

**Department of Health and Human Services**  
**DEPARTMENTAL APPEALS BOARD**  
**Appellate Division**

Highland Pines Nursing Home, Ltd.  
Docket No. A-11-42  
Petition to Reopen Decision No. 2361  
Ruling No. 2011-4  
February 25, 2011

**RULING ON PETITION TO REOPEN DECISION**

We deny the February 8, 2011 petition of Highland Pines Nursing Home, Ltd. (Highland Pines) asking the Board to reopen and withdraw its January 14, 2011 decision, *Highland Pines Nursing Home, Ltd.*, DAB No. 2361 (2011). In DAB No. 2361, the Board affirmed the decision of Administrative Law Judge Carolyn Cozad Hughes that Highland Pines was not in substantial compliance with three Medicare participation requirements at a level that posed immediate jeopardy to resident health and safety, and that the civil money penalty (CMP) imposed by the Centers for Medicare & Medicaid Services (CMS) was reasonable. *Highland Pines Nursing Home, Ltd.*, DAB CR2204 (2010).

Highland Pines states that on November 23, 2010, it accepted CMS's offer to settle the appeal for payment of 70 percent of the total CMP amount, and that its counsel offered to file a notice of settlement with the Board but inadvertently failed to do so. Highland Pines states that it executed the settlement agreement on January 12, 2011, and that CMS executed it on January 24, 2011, the same date that Highland Pines received a copy of the Board's January 14 decision.

Highland Pines asserts that the parties reached a binding agreement when it accepted CMS's settlement offer on November 23, 2010, that the agreement "resolved all issues in this matter and renders Decision No. 2361 moot" and that "[b]ecause there were no longer any issues in controversy at the time the Board issued Decision No. 2361, the Decision is advisory in nature and should be withdrawn." Petition to Reopen at 2-3.

The regulations governing this appeal provide that our decision "may be reopened, within 60 days from the date of the notice of decision, upon the motion of the ALJ or the Board or upon the petition of either party to the hearing." 42 C.F.R. § 498.100(a). While the applicable regulations do not specify a standard for granting a petition to reopen, the Board has applied the standard in regulations governing the Board's review of other types of disputes, which authorize the Board to reconsider a decision "where a party promptly

alleges a clear error of fact or law[.]” 45 C.F.R. § 16.13; *see, e.g., Beverly Health Care Lumberton*, Ruling No. 2008-5, at 1-2 (May 2, 2008); *Mimiya Hospital*, App. Div. Docket No. A-02-22, Ruling on Petition to Reopen at 2 (Oct. 3, 2002). Reopening a Board decision “is not a routine step” under the Part 498 procedures for Board review of an ALJ decision; “[r]ather, it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong.” *Beverly Health Care Lumberton* at 1-2; *Mimiya Hospital* at 2.

Highland Pines has alleged no error in the Board’s decision. The settlement negotiations related to the parties’ own conduct, not to any error in the Board’s decision. Had Highland Pines moved for a stay of proceedings so that the parties could pursue settlement negotiations, the Board would have considered and might well have granted a stay. However, counsel did not do so, as the petition to reopen notes, and the Board issued its decision. Under 42 C.F.R. § 498.90, that decision became the final, binding decision of the Secretary. The regulations provide no basis for withdrawing a decision once it has been issued, even if the case is later settled. Moreover, Highland Pines admits that the settlement agreement was not fully executed until January 24, 2011, after the date of the Board’s decision. Thus, in addition to providing no basis for reopening the decision under the Board’s governing regulations, Highland Pines has made a factual concession that totally undercuts its mootness argument.

Accordingly, we deny the petition to reopen DAB No. 2361.

\_\_\_\_\_/s/  
Judith A. Ballard

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Sheila Ann Hegy  
Presiding Board Member