

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:)	
)	
Jackson Manor Health Care, Inc.,)	Date: August 4, 1998
)	
Petitioner,)	
)	
- v. -)	Docket No. C-98-174
)	Decision No. CR545
Health Care Financing)	
Administration.)	
)	

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the request for hearing of Petitioner, Jackson Manor Health Care, Inc. I do so because Petitioner did not file its request timely and because Petitioner has not shown good cause for its failure to file its request timely.

I. BACKGROUND AND UNDISPUTED MATERIAL FACTS

This case is before me on the Health Care Finance Administration's (HCFA) motion to dismiss Petitioner's January 29, 1998 request for a hearing. HCFA's motion includes eight exhibits (HCFA Ex. 1 - HCFA Ex. 8). I am receiving these exhibits into evidence as unopposed exhibits. I base my recitation of the relevant facts on these exhibits and on Petitioner's request for a hearing.

On April 30, 1997 and May 5, 1997 the State of Florida Agency for Health Care Administration (Florida State survey agency) sent notices to Petitioner. HCFA Ex. 1; HCFA Ex. 2. The notices advised Petitioner of the results of a compliance survey of Petitioner that was conducted on April 21 - 25, 1997. Id. They advised Petitioner that the Florida State survey agency would recommend to HCFA that remedies be imposed against Petitioner based on the results of that survey. Id. The May 5, 1997 notice additionally advised Petitioner that, if it disagreed with the survey results, it could avail itself of an informal dispute resolution process to be conducted by the State of Florida. HCFA Ex. 2 at 3.

On May 13, 1997, HCFA sent a notice to Petitioner. HCFA Ex. 3. In that notice, HCFA advised Petitioner that HCFA concurred with the recommendations of the Florida State survey agency and that it had determined to impose remedies against Petitioner. Id. The remedies included a civil money penalty and denial of payment for new admissions. Id. at 1 - 2. The amount of the civil money penalty was stated to be \$10,000 for each day of Petitioner's noncompliance with participation requirements. Id. The notice advised Petitioner that, if Petitioner disagreed with HCFA's determination, Petitioner had a right to request a hearing before an administrative law judge. It stated that:

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

Id. at 3.

The Florida State survey agency sent an additional notice to Petitioner on May 28, 1997. HCFA Ex. 4. In this notice, the Florida State survey agency advised Petitioner of the results of a revisit survey that had been conducted of Petitioner on May 22 - 23, 1997. Id. The notice told Petitioner that, at that survey, Petitioner was found again not to be complying with federal participation requirements. Id.

On August 8, 1997, HCFA sent an additional notice to Petitioner. HCFA Ex. 5. In this notice, HCFA restated that it had imposed a civil money penalty against Petitioner on May 13, 1997 in the amount of \$10,000 per day. The notice advised Petitioner that, effective May 23, 1997, the penalty was reduced to \$1,500 per day, based on Petitioner's removal of immediate jeopardy at its facility, but based also on Petitioner's continuing noncompliance with participation requirements at a level of severity that was less than the immediate jeopardy level. Id.

On October 8, 1997, HCFA sent yet another notice to Petitioner. HCFA Ex. 7. This notice recited that Petitioner had been found not to be complying with federal participation requirements at the April, 1997 survey. Id. at 1. It recited also that, at a May 23, 1997 revisit, Petitioner had been found by the Florida State survey agency to remain noncompliant with participation requirements. Id. at 1 - 2. The notice advised Petitioner that its participation in Medicare would be terminated on October 25, 1997 if Petitioner did not attain compliance with participation requirements by that date. Again, the notice advised Petitioner that Petitioner had a right to request a hearing. Id. Once again, HCFA told Petitioner that it must request a hearing within sixty days of Petitioner's receipt of the notice.

HCFA sent an additional notice to Petitioner on January 12, 1998. HCFA Ex. 6. The notice confirmed that, effective October 10, 1997, Petitioner had attained compliance with federal participation requirements. Id. HCFA also advised Petitioner that it had determined to revise the amounts of the civil money penalties that it had imposed against Petitioner. Id. Petitioner was advised that the total amount due in civil money penalties was \$241,900. Id.

HCFA sent a final notice to Petitioner on March 19, 1998. HCFA Ex. 8. In this notice, HCFA told Petitioner that it had revised the amounts of the civil money penalties that it determined to impose against Petitioner. The total amount due in civil money penalties was now stated to be \$154,900. Id. at 1.

Petitioner filed a hearing request on January 29, 1998. The request was filed more than sixty days from Petitioner's receipt of either HCFA's May 13, 1997, August 8, 1997, or October 8, 1997 notices to Petitioner. See HCFA Ex. 3; HCFA Ex. 7. Petitioner implicitly acknowledged that its hearing request was untimely. It requested leave to submit a hearing request untimely for the following reasons:

- (1) The facility has filed its informal appeal of the alleged deficiencies with Health Care Financing Administration's ("HCFA") state appointed agent, the Agency for Healthcare Administration and, as such, believed it had preserved its appeal rights with HCFA by appealing to the appropriate state agency.
- (2) During November, 1997, the President of the company, who is the individual responsible for filing the appeals was terminated. The company was unaware that a formal appeal had not been filed until approximately January 22, 1998, when the company's Florida operations officer concluded the informal appeal with ACHA and Ms. Linda Niswander of HCFA.

Petitioner's hearing request at 1.

HCFA filed a motion to dismiss Petitioner's hearing request on June 24, 1998. HCFA argued that Petitioner's request was untimely and that Petitioner had not shown good cause for filing its request untimely. Petitioner did not respond to HCFA's motion.

II. ISSUES, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Issues

The issues in this case are whether Petitioner: (1) is entitled to a hearing; and (2) has shown good cause for filing its hearing 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 state each Finding below as a separate heading. I discuss each Finding in detail.

1. In order to be entitled to a hearing from a determination by HCFA, an entity must file its hearing request no more than 65 days from the date of HCFA's mailing to that party of the notice of HCFA's determination.

The regulations which govern hearings involving HCFA require that an entity file a hearing request no more than 65 days from the date of mailing of notice of a determination by HCFA in order to be entitled to a hearing from that determination. Specifically, an entity must make its request within 60 days from its receipt of the notice of HCFA's determination. 42 C.F.R. § 498.40(a)(2). Receipt of a notice of a determination is presumed to occur five days from the date of mailing of the notice. *Id.*; 42 C.F.R. § 498.22.

2. Petitioner did not file timely a hearing request and is not entitled to a hearing.

Petitioner's January 29, 1998 hearing request was not a timely request from a determination by HCFA. Therefore, Petitioner is not entitled to a hearing.

It is apparent from the notices that HCFA sent to Petitioner that HCFA made more than one determination which potentially gave Petitioner hearing rights. These determinations include HCFA's May 13, 1997 determination to impose a civil money penalty and other remedies against Petitioner. HCFA Ex. 3. They also include HCFA's August 8, 1997 determination to decrease the amount of the civil money penalty effective May 23, 1997 based on HCFA's conclusions that Petitioner had ceased being noncompliant at the immediate jeopardy level as of May 23, 1997 but that Petitioner remained noncompliant as of that date at a lower level of scope and severity. HCFA Ex. 5. And, they also include HCFA's October 8, 1997 determination to terminate Petitioner's participation in Medicare if Petitioner had not attained compliance with all participation requirements as of October 25, 1997. HCFA Ex. 7.

Of these three determinations, only the first two actually constituted determinations from which Petitioner had a right to a hearing. The May 13, 1997 determination and the August 8, 1997 determination both imposed civil money penalties against Petitioner in different amounts. The May 13, 1997 determination was based on the findings of noncompliance that the Florida State survey agency made at the April 1997 survey of Petitioner. The August 8, 1997 determination was based on additional findings of noncompliance that the Florida State survey agency made at the May 1997 revisit survey of Petitioner. By contrast, the October 8, 1997 determination never actually resulted in the imposition of a remedy (termination from participation) against Petitioner. Effective October 10, 1997 it was finally determined that Petitioner had achieved substantial compliance with participation requirements. HCFA Ex. 6 at 1.

I do not find that HCFA's notices to Petitioner of January 12, 1998 and March 19, 1998 are notices of determinations from which Petitioner had a right to a hearing. See HCFA Ex. 6; HCFA Ex. 8. These notices do not announce determinations by HCFA to impose a remedy against Petitioner. Rather, they advise Petitioner only that HCFA had revised its calculations of remedies that HCFA had imposed against Petitioner previously. See *ids.*

Petitioner's January 29, 1998 hearing request was untimely, whether its date of filing is measured against HCFA's May 13, 1997 determination or against HCFA's August 8, 1997 determination. Petitioner made its request more than 65 days from the mailing date of either of these two notices. Indeed, Petitioner filed its hearing request more than 65 days after Petitioner's receipt of HCFA's October 8, 1997 notice to Petitioner.

3. An entity may receive from an administrative law judge an extension of time for filing a request for a hearing from a determination by HCFA only where that party establishes good cause for not filing timely its hearing request.

An administrative law judge may dismiss an untimely hearing request. An untimely request may be dismissed where the entity requesting the hearing has not established good cause for failing to file its request timely. 42 C.F.R. § 498.70(c).

The term "good cause" is not defined by the regulation. See 42 C.F.R. § 498.70(c)(2). "Good cause" has been held to mean a circumstance or circumstances beyond an entity's ability to control which prevented that entity from making a hearing request timely. Hospicio San Martin, DAB CR387, at 2, (1995); Hillcrest Health Facility, Inc., DAB CR489, at 3, (1997); Mathis Nursing Home, DAB CR461, at 6, (1997). Avoidable human error does not constitute "good cause" for failure to file a hearing request timely. Mathis Nursing Home at 9. In a case where an entity files a hearing request untimely the

burden is on that entity to show that it was prevented by a circumstance or circumstances that were beyond its ability to control from filing a hearing request timely.

4. Petitioner has not established good cause for its failure to file a hearing request timely.

Petitioner has not offered sworn statements to affirm the two explanations that it offers for its failure to file a hearing request timely. I am assuming that they are true for the purpose of deciding this case. I conclude that these explanations amount to assertions that human error is the basis for Petitioner's failure to file a hearing request timely. Such error does not constitute good cause.

The two explanations that Petitioner offers for its failure to file a hearing request timely are that: (1) Petitioner erroneously believed that the deadline for filing a request for hearing would be tolled by its involvement in an informal dispute resolution process with the State of Florida; and (2) that the former President of Petitioner's facility was remiss in not filing a hearing request. Petitioner's hearing request at 1. These assertions are on their face acknowledgments that Petitioner's failure to file a hearing request timely was due to avoidable human error.

Any belief that Petitioner might have formed that it was not obligated to file a hearing request while informal dispute resolution was ongoing could only have been the product of avoidable mistake on Petitioner's part. There is nothing that either HCFA or the Florida State survey agency said to Petitioner that could have misled Petitioner into believing that ongoing informal dispute resolution tolled Petitioner's deadline for filing a hearing request.

HCFA gave Petitioner explicit notice that if Petitioner wanted a hearing it was obligated to file a hearing request within 60 days of its receipt of HCFA's May 13, 1997 notice. The notice states unambiguously that Petitioner had a right to a hearing which it had to exercise within 60 days from receipt of the notice. HCFA Ex. 3 at 2. There is nothing in the notice which could have misled Petitioner into concluding that its obligation to request a hearing would be tolled by other proceedings.

The May 5, 1997 notice which Petitioner received from the Florida State survey agency which, among other things, advised Petitioner of an informal dispute resolution process was not misleading. HCFA Ex. 2. It contained no language that suggested that the informal dispute resolution process would toll other deadlines that HCFA might impose on Petitioner. See id. Indeed, the language of the Florida State survey agency's notice to Petitioner made plain that the imposition of remedies by HCFA would *not* be tolled by an informal dispute resolution process. The Florida State survey agency's notice states

explicitly that:

Informal dispute resolution for the cited deficiencies *will not delay the imposition of the enforcement actions recommended*

HCFA Ex. 2 at 1 (emphasis added).

The fact that the former President of Petitioner's facility may have been remiss in not filing a hearing request is no basis for my finding good cause to extend the deadline for filing the request. The failure of a corporate employee who serves as an agent of a corporation to discharge his or her responsibility on behalf of the corporation carries the same consequences as the failure of an individual to discharge a personal responsibility. A corporation may not assert good cause premised on the avoidable failure of one of its employees to discharge a duty that the employee had been empowered to discharge in the corporate name. In this respect, the facts of this case are very similar to the facts of Mathis Nursing Home. There, as with this case, the failure of the petitioner to request a hearing timely was in part due to the avoidable failure of a corporate employee to request a hearing on behalf of the corporation. DAB CR461 at 8 - 9. I found there, as I do here, that such failure is not good cause to extend a deadline for filing a hearing request.

/s/

Steven T. Kessel
Administrative Law Judge