DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Departmental Appeals Board
Appellate Division
Room 637-D, HHH Building
200 Independence Avenue, SW
Washington, D.C. 20201

BY FACSIMILE AND REGULAR MAIL

[redacted]

NOV 23 1999

and

[redacted]

RE: Pacific Regency Arvin v. HCFA,
Civil Remedies Docket No. C-99-697
Appellate Docket No. A-2000-0016

RULING ON REQUEST FOR REMOVAL OF HEARING TO BOARD

The Health Care Financing Administration (HCFA) filed a request that the Departmental Appeals Board (Board) remove from Administrative Law Judge Steven Kessel (the ALJ) a hearing assigned to him in the matter of Pacific Regency Arvin, Docket No. C-99-697. In its November 12, 1999 request, HCFA contended that the ALJ abused his discretion by refusing "to follow uniform and unequivocal Board precedent" that a hearing request should be dismissed under 42 C.F.R. § 498.70(c) if it fails to meet the hearing request content requirements of 42

C.F.R. § 498.40 within the 60-day period allotted by regulation (absent a showing of "good cause").[1]

HCFA submitted its request for removal in response to an October 22, 1999 letter. That letter advised the parties that the ALJ would consider a dispositive motion by HCFA addressing the alleged inadequacy of Pacific Regency Arvin's hearing requests only if HCFA could assert that it had attempted to resolve its concerns through negotiation. The letter attached a copy of the ALJ's ruling in Rehabilitation and Healthcare Center of Tampa, Docket No. C-99-294 (July 23, 1999), which, the October 22, 1999 letter stated, explained the ALJ's legal analysis of the issue. HCFA contended that the ALJ implicitly had decided that the hearing requests did not meet the requirements of section 498.40(b). HCFA further submitted that by his order, the ALJ had taken the position: A) that the ALJ had "discretion to waive or ignore the regulatory mandate and limit on his jurisdiction" established under section 498.40 and Board precedent; and B) that HCFA had the responsibility to assist Pacific Regency Arvin to craft a document that could be treated as a hearing request, notwithstanding the 60-day time limit for filing hearing requests. According to HCFA, the ALJ essentially created a "good faith" exception to the filing requirement.

HCFA argued that the immediate matter was distinguishable from two prior actions in which the Board refused to exercise its removal authority. HCFA further submitted that this case required immediate intervention and removal because, among other things, a division of opinion among the Civil Remedies ALJs has developed with respect to the issue presented and the ALJ's order placed HCFA's counsel in an "untenable position" of either abrogating responsibility to her client by engaging in negotiations with Pacific Regency Arvin or defying the ALJ's order.

On November 15, 1999, the day that the Board received HCFA's removal request, the Presiding Board Member sent to the parties copies of the Board's decision in the case of Alden-Princeton Rehabilitation and Health Care Center v. HCFA, DAB 1709 (November 1, 1999), noting that the decision might have a bearing on the immediate matter. The Presiding Board Member directed the parties to submit comments to the Board relating to the Alden-Princeton decision by November 17, 1999. Both HCFA and Pacific Regency Arvin submitted comments which the Board has considered.

For the reasons discussed below, we deny HCFA's request for removal. We reject HCFA's characterizations of the ALJ's actions as well as HCFA's contentions that the ALJ contravened Board precedent and the Secretary's regulations. We also determine that the circumstances here

---

[1] Section 498.40(b) specifies that the hearing request must--

(1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
(2) Specify the basis for contending that the findings and conclusions are incorrect.

Section 498.40(c) provides that the ALJ may extend the time for filing a request for hearing for good cause shown. Under 42 C.F.R. § 498.70(c), the ALJ may dismiss a hearing request entirely or as to any stated issue if the affected party did not timely file a hearing request and the time for filing has not been extended for good cause.

do not warrant the extreme measure of removing the hearing to the Board. HCFA did not raise its concerns about the ALJ order directly to the ALJ, and those concerns are at this point premature and speculative. Moreover, the ALJ did not have the opportunity to consider the Board's decision in the Alden-Princeton case, which was issued after his order.

As a preliminary matter, it is important to recognize that HCFA's argument before us was founded on its assertion that, while the ALJ had not yet issued a dispositive ruling analyzing the sufficiency of Pacific Regency Arvin's hearing requests, he had implicitly decided that the requests failed to meet the requirements of section 498.40(b). The ALJ, however, neither implicitly nor explicitly determined that the hearing requests were insufficient under section 498.40(b). Rather, the October 22, 1999 letter stated that "in light of the issues raised by HCFA's submission," the ALJ would rule on a dispositive motion addressing "the alleged inadequacy" of the hearing requests only if HCFA had first sought to resolve "its concerns" through discussions with Pacific Regency Arvin (emphasis added). The letter further provided that the ALJ would consider the motion if HCFA could represent that it had "had discussions with Petitioner and that those discussions were unsuccessful because Petitioner was unwilling or unable to remedy the perceived problems" with the hearing requests (emphases added). Thus, the letter does not show that the ALJ had implicitly decided that Pacific Regency Arvin's hearing requests were legally insufficient, but only that HCFA was making that contention before him.

Accordingly, we find the premise of HCFA's contentions without merit. The ALJ in this case has not yet made any determination as to whether Pacific Regency Arvin's submissions constituted legally sufficient requests for hearing under section 498.40(b) of the regulations. Rather, the ALJ has directed HCFA to attempt to resolve its concerns about the sufficiency of the hearing requests without judicial intervention, based on his inherent discretion to manage the proceedings before him. Thus, we reject HCFA's contentions that the ALJ's action squarely contravened Board precedent and the plain language of the regulations, created an exception to the filing requirements and in effect, ordered HCFA to assist Pacific Regency Arvin to perfect insufficient hearing requests.

As noted above, HCFA argued that under the plain language of the regulations, a submission that fails to meet the criteria of section 498.40(b) does not constitute a "hearing request" and must be dismissed under section 498.70(c), unless it has been revised to meet the filing criteria within the 60-day time limit set by regulation or an extension to the time limit has been granted for "good cause." In support of its contention, HCFA cited the Board's decision in Birchwood Manor Nursing Center, DAB 1669 (1998), aff'd, Birchwood Manor Nursing Center v. Dep't of Health and Human Servs., No. 98-60695 (5th Cir. June 29, 1999), (reh'g denied September 8, 1999), as well as decisions of other Civil Remedies ALJs. Request for Review at 4. While HCFA noted that the Board "seems to have qualified this teaching" in the recent rulings denying requests for removal in Four States Care Center, Appellate Division Docket No. A-99-66, (June 7, 1999) and Rehabilitation & Healthcare Center of Tampa, Appellate Division Docket No. A-99-95 (August 16, 1999), HCFA nonetheless argued that these rulings were inapposite because Pacific Regency Arvin made no effort to supplement its requests and the ALJ did not make findings as to whether the intent of the filing procedures had been fulfilled. Request for Review, fn 3. HCFA contended not only that the ALJ's October 22, 1999 directive in this case contravened the plain language of the regulations, but also that the order attached to the October 22, 1999 letter "staked out an inalterable position" that was "sharply at odds" with Board precedent and the rulings of

other Civil Remedies ALJs with respect to ALJs' discretionary authority under section 498.70 of the regulations. HCFA requested that the Board act to ensure "consistent guidance as to the meaning of the Part 498 regulations" as well as to prevent the unnecessary expenditure of scarce resources in this case. Request for Removal at 5.

The Board has already provided guidance that an ALJ may exercise discretion not to dismiss a defective hearing request under section 498.70 of the regulations in the recent rulings and decisions cited above; consequently, HCFA's assertion that removal is warranted to address this question has no merit. In Alden-Princeton, the Board discussed the types of circumstances that an ALJ may consider in exercising his discretion under section 498.70 of the regulations. In its comments on this decision, HCFA raised concerns that engaging in discussions with Pacific Regency Arvin might create a circumstance which the ALJ may then use for rejecting a motion by HCFA to dismiss. The validity of these concerns depends on how the ALJ directive is read and implemented. HCFA's concerns may merit consideration by the ALJ either now or if the ALJ ultimately rules on the legal sufficiency of the hearing requests. However, HCFA has not even attempted to present these concerns directly to the ALJ. The ALJ has not had an opportunity to respond to these concerns by, for example, clarifying or modifying his order or by taking them into account in ruling on any motion to dismiss submitted by HCFA. Moreover, we note that the Board's recent decision in Alden-Princeton, which may have a bearing on how the ALJ manages the proceedings below, was issued after the ALJ's directive in this case.

Under the circumstances here, the extreme measure of removing the hearing to the Board is not warranted. Consequently, we deny HCFA's request for removal.

[redacted]
Judith A. Ballard

[redacted]
Donald F. Garrett

[redacted]
M. Terry Johnson
Presiding Board Member

cc: Civil Remedies Division

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Departmental Appeals Board
Appellate Division, MS-6127
Room G-644, Cohen Building
330 Independence Avenue, SW
Washington, D.C. 20201

DAB E-FILE

May 22, 2018

[redacted]

and

[redacted]

Re: Signature Healthcare of East Louisville, Civil Remedies Docket No. C-14-1127, Appellate Div. Docket No. A-18-55
Donelson Place Care and Rehabilitation Center, Civil Remedies Docket No. C-15-2222, Appellate Div. Docket No. A-18-56
Signature Health Care of Pikeville, Civil Remedies Docket No. C-14-1916, Appellate Div. Docket No. A-18-57

DENIAL OF MOTION FOR ALJ DECISION OR REMOVAL AND RELEASE OF ESCROW FUNDS

The Board denies Petitioners' "Motion for Decision, Removal to Board, and/or Return of Escrow" (Motion). Petitioners are three nursing facilities that requested Administrative Law Judge (ALJ) hearings on the Centers for Medicare & Medicaid Services' (CMS's) imposition of civil money penalties (CMPs). They seek the "unusual intervention" of the Board ordering the ALJ to issue decisions in their appeals that "have been pending following hearing and briefing for more than two years;" in the alternative, they ask the Board "to remove the cases to the Board for decision; and/or to order CMS to return to the Petitioners all funds 'escrowed'" by CMS "without interest" as CMPs "pending final determination of these cases." Motion at 2-3. Petitioners reports, and CMS does not dispute, that the three cases "involve surveys and CMS enforcement actions from 2014, were tried and briefed in the Summer and Fall of 2015," and that "nothing has happened thereafter, notwithstanding the requirement of 42 C.F.R. § 498.74 that the ALJ issue a written decision 'as soon as practicable after the close of the hearing.'" *Id*. at 3. They

report that the amounts "at issue" in each case are approximately $154,600, $123,800 and "in excess of $150,000" that CMS holds in escrow. *Id*.

As authority for the Board to order the ALJ to issue decisions, Petitioners cite 42 C.F.R. § 498.74, which states, in relevant part, "[a]s soon as practical after the close of the hearing, the ALJ issues a written decision in the case." Petitioners assert that the requested orders lie within the Board's "authority to regulate the course of proceedings before it, including the issuance of ALJ Decisions." *Id*. at 4. Petitioners argue it is mandatory that ALJs issue decisions, and "practicable" for the ALJ to have done so here, given that, Petitioners state, "some ALJs routinely do so, as soon as weeks after the hearing." *Id*.

Petitioners cite the "fundamental rule of Anglo-Saxon jurisprudence" that "justice delayed is justice denied"; court cases that address "failure to decide cases after hearings or trials in a variety of contexts"; and "various constitutional provisions implicated by delays in resolving civil cases." *Id*. at 2-7. They further argue that CMS's regulations authorizing collection and escrow of CMPs pending hearing decisions conflict with congressional purpose and constitutional principles, raise "due process considerations," and are inconsistent with the requirement that the ALJ consider financial impact in determine whether a CMP is reasonable. *Id*. at 8-9, citing 42 C.F.R. § 488.438(f)(2).

Petitioners also argue that the Board could address the delays by "remov[ing the] cases to itself for decision under [42 C.F.R. §§] 498.76 and/or 498.88 if an ALJ has not decided an appeal within a reasonable period of time, say, six months or even a year after the end of briefing[.]" *Id*. at 10.

CMS opposes Petitioners' Motion, on the ground that "Petitioners have failed to show that they are entitled to any of the relief they request, or that this Tribunal has the power to provide such remedies." CMS Opposition at 1-2.

Ruling

I decline to grant any of the extraordinary remedies sought by Petitioners in their motions. The regulations governing ALJ hearings and Board review of ALJ actions nowhere expressly authorize the relief they seek – ordering the ALJ to issue a decision and CMS to return escrowed funds. I disagree that the circumstances set out by Petitioners would justify the Board in taking such admittedly unusual measures based on an amorphous authority to regulate proceedings. Moreover, the regulations providing for Board removal of cases before ALJs are expressly limited to pre-hearing situations.

As CMS points out, those regulations state that "[e]ither of the parties [to the case before the ALJ] has a right to request Departmental Appeals Board review of the ALJ's ***decision or dismissal order***, and the parties are so informed in the notice of the ALJ's action." 42

C.F.R. § 498.80, "Right to request Departmental Appeals Board review of Administrative Law Judge's decision or dismissal" (emphasis added); CMS Opp. at 2. The ALJ has not issued any decision or dismissal order that the Board may review.

I do not hold that ALJ action or inaction could never be so egregious as to violate applicable requirements or effectively constitute a decision or dismissal order, but that is not the case here. As Petitioners recognize, the regulations impose no set deadline on the issuance of ALJ decisions in appeals by long term care facilities of CMPs that CMS imposes and require only that the decision in such an appeal be issued "[a]s soon as practical after the close of the hearing[.]" 42 C.F.R. § 498.74(a); Motion at 4 ("Petitioners understand that there is no other statute or regulation (or manual) . . . that requires ALJs to decide nursing facility appeals within a certain number of days.").

As CMS points out, this absence of a deadline stands in contrast to the deadline the regulations do set for ALJ decisions and dismissal orders in appeals of denials of Medicare provider and supplier enrollment applications. 42 C.F.R. § 498.79 ("ALJ must issue a decision, dismissal order or remand to CMS, as appropriate, no later than the end of the 180-day period beginning from the date the appeal was filed with an ALJ"). It also stands in contrast to the deadline the HHS Inspector General regulations set for ALJ decisions in appeals of exclusions from the Medicare and Medicaid programs and CMPs and assessments imposed by the Inspector General. 42 C.F.R. § 1005.20(c) ("ALJ will issue the initial decision to all parties within 60 days after the time for submission of post-hearing briefs and reply briefs, if permitted, has expired"; if "ALJ fails to meet the deadline contained in this paragraph, he or she will notify the parties of the reason for the delay and will set a new deadline."). Thus, an HHS agency that intends to impose a time frame for issuing a hearing decision is capable of doing so. CMS has not done so here.

Moreover, after Petitioners filed their Motion, CMS reports, the ALJ filed a "Notice of Expected Decision" in each case between April 9 and 12, 2018, advising that a decision will issue in each case in 60 to 90 days from the date of each notice. CMS Opp. at 2 n.1; *see*, *e.g.*, Notice of Expected Decision in Donelson Place Care, available on DAB E-File (Docket C-15-1222). I have no reason not to expect the decisions to issue as stated, which effectively grants Petitioners much of the relief they seek.

Petitioner has failed to identify any authority for the Board to order CMS to return any funds escrowed as potential CMPs pending issuance of ALJ decisions. As Petitioners explicitly acknowledge, "escrow of a CMP is not an 'initial determination' specifically enumerated in 42 C.F.R. § 498.3 that can trigger an appeal." Motion at 10; *see* § 498.3(b) (listing appealable "[i]nitial determinations by CMS" including, at (b)(13), "the finding of noncompliance leading to the imposition of enforcement actions" including CMPs). As CMS notes, applicable regulations authorize it to collect CMP amounts and place them escrow pending issuance of the ALJ's decision (and the Board's decision if the ALJ's decision is appealed), and the Board has held that "we have no

authority to rule on the merits" of a claim that CMS "unlawfully escrowed" a facility's funds "or give [the facility] a remedy" in a "proceeding under 42 C.F.R. Part 498." *Golden Living Ctr. – Superior*, DAB No. 2768, at 3 n.2 (2017) (citations omitted); CMS Opp. at 3-4; 42 C.F.R. § 488.431(b), (c).

Petitioners ask us to ignore this absence of authority to address the escrow of penalties on the ground that CMS's "seizure" of the funds "without interest" prior to the hearing is unconstitutional and contrary to congressional intent in authorizing escrow. Motion at 3, 7-10. As CMS states, the Board "can neither invalidate nor disregard unambiguous statutes or regulations on constitutional grounds," in situations where they apply. CMS Opp. at 4-5, citing, *e.g.*, *Sentinel Med. Labs., Inc.*, DAB No. 1762, at 9 (2001), *aff'd*, *Teitelbaum v. Health Care Fin. Admin.*, 32 F. App'x 865 (9th Circ. 2002). Petitioners have also not shown that CMS's retention of the potential CMP amounts deprives it of due process or other constitutional protections. Petitioners have received the hearings they requested to challenge the CMPs and may appeal any adverse decisions to the Board and, contrary to their assertions, should they prevail the escrowed funds will be repaid with interest. 42 C.F.R. § 488.431(d)(2) (upon ALJ decision reversing CMPs, or upon Board decision sustaining reversal if CMS appeals the ALJ decision, "[a]ny collected civil money penalty amount owed to the facility based on a final administrative decision will be returned to the facility with applicable interest as specified in section 1878(f)(2) of the [Social Security] Act"); CMS Opp. at 5.

Finally, the regulations do not provide for the Board to remove these cases from the ALJ as Petitioners ask. The regulation authorizing removal, 42 C.F.R. § 498.76, "Removal of hearing to Departmental Appeals Board," which Petitioners cite but do not quote or discuss, states that "(a) ***At any time before the ALJ receives oral testimony***, the Board may remove to itself any pending request for a hearing." (emphasis added). That does not encompass these three cases which, Petitioners state, "were tried and briefed in the Summer and Fall of 2015" and await only decisions, "following hearing and briefing for more than two years[.]" Motion at 2-3. In any case, if any circumstances might exist that nevertheless call for removal of a case after hearing, such circumstances do not arise here, especially given that the ALJ has stated his intent to issue decisions in these appeals within 60 to 90 days.

Petitioners' Motion is therefore denied in full. These appeals will be closed on the Board's docket without prejudice to future appeals after issuance of ALJ decisions in the underlying cases.

———/s/———

Leslie A. Sussan
Presiding Board Member

cc: Civil Remedies Division

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Perry County Nursing Center
Docket No. A-12-67
CRD Docket No. C-12-59
Ruling No. 2012-5
May 9, 2012

RULING DENYING REQUEST FOR EXPEDITED REVIEW AND FOR STAY OF HEARING

By letter dated April 27, 2012, Perry County Nursing Center (Perry) submitted a request to the Board for "expedited review" of what it styled as the "Final Decision Regarding Petitioner's Motion for Judgment as a Matter of Law" issued by Administrative Law Judge (ALJ) Carolyn Cozad Hughes on April 6, 2012. Perry further requested that the Board stay the hearing currently scheduled for May 14, 2012 in its appeal pending before the ALJ. The Board denies both requests as explained below.

The enforcement remedies which Perry challenges before the ALJ arose from a survey of its facility conducted in August 2011. Perry contends that CMS lacked authority to impose remedies based on this survey because it allegedly constituted an improper reopening of a prior survey conducted in January 2010. Perry request at 5.

The ALJ denied Perry's motion for summary judgment, concluding that she lacked authority to "review an agency decision to conduct a survey," as well as disagreeing with Perry's view that the survey constituted a "reopening." ALJ Ruling of April 6, 2012, at 2. She set out the issues to be addressed at the hearing as whether the facility was in substantial compliance, whether any deficiencies posed immediate jeopardy, and whether the remedies imposed were reasonable. *Id.* at 3.

Analysis

The regulations provide that a party may request Board review of an "ALJ's decision or dismissal order," and that the ALJ's action will so inform the parties. 42 C.F.R. § 498.80; *see also* 42 C.F.R. § 498.82. An ALJ decision is described in section 498.74 as coming after the close of the hearing and being based on the

evidence of record. A decision or dismissal as described in the regulations is an action dispositive of the matter before the ALJ and final and binding unless appealed further. Contrary to Perry's characterization of the ALJ's action, we find that no final decision has been issued in this matter.

Perry argues that the April 6th order should be considered an appealable final decision on the grounds that it effectively "excludes any further argument" at the ALJ hearing on the issue of "whether the survey is proper." Perry request at 4. The ruling which Perry challenges was contained in a Summary of Prehearing Conference and Order Establishing Procedures for Hearing. The ALJ action precedes a scheduled hearing and addresses a preliminary legal issue about the scope of the hearing. The ruling does not purport to be a final decision and does not inform the parties of any further appeal rights. Indeed, while the ALJ denies summary judgment and addresses the merits of Perry's argument about the propriety of the survey, the ruling does not expressly preclude Perry from revisiting that issue in post-hearing briefing. Consequently, we conclude that Perry's request to us is in the nature of an interlocutory appeal.

The applicable regulations permit the Board to remove a case from an ALJ to the Board itself for hearing (42 C.F.R. § 498.76) but contain no provision for parties to request interlocutory review of an ALJ order prior to the issuance of a dispositive decision or a dismissal. The Board has in the past "declined to assume that it may take such appeals in the absence of express authority to do so." *Cooper University Hospital, Cooper Surgery Center and Rancocas Endoscopy Center*, Appellate Div. Docket No. A-09-72, Ruling Denying CMS's Motion for Emergency Stay, Request for Review of ALJ Rulings, and Request for Removal (March 24, 2009), and authorities cited therein (copy enclosed). Interlocutory appeals, if permissible at all, would require an extraordinary showing that the issues presented could not wait for review until after the completion of the normal process below and issuance of an ALJ decision. Perry points to no authority for us to intervene at this point in the process and has not shown that some irreparable harm or significant prejudice would be caused by allowing the normal proceedings to go forward.

Perry's argument for early intervention is that, were it to prevail on its claim that CMS exceeded its authority in conducting the survey giving rise to the deficiency findings, the parties would be spared the time and effort involved in adjudicating the merits of those findings at a hearing. Perry request at 6. Perry argues that the Board should instead issue a final determination that it lacks authority to determine the validity of the "survey reopening" and thereby permit Perry to proceed with an immediate court appeal on this legal issue. Id. at 2.

This argument gives overriding weight to one view of judicial efficiency and economy while ignoring other effects of premature intervention. If Perry prevails on the merits before the ALJ, for example, any question as to the nature or propriety of the survey will become moot. Thus, allowing the matter to proceed to hearing on the merits may obviate any need for the Board to consider the scope of its authority to review a decision to conduct a survey or the handling of the survey at issue, much less whether any alleged impropriety in the survey process would have the effect sought by Perry of rendering the deficiency findings "null and void." Perry request at 2. It would be inefficient for the Board, and perhaps a federal court, to be forced to prematurely resolve a legal issue which may not even be relevant to the outcome of the case. Furthermore, it would be contrary to the goal of prompt enforcement to encourage correction to delay resolution of the merits of the deficiency findings if the case were stayed and Perry did not prevail on its procedural challenge.

Conclusion

For the reasons set out above, we decline the requests to impose a stay on the hearing or to provide expedited review in this matter.

[redacted]
Judith A. Ballard

[redacted]
Constance B. Tobias

[redacted]
Leslie A. Sussan
Presiding Board Member

Enclosure: Board ruling dated 3/24/09

DEPARTMENT OF HEALTH & HUMAN SERVICES Office of the Secretary

Departmental Appeals Board
Appellate Division, MS-6127
Room G-644, Cohen Building
330 Independence Avenue, SW
Washington, D.C. 20201

BY FACSIMILE

[redacted]

MAR 24 20

And

[redacted]

Re: Cooper University Hospital, Cooper Surgery Center
And Rancocas Endoscopy Center v. CMS
Civil Remedies Docket No. C-08-758

RULING DENYING CMS'S MOTION FOR EMERGENCY STAY, REQUEST FOR REVIEW OF ALJ RULINGS, AND REQUEST FOR REMOVAL

On March 23, 2009, the Centers for Medicare & Medicaid Services (CMS) filed with the Board a motion for an emergency stay of the March 27, 2009 deadline to produce documents established by the March 13, 2009 ruling issued by Administrative Law Judge (ALJ) Keith W. Sickendick in the case identified above. CMS also sought review by the Board of that ruling, as well as of the ALJ's March 12, 2009 ruling denying CMS's motion for summary judgment. In the alternative, CMS requested that the Board remove the case pursuant to 42 C.F.R. § 498.76 and conduct the hearing. For the reasons explained below, we reject CMS's interlocutory appeal and deny its request for removal.

The Board has previously stated that "[t]he hearing procedures at 42 C.F.R. Part 498 do not provide for interlocutory appeals, and the Board has declined to assume that it may take such appeals in

the absence of express authority to do so." United Presbyterian Residence, Appellate Division Docket No. A-03-59, Ruling Denying Interlocutory Appeal (May 19, 2003) (copy enclosed), citing Rehabilitation & Healthcare Center of Tampa, Appellate Division Docket No. A-99-95, Ruling On Request for Removal of Hearing to Board (August 16, 1999). CMS does not point to any authority permitting the Board to review the ALJ's rulings while the case is still pending before the ALJ.

While section 498.76 authorizes the Board to remove a case to itself, the Board noted in the United Presbyterian Residence ruling that it has previously characterized removal of a pending request for a hearing pursuant to 42 C.F.R. § 498.76 as an "extreme remedy." Id.; Pacific Regency Arvin, Appellate Division Docket No. A-2000-16, Ruling on Request for Removal of Hearing to Board (November 23, 1999). As we discuss below, we conclude that CMS's motion provides no grounds that justify removal of the hearing request.

Cooper University Hospital (Petitioner) requested a hearing by an ALJ with respect to CMS's July 25, 2008 determination on reconsideration that the Voorhees Surgery Center (formerly Cooper Surgery Center) and the Rancocas Endoscopy Center are not outpatient departments of Petitioner for purposes of Medicare payment but are instead ambulatory surgical centers (ASCs) and thus do not qualify for provider-based status under 42 C.F.R. § 413.65(a)(1)(ii)(A). CMS rejected Petitioner's argument that the two facilities in question had voluntarily terminated their ASC status. CMS also pointed out that, under 42 C.F.R. § 416.30(f), an ASC operated by a hospital does not have the option of converting to or being paid as an outpatient hospital department "unless CMS determines that there is good cause to do otherwise."

During the proceedings before the ALJ, CMS moved for summary judgment. In his March 12, 2009 ruling, the ALJ denied CMS's motion, finding that there is a genuine dispute of material fact as to whether the facilities continued to be ASCs or whether their agreements with the Secretary had been terminated. The ALJ also stated that he "will receive, subject to objection at hearing, evidence on the issue of whether good cause existed to permit Petitioner's facilities to convert" from ASCs to outpatient hospital departments. In his March 13, 2009 ruling, the ALJ granted in part and denied in part Petitioner's request to compel the production of documents and to subpoena a witness. In particular, the ALJ ordered CMS to produce certain documents showing whether CMS in the past had permitted any ASC to convert to being paid as an outpatient department of a hospital or to terminate ASC status and convert to "provider-based status," as well as documents discussing CMS policy on these matters not

related to any specific case. The ALJ also ordered production of any document related to CMS's initial or reconsidered determination in this case, and not previously produced. In addition, the ALJ granted Petitioner's request to subpoena CMS employee Shantella Jackson, stating that she may be able to provide testimony relevant to at least some of the areas identified by Petitioner, subject to Petitioner establishing an adequate foundation and any objection CMS may interpose at hearing.

CMS argues that the ALJ's rulings "are based on an erroneous legal standard and constitute[] an abuse of discretion." Request for Review at 4. According to CMS, the rulings "authorize discovery that is relevant only to an issue over which the ALJ has no jurisdiction, i.e. CMS' determination, under 42 C.F.R. § 416.30(f)(2), that no 'good cause' existed to allow the Petitioner's ASCs to convert to outpatient hospital departments[.]" Id. CMS argues, moreover, that the ALJ's rulings "require the production of documents that would be protected by the attorney client or work product privilege, or that are predecisional, and thus fall under the deliberative process privilege." Id. at 5. CMS asserts that "production of privileged documents will have an immediate chilling effect on intra-agency communications and request for advice that could negatively affect agency determinations in the future[.]" Id. CMS also seeks reversal of the ALJ's decision to issue the subpoena to the extent that the ruling could be interpreted as allowing testimony that the two facilities in question here were treated differently from similarly-situated facilities. See id. at 3.

CMS's arguments do not persuade us that the "extreme remedy" of removal is warranted here. CMS asserts that it is irrelevant whether good cause existed to allow the alleged ASCs in question here to convert to outpatient hospital departments because CMS based its findings on 42 C.F.R. § 413.65. The CMS reconsideration, however, also expressly notes that conversion from an ASC to a provider-based facility is permitted only if CMS finds good cause, citing section 416.30(f). The reconsideration then sets out Petitioner's argument about good cause, specifically affirming the initial determination with respect to the Voorhees Surgery Center that "good cause does not exist to overturn the previous determination." Reconsideration, 2nd page. With respect to the Rancocas Endoscopy Center, the CMS reconsideration specifically states that "the rules in § 413.65(a)(1)(ii)(A) and § 416.30 apply and we do not find good cause for an exception." Id., 3rd page. Thus, CMS clearly viewed the good cause issue as relevant at the time it issued its reconsideration and informed Petitioner that it had a right to request a hearing on that determination.

In any event, the ALJ did not rule that the good cause issue is relevant here. Instead, the ALJ's March 12, 2009 ruling "encourages the parties to address in their post-hearing briefs the CMS argument that its determination of whether or not good cause exists to permit conversion of an ambulatory surgical center to an outpatient hospital department . . . is not subject to appeal or review." Ruling at 3. The ALJ further stated that "[n]o decision will be made on the reviewability of the good cause determination until I have received the benefit of the parties' briefing and have rendered a decision on the merits." Id. at 4.

CMS also objects to the ALJ's March 12, 2009 ruling that CMS produce decisions regarding provider-based status of other ASCs, asserting that this documentation "can only be related to Petitioner's 'equal protection' argument that it was treated differently from other ASCs" and that this claim "is clearly not reviewable in the administrative forum[.]" Motion at 3; Request for Review at 4. Contrary to what CMS suggests, however, the ALJ did not justify his order to produce other related decisions based on an equal protection argument. Instead, he concluded that "CMS decisions with regard to other providers are not relevant in this case, except to the extent that evidence that CMS allowed conversion in other cases may undermine a CMS argument that could be construed to be that conversions are never permitted." Ruling at 4.

Moreover, the ALJ's ruling specifically noted that "production of documents pursuant to this order does not amount to a concession by CMS that the documents are relevant or admissible at hearing[.]" Instead, he indicated, the documents would be "subject to timely objection if offered as evidence at hearing." Ruling at 5.

Thus, we see no merit to CMS's assertion that the ALJ's rulings are based on an erroneous legal standard or constitute an abuse of discretion.

Furthermore, we see no reason to preclude the ALJ from ordering production prior to determining whether any particular document is in fact relevant. CMS has not alleged that production of the documents will be unduly burdensome. CMS's only stated objection to the ALJ's production order is that some of the documents it requires CMS to produce are privileged. This mischaracterizes the ALJ's March 13, 2009 ruling, which states in pertinent part:

> If CMS asserts a privilege as to any of the documents to be produced, copies of the documents will be filed only with my office attached to a privilege log that clearly

> identifies the document, the privilege asserted, and citations to the authorities upon which CMS relies for the privilege. The privilege log will be served on counsel for Petitioner but the documents will only be filed with me for in camera inspection and ruling upon the alleged privilege.

Ruling at 5. Under this ruling, CMS will not be required to release documents as to which it asserts the privilege prior to an in camera inspection by the ALJ to determine whether the documents are in fact privileged. We conclude that this procedure will adequately protect any privileged documents. CMS's stated concern that "CMS will have no remedy if the ALJ overrules CMS' assertion of privilege" in effect asks us to speculate that some responsive documents are in fact privileged, and that the ALJ will nonetheless find they are not. CMS has stated no reason to think this is a legitimate concern. In sum, CMS has not set out any grounds that justify removal at this time.

Conclusion

For the foregoing reasons, we reject CMS's interlocutory appeal and its request for removal. Since we are issuing this ruling prior to the deadline set by the ALJ for CMS's production of documents, CMS's request that the Board stay that deadline pending a Board ruling is moot.

[redacted]
Leslie A. Sussan

[redacted]
Constance B. Tobias

[redacted]
Judith A. Ballard
Presiding Board Member

Enclosure

cc: Civil Remedies Division

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Del Rosa Villa
Docket No. A-11-20
CRD Docket No. C-10-45
Ruling No. 2011-2
December 2, 2010

RULING DENYING REQUEST FOR INTERLOCUTORY REVIEW OF DENIAL OF STAY OF PROCEEDINGS OR POSTPONEMENT OF HEARING

On November 19, 2010, Del Rosa Villa (Petitioner) filed a request with the Departmental Appeals Board (Board) asking that we intervene to postpone the hearing before Administrative Law Judge (ALJ) Richard Smith in the above-captioned case currently scheduled to begin on December 6, 2010. CMS filed a response opposing the request. For the reasons explained below, we decline to intervene at this stage of the proceedings.

Board consideration of interlocutory appeals

Before reaching the merits of Petitioner's request, we note that the Board has previously stated that "[t]he hearing procedures at 42 C.F.R. Part 498 do not provide for interlocutory appeals, and the Board has declined to assume that it may take such appeals in the absence of express authority to do so." *Cooper University Hospital, Cooper Surgery Center and Rancocas Endoscopy Center*, App. Div. Docket No. A-09-72, Ruling Denying CMS Motion for Emergency Stay, Review of ALJ Rulings, and Request for Removal (March 24, 2009), quoting *United Presbyterian Residence*, App. Div. Docket No. A-03-59, Ruling Denying Interlocutory Appeal (May 19, 2003), citing *Rehabilitation & Healthcare Center of Tampa*, App. Div. Docket No. A-99-95, Ruling On Request for Removal of Hearing to Board (August 16, 1999)(copies of rulings attached).

The Appellate Division Practice Manual explains that, even where the Board does find that it has authority to intervene in a proceeding before an ALJ, the party seeking such action bears a very high burden:

> The Board has historically disfavored such appeals. In general, for the Board to consider an interlocutory appeal, a party would have to show that an interlocutory decision would promote efficient adjudication of the dispute and that the party would suffer irreparable harm by waiting for a final decision to appeal an ALJ's ruling. The Board's ruling to dismiss an interlocutory appeal is without prejudice to the party's right to renew its arguments in a timely appeal of the ALJ's decision, ruling or order dispositive of the case.

(Accessible at http://www.hhs.gov/dab/divisions/appellate/practicemanual/manual.html.)

Petitioner recognizes that its request is for "extraordinary interlocutory review" but states that the request it "reluctantly files" is necessary because of "the importance of the legal issue" and "the irreparable nature of the injury that could be caused to Petitioner and certain of its employees should this case proceed to hearing as scheduled . . . ." P. Request at 1. We consider next whether Petitioner has made a sufficient showing to demand extraordinary relief.

Case background

Petitioner reports that the relevant issues to be resolved at the hearing relate to a suicide which occurred at its facility and was the subject of deficiency findings leading to imposition of a civil money penalty. P. Request at 3. Petitioner requested a hearing which was initially scheduled for September 2010 after the parties' exchange of briefs, proposed exhibits and witness lists in March 2010.

Petitioner asserts that it learned some time in the spring of 2010 that state authorities had convened a grand jury to investigate the circumstances surrounding the death and that it presumes the purpose is to decide whether to bring state criminal neglect or abuse charges against Petitioner and/or one or more of its employees. *Id*. at 3-4. Petitioner asserts that many of its employees, represented by separate criminal counsel, have been advised to assert their Fifth Amendment rights if called to testify at the ALJ hearing. *Id.* at 4. Although some employees have obtained immunity grants, Petitioner alleges, those are limited to protection from the use of statements made before the grand jury. *Id*. at 5. Petitioner also alleges that its employees are "bound at this time by grand jury secrecy rules" and are thereby precluded, even if willing, "even from assisting counsel in the preparation for the hearing . . . ." *Id.* at 4.

On July 7, 2010, Petitioner requested that ALJ Smith postpone the hearing, and ALJ Smith did so over CMS's opposition. *Id.* at 6. The hearing was rescheduled to begin December 6, 2010. On November 17, 2010, Petitioner notified ALJ Smith that the parties had settled other issues in the case but that Petitioner would be seeking a further delay of the hearing because a criminal investigation was

ongoing. *Id.* at 7. By letter dated November 17, 2010, ALJ Smith denied the request for any further postponement or continuance of the hearing.

This interlocutory appeal followed.

Legal framework on parallel criminal and civil administrative proceedings

In a case involving an administrative investigation by the Food and Drug Administration that also generated a criminal indictment, the Supreme Court rejected the argument that the civil matter should be stayed where the government had not brought the civil action "solely to obtain evidence for its criminal prosecution" and the defendant was represented by counsel and had not shown "special circumstances" making parallel proceedings improper or unjust. *U.S. v. Kordel*, 397 U.S. 1, 11-12 (1970).

A leading case, relied on by Petitioner, articulated the principles governing parallel proceedings concerning the same conduct in criminal and administrative forums while explaining that the overlap of regulatory and criminal law is a regular part of the legal system in this country. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980), *cert. denied* 449 U.S. 993 (1980). Parallel proceedings have been recognized as unobjectionable by the Supreme Court since at least 1912. *Id., citing Standard Sanitary Mfg. Co. v. U.S.*, 226 U.S. 20, 52 (1912) (civil and criminal antitrust proceedings). Based on the Supreme Court precedents, the *Dresser* court concluded that a stay of civil proceedings is not ordinarily compelled by a criminal proceeding, although a court "may decide in its discretion" to take some protective action, such as a stay, postponement of discovery, or protective orders where justice would be served. *Id.* at 1375. Absent a showing of bad faith by the government, a court may be most likely to consider protective action where a party "under indictment for a serious offense" would be prejudiced by having to expose the basis for its criminal defense prematurely or to rely on the Fifth Amendment to withhold testimony. *Id.* at 1376. Even in such situations, however, the court must balance potential injury to the public interest from delay of the noncriminal proceeding. *Id.* In *Kordel*, the Supreme Court found the factor of protecting the public compelling in a case involving government enforcement of health and safety laws, explaining that it "would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." 397 U.S. at 11.

As CMS notes, any appeal by Petitioner would fall under the jurisdiction of the Ninth Circuit. CMS Opposition at 8-9. Although Ninth Circuit jurisprudence articulates somewhat differently the particular circumstances to be considered by a court in deciding whether to issue a discretionary stay of a parallel civil administrative proceeding, the Ninth Circuit agreed that no stay was required by

any constitutional principles. *FSLIC v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). The appeals court concluded that a district court did not abuse its discretion by denying a stay pending any criminal prosecution for breach of fiduciary duty by a banker. 889 F.2d at 902-03. In addition to taking into account the degree to which a defendant's Fifth Amendment rights may be implicated, the Ninth Circuit pointed to the following factors as relevant to guiding the exercise of discretion:

> (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

889 F.2d at 903, *quoting Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D.Pa. 1980) *and citing Kordel*, 397 U.S. at 11-12 and *Dresser*, 628 F.2d at 1374-76; *see also U.S. v. Certain Real Property, Commonly known as 6250 Ledge Road, Egg Harbor, Wis.*, 943 F.2d 721 (7th Cir.1991); *United States v. Little Al*, 712 F.2d 133 (5th Cir.1983).

Furthermore, the Ninth Circuit denied that there exists any "absolute right not to be forced to choose between testifying in a civil matter and asserting [one's] Fifth Amendment privilege." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 325 (9th Cir. 1995). Not only is a defendant not entitled to protection from this choice by means of a stay, a civil court may draw a negative inference from the invocation of the Fifth Amendment. *Id.* at 326; *see also Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1970); *KLA-Tencor Corp. v. Murphy*, 717 F. Supp. 895, 903 (N.D. Cal. 2010).

The case for delay is weakened where no indictment has actually been filed at the time the stay is sought. As the Ninth Circuit stated, the possibility of future criminal indictments may make "responding to civil charges more difficult," but the district court "did not abuse its discretion by deciding that this difficulty did not outweigh the other interests involved." 889 F.2d at 903. Furthermore, the absence of an indictment makes any assessment of the degree of overlap between civil and criminal matters speculative. *SEC v. Brown*, 2007 WL 4192000, at *4 (D. Minn. 2007).

Analysis

Petitioner admits from the outset, as the above legal authorities clearly require, that it has no "constitutional right to delay civil or regulatory proceedings pending

resolution of parallel criminal proceedings." P. Request at 7, *citing U.S. v. Kordel*, 397 U.S. 1 (1970). Petitioner identifies no statutory or regulatory authority requiring the ALJ to grant a stay of proceedings where the possibility of criminal prosecution is raised, and we find none. The ALJ has sufficient discretion under the regulations at 42 C.F.R. § 498.53(a) to postpone a hearing upon request for good cause and has declined to do so here. CMS Opposition, Ex. L. We review an exercise of discretion to determine whether it is arbitrary, capricious or an abuse of discretion.

Petitioner further concedes, as is equally well-established in law, that a corporate entity has no Fifth Amendment right against self-incrimination to evoke. P. Request at 7; *Braswell v. United States*, 487 U.S. 99, 110 (1998). Nevertheless, Petitioner cites to some instances in which courts have recognized that an entity without such rights itself may have its ability to defend a civil case impaired when employees' testimony is unavailable to it as a result of their individual refusals to speak on Fifth Amendment grounds. P. Request at 10, *citing Chagolla v. City of Chicago*, 529 F. Supp.2d 941, 948 (N.D. Ill. 2008) and *Britt v. Int'l Bus Srvs., Inc*., 255 A.D.2d 143 (N.Y. Appl. 1998). In both of the cited cases, the courts viewed the decision to stay as discretionary and dependent on the particular circumstances and status of the case. *See* 529 F. Supp.2d at 948 *and* 255 A.D.2d at 144 (motion to "stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court").

In *Chagolla*, the court noted that the city's request for a stay might not have prevailed on its own merits, since the city has no personal Fifth Amendment rights, but granted a partial stay as a matter of discretion because it had determined to do so for the individual defendants. 529 F.Supp.2d at 948. Here, Petitioner alone is subject to administrative sanctions and no individuals appear as defendants.

Petitioner argues that its ability to present its case was so impaired here that the ALJ's denial of its stay request was an abuse of discretion for two reasons. P. Request at 7. First, Petitioner alleges that the inability or unwillingness of its employees to participate as witnesses or "even in preparation of the case" materially limits its defense.[1] Petitioner states that their testimony is necessary to

[1] The claim that employees are precluded from assisting in case preparation is based on grounds of grand jury secrecy. P. Request at 4, 10. Petitioner cites nothing beyond its own bald assertion for the claim that grand jury secrecy somehow precludes willing employees from participating in Petitioner's preparation for the hearing. Federal grand jury secrecy rules contain no prohibition against witnesses speaking about the subject matter as to which they have testified or may be called to testify before the grand jury. Fed. Rules of Crim. Proc., Rule 6(e)(2). Indeed, the rule does not impose any secrecy requirements on grand jury witnesses at all and they are free to speak about their appearances. *See, e.g., In re Vescovo Special Grand Jury*, C.D.Cal.1979, 473 F.Supp. 1335. Petitioner identifies no different rule under state law. We therefore do not consider this claim by Petitioner in assessing whether the ALJ should have granted the stay.

its case, that they would vitiate their Fifth Amendment rights by testifying because the subject matter covered would likely be the same as that relevant to the criminal matter, and that Petitioner is "not willing to initiate the spectacle of subpoenaing its own employees to appear . . . simply to assert their personal Fifth Amendment rights."[2] The choice of whether to seek to elicit testimony from employees who may refuse to answer at least some questions or to forego calling those employees may be a difficult quandary, but it is the sort of difficult position from which courts have held that defendants are not necessarily entitled to be rescued by a stay.

The parties dispute before us whether the potential witnesses who might decline to testify are indeed central to Petitioner's case. Petitioner alleges that its administrator, director of nursing and the "nurses on duty at the time of death" were prospective witnesses who have been instructed by criminal counsel not to testify. P. Request at 5. Among the topics that Petitioner asserts that these witnesses could address are the facility's policies and practices, assessments of and care planning for the resident, the resident's behavior and demeanor, the circumstances of the suicide and the facility's investigation. *Id.* at 5-6. Petitioner does not indicate whether some or all of this information could be obtained from documents available to the facility, such as written policies, assessments, care plans, and nursing notes. CMS asserts that Petitioner has not listed as witnesses any of the nurses or aides who "provided direct care and services" to the resident or who were "on duty on the night" of the suicide." CMS Opposition at 7. Furthermore, CMS alleges that the facility administrator already testified by deposition based on her unavailability for the hearing and did not address the resident or suicide at all. *Id*. The ALJ has access to the complete record of the case and is most familiar with the issues, the proposed witnesses and the proffered testimony. We see no reason to second-guess the ALJ's judgment that the matter may proceed to hearing without undue prejudice.

Petitioner's second basis for claiming that the denial of stay abused the ALJ's discretion is that going forward "could require Petitioner prematurely to reveal its defenses to any prospective criminal charges, and even could help the State frame such charges." P. Request at 7-8. Courts have been concerned that governmental agencies not use civil proceedings merely as a device to obtain discovery for use in criminal prosecution that would not otherwise be permissible in the criminal proceeding. *See, e.g., U.S. v. Kordel*, 397 U.S. 1, 11. In this case, the governmental unit contemplating criminal charges is a state attorney general. CMS's responsibility for enforcement of Medicare participation requirements and protection of Medicare beneficiaries is a matter of federal law. No suggestion has

[2] Petitioner suggests that CMS might attempt to subpoena Petitioner's employees in order to force them to assert their rights and then seek an adverse inference based on that. P. Request at 9. CMS expressly denies any intention to subpoena any of Petitioner's employees, noting that in any case the deadline for CMS to identify any additional witnesses or seek subpoenas has already passed. CMS Opposition at 17.

been (or could reasonably be) made that CMS is pursuing the federal enforcement process merely to aid the state in discovering aspects of a possible defense to state criminal charges which might be brought at some future point. CMS also points out that Petitioner has already laid out its defenses to CMS's action "in detail" in its pre-hearing brief before the ALJ. CMS Opposition at 15. To the extent that its defense before the ALJ tracks any possible defense against a future criminal charge, therefore, Petitioner's administrative defense is already on the record. Again, the possibility that information disclosed in a civil case may impact a future criminal case may present a dilemma for the defendant but does not represent a reason to overturn the ALJ's discretion in denying a stay.

Two factors considered by courts as reflected in the legal authorities above cut against granting a stay here. The first is judicial efficiency. The second is the strong public interest in nursing home enforcement.

On the first point, Petitioner denies that it is seeking an indefinite stay but at the same time proposes that "the parties report to Judge Smith every 60 days regarding the status of the criminal investigation," with the hearing rescheduled when that status is clarified. P. Request at 11. This open-ended proposal could leave the matter in limbo for many months. Although Petitioner asserts that the criminal counsel believes that some clarification will be forthcoming by the end of January 2011, Petitioner does not, and presumably cannot, represent when the hearing might begin if charges are ultimately brought. This appeal was docketed in October 2009 and has been pending for more than a year. The hearing was already postponed once at Petitioner's request. The ALJ was entitled to consider in resolving the request for a further stay the "convenience of the court in the management of its cases, and the efficient use of judicial resources." *Molinaro*, 889 F.2d at 903.

If Petitioner ultimately prevails on the merits before the ALJ, moreover, the questions raised by Petitioner in its present request become moot. It is also possible that the difficulties Petitioner now envisions will not have materialized or will not have in fact materially impacted Petitioner's presentation, even if Petitioner does not prevail. If Petitioner does not prevail and can show that the ALJ's ruling in fact prejudiced it, Petitioner may raise that issue in a future appeal. At that time, the Board can review that matter with the benefit of a full record based on the actual course of events rather than on speculation about potential problems.

Perhaps most importantly, the second point cutting against imposing a stay here lies in the interest of vulnerable beneficiaries and their families in having confidence that facilities receiving public funds are indeed complying with the statute and regulations. The regulations at issue deal with the health, safety and well-being of nursing home residents and the imposition of remedies such as civil money penalties is intended to motivate prompt achievement and maintenance of

compliance. The ALJ could reasonably place a high value on the public interest in deciding not to grant the requested stay.

Conclusion

For the reasons explained above, we decline Petitioner's request that we intervene to overturn the ALJ's denial of a further stay of the hearing in this matter.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Leslie A. Sussan
Presiding Board Member

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Departmental Appeals Board
Appellate Division, MS-6127
Room G-644, Cohen Building
330 Independence Avenue, SW
Washington, D.C. 20201

BY FACSIMILE

MAR 24 2009

[redacted]

And

[redacted]

Re: Cooper University Hospital, Cooper Surgery Center
And Rancocas Endoscopy Center v. CMS
Civil Remedies Docket No. C-08-758

RULING DENYING CMS'S MOTION FOR EMERGENCY STAY, REQUEST FOR REVIEW OF ALJ RULINGS, AND REQUEST FOR REMOVAL

On March 23, 2009, the Centers for Medicare & Medicaid Services (CMS) filed with the Board a motion for an emergency stay of the March 27, 2009 deadline to produce documents established by the March 13, 2009 ruling issued by Administrative Law Judge (ALJ) Keith W. Sickendick in the case identified above. CMS also sought review by the Board of that ruling, as well as of the ALJ's March 12, 2009 ruling denying CMS's motion for summary judgment. In the alternative, CMS requested that the Board remove the case pursuant to 42 C.F.R. § 498.76 and conduct the hearing. For the reasons explained below, we reject CMS's interlocutory appeal and deny its request for removal.

The Board has previously stated that "[t]he hearing procedures at 42 C.F.R. Part 498 do not provide for interlocutory appeals, and the Board has declined to assume that it may take such appeals in

the absence of express authority to do so." United Presbyterian Residence, Appellate Division Docket No. A-03-59, Ruling Denying Interlocutory Appeal (May 19, 2003) (copy enclosed), citing Rehabilitation & Healthcare Center of Tampa, Appellate Division Docket No. A-99-95, Ruling On Request for Removal of Hearing to Board (August 16, 1999). CMS does not point to any authority permitting the Board to review the ALJ's rulings while the case is still pending before the ALJ.

While section 498.76 authorizes the Board to remove a case to itself, the Board noted in the United Presbyterian Residence ruling that it has previously characterized removal of a pending request for a hearing pursuant to 42 C.F.R. § 498.76 as an "extreme remedy." Id.; Pacific Regency Arvin, Appellate Division Docket No. A-2000-16, Ruling on Request for Removal of Hearing to Board (November 23, 1999). As we discuss below, we conclude that CMS's motion provides no grounds that justify removal of the hearing request.

Cooper University Hospital (Petitioner) requested a hearing by an ALJ with respect to CMS's July 25, 2008 determination on reconsideration that the Voorhees Surgery Center (formerly Cooper Surgery Center) and the Rancocas Endoscopy Center are not outpatient departments of Petitioner for purposes of Medicare payment but are instead ambulatory surgical centers (ASCs) and thus do not qualify for provider-based status under 42 C.F.R. § 413.65(a)(1)(ii)(A). CMS rejected Petitioner's argument that the two facilities in question had voluntarily terminated their ASC status. CMS also pointed out that, under 42 C.F.R. § 416.30(f), an ASC operated by a hospital does not have the option of converting to or being paid as an outpatient hospital department "unless CMS determines that there is good cause to do otherwise."

During the proceedings before the ALJ, CMS moved for summary judgment. In his March 12, 2009 ruling, the ALJ denied CMS's motion, finding that there is a genuine dispute of material fact as to whether the facilities continued to be ASCs or whether their agreements with the Secretary had been terminated. The ALJ also stated that he "will receive, subject to objection at hearing, evidence on the issue of whether good cause existed to permit Petitioner's facilities to convert" from ASCs to outpatient hospital departments. In his March 13, 2009 ruling, the ALJ granted in part and denied in part Petitioner's request to compel the production of documents and to subpoena a witness. In particular, the ALJ ordered CMS to produce certain documents showing whether CMS in the past had permitted any ASC to convert to being paid as an outpatient department of a hospital or to terminate ASC status and convert to "provider-based status," as well as documents discussing CMS policy on these matters not

related to any specific case. The ALJ also ordered production of any document related to CMS's initial or reconsidered determination in this case, and not previously produced. In addition, the ALJ granted Petitioner's request to subpoena CMS employee Shantella Jackson, stating that she may be able to provide testimony relevant to at least some of the areas identified by Petitioner, subject to Petitioner establishing an adequate foundation and any objection CMS may interpose at hearing.

CMS argues that the ALJ's rulings "are based on an erroneous legal standard and constitute[] an abuse of discretion." Request for Review at 4. According to CMS, the rulings "authorize discovery that is relevant only to an issue over which the ALJ has no jurisdiction, i.e. CMS' determination, under 42 C.F.R. § 416.30(f)(2), that no 'good cause' existed to allow the Petitioner's ASCs to convert to outpatient hospital departments[.]" Id. CMS argues, moreover, that the ALJ's rulings "require the production of documents that would be protected by the attorney client or work product privilege, or that are predecisional, and thus fall under the deliberative process privilege." Id. at 5. CMS asserts that "production of privileged documents will have an immediate chilling effect on intra-agency communications and request for advice that could negatively affect agency determinations in the future[.]" Id. CMS also seeks reversal of the ALJ's decision to issue the subpoena to the extent that the ruling could be interpreted as allowing testimony that the two facilities in question here were treated differently from similarly-situated facilities. See id. at 3.

CMS's arguments do not persuade us that the "extreme remedy" of removal is warranted here. CMS asserts that it is irrelevant whether good cause existed to allow the alleged ASCs in question here to convert to outpatient hospital departments because CMS based its findings on 42 C.F.R. § 413.65. The CMS reconsideration, however, also expressly notes that conversion from an ASC to a provider-based facility is permitted only if CMS finds good cause, citing section 416.30(f). The reconsideration then sets out Petitioner's argument about good cause, specifically affirming the initial determination with respect to the Voorhees Surgery Center that "good cause does not exist to overturn the previous determination." Reconsideration, 2nd page. With respect to the Rancocas Endoscopy Center, the CMS reconsideration specifically states that "the rules in § 413.65(a)(1)(ii)(A) and § 416.30 apply and we do not find good cause for an exception." Id., 3rd page. Thus, CMS clearly viewed the good cause issue as relevant at the time it issued its reconsideration and informed Petitioner that it had a right to request a hearing on that determination.

In any event, the ALJ did not rule that the good cause issue is relevant here. Instead, the ALJ's March 12, 2009 ruling "encourages the parties to address in their post-hearing briefs the CMS argument that its determination of whether or not good cause exists to permit conversion of an ambulatory surgical center to an outpatient hospital department . . . is not subject to appeal or review." Ruling at 3. The ALJ further stated that "[n]o decision will be made on the reviewability of the good cause determination until I have received the benefit of the parties' briefing and have rendered a decision on the merits." Id. at 4.

CMS also objects to the ALJ's March 12, 2009 ruling that CMS produce decisions regarding provider-based status of other ASCs, asserting that this documentation "can only be related to Petitioner's 'equal protection' argument that it was treated differently from other ASCs" and that this claim "is clearly not reviewable in the administrative forum[.]" Motion at 3; Request for Review at 4. Contrary to what CMS suggests, however, the ALJ did not justify his order to produce other related decisions based on an equal protection argument. Instead, he concluded that "CMS decisions with regard to other providers are not relevant in this case, except to the extent that evidence that CMS allowed conversion in other cases may undermine a CMS argument that could be construed to be that conversions are never permitted." Ruling at 4.

Moreover, the ALJ's ruling specifically noted that "production of documents pursuant to this order does not amount to a concession by CMS that the documents are relevant or admissible at hearing[.]" Instead, he indicated, the documents would be "subject to timely objection if offered as evidence at hearing." Ruling at 5.

Thus, we see no merit to CMS's assertion that the ALJ's rulings are based on an erroneous legal standard or constitute an abuse of discretion.

Furthermore, we see no reason to preclude the ALJ from ordering production prior to determining whether any particular document is in fact relevant. CMS has not alleged that production of the documents will be unduly burdensome. CMS's only stated objection to the ALJ's production order is that some of the documents it requires CMS to produce are privileged. This mischaracterizes the ALJ's March 13, 2009 ruling, which states in pertinent part:

> If CMS asserts a privilege as to any of the documents to be produced, copies of the documents will be filed only with my office attached to a privilege log that clearly

identifies the document, the privilege asserted, and citations to the authorities upon which CMS relies for the privilege. The privilege log will be served on counsel for Petitioner but the documents will only be filed with me for in camera inspection and ruling upon the alleged privilege.

Ruling at 5. Under this ruling, CMS will not be required to release documents as to which it asserts the privilege prior to an in camera inspection by the ALJ to determine whether the documents are in fact privileged. We conclude that this procedure will adequately protect any privileged documents. CMS's stated concern that "CMS will have no remedy if the ALJ overrules CMS' assertion of privilege" in effect asks us to speculate that some responsive documents are in fact privileged, and that the ALJ will nonetheless find they are not. CMS has stated no reason to think this is a legitimate concern. In sum, CMS has not set out any grounds that justify removal at this time.

Conclusion

For the foregoing reasons, we reject CMS's interlocutory appeal and its request for removal. Since we are issuing this ruling prior to the deadline set by the ALJ for CMS's production of documents, CMS's request that the Board stay that deadline pending a Board ruling is moot.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member

Enclosure

cc: Civil Remedies Division

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Departmental Appeals Board
Appellate Division
Room 637-D, HHH Building
200 Independence Avenue, SW
Washington, D.C. 20201

RETURN RECEIPT REQUESTED

MAY 19 2003

[redacted]

and

[redacted]

Re: United Presbyterian Residence v. CMS
Civil Remedies Docket No. C-02-139
Appellate Division Docket No. A-03-59

RULING DENYING INTERLOCUTORY APPEAL

We deny the Centers for Medicare & Medicaid Services' request for interlocutory review of an April 18, 2003 ruling by Administrative Law Judge (ALJ) Alfonso J. Montano. The ALJ declined to dismiss a portion of Petitioner's appeal of CMS's determination that Petitioner was not in compliance with performance standards applicable to nursing facilities. The ALJ ruled that Petitioner, United Presbyterian Residence, had not timely appealed CMS's initial noncompliance determination, but had timely appealed CMS's later determination of the date that Petitioner had achieved substantial compliance with the performance standards, and the number of days for which remedies would apply. We deny CMS's request because CMS has not demonstrated that the Board has authority to accept this interlocutory appeal under 45 C.F.R. Part 498, and failed to show that the ALJ abused his discretion or that his ruling was erroneous.

Facts

In a letter dated June 15, 2001, CMS notified Petitioner that a survey by the state had found that Petitioner was not in

compliance with requirements for participation in the Medicare program, and that CMS was imposing the remedy of denial of payment for new admissions (DPNA) effective July 1, 2001 and termination of Petitioner's provider agreement effective September 9, 2001 if Petitioner did not achieve substantial compliance by that time. In a second letter dated September 4, 2001, CMS informed Petitioner that a second survey completed on August 17, 2001 had found Petitioner back in substantial compliance, that the DPNA was lifted as of that date, and that the termination was rescinded. By letter dated October 22, 2001, Petitioner requested review of the initial finding of noncompliance, the penalties imposed thereunder, and the determination that Petitioner was not in substantial compliance until August 17, 2001.

Upon CMS's motion, the ALJ dismissed the October 22 hearing request as untimely to appeal CMS's June 15, 2001 notice of compliance and the imposition of remedies thereunder, but also found that Petitioner's hearing request had preserved its appeal rights with respect to CMS's September 4, 2001 letter announcing the date that Petitioner attained substantial compliance and the end of the DPNA. The ALJ thus limited the scope of the hearing to permitting Petitioner to prove that it achieved compliance earlier than August 17, 2001. The ALJ based his determination on the Board's decision in Mimiya Hospital, DAB No. 1833 (2002), where the Board held that the petitioner had a right to appeal a CMS determination as to the time that the facility attained substantial compliance, and the resulting determination of the number of days to which a civil monetary penalty (CMP) for each day of noncompliance would apply. CMS then filed this interlocutory appeal.

Applicable procedures do not provide for interlocutory appeals.

The Board has historically disfavored interlocutory appeals. Riverview Care Center, Appellate Division Docket No. A-02-133, Acknowledgment and Dismissal of Appeal (September 26, 2002). The hearing procedures at 42 C.F.R. Part 498 do not provide for interlocutory appeals, and the Board has declined to assume that it may take such appeals in the absence of express authority to do so. Rehabilitation & Healthcare Center of Tampa, Appellate Division Docket No. A-99-95, Ruling On Request for Removal of Hearing to Board (August 16, 1999). Past interlocutory appeals have been based on 42 C.F.R. § 498.76, which authorizes the Board to "remove to itself any pending request for a hearing," upon which "[t]he Board conducts the hearing in accordance with the rules that apply to ALJ hearings under this subpart," which the Board has characterized as an extreme remedy. Pacific Regency Arvin, Appellate Division Docket No. A-2000-16, Ruling on Request for Removal of Hearing to Board (November 23, 1999). In denying interlocutory appeals brought by CMS, the Board found that CMS

had not cited any support for the proposition that the Board is empowered to remove a case from the ALJ for the limited purpose of issuing an interlocutory order and then remanding the case to the ALJ. Applying such an interpretation of section 498.76, the Board found, could lead to frequent interruptions in the proceedings before the ALJ. Rehabilitation & Healthcare Center of Tampa; see also Four States Care Center, Appellate Division Docket No. A-99-66, Ruling on Request for Removal of Hearing to Board (June 7, 1999).

Here, CMS based its interlocutory appeal not on section 498.76, but on regulations applicable to the Inspector General (IG) governing appeals of exclusions and CMPs. These regulations, which CMS did not argue apply to this action, state that there is no right to appeal to the Board any interlocutory ALJ ruling "except on the timeliness of a hearing request." 45 C.F.R. § 1005.21(d). CMS argued that this rule should apply by analogy, because IG and CMS cases are heard by the same ALJs and are subject to review by the Board. However, CMS cited no authority for the notion that the coincidence of adjudicators authorizes the Board to apply a provision that is included in the IG regulations but is notably absent from the hearing regulations that CMS published at Part 498.

Moreover, CMS failed to show that the IG provision at section 1005.21(d) would permit this interlocutory appeal if it applied to this case. By its terms, section 1005.21(d) permits interlocutory appeals only of ALJ rulings on the timeliness of a hearing request. Although the ALJ found that Petitioner timely appealed CMS's September 4, 2001 notice of the end of noncompliance, timeliness was not the issue in that portion of his ruling, and not the basis of CMS's interlocutory appeal. There is no question, and CMS does not dispute, that Petitioner's October 22, 2001 appeal was filed within 60 days after the September 4, 2001 notice, the applicable time period for appealing reviewable determinations by CMS. 42 C.F.R. § 498.40. Instead, CMS argues that the September 4, 2001 notice was not a determination that Petitioner had a right to appeal. CMS argues that the only determination it issued that Petitioner had a right to appeal was CMS's June 15, 2001 notice of noncompliance and the imposition of remedies. However, the ALJ found that Petitioner's October 22, 2001 request for review was indeed untimely to appeal that determination, granted CMS's motion to dismiss that portion of the appeal, and limited Petitioner's appeal of CMS's September 4, 2001 determination to the sole issue of when Petitioner had come back into substantial compliance. Timeliness is thus not an issue in CMS's interlocutory appeal, and CMS has shown no basis to apply section 1005.21(d) to this case.

CMS has not demonstrated any error in the ALJ order.

CMS attempted to distinguish this interlocutory appeal from those that the Board denied in Four States and Rehabilitation & Healthcare Center of Tampa, arguing that in those cases the Board deferred in some degree to the ALJ's exercise of discretion in issuing his order. CMS argued that the ALJ's ruling here involved a legal question not committed to his discretion, and was erroneous. We note that in Four States, where CMS argued that the ALJ's interlocutory order was contrary to regulations requiring him to dismiss the hearing request, the Board considered CMS's argument and concluded that the ALJ was indeed vested with discretion, which he properly exercised in issuing his order. Accordingly, we examine CMS's arguments concerning an ALJ's discretion in ruling on motions to dismiss, and reach similar conclusions here.

CMS argued that, in contrast to those two cases, the ALJ here was not required to and did not "exercise discretion to waive an untimely hearing request for 'good cause,' pursuant to 42 C.F.R. § 498.40(c)." CMS Request for Review at 13. Section 498.40(c)(2) authorizes an ALJ to determine whether a petitioner has shown good cause to extend the 60-day time limit for filing a hearing request. CMS thus reads Four States and Rehabilitation & Healthcare Center of Tampa as recognizing ALJ discretion only with respect to ruling on the timeliness of a hearing request.

However, in those rulings, the Board found that ALJ discretion in ruling on motions to dismiss also springs from Part 498 provisions stating that the ALJ "may dismiss" a hearing request under several circumstances, including when the party requesting a hearing is not a proper party or does not otherwise have a right to a hearing. 42 C.F.R. § 498.70. The Board found that the use of the word "may" in the dismissal regulations means that the ALJ has discretion to determine whether a particular request for hearing shall be dismissed, based on the circumstances in that case. Four States; Rehabilitation & Healthcare Center of Tampa; see Alden-Princeton Rehabilitation and Health Care Center, Inc., DAB No. 1709 (1999).

Any dispute over the degree of discretion afforded ALJs in ruling on motions to dismiss will not prejudice CMS, as it is not likely that CMS would prevail if we granted CMS's interlocutory appeal and reviewed the ALJ's ruling. As noted above, the ALJ's ruling was based on Mimiya Hospital, DAB No. 1833 (2002), where the Board held that the petitioner, a nursing facility, had a right to appeal CMS's determination as to the date that the facility attained substantial compliance, and the resulting determination of the number of days to which a CMP for each day of noncompliance would be applied. As here, that case involved an initial CMS determination, not timely appealed, of the facility's

noncompliance and the remedy to be imposed, the size of which would ultimately depend on the length of the period of noncompliance. Also as here, CMS issued a second, later determination of the date that the facility again achieved substantial compliance and thus the specific time period to which the penalty would apply. The Board sustained the ALJ's dismissal of the petitioner's untimely appeal of the first notice, but also found that the second notice was a determination that Petitioner could appeal and that the request for hearing had been timely with respect to that second notice. The Board observed that the initial determination notice did not inform the facility of the duration of its noncompliance or the total amount of the CMP. Lacking that knowledge, which CMS did not provide until the second notice, "Mimiya was not in a position to make a reasonable judgment as to whether the cost of appealing the CMP was worthwhile." Mimiya Hospital, at 7.

CMS attempts to distinguish Mimiya on the grounds the regulations permit a facility to reduce a CMP (but not a DPNA) by 35 percent by waiving its right to request a hearing. 42 C.F.R. § 488.436(b). According to CMS, the possibility of losing the 35 percent reduction was the "cost" of appealing the CMP that the facility was entitled to consider in deciding whether an appeal was worthwhile, and thus the basis for permitting Petitioner to appeal the second notice announcing the date that it attained substantial compliance. This reading of Mimiya is strained. Nowhere did the Board state that the "cost" of filing an appeal was the loss of the opportunity to receive the 35 percent CMP, or that such "cost" was the sole basis for finding a right to appeal CMS's determination of the date that substantial compliance was re-attained. Rather, the Board found that CMS's second notice was an "initial determination" appealable under the regulations, in that case an initial determination that Mimiya had failed to achieve substantial compliance until the date that CMS announced in that notice. The Board addressed the opportunity for a 35 percent CMP reduction only in the context of rejecting Petitioner's argument that CMS's first notice was void for failing to inform it of that opportunity. Because the Board in Mimiya did not describe the "cost" of an appeal, it is not reasonable to conclude that the only cost of an appeal is the loss of the 35 percent CMP reduction. Other obvious costs could include the actual, out-of-pocket expenses that mounting an appeal entails, such as the attorney's fees for presenting witnesses and argument at an in-person evidentiary hearing over several days, with transcripts, briefing, and other attendant activities. As in Mimiya, the facility's decision of whether to incur such presumably sizable costs would certainly be influenced by the amount of the penalty it faces, information it would not have until receiving CMS's notice of the date that CMS determined that the facility had achieved substantial compliance. The Board's reasoning in Mimiya thus applies here with equal force,

and CMS has failed to demonstrate any error in the ALJ's ruling sufficient to warrant the unusual step of granting interlocutory relief or otherwise removing this case to the Board.

/s/
Judith A. Ballard

/s/
Donald F. Garrett

/s/
Marc R. Hillson
Presiding Board Member

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Departmental Appeals Board
Room 637-D, HHH Building
200 Independence Avenue, SW
Washington, D.C. 20201

BY FAX AND MAIL -- RETURN RECEIPT REQUESTED

[redacted]

AUG 16 1999

and

[redacted]

Re: Rehabilitation & Healthcare Center of Tampa
Civil Remedies Docket No. C-99-294
Appellate Division Docket No. A-99-95

RULING ON REQUEST FOR REMOVAL OF HEARING TO BOARD

The Health Care Financing Administration (HCFA) filed a request that the Departmental Appeals Board (Board) remove from Administrative Law Judge Steven Kessel (the ALJ) a hearing assigned to him in the matter of Rehabilitation & Healthcare Center of Tampa (the provider), Docket No. C-99-294. HCFA contended that the Board has the authority to remove a case from an ALJ pursuant to 42 C.F.R. § 498.76, and that removal was appropriate because the ALJ abused his discretion by setting forth standards that he may apply in future cases when HCFA moves to dismiss hearing requests for failure to comply with 42 C.F.R. § 498.40(b), which specifies the contents of hearing requests.

HCFA sought review of language in the ALJ's ruling stating that, in the future, he will not hear a motion to dismiss an allegedly insufficient hearing request unless HCFA first attempts to resolve informally its concerns about the adequacy of the request,

and that he will dismiss a request for inadequacy only where the request was not made in good faith and the party requesting the hearing is unwilling or unable to conform its request to the requirements of the regulations. HCFA argued that this aspect of the ALJ ruling imposes unlawful burdens upon HCFA and may subject HCFA to sanctions in future cases in which it seeks dismissal. HCFA requested that the case be removed for the limited purpose of a ruling "on the validity of these new standards," and remanded to the ALJ "for a determination in accordance with the law." HCFA Request for Removal, at 8.

In a recent ruling on another HCFA request for Board removal following the ALJ's denial of HCFA's motion to dismiss a hearing request, the Board concluded that an ALJ has discretion under 42 C.F.R. § 498.70 to determine whether to dismiss a particular request for hearing, based on the circumstances of the case. Four States Care Center, Docket No. C-98-344, Ruling on Request for Removal of Hearing to Board.

We have reviewed the request for removal and find no allegation that the ALJ did not properly exercise his discretion in declining to dismiss the provider's request for a hearing in this case. HCFA did not show that the ALJ's denial of HCFA's motion to dismiss was based either on an erroneous legal standard or an abuse of discretion.

HCFA sought removal of the case based solely on the ALJ's discussion of actions he may take in future cases when presented with motions to dismiss hearing requests, rather than on any action taken in this case. These premises are insufficient to support the Board's removal of this particular request for a hearing. The ALJ here did not refuse to hear HCFA's motion for dismissal and did not require HCFA to show that the hearing request was not made in good faith. The Board will not interfere with an ALJ's prerogative to state his preferences about HCFA's future procedural practices. HCFA did not demonstrate an abuse of discretion in this case; indeed, the ALJ's explanation for his refusal to dismiss is reasonable.

Moreover, HCFA failed to demonstrate that the Board is authorized to grant the requested relief. The regulation authorizing Board removal of ALJ hearings to the Board provides that upon removal, the Board is to conduct the hearing in accordance with the rules that apply to ALJ hearings under this subpart. 42 C.F.R. § 498.76(c). HCFA did not cite any support for the proposition that the Board is empowered to remove a case from the ALJ for the limited purpose of issuing an interlocutory order and then remand the case to the ALJ. Applying HCFA's interpretation of § 498.76(c) could lead to frequent interruptions in the proceedings before the ALJ. Thus, the Board will not assume that it has authority to do what HCFA requested in the absence of express provision therefor.

In a submission filed in response to HCFA's request for removal, the provider has asked the Board for an award of attorney's fees it incurred in responding to the request for removal. Even assuming *arguendo* that the Board has authority to award such fees, no such award is appropriate here since no brief was required of or requested from the provider. If HCFA should file any further motions which the

provider considers frivolous and unfounded (the grounds asserted by the provider as supporting its request for fees), the provider may contact the Board to determine if a response is required.

/s/
Judith A. Ballard

/s/
Cecilia Sparks Ford

/s/
M. Terry Johnson
Presiding Board Member

cc: Civil Remedies Division