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NOTICE OF AGENCY'S FINAL DECISION

(Please keep form with file until a final decision is issued)

Case Name: [REDACTED]

ALJ: Oneschwa

Decision Date: 4/9/19

Case No.: MDH-MCP-15-17-3554

Agency Case No. (if applicable): _____

Document Name (CRS): _____

Please check one:

AFFIRMED

AFFIRMED w/ comment

MODIFIED

REVERSED

OTHER _____

If not affirmed in its entirety, please append a copy of the Agency's Final Decision.

5/17/19
Date

Signature Appears on Original

Secretary or Designee

Please return to:

Librarian
Office of Administrative Hearings
Administrative Law Building
11101 Gilroy Road
Hunt Valley, Maryland 21031-1301

OAH-OPER-10
(REVISED 10/02)

APPELLANT * BEFORE NICOLAS ORECHWA,
v. * ADMINISTRATIVE LAW JUDGE,
MARYLAND DEPARTMENT * THE MARYLAND OFFICE
OF HEALTH * OF ADMINISTRATIVE HEARINGS
* OAH No.: MDH-MCP-15-17-35541

PROPOSED RULING ON MOTION TO DISMISS

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
ORDER

STATEMENT OF THE CASE

By notice dated August 17, 2017, the Maryland Department of Health (Department) notified [REDACTED] (Appellant) that it denied the Appellant's request for payment of services because the admitted patient did not meet the Medical Assistance Program requirements for medically necessary acute hospital care under Code of Maryland Regulations (COMAR) 10.09.06.04, 10.09.06.01 and 10.09.36.01 (first notice of agency action). The Department further notified the Appellant that if it wished to appeal the Department's determination, it must do so within thirty days from the date of the notice.

By letter dated September 20, 2017, the Appellant appealed the Department's August 17, 2017 determination. By notice dated October 6, 2017, the Department notified the Appellant its appeal was untimely and dismissed the appeal (second notice of agency action). By letter dated October 12, 2017, the Appellant again appealed the Department's first notice of agency action.

On or about October 31, 2017, the Department transmitted the Appellant's October 12, 2017 appeal to the Office of Administrative Hearings (OAH) for a hearing. On January 18, 2019, the OAH set this matter for a hearing on April 17, 2019, at 9:00 am at the OAH in Hunt Valley, Maryland. On March 21, 2019, the Department filed a Motion to Dismiss (Motion).¹ The Appellant did not file a response.²

ISSUE

Should the appeal of the first notice of agency action be dismissed?

Should the appeal of the second notice of agency action be dismissed?

SUMMARY OF THE EVIDENCE

Exhibits

The Department submitted a Motion to Dismiss with two exhibits:

- MDH Ex. 1 – The Appellant's October 12, 2017, appeal letter and the Department's second notice of agency action
- MDH Ex. 2 – The Appellant's September 20, 2017, appeal letter and the Department's first notice of agency action

The Appellant submitted neither a response nor exhibits.

I have entered into the record the Motion to Dismiss and MDH Ex's. 1 and 2. Md. Code Ann., State Gov't § 10-218 (2014).

¹ The Appellant's appeal to the Department's second notice of agency action is technically the only issue before the OAH. However, for the sake of completeness, I shall address all issues the Department raised in its Motion.

² The Appellant had fifteen days from March 21, 2019, the date on which the Department's Motion was filed, to file its response. COMAR 28.02.01.12B(3)(a).

DISCUSSION

The OAH's Rules of Procedure provide for consideration of a Motion to Dismiss under COMAR 28.02.01.12C and of a Motion for Summary Decision under COMAR 28.02.01.12D. Those regulations provide as follows:

C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

D. Motion for Summary Decision.

(1) Any party may file a motion for summary decision on all or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. Motions for summary decision shall be supported by affidavits.

(2) The response to a motion for summary decision shall identify the material facts that are disputed.

(3) An affidavit supporting or opposing a motion for summary decision shall be made upon personal knowledge, shall set forth the facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

(4) The judge may issue a proposed or final decision in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

The Department's Motion includes exhibits. However, because the Department did not support its Motion with an affidavit as required by COMAR 28.02.01.12D, I shall only consider it a Motion to Dismiss.

In its Motion, the Department contends the OAH should dismiss both of the Appellant's appeals. The Department argues the OAH should dismiss the October 12, 2017 appeal because it fails to state a claim for which relief may be granted. The Department also argues the OAH should dismiss the September 20, 2017 appeal because the Appellant did not file it timely and

the Appellant did not provide a reason as to its untimeliness. I agree with the Department as to both contentions.³

The Department's First Notice of Agency Action

The Department's First Notice of Agency Action advised the Appellant the following with regard to its appeal rights:

If you disagree with this decision, you may request reconsideration from Telligen or appeal to the Department for review by an Administrative Law Judge at the Office of Administrative Hearings as described below.

Appeal: You may appeal this decision without requesting reconsideration pursuant to COMAR 10.09.06.13 and 10.01.03.01 et seq. Your appeal must be submitted within 30 days from the date of this letter, unless you submit a timely request for reconsideration. Your request must be submitted in writing West Preston Street, 1st floor, Baltimore, Maryland 21201 or fax to (410) [REDACTED]

(Underline emphasis added.)

"A person, either directly or through a representative, may request a hearing by mailing or delivering a written request via U.S. mail, facsimile, or electronic mail to the individual and unit of the Department specified in the notice." COMAR 10.01.03.06A. "A request for a hearing shall be deemed filed when received in the unit of the Department specified in the notice required by Regulation .05⁴ of this chapter." COMAR 10.01.03.06E. "'Filed' means, unless otherwise indicated in this chapter, the earlier of when the document is postmarked or received at the Office and, when required, served on the other parties to a proceeding or an administrative law judge." COMAR 28.02.01.02B(5). "An initial pleading is timely when it is filed within the time period specified by relevant law." COMAR 28.02.01.04B(1).

³ The Department also raised an issue concerning OAH's jurisdiction over the original appeal. Because I am dismissing on other ground, I find that issue moot and shall not address it.

⁴ "The Department shall provide the notices of agency action and of the right to a hearing required by law. The notices shall contain the information required by State Government Article, §§10-207 and 10-208, Annotated Code of Maryland." COMAR 10.01.03.05.

The Department's first notice of agency action is dated August 17, 2017. Thirty days from August 17, 2017, is Saturday September 16, 2017. The next business day is Monday September 18, 2017.⁵ The Appellant's letter requesting an appeal hearing is dated September 20, 2017. Thus, I find the earliest the Department could have received the Appellant's request would be September 20, 2017, which is more than thirty days beyond August 17, 2017. Accordingly, I find the Appellant submitted its request for an appeal hearing untimely.

The Department's Second Notice of Agency Action

When the Appellant failed to timely file its appeal to the Department's first notice of agency action, the Department issued a second notice of agency action. The second notice of agency action advised the Appellant that it filed an untimely appeal to the first notice of agency action. The second notice of agency action also read in pertinent part as follows:

If you disagree with this determination, you may appeal this decision to the Maryland Office of Administrative Hearing [sic], Pursuant to COMAR 10.09.06.13, by writing to Executive Director, Attn: Appeals Coordinator, Office of Health Service, 201 West Preston street, Room 127, Code 79, Baltimore, Maryland 21201 within 30 days of receipt of this letter. **The Program will contend that any hearing must first resolve the issue of timeliness before the merits of the case are considered.**

(Emphasis added.)

⁵ C. Computation of Time.

(1) In computing any period of time, the day of the act, event, or default, after which the designated period of time begins to run, is not to be included.

(2) The last day of the period so computed is to be included unless:

(a) It is a Sunday or a legal holiday, in which event, the period runs until the end of the next day which is not a Sunday or a holiday; or

(b) The act to be done is the filing of some paper at the Office on the last day of the period and the Office is not open, or is closed for part of the day, in which event, the period runs until the end of the next day which is not a Sunday, Saturday, legal holiday, or a day on which the Office is not open the entire day during ordinary business hours.

(3) When the period of time is more than 7 days, intermediate Sundays and holidays shall be considered as other days.

COMAR 28.02.01.04C (1), (2) and (3).

“[A request for hearing] shall include a brief statement of the basis for the request, and other information required by law.” COMAR 10.01.03.06C (emphasis added). The Appellant’s appeal to the Department’s second notice of agency action addresses the issues in the Department’s first notice of agency action (i.e. the merits of the case). The Department clearly placed the Appellant on notice that it must address the issue of timeliness prior to the merits. However, in its notice of appeal, the Appellant failed to address the issue of timeliness or provide an explanation as to why it filed an untimely appeal to the first notice of agency action. Had the Appellant done so, the issue of whether good cause exists to excuse its failure to timely file its first appeal could have been considered. Accordingly, I find the Appellant failed to state a claim upon which I can grant relief.

CONCLUSIONS OF LAW

I conclude as a matter of law that the Appellant failed to timely file its appeal to the Department’s first notice of agency action. COMAR 28.02.01.04B(1)..

I conclude as a matter of law that the Appellant’s appeal to the Department’s second notice of agency action failed to state a claim upon which relief can be granted. COMAR 28.02.01.12C; COMAR 10.01.03.06C.

PROPOSED ORDER

I ORDER that the Department’s Motion to Dismiss is **GRANTED**.

I further ORDER that the hearing on the merits scheduled for April 17, 2019, at the OAH in Hunt Valley, Maryland shall be cancelled.

April 9, 2019
Date Order Issued

Signature Appears on
Original

Nicolas Orechwa
Administrative Law Judge

NO/sw
#179086

RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this Proposed Order to Dismiss has the right to file written exceptions with the Secretary of the Maryland Department of Health within twenty-one (21) days of receipt of this decision. Md. Code Ann., State Gov't §§ 10-216, 10-220 (2014); COMAR 10.01.03.18A; *see* COMAR 10.01.03.20. The Secretary will review timely exceptions before rendering the final agency decision. Md. Code Ann., State Gov't §§ 10-216, 10-220, 10-221 (2014); COMAR 10.01.03.18F. The Office of Administrative Hearings is not a party to any review process.

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