**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Life Care Center of Attleboro
(CCN: 22-5564),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-681

Decision No. CR2187

Date: July 19, 2010

# DECISION

This matter is before me on the June 10, 2010 Motion to Dismiss and Incorporated Memorandum of Law filed by the Center for Medicare and Medicaid Services (CMS). Petitioner, Life Care Center of Attleboro, filed its Response to CMS's Motion to Dismiss on June 30, 2010.

## 1. Background

The Massachusetts Department of Public Health, Division of Health Care Quality (state agency) completed a complaint survey of Petitioner's facility on February 4, 2010. By notice letter dated February 22, 2010, CMS informed Petitioner that it was out of substantial compliance with Medicare and Medicaid requirements. The February 22, 2010 notice letter notified Petitioner that CMS would be imposing a $5000 per-instance civil money penalty (CMP) and a prohibition against the approval of a nurse aide training and competency evaluation program (NATCEP) that was triggered by the CMP. Further, the notice letter informed Petitioner that its provider agreement would be terminated unless substantial compliance was achieved and verified by August 4, 2010. In addition, the notice letter informed Petitioner that a denial of payment for new Medicare and

Medicaid admissions (DPNA) would be imposed unless substantial compliance was achieved and verified by May 4, 2010. The notice letter advised Petitioner that it could request a hearing before an Administrative Law Judge (ALJ).

Subsequently, by letter dated March 19, 2010, CMS informed Petitioner that it had achieved substantial compliance, effective March 1, 2010. The March 19, 2010 notice letter notified Petitioner that the $5000 per-instance CMP and the prohibition against NATCEP would remain in effect but the termination and the DPNA would not be imposed.

Petitioner's Request for Hearing, dated April 30, 2010, was received and docketed by the Civil Remedies Division on May 11, 2010. My Acknowledgement and Initial Docketing Order gave the parties 30 days to file Reports of Readiness or dispositive motions. Petitioner submitted a timely Report of Readiness. CMS submitted a Motion to Dismiss and accompanying memorandum of law. CMS's Motion to Dismiss was accompanied by a June 10, 2010 letter from CMS rescinding both the per-instance CMP and the NATCEP based on a review of additional materials.[1]

CMS asserts that it has rescinded all the enforcement remedies it sought to impose against Petitioner. Petitioner does not contest this assertion. Thus, the issue before me is whether a long-term care facility has a right to a hearing when CMS withdraws the enforcement remedies provided for in 42 C.F.R. § 488.406. This issue is hardly novel. All of the Administrative Law Judges (ALJs) of the Civil Remedies Division, including myself, have addressed it many times, and have without exception come to the same resolution of that issue I announce here. I find and conclude that Life Care Center of Attleboro is not entitled to a hearing, and, on the basis of 42 C.F.R. § 498.70(b), I dismiss Petitioner's hearing request.

42 C.F.R. Part 498 set forth the hearing rights of a long-term care facility. A provider dissatisfied with CMS's initial determination is entitled to further review, but administrative actions that do not constitute initial determinations are not subject to appeal. 42 C.F.R. § 498.3(d). The regulations specify which actions are "initial determinations" and set forth examples of actions that are not. A finding of noncompliance that results in the imposition of a remedy specified in 42 C.F.R. § 488.406 is an initial determination for which a facility may request a hearing. 42 C.F.R. § 498.3(b)(13). Unless the finding of noncompliance results in the actual imposition of a specified remedy, however, the finding is not an initial determination. 42 C.F.R. § 498.3(d)(10)(ii). Where, as here, CMS does not impose a remedy, or rescinds all proposed remedies, a facility has no hearing right because no determination properly subject to a hearing exists. It is the final imposition of an enforcement remedy or

[1] Pursuant to 42 C.F.R. § 498.30, CMS has the authority to reopen its initial determinations within 12 months after the date of notice of the determination.

sanction and not the citation of a deficiency that triggers a facility's right to a hearing pursuant to 42 C.F.R. Part 498. *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *Lakewood Plaza Nursing Ctr.*, DAB No. 1767 (2001); *Lutheran Home-Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997).

In Petitioner's June 30, 2010 Response to CMS's Motion to Dismiss, Petitioner argues that "once a petitioner affirmatively seeks its hearing to contest specific findings that CMS has stated forms a basis for a sanction, CMS cannot, sua sponte, vitiate . . . [the right to a hearing] simply by announcing that it has rescinded the penalty, but leave in place damaging allegations [of noncompliance]." Petitioner's Response at 5. Petitioner bases its argument on the general rule in federal court that jurisdiction depends on the facts as they existed when the complaint was brought and cannot be ousted by subsequent events. Petitioner's Response at 2. Petitioner's argument is unpersuasive. Petitioner does not support the extension of its argument to administrative proceedings before an ALJ by citation of any statute, decision, or regulation that permits me to hear and decide its case when all remedies imposed by CMS have been rescinded, and fails to address any of the authorities cited by CMS and noted in the preceding paragraph.

The regulations and prior decisions are clear — there is no right to a hearing where deficiencies are identified, but where CMS has thereafter rescinded the initial determination to impose a CMP, and no other enforcement remedy has been imposed. My authority in cases involving CMS is limited to hearing and deciding those issues which the Secretary of this Department has delegated authority for me to hear and decide. That authority is specified at 42 C.F.R. §§ 498.3 and 498.5. The regulations authorize me only to hear and decide cases involving specified initial determinations by CMS.

I am authorized to dismiss a hearing request when a petitioner does not have a right to a hearing pursuant to 42 C.F.R. § 498.70(b) and, for that reason, I do so now in this matter. Petitioner's April 30, 2010 Request for Hearing must be, and it is, DISMISSED. The parties may request that an order dismissing a case be vacated pursuant to 42 C.F.R. § 498.72.

/s/
Richard J. Smith
Administrative Law Judge