

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Royal Suites Health Care and Rehabilitation,
(CCN: 31-5503),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-371

Decision No. CR2585

Date: August 10, 2012

DECISION

I dismiss as untimely the hearing request of Royal Suites Health Care and Rehabilitation (Petitioner) because no good cause justifies extending the time for filing.

I. Background

Petitioner is a long-term care facility located in Galloway Township, New Jersey and participates in the Medicare program. Based on a survey completed on August 18, 2011, the Centers for Medicare and Medicaid Services (CMS) notified Petitioner, by letter dated September 22, 2011, that it was not in substantial compliance with Medicare participation requirements and that CMS was imposing a per-instance civil money penalty (PICMP) of \$3,100. The notice letter also informed Petitioner that if it disagreed with CMS's determination, it could request a hearing before an administrative law judge (ALJ) within 60 days of its receipt of CMS's notice letter. CMS Exhibits (CMS Exs.) 1, 5.

By letters dated February 8, 2012, Petitioner filed a hearing request and a request for an extension of time to file the hearing request. Petitioner concedes that it failed to request a hearing timely. Petitioner argues, however, that good cause exists to extend the time for filing because it believed it could not file a hearing request until an ongoing State Internal Dispute Resolution (IDR) process was completed.

The hearing request and request for extension were docketed, and the case was assigned to me. On May 7, 2012, CMS filed a motion to dismiss because Petitioner's hearing request was untimely filed and no good cause exists to extend the time for filing (CMS Br.). CMS filed ten exhibits with its motion. Petitioner filed a response (P. Br.) on May 25, 2012, unaccompanied by exhibits. In the absence of objection, I admit into the record CMS Exs. 1-10.

II. General Authority

Section 1866(h) of the Social Security Act (Act) (42 U.S.C. § 1395cc(h)) authorizes administrative review of determinations that a provider fails to comply substantially with Medicare program requirements "to the same extent as is provided in section 205(b) [of the Act]." The Secretary of Health and Human Services must provide notice and opportunity for a hearing "upon request by [the affected party] who makes a showing in writing that his or her rights may be prejudiced" by the Secretary's decision. The hearing request "**must** be filed within sixty days" after the affected party receives notice of CMS's determination. Act § 205(b), 42 U.S.C. § 405(b) (emphasis added).

Similarly, the applicable regulations mandate that an affected party "file the request in writing within 60 days from receipt of the notice . . . unless that period is extended" 42 C.F.R. § 498.40(a)(2). On motion of a party, or on his or her own motion, an ALJ may dismiss a hearing request that was not timely filed if the time for filing is not extended. 42 C.F.R. § 498.70(c). Receipt of the notice is "presumed to be 5 days after the date on the notice unless there is a showing that it was, in fact, received earlier or later." 42 C.F.R. §§ 498.40(a)(2); 498.22(b)(3). The affected party may file a written request for an extension of the 60-day period, stating the reason why the hearing request was not timely filed. For good cause shown, an ALJ may extend the time for filing the hearing request. 42 C.F.R. § 498.40(c).

If a facility is successful during an IDR proceeding at demonstrating that the deficiencies should not have been cited, they are removed from the statement of deficiencies (SOD) and any enforcement action imposed solely as a result of those deficiencies is rescinded. 42 C.F.R. § 488.331(c). However, failure of the state or CMS to complete IDR timely cannot delay the effective date of any enforcement action against the facility, and a

facility may not seek a delay of such action on the ground that IDR was not completed before the effective date of the enforcement action. 42 C.F.R. § 488.331(b).

III. Issue

The issues in this case are whether:

1. Petitioner's hearing request is untimely.
2. There is good cause to extend the time period for Petitioner to file a hearing request.

IV. Findings

Petitioner is not entitled to a hearing because it did not file a timely hearing request, and no good cause justifies extending the time for filing.

Petitioner concedes that it did not file a timely hearing request but argues that good cause exists to extend its time for filing.

The New Jersey Department of Health and Senior Services (state agency) conducted a complaint survey of Petitioner's facility on August 18, 2011. The state agency determined that Petitioner placed and operated an electric space heater in a resident's room from August 2-11, 2011, which the state agency alleged was a violation of the Life Safety Code. CMS Ex. 1. The state agency sent a letter to Petitioner on September 6, 2011, enclosing a SOD and offering Petitioner an opportunity to participate in the state IDR process if Petitioner decided to contest the deficiency. The letter highlighted, however, that the IDR resolution process would not "delay the effective date of any enforcement action." The letter also notified Petitioner that the state agency was recommending to CMS that a \$3,100 PICMP be imposed for past noncompliance constituting immediate jeopardy. CMS Ex. 4.

CMS accepted the state agency's recommendations and, by letter dated September 22, 2011, notified Petitioner of the noncompliance. The notice letter alleges specifically that Petitioner was out of substantial compliance with the regulation at 42 C.F.R. § 483.25(h) (Tag F323) at a scope and severity level of "J," and then it informs Petitioner that CMS is imposing a PICMP of \$3,100 based on that noncompliance. The notice letter also advises Petitioner that if it decides to dispute the finding of noncompliance and imposition of the PICMP, it must file a hearing request within 60 days of its receipt of the notice letter. CMS Ex. 5. Petitioner acknowledges, by letter dated December 14, 2011, that it received CMS's September 22, 2011 notice letter about September 24, 2011 ["[w]e received this

letter on approximately September 24th 2011”]. CMS Ex. 7. Therefore, Petitioner needed to file a hearing request by November 23, 2011.

The state agency notified Petitioner of the IDR results, by letter dated November 21, 2011, stating that the deficiency at “F323 S/S=J” was upheld. CMS Ex. 6. Although Petitioner asserts that, after its receipt of the IDR results, it “proceeded to file a request for hearing before an administrative law judge” (P. Br. at 1), there is no evidence that Petitioner ever filed, nor does Petitioner assert it filed, a hearing request with the Civil Remedies Division of the Departmental Appeals Board before February 8, 2012.

Petitioner argues, “it became clear that the 60 day timeframe in which to request a hearing to contest [the state agency’s] findings ran from the September 22, 2011 Imposition of Remedies Notice rather than the November 21st notice finalizing the IDR decision.” P. Br. at 2-3. Petitioner never explains how “it became clear,” nor does it assert that it became clear to Petitioner before the 60-day period elapsed on November 23, 2011. Petitioner does state that it contacted CMS employee JK on December 14, 2011, several weeks after the 60-day period elapsed, and JK suggested that Petitioner request “reconsideration to allow for timely filing of a request for hearing.” P. Br. at 3.

Petitioner sent a letter to CMS’s Deputy Associate Regional Administrator, JWR, on December 14, 2011, requesting an extension and stating that it “realized our error” in not appealing the hearing request within 60 days of its receipt of CMS’s September 22 letter on approximately September 24, 2011, but that it “misinterpreted” the letter and thought it did not have to request a hearing until it received the state agency decision resulting from IDR. CMS Ex. 7.

By letter dated January 30, 2012, JWR responded, informing Petitioner that CMS could not “offer an extension” to Petitioner to file a hearing request. JWR noted, however, that 42 C.F.R. § 498.40(c) provides that a party can file for an extension of time to request a hearing with an ALJ, stating the reason why the request was not timely filed. CMS Ex. 9.

On February 8, 2012, Petitioner requested an extension of time to file a request for hearing, along with the hearing request, on which this case is based. CMS asserts that Petitioner did not show good cause for its untimely filing, arguing that pursuit of IDR does not stay or toll the applicable appeal period or provide good cause for extending that period. CMS Br. at 2.

Petitioner concedes that its hearing request was not timely filed. P. Br. at 2. Petitioner argues that it has good cause to file its hearing request late because it “misinterpreted the manner in which the process is conducted” and believed that it had to wait until after IDR

to file a hearing request. P. Br. at 6. Petitioner also asserts a claim of estoppel, arguing that it relied to its detriment on the advice of JK, who instructed Petitioner to write a letter to CMS requesting an extension of the hearing request and also on CMS's January 30, 2012 letter instructing Petitioner to file for an extension with an ALJ. P. Br. at 5.

Petitioner now seeks "an opportunity to bring into question the validity of the cited deficiency, the actual circumstances of which were corrected immediately upon discovery, regardless of the validity of the citation." P. Br. at 5-6.

The Departmental Appeals Board has long held that pursuit of IDR does not toll or stay the time period for requesting a hearing and that engaging in IDR does not excuse a failure to timely file or constitute good cause for making an untimely filing. The Board has pointed out that a state IDR process is separate from and in addition to appeal rights provided to a facility under federal regulations, that requesting both IDR and a hearing at the same time are not mutually exclusive, and that a petitioner could not reasonably conclude that participation in IDR would somehow toll the federal appeal process where a notice letter is clear with regard to a party's hearing rights. *Quality Total Care, L.L.C., d/b/a The Crossings*, DAB No. 2242, at 10 (2009) (citing *Concourse Nursing Home*, DAB No. 1856 (2002), *aff'd Concourse Rehab. & Nursing Ctr., Inc. v. Thompson*, No. 03 Civ. 260 (NRB) (S.D.N.Y. Mar. 8, 2004), 2004 WL 434434, *aff'd* 155 Fed. App'x 28, No. 04-2586-CV, 2005 WL 3076899 (2d Cir. Nov. 17, 2005)); *Hillcrest Healthcare, LLC*, DAB No. 1879 (2003).

Here the regulatory timeframe to file a hearing request was made clear in CMS's September 22, 2011 notice letter, which spelled out in detail Petitioner's hearing rights. Petitioner's failure to follow the precise instructions in CMS's September 22, 2011 notice letter and request a hearing within 60 days of its receipt of that letter does not constitute good cause for Petitioner's failure to timely file a hearing request.

Moreover, with regard to Petitioner's argument that it relied to its detriment on advice from CMS regarding how to request an extension to file a hearing request, nowhere does Petitioner allege that it received advice from CMS employees prior to the expiration of the 60-day period in which it was authorized to request a hearing. With specific regard to Petitioner's contacts with JK and JWR, Petitioner does not allege any contact with them, or with anyone at CMS, prior to December 14, 2011, which Petitioner does not dispute was after the expiration of the 60-day appeal period. Thus, even if I had the authority to entertain claims of equitable estoppel, I would not find Petitioner harmed. The original notice letters that Petitioner undisputedly received were clear that Petitioner had 60 days to challenge the PICMP regardless of pending IDR proceedings.

V. Conclusion

For the reasons discussed above, I dismiss Petitioner's hearing request, pursuant to 42 C.F.R. § 498.70(c), because it was not timely filed, and I deny Petitioner's request for an extension of time to file that hearing request, as no good cause justifies extending the time for filing for IDR proceedings. Petitioner did not timely take advantage of the opportunity to request a hearing, of which it was clearly notified in CMS's September 22, 2011 notice letter.

/s/

Joseph Grow
Administrative Law Judge