

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Eye Life Institute,	)	Date: February 19, 2008
(CCN: 05C0001128),	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C- 07-460
	)	Decision No. CR1738
Centers for Medicare and Medicaid	)	
Services.	)	
_____	)	

**DECISION DISMISSING  
REQUEST FOR HEARING**

Having considered the parties' arguments and the exhibits, I dismiss Petitioner's hearing request as it relates to the Centers for Medicare & Medicaid Services' (CMS's) notice letter of January 24, 2007 (January Notice). Petitioner did not file a timely request for hearing pursuant to the January Notice, as is required by 42 C.F.R. § 498.40(a)(2). And, Petitioner has not established good cause for extending the timeframe within which it might file its hearing request.

**I. Background**

Petitioner, Eye Life Institute, is an ambulatory surgical center located in Paradise, California. By the January Notice, sent by overnight mail, CMS informed Petitioner that it no longer met Medicare requirements for participation as a supplier of services in the Medicare program. It informed Petitioner that its Medicare agreement would be terminated at 12:01 a.m. on February 13, 2007. It also informed Petitioner of its right to a hearing to contest the termination. It specifically stated:

If you do not agree with this determination, you may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board, in accordance with 42 C.F.R. Part 498. 42 C.F.R. 416.35(b)(3). Such a hearing request must be filed in writing no later than sixty (60) days from receipt of this notice.

CMS Exhibit (CMS Ex.) 1. The January Notice explained that no Medicare payment would be available for services provided by Petitioner on or after the February 13, 2007 termination date.

The January Notice terminating Petitioner's Medicare participation followed a Medicare validation survey of Petitioner conducted by the California Department of Health Services, followed by two revisit surveys (on April 13, 2006, June 14, 2006, and October 12, 2006 respectively), which all found that Petitioner was not in substantial compliance with the conditions for coverage for ambulatory surgical centers (as set forth at 42 C.F.R. Part 416). CMS Exs. 1, 5; 42 C.F.R. § 416.35(b). A March 14, 2007 post-termination survey also documented failure to comply with the conditions for coverage.

CMS filed a motion to dismiss Petitioner's hearing request on October 29, 2007 (CMS Br.). In support of its motion, CMS filed nine proposed exhibits, which have been marked as CMS Exs. 1-9. Petitioner responded to CMS's motion on November 30, 2007 (P. Br.), but did not file any proposed exhibits with its brief. CMS filed a reply (CMS Reply) to Petitioner's response on December 14, 2007. Petitioner filed a sur-reply (P. Reply) on December 28, 2007. Petitioner did not object to the exhibits offered by CMS. Accordingly, I admit CMS Exs. 1-9 into evidence.

## **II. Issues, findings of fact and conclusions of law**

### **A. Issues**

The issues in this case are:

- Whether Petitioner timely filed a request for hearing as it relates to CMS's January Notice.
- Whether Petitioner has shown good cause to extend the time in which to file a request for hearing related to CMS's January Notice.

## **B. Findings of fact and conclusions of law**

I make findings of fact and conclusions of law (Findings) to support my decision. I set forth each Finding below as a separately numbered heading. I discuss each Finding in detail.

*1. CMS's January Notice to Petitioner unambiguously informed Petitioner of its right to request a hearing to challenge CMS's determination to terminate Petitioner from participation in the Medicare program.*

The January Notice informed Petitioner that Medicare coverage of its services would be terminated effective February 13, 2007 based on deficiencies found following the surveys beginning on April 13, 2006. The January Notice clearly placed Petitioner on notice of CMS's determination to terminate Petitioner from the Medicare program and unambiguously informed Petitioner of its hearing rights and the specific time period in which it had to file its request for hearing - no later than 60 days from its receipt of the January Notice. CMS Ex. 1.

*2. Petitioner failed to file its hearing request within 60 days of the January Notice, as required by applicable statute and regulation.*

Petitioner failed to file its hearing request within 60 days of its receipt of CMS's notice as required by statute and regulation. Section 1866(h) of the Social Security Act (Act) authorizes administrative review of a determination that a provider has failed to comply substantially with a provider agreement entered into with the Secretary of Health and Human Services (Secretary). The regulations mandate that the affected party "file the request in writing within 60 days from receipt of the notice . . . unless that period is extended . . . in accordance with paragraph (c) . . .," which allows an ALJ to extend the time for filing a hearing request for "good cause shown." 42 C.F.R. § 498.40. On the motion of a party, or on his or her own motion, an administrative law judge (ALJ) may dismiss a hearing request where that request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c). Under section 498.40(a)(2), receipt 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. § 498.22(b)(3).

CMS sent the January Notice by overnight mail. Petitioner does not dispute timely receipt of the January Notice. Accordingly, the 60-day period for requesting a hearing expired on or about March 26, 2007. Petitioner filed a request for hearing on April 13, 2007, over two weeks later. Petitioner's request for hearing was thus filed beyond the requisite 60-day period to request a hearing. Petitioner does not allege that its hearing request was filed within the regulatory 60-day time period, only that its hearing request

should be deemed timely for the reasons set forth below. P. Br. at 2. Thus, I find that Petitioner failed to file its request for hearing within 60 days of its receipt of CMS's January Notice.

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

An affected party may ask for an extension of time to file a request for hearing based upon a showing of good cause. 42 C.F.R. § 498.40(c). An ALJ may dismiss an untimely hearing request where a party fails to demonstrate good cause for not filing the hearing request timely. 42 C.F.R. § 498.70(c). "Good cause" has been interpreted in case law to mean "circumstances beyond the ability of the provider to control, which intervened to prevent the provider from making a timely hearing request." *See Hospicio San Martin*, DAB CR387, at 2 (1995), *aff'd*, DAB No. 1554 (1996). Only an ALJ can grant an extension of time to request a hearing. 42 C.F.R. § 498.40(c)(2).

Petitioner asserts that CMS acted "unreasonably and unfairly" and that it had good cause for its untimely filing. P. Reply at 5. Petitioner asserts that: CMS granted it an extension of time in which to file its hearing request; the CMS agent who granted the extension had ostensible authority to grant the extension and did not respond to Petitioner's confirming letter to say she did not have the authority to grant the extension; the CMS agent who had actual authority to extend the time for filing was copied on the confirming letter and did not deny an extension was granted; the circumstances creating the untimely filing were within CMS's control and beyond Petitioner's control; and CMS intentionally delayed informing Petitioner of the results of the March 14, 2007 post-termination survey to prevent Petitioner from timely filing its hearing request. P. Br. at 1-2.

Specifically, in its "Statement of Relevant Facts," Petitioner asserts that: on February 9, 2007, CMS, through its agent, Michelle Griffin,<sup>1</sup> authorized an additional survey of Petitioner's facility (CMS Ex. 5,<sup>2</sup> paragraph 14), granting an extension of time to Petitioner to file a hearing request; the extension was memorialized in a letter dated February 27, 2007 (CMS Ex. 3) which Petitioner's Medical Director, Jerome Niswonger, M.D., sent to Ms. Griffin; CMS received the letter (CMS Ex. 5, paragraph 15); a copy of

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<sup>1</sup> At the relevant time, Ms. Griffin, a registered nurse, was the Manager of Hospital & Community Care Operations for CMS in Region IX, and was responsible for reviewing licensing and certification surveys pertaining to health care providers, including ambulatory surgical centers. CMS Ex. 5, at paragraphs 2, 3.

<sup>2</sup> CMS Ex. 5 is the Declaration of Ms. Griffin.

the letter was mailed to Captain Steven D. Chickering,<sup>3</sup> who Petitioner asserts had the authority to grant an extension (CMS Ex. 5, at paragraph 5); CMS failed to respond to the letter by denying that Petitioner's time for filing a hearing request was extended; inclement weather delayed the resurvey of Petitioner from February 28, 2007 to March 14, 2007 (CMS Ex. 5, at paragraph 17); Ms. Griffin did not inform Petitioner of the survey results until April 10, 2007 (CMS Ex. 5, at paragraph 17); on April 13, 2007, Petitioner requested a hearing (CMS Ex. 7), within the 30-day extension period. P. Br. at 2 - 3. However, even assuming that all of Petitioner's assertions are true, they do not constitute good cause for Petitioner's untimely filing.

The letter sent by Dr. Niswonger to Ms. Griffin (with a cc: to Captain Chickering) on February 27, 2007, does not, as Petitioner asserts, confirm authorization of an extension of time in which Petitioner could request a hearing. Instead, it states that,

It was a pleasure meeting Pat Frey, RN. Unfortunately, due to the weather and loss of power to the facility, she was unable to complete the survey. It is our understanding that the certification process has been extended 30 days pending the re-survey of the facility.

CMS Ex. 3. It is not clear on the face of this letter what Petitioner means by asserting that the "certification process" has been extended for 30 days. In fact, by February 27<sup>th</sup>, when the letter was written, termination of Petitioner's facility had already been imposed and would only be rescinded if Petitioner was found in compliance following the post-termination survey. Furthermore, Petitioner's unilateral declaration that its "certification process" has been extended cannot contravene the 60-day regulatory deadline reflected in the January Notice, as the decision to terminate was never revised or rescinded by CMS. Although Petitioner asserts that CMS should have responded to and clarified whether an extension of time to file a hearing request had been granted (P. Reply at 4), there is no requirement that CMS do so, especially here where Petitioner did not assert specifically that such an extension had been granted. I do not find that CMS misled Petitioner into untimely requesting a hearing by failing to reply to Petitioner's February 27, 2007 letter, as Petitioner would like me to infer. P. Reply at 4.

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<sup>3</sup> At the relevant time, Captain Chickering was the Survey and Certification Officer with the authority to terminate the participation of providers and suppliers in Region IX. CMS Ex. 5, at paragraph 5.

Moreover, even if Ms. Griffin or Captain Chickering had explicitly agreed to extend the 60-day period for filing a hearing request, this would not constitute good cause for Petitioner's failure to timely file. While Captain Chickering may have had the authority to rescind or revise the decision to terminate, only an ALJ has the authority to extend the 60-day period in which a facility can file a hearing request (and there is no evidence that the termination was ever rescinded or revised). A facility cannot rely on an alleged misrepresentation by a CMS representative regarding the regulatory deadline to request a hearing in order to relieve itself of acting in accordance with the regulations. *See Knox County Nursing Home*, DAB CR1588 (2007); *Hamilton County Nursing Home*, DAB CR716 (2000).

Following receipt of the January Notice, no circumstances beyond Petitioner's control prevented Petitioner at any point from requesting a hearing. It was Petitioner's choice not to request a hearing in accordance with the January Notice. It was Petitioner's choice to instead attempt to prove its compliance with the conditions of coverage through the post-termination survey and to refrain from filing a hearing request pending that survey. Petitioner's choice does not constitute good cause for untimely filing. The terms of the January Notice are clear. Petitioner had 60 days from receipt of the January Notice to file its hearing request. Petitioner did not do so.

### **III. Conclusion**

Based on all of the evidence and arguments presented by the parties, I find Petitioner failed to file a request for hearing within the applicable statutory time period and good cause does not exist to extend the period for filing a hearing request. Accordingly, I dismiss Petitioner's request for hearing in this matter.

/s/ Alfonso J. Montano  
Administrative Law Judge