was not in substantial compliance with program requirements. On May 11, 2007, CMS notified Petitioner that it was not in substantial compliance with program requirements, and that it was imposing a Civil Money Penalty in the amount of \$3550 per day beginning March 30, 2007, and continuing until the facility achieved substantial compliance or the facility was terminated. CMS further informed Petitioner that if it disagreed with this determination, it may request a hearing before an

administrative law judge (ALJ) and that the procedures governing this process are set out in 42 C.F.R. § 498.40, *et seq.* CMS Ex. 1. CMS informed Petitioner that “[a] written request for a hearing must be filed no later than sixty days from the date of this letter.” *Id.* CMS sent the notice by U.S. mail. ALJ Ex. 1.

Petitioner requested a hearing by letter dated October 3, 2007, contending that it was in compliance prior to May 8, 2007, and disputing all immediate jeopardy noncompliance findings imposed.

On November 7, 2007, I issued an Acknowledgment and Initial Pre-Hearing Order that set forth procedures and a schedule for the initial development of the case. In pertinent part, the Order, in paragraph 24, directed that the time limit for a party to answer a motion is 20 days from the date of receipt of that motion unless I provide otherwise and that I may grant a motion if a party fails to respond timely to it. *See also* 42 C.F.R. § 498.17.

On November 15, 2007, CMS counsel filed her notice of appearance. On November 26, 2007, CMS counsel filed a motion to dismiss for failure to file a timely request for hearing. Petitioner did not file a rebuttal to the motion.

After consideration of the written arguments and documentary evidence submitted by CMS, I grant CMS’s motion to dismiss. 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

- A. Whether Petitioner filed a timely request for hearing; and if not
- B. 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. 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 the request for hearing. Each finding is noted below in bold, italic face, followed by a discussion of each Finding.

A. CMS notified Petitioner of its action on May 11, 2007.

CMS sent Petitioner the notice of deficiencies by U.S. mail on May 11, 2007. CMS Ex. 1; ALJ Ex. 1. The notice is an “initial, reconsidered, or revised determination” by CMS. 42 C.F.R. §§ 488.406, 498.3(b)(13). This notice constituted agency action from which Petitioner’s right to appeal arose. 42 C.F.R. §§ 498.5, 498.40.

B. Petitioner received CMS’s notice letter by May 16, 2007.

There is a regulatory presumption that the affected party has received the notice of determination five days after it is mailed. 42 C.F.R. §§ 498.40(a)(2), 498.22(b)(3). Petitioner did not submit a rebuttal to CMS’s motion to dismiss, and Petitioner did not address in its hearing request any delay in receiving the notice of determination. Therefore, Petitioner received CMS’s notice of determination by May 16, 2007.

C. Petitioner’s hearing request was filed on October 3, 2007.

Petitioner’s hearing request is dated October 3, 2007, and was received by the Civil Remedies Division on October 4, 2007. Petitioner does not discuss when CMS’s notice letter was received in its hearing request. ALJ Ex. 1. Again, I have received nothing from Petitioner objecting to CMS’s motion to dismiss for untimeliness. I find that Petitioner’s hearing request was filed on October 3, 2007.

D. Petitioner’s hearing request was filed more than 60 days after receipt of CMS’s notice letter, and was therefore untimely.

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 for hearing in writing within 60 days from the receipt of the notice of initial, reconsidered, or revised determination unless that period is extended

The latest date by which Petitioner could have filed a timely hearing request consistent with 42 C.F.R. § 498.40(a)(2) was July 16, 2007, 61 days after May 16, 2007.* Petitioner's hearing request was submitted on October 3, 2007. The filing of Petitioner's request was clearly beyond the 60 days stipulated in the regulations. Therefore, Petitioner's hearing request was untimely.

E. Petitioner has not shown good cause for its untimely hearing request.

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). To extend the period for filing, the affected party "may file a written request for extension of time stating the reasons why the request was not filed timely." 42 C.F.R. § 492.40(c)(1). I may extend the time for filing the request "for good cause shown." 42 C.F.R. § 498.40(c)(2). Here, however, I need not reach the issue of good cause because Petitioner has not satisfied the threshold requirement of filing a written request for extension.

As mentioned above, Petitioner did not file any rebuttal or objection to CMS's motion to dismiss for failure to file a timely hearing request. Therefore, I have nothing before me that could be interpreted as an explanation of good cause for failure to submit a timely hearing request. Paragraph 24 of my Acknowledgment and Initial Pre-Hearing Order gives the party opposing a motion 20 days to file its answer to a motion to dismiss. Petitioner did not file its answer to CMS's motion to dismiss, therefore I must grant CMS's motion to dismiss.

V. Conclusion

Based on the applicable law and undisputed facts, I conclude that Petitioner's hearing request 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

* 60 days after May 16, 2007, was July 15, 2007, which was a Sunday.