

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)
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The Gardens at Issaquah,)	Date: June 15, 2007
(CCN: 50-5004),)	
)	
Petitioner,)	Docket No. C-07-334
)	Decision No.CR1605
v.)	
)	
Centers for Medicare & Medicaid)	
Services.)	
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DECISION

Petitioner’s request for hearing is dismissed pursuant to 42 C.F.R. § 498.68.

I. Background

Petitioner, The Gardens at Issaquah, which is owned by Bouchy, LLC, requested a hearing by letter dated March 20, 2007. Petitioner’s facility was subject to a survey by the Washington Department of Social and Health Services, Division of Residential Care Services, Aging and Disability (the state agency) that was completed on January 26, 2007. The Centers for Medicare & Medicaid Services (CMS) notified Petitioner by letter dated January 30, 2007, that based upon the survey concluded on January 26, 2007, CMS was imposing a denial of payment for new admissions (DPNA) effective February 14, 2007; that Petitioner’s authority to conduct a Nurse Aide Training and Competency Evaluation Program (NATCEP) was withdrawn; and that Petitioner’s provider agreement would be terminated effective February 18, 2007, if Petitioner did not return to substantial compliance with program requirements before that date. CMS also advised Petitioner that three regulatory violations or deficiencies were considered to be at the level of immediate jeopardy, the violations of 42 C.F.R. §§ 483.13(b), 483.13(c), and 483.75. In its request for hearing, Petitioner specifically alleged that the four alleged immediate jeopardy deficiencies were erroneous and requested review of those deficiency allegations. The case was assigned to me for hearing and decision on April 2, 2007.

On April 20, 2007, Petitioner filed a motion for summary judgment with supporting memorandum (P. Brief) and exhibits (P. Ex.) a - e.

On May 3, 2007, I ordered that CMS show cause why this case should not be dismissed pursuant to 42 C.F.R. § 498.70(b). On May 9, 2007, CMS filed its cross-motion for summary judgment and/or dismissal of Petitioner's request for hearing with supporting brief (CMS Brief). Petitioner filed a request for stay and a reply (P. Reply) in support of its motion for summary judgment on May 14, 2007. The request for stay is moot as I am ruling upon the cross-motions and dismissing Petitioner's request for hearing.

II. Discussion

Petitioner requests summary judgment and dismissal of its request for hearing citing 42 C.F.R. §§ 498.68 and 498.70. Petitioner argues it is entitled to summary judgment of dismissal as there are no disputed issues of material fact and the only remaining issues may be resolved as questions of law. Petitioner argues that CMS has rescinded the remedies in this case and that Petitioner no longer has a right to hearing. P. Brief at 5-6.

CMS proposed two enforcement remedies based upon the survey concluded on January 26, 2007: termination and a DPNA. CMS notified Petitioner by letter dated March 5, 2007, that based upon a revisit survey on February 26, 2007, it was found to be in substantial compliance. P. Ex. e. However, as Petitioner acknowledges, it was subject to a DPNA that was effectuated during the period February 14 through 20, 2007. P. Brief at 3. Both the DPNA and the termination remedy triggered the right to request a hearing. In general, a participating nursing facility will have a right to a hearing if CMS makes an initial determination to impose a remedy against that facility. 42 C.F.R. § 498.3(b)(13). The possible remedies that CMS might impose against a facility, in addition to termination of the provider agreement, are specified at 42 C.F.R. § 488.406(a). No right to a hearing exists pursuant to 42 C.F.R. § 498.3(b)(13), unless CMS determines to impose – and actually imposes – one of the specified remedies. *Lutheran Home – Caledonia*, DAB CR674 (2000), *aff'd* DAB No. 1753 (2000); *Schowalter Villa*, DAB CR568 (1999), *aff'd* DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB CR424 (1996), *aff'd* DAB No. 1607 (1997). It is the remedy, and not the citation of a deficiency, that triggers the right to a hearing. *Eaglecare, Inc., d/b/a Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). *See also*, *The Lutheran Home-Caledonia*, DAB No. 1753 (2000), *Walker Methodist Health Center*, DAB CR869 (2002), *Charlesgate Nursing Center*, DAB CR868 (2002), *D.C. Association for Retarded Citizens*, DAB CR776 (2001), *Alpine Inn Care, Inc.*, DAB CR728 (2000), *Woodland Care Center*, DAB CR659 (2000), and *Fort Tryon Nursing Home*, DAB CR425 (1996).

Arguably, Petitioner did have a right to a hearing to challenge the deficiency findings that provided a basis for imposition of the DPNA, even though the termination remedy was rescinded. The gist of the CMS cross-motion for summary judgment is that Petitioner only requested review of four deficiencies cited at the level of immediate jeopardy and that there were other deficiency citations that provided an adequate basis for imposition of the DPNA. CMS has not, however, submitted evidence in support of its cross-motion for summary judgment and that motion must be denied.

Whether Petitioner preserved its right to review of all deficiency citations or whether deficiency citations other than those specified in the request for hearing are an adequate basis for imposition of a DPNA, are not issues that I need to reach in this decision. Petitioner cited 42 C.F.R. § 498.68, as alternate grounds for dismissal. Pursuant to section 498.68, Petitioner may withdraw its hearing request and request dismissal at anytime before I issue a decision. Petitioner need state no cause for such a request. Accordingly, I find that this is a proper basis upon which to dismiss Petitioner's request for hearing.

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed pursuant to 42 C.F.R. § 498.68. Pursuant to 42 C.F.R. § 498.72, I may vacate a dismissal of a request for hearing upon a showing of good cause by a party if such showing is made not more than 60 days from receipt of this Decision. *See* 42 C.F.R. § 498.22(b)(3).

/s/

Keith W. Sickendick
Administrative Law Judge