Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

America Home Care, Inc.,
(PTAN: 10-9111),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-345

ALJ Ruling No. 2013-10

Date: May 3, 2013

RULING AND ORDER DISMISSING CASE

This case is before me in circumstances that no judge appreciates or enjoys. The brief procedural history of this appeal is marked by one party's inattention to — and by what might easily be seen as its efforts to manipulate — the routine processes by which appeals taken pursuant to 42 C.F.R. Part 498 move toward a speedy, orderly, and fair resolution. As will be seen below, the present situation admits of no other outcome than the dismissal of Petitioner's Request for Hearing.

That Request for Hearing was filed on January 28, 2013, and it sought review and reversal of actions by the Centers for Medicare and Medicaid Services (CMS) that revoked Petitioner's Medicare billing privileges as a Home Health Agency. In the routine course of docketing Petitioner's appeal, my standard Acknowledgment and Initial Docketing Order was issued on February 6, 2013.

That Initial Docketing Order set out, as it has set out in numerous other cases in which Petitioner's counsel has appeared, a series of clear directives informing the parties of "the initial steps they must follow to raise certain legal issues, and if necessary, to prepare the case for the exchange of evidence and other material relevant to the disposition of

Petitioner's appeal on its merits." One of the most important substantive portions of the Initial Docketing Order required motions seeking summary disposition to be filed within 30 days, *i.e.*, in this case on or about March 8, 2013.

CMS timely filed such a Motion on March 8, 2013, and incorporated into its Motion a memorandum of argument and authorities 13 pages in length, together with an appendix. CMS also filed a list of proposed witnesses and exhibits on which it expected to rely if the matter proceeded to a full hearing. This CMS pleading was fully compliant with paragraph 2(b) of the Initial Docketing Order, and with Civil Remedies Division Procedures (CRDP) § 9 in the marking of CMS's exhibits.

By the plain terms of paragraph 2(b) of the Initial Docketing Order, Petitioner was permitted — and obliged — to "answer as provided by the terms of 42 C.F.R. § 498.17." Petitioner was cautioned by the explicit terms of that same paragraph that "Any motions not opposed as provided above will be treated as conceded and will be granted without further notice." Thus, Petitioner was required by the terms of the Initial Docketing Order to do at least one of two things: first, if Petitioner intended to file a dispositive motion, it was required to do so on or about March 8, 2013; and second, if it had not filed a motion of its own, it was required by 42 C.F.R. § 498.17 to respond to CMS's Motion within 20 days of March 8, 2013.

Instead of acting promptly, Petitioner did nothing. After 30 days of Petitioner's silence, I issued an Order to Show Cause on April 8, 2013, noting that Petitioner had filed nothing in response to the Initial Docketing Order or in response to the CMS Motion. My Order to Show Cause directed Petitioner to take two immediate steps or face dismissal of its case as abandoned. The first step required Petitioner to explain why it had not replied to my Initial Docketing Order or to the CMS Motion; the second step required Petitioner actually to file whatever responses to that Initial Docketing Order or the CMS Motion it intended to submit.

Petitioner filed its Motion in Opposition to CMS's Motion for Summary Judgment and additional material on April 11, 2013, and it is at that point that the record in this case begins to reflect something other than simple confusion and excusable error. First, Petitioner's April 11 Opposition makes no effort to explain or justify its failure to respond timely to the CMS Motion or the Initial Docketing Order. Next, the plain tenor of the April 11 pleading was an effort to refute the arguments made by CMS in its March 8 Motion, but Petitioner makes no concurrent effort to explain waiting well past the deadline to attempt any such refutation. Third, Petitioner's April 11 pleading was supported by approximately 350 pages of purported exhibits, not a single page of which proffer was marked in accordance with the provisions of CRDP § 9, and a good deal of which material had already been submitted as part of Petitioner's Request for Hearing. Fourth, Petitioner's April 11 filing included a "Motion for the Issuance of Subpoena," a measure plainly premature and facially not in compliance with any of the terms of 42

C.F.R. § 498.58. It is very difficult to see Petitioner's April 11 filings, when taken as a whole, as anything other than a cavalier gesture intended more as a smokescreen than as a serious effort to debate and refute the CMS Motion of March 8, and as a disingenuous finessing of the Order to Show Cause.

My response to Petitioner's filings appears in the letter composed by me and sent at my explicit direction on April 22, 2013. My letter put Petitioner on notice that its April 11 filing was an untimely response to the CMS Motion, and that it had not attempted, much less accomplished, a successful showing of good cause for that untimeliness. My letter offered Petitioner a final opportunity to do so, but warned that Petitioner faced the dismissal of its case in the event of its failure immediately to make that showing as required by the Order to Show Cause.

On April 25, 2013, Petitioner's Good Cause Response was filed. Its direct response to my insistence that Petitioner explain its failure to respond to the Order to Show Cause was to deny receipt of that Order. There is nothing in the records of the Civil Remedies Division's transmission of the Order to Show Cause to support Petitioner's denial. But beyond that question, Petitioner's April 25 Response contained this remarkable assertion: "On April 11, 2013, 30 days after receiving CMS's Motion, etc., I timely filed Petitioner's Motion in Opposition . . . ." That assertion — that Petitioner's April 11 filing was timely — is an obvious and intentional misstatement of procedural fact. By the terms of my Initial Docketing Order, and by the terms of 42 C.F.R. § 498.17 it was out-of-time, and by the plain language of my Order to Show Cause Petitioner was on notice that it was out-of-time. Thus, Petitioner's April 25 filing offered an excuse unsupported by Civil Remedies Division records and then willfully attempted to bluff its way past the problem of its untimely filing on April 11, 2013.

I do not suggest that Petitioner's conduct in this case approaches the absolute level of defiant recalcitrance and willfulness that appeared in *Meridian Nursing & Rehab of Shrewsbury*, DAB No. 2504 (2013) or in *High Tech Home Health, Inc.*, DAB No. 2105 (2007). Nor have I forgotten the principle that invokes the greatest caution when the dismissal of a request for hearing is under consideration, since such any dismissal deprives a petitioner of the right to present its case on the merits. But I do find and conclude that this Petitioner's conduct has interfered with the development of this case to a material degree, and that its conduct in doing so has been willful and intentional.

The question of what sanction or sanctions might be applied to bring Petitioner into a more cooperative posture is, at first impression, somewhat more subtle. It may at first appear that an additional warning, as seen in the *Meridian* and *High Tech* cases, might achieve the desired result. But Petitioner's April 25 pleading offers no reason whatsoever to hope for a change in its approach to this forum, and its regard for the CRDP, the regulations, and the statutes by which its appeal must proceed. As above, the April 25 pleading amounts to nothing beyond an unsupported excuse and a deliberate-but-

unsuccessful bluff. Further warnings or admonitions, after the Order to Show Cause and my letter of April 22, offer meager hope of an improved result, and I find and conclude that they would be pointless. Mindful of the reasoning in the cases cited above, as well as *Osceola Nursing and Rehabilitation Center*, DAB No. 1708 (1999) and *Goforth v. Owens*, 766 F.2d 1533 (11th Cir. 1985), I find and conclude that no lesser sanction short of dismissal will ensure the speedy, orderly, and fair disposition of this case.

It is true that dismissal is a drastic measure, and that I am invested with some discretion in deciding whether to invoke it here. But, as I wrote in *Social Security Administration, Office of Inspector General v. People's Benefit Services, Inc*., DAB CR1525, at 1 (2006):

> "Men must turn square corners when they deal with the government." *Rock Island, A. & L. R. Co. v United States*, 254 U.S. 141, 143 (1920) (Holmes, J.). So, too, must litigants when they enter this forum. When a litigant in this forum has placed itself in a position of procedural vulnerability and seeks to avoid the consequences by an appeal to the Administrative Law Judge's (ALJ's) discretion, a trail of "cut corners" marked by evasions and failures of candor does not serve it well.

So it is in this case. For all the reasons set out above, and in the exercise of the authority set out in section 1128A(c)(4) of the Social Security Act, 42 U.S.C. § 1320a-7a(c)(4), and 42 C.F.R. § 498.69(b), Petitioner America Home Care, Inc.'s January 28, 2013 Request for Hearing should be, and it is, DISMISSED. The terms of 42 C.F.R. § 498.72 provide that I may vacate this dismissal of Petitioner's Request for Hearing if, within 60 days of its receipt of this Ruling and Order, Petitioner files a request to that effect and shows good cause why I should vacate this dismissal.

/s/
Richard J. Smith
Administrative Law Judge