

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Western State Hospital,)	Date: March 1, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-06-645
)	Decision No. CR1570
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION

I consider here whether a hospital has a right to a hearing on the Centers for Medicare & Medicaid Services' (CMS's) determination that it was not in substantial compliance with Medicare conditions of participation where CMS ultimately declines to terminate its Medicare provider agreement. I conclude that the hospital is not entitled to a hearing, and grant CMS's motion to dismiss.

Petitioner, Western State Hospital, was a hospital accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), and, under the Medicare regulations, was deemed to be in compliance with Medicare conditions of participation. 42 C.F.R. § 488.5(a). However, based on the findings of a June 8, 2006 survey conducted by the Kentucky State Survey Agency, CMS determined that the hospital no longer met the requirements for Medicare participation, and that its deficiencies posed "an immediate and serious threat to the health and safety of patients." In a notice letter dated June 21, 2006, CMS advised Petitioner that its Medicare provider agreement would be terminated effective July 1, 2006. CMS Ex. 1, at 1.

Petitioner timely appealed. CMS Exs. 3 and 4.

In the meantime, the hospital apparently made changes that were acceptable to CMS, and, in a letter dated July 7, 2006, CMS informed Petitioner that, based on the Kentucky State Agency's June 30, 2006 revisit survey, it had determined that the hospital was back in compliance with Medicare conditions of participation. CMS Ex. 2.

CMS now asks that I dismiss Petitioner's hearing request, and Petitioner opposes. In addition to its motion to dismiss, CMS files four exhibits (CMS Exs. 1-4).

1. Petitioner is not entitled to a hearing because its Medicare provider agreement was not terminated; hospitals are not entitled to a hearing on CMS's findings of noncompliance.¹

Section 1866(h)(1) of the Social Security Act provides that an institution (such as a hospital) is entitled to an administrative hearing to challenge CMS's determination that it is not a provider of services. By regulation, CMS has established the limits of that hearing right. 42 C.F.R. Part 498. A provider dissatisfied with CMS's "initial determination" is entitled to further review, but administrative actions that are not 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. CMS's determination to terminate a provider agreement is an initial determination reviewable by an administrative hearing. 42 C.F.R. § 498.3(d)(8). But here, CMS opted not to terminate. What remains is its determination that the facility was not in compliance with Medicare conditions of participation. Among the listed administrative actions that are *not* initial determinations is the finding that a JCAHO-accredited hospital "is not in compliance with a condition of participation, and a finding that that hospital is no longer deemed to meet the conditions of participation." 42 C.F.R. § 498.3(d)(9). Thus, the regulations unambiguously preclude me from reviewing the determination of noncompliance.

Petitioner complains that CMS's June 21, 2006 findings were wrong, and argues that CMS effectively – if not literally – imposed a remedy because, to avoid termination, the hospital had to expend large sums of money and the hospital suffered adverse media coverage. Petitioner also complains that dismissal effectively shuts off its appellate review, leaving it no adequate remedy. This may be so, but I am bound by the regulations; the regulations are unequivocal; and these complaints do not create a hearing right.

¹ There being no dispute of fact in this case, I make this one conclusion of law.

An ALJ may dismiss a hearing request where a party has no right to a hearing. 42 C.F.R. § 498.70(b). I therefore grant CMS's motion to dismiss and order this case dismissed.

 /s/

Carolyn Cozad Hughes
Administrative Law Judge