Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: July 29, 2009
Florida Health Sciences Center, Inc., d/b/a/ Tampa General Hospital,	
Petitioner,	Civil Remedies Docket No. C-09-56
	App. Div. Docket No. A-09-84
	Decision No. 2263
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DISMISSAL

Florida Health Sciences Center, Inc., d/b/a/ Tampa General Hospital (Tampa General), appeals the March 9, 2009 order of Administrative Law Judge (ALJ) Alfonso J. Montano dismissing Tampa General's request for hearing and the May 15, 2009 ALJ ruling denying Tampa General's request to reconsider and vacate the dismissal. Florida Health Sciences Center, Inc., d/b/a/ Tampa General Hospital, CR Docket No. C-09-56. The ALJ determined that Tampa General had no right to a hearing because the Centers for Medicare & Medicaid Services (CMS) withdrew its proposal to terminate Tampa General's Medicare provider agreement. Since CMS rescinded the proposed remedy, the ALJ determined, there was no "initial determination" over which he had jurisdiction, and Tampa General "no longer [had] any right

to a hearing" under the governing regulations. ALJ March 9, 2009 Order Dismissing Case (ALJ Dismissal), citing 42 C.F.R. §§ 498.3(b), 498.70(b). The ALJ subsequently ruled that Tampa General did not show "good cause" to vacate the dismissal pursuant to 42 C.F.R. § 498.72. ALJ May 15, 2009 Ruling Denying Tampa General's Request to Vacate Dismissal.

For the reasons explained below, we sustain the ALJ Dismissal.

Case Background

On August 14, 2008, the Florida Agency for Health Care Administration (state survey agency) conducted a complaint survey of Tampa General to assess the hospital's compliance with the Medicare conditions of participation. The state survey agency found that Tampa General failed to comply substantially with numerous Medicare conditions of participation and concluded that "the conditions at the hospital posed an immediate and serious threat to the health and safety of patients." CMS Ex. 1.

In an August 19, 2008 letter, CMS notified Tampa General that CMS had determined on the basis of the survey findings of noncompliance with the Medicare conditions of participation set forth in an accompanying statement of deficiencies (SOD) that the hospital "no longer [met] the requirements for participation as a provider of services in the Medicare program." Id. Accordingly, CMS advised Tampa General that CMS would terminate the hospital's Medicare provider agreement effective September 6, 2008 if the immediate jeopardy was not removed by that date.

The state survey agency conducted a revisit survey of Tampa General on September 2-5, 2008. CMS notified Tampa General on September 23, 2008 that, based on the September survey findings, CMS had determined that "the immediate jeopardy situation [had] been resolved" and that the hospital was in full compliance with the Medicare participation requirements. CMS Ex. 2. Accordingly, CMS wrote, "the hospital's 'deemed status' as a facility accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) ha[d] been restored." Id.

On October 16, 2008, Tampa General filed a request for an ALJ hearing to "appeal[] the findings and conclusions set forth" in the SOD that accompanied CMS's August 19, 2008 letter. Tampa General stated that it requested an ALJ hearing "to correct

certain facts alleged and to reverse the determination that conditions at the Hospital posed an immediate and serious threat to the health and safety of Hospital patients, i.e. Immediate Jeopardy." October 16, 2008 Request for Hearing at 1.

On February 4, 2009, CMS moved to dismiss Tampa General's appeal pursuant to 42 C.F.R. § 498.70(b), which states that an ALJ may dismiss a hearing request if the party requesting a hearing has no right to a hearing. CMS asserted that Tampa General had no right to an ALJ hearing because the termination did not take place and CMS had not imposed any other remedy based on the noncompliance findings. Consequently, CMS argued, there was no "initial determination" under 42 C.F.R. § 498.3 subject to review.

Tampa General opposed CMS's motion. Tampa General argued that the SOD had "become a generally accessible public record" that had caused "tangible harm" to the hospital's reputation and financial status. Petitioner's Response to Respondent's Motion to Dismiss at 3-5. If the appeal were dismissed, Tampa General argued, it would be deprived of "the procedural due process rights afforded by the 5th Amendment to the United States Constitution." Id. at 2.

As noted, the ALJ granted CMS's motion to dismiss, and Tampa General timely appealed the ALJ Dismissal to the Board. When Tampa General filed its request for Board review, it simultaneously filed a motion with the ALJ to reconsider and vacate the dismissal. The Board stayed the appeal pending the ALJ's action on Tampa General's post-judgment motion. As further noted, the ALJ denied Tampa General's request to vacate the dismissal. On May 27, 2009, Tampa General notified the Board of the ALJ's post-judgment ruling and requested Board review of the ruling. The parties thereafter briefed the appeal pursuant to the Board's scheduling order.

Standard of Review

We review a disputed conclusion of law to determine whether it is erroneous. Departmental Appeals Board, Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, http://www.hhs.gov/dab/guidelines/prov.html. We review an ALJ's exercise of discretion to dismiss a hearing request, where such dismissal is authorized by law, for abuse of

discretion. See, e.g., High Tech Home Health, Inc., DAB No. 2105, at 7-8 (2007) (and cases cited therein), aff'd, High Tech Home Health, Inc. v. Leavitt, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

Analysis

Section 1866(h)(1) of the Social Security Act (Act)[1] provides that a hospital "dissatisfied with a determination by the Secretary that it is not a provider of services or with a determination [to terminate its Medicare provider agreement] shall be entitled to a hearing . . . ."

Title 42, Part 498 of the Code of Federal Regulations sets forth the scope of, and procedures for, appeals of CMS determinations involving Medicare provider participation. Section 498.3 of the regulations includes a list of administrative actions that are "initial determinations by CMS" subject to review, as well as a list of other types of "administrative actions that are not initial determinations (and therefore not subject to review under [Part 498])." 42 C.F.R. § 498.3(b),(d).

The appealable "initial determinations" include the "termination of a provider agreement in accordance with § 489.53 of this chapter." 42 C.F.R. § 498.3(b)(8). Section 489.53, in turn, sets forth the bases for CMS to terminate a provider agreement, including where CMS has found that the provider failed to comply with the provisions of its Medicare provider agreement or with other requirements of the Medicare statute and regulations. 42 C.F.R. § 489.53(a)(1). In addition, section 498.5(b) states that "[a]ny provider dissatisfied with an initial determination to terminate its provider agreement is entitled to a hearing before an ALJ."

The list of "[a]dministrative actions that are not initial determinations" in section 498.3(d) includes a "finding that a

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[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

hospital accredited by the Joint Commission on Accreditation of Hospitals or the American Osteopathic Association 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); see 42 C.F.R. § 488.7(d).

The plain language of the regulations thus makes clear that a JCAHO-accredited hospital, such as Tampa General, has no right to an ALJ hearing solely to contest findings of noncompliance with the Medicare conditions of participation, such as those set forth in the SOD, when a proposed termination has been rescinded. Accordingly, the ALJ properly dismissed Tampa General's request for hearing appeal pursuant to section 498.70(b) because Tampa General had no right to a hearing.

Tampa General acknowledges that the ALJ Dismissal is consistent with prior Board decisions "holding that a provider cannot appeal survey findings when CMS's enforcement remedies are subsequently withdrawn."[2] P. Br. at 1. Tampa General argues, however, that the prior decisions "were decided without regard to federal and state case law that address" the "procedural due process rights afforded by the 5th Amendment to the United States Constitution" Tampa General Br. at 1, 5. As it argued before the ALJ, Tampa General contends that the SOD "contains factual inaccuracies" and "has become a generally accessible public record that has caused . . . tangible harm to [the] Hospital." Id. at 4.

Even if we accepted Tampa General's contention that the findings in the SOD injured the hospital, we could not provide Tampa General with a right to a hearing where the plain language of the regulations precludes it, Tampa General's constitutional argument notwithstanding. As the Board has previously stated,

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[2] The prior Board decisions include Fountain Lake Health and Rehabilitation, DAB No. 1985 (2005); Lakewood Plaza Nursing Center, DAB No. 1767 (2001); Schowalter Villa, DAB No. 1688 (1999); Raphael Convalscent Hospital, DAB No. 1616 (1997); and Arcadia Acres, DAB No. 1607 (1997). These decisions were based primarily on the language of 42 C.F.R. § 498.3(b)(13) (formerly 42 C.F.R. § 498.3(b)(12)), which is not applicable here, but similarly addressed situations where proposed remedies had been fully rescinded.

it is "well established that administrative forums, such as this Board and the Department's ALJs, do not have the authority to ignore unambiguous statutes or regulations on the basis that they are unconstitutional." Sentinel Medical Laboratories, Inc., DAB No. 1762, at 9 (2001), aff'd sub nom., Teitelbaum v. Health Care Financing Admin., No. 01-70236 (9th Cir. Mar. 15, 2002), reh'g denied, No. 01-70236 (9th Cir. May 22, 2002).

In any event, Tampa General's allegations of harm caused by the noncompliance findings in the SOD are merely speculative, as reflected in the language that Tampa General itself uses in its brief. For example, Tampa General argues that as a result of the publication in local newspapers of allegedly erroneous facts drawn from the SOD, patients "may choose other local facilities . . . for elective services;" "donors . . . may contribute to other organizations rather than [the] Hospital;" Tampa General's "medical staff may admit patients to competing hospitals;" "employees and prospective employees may seek employment elsewhere;" and CMS or the State agency "may use the disputed facts in future actions against [the] Hospital to illustrate a pattern of conduct" warranting future remedies. P. Br. at 4-5 (emphasis added). Likewise, Tampa General's claim that the introduction of the SOD into evidence in certain medical malpractice trials against the hospital "will result in irreparable injury to the Hospital, whether through larger jury verdicts or decreased leverage for [the] Hospital in negotiating settlements" is a matter of conjecture. Id. at 5. Thus, we reject Tampa General's claim that the findings in the SOD have in fact caused the hospital "tangible harm."

Finally, we find the Florida State Court decisions on which Tampa General relies to be inapposite. See P. Br. at 6, citing W. Frank Wells Nursing Home v. State of Florida, Agency for Health Care Admin., 979 So.2d 339 (Fla. 1st DCA 2008); Menorah Manor, Inc. v. Agency for Health Care Admin., 908 So.2d 1100 (Fla. 1st DCA 2005). In the cited cases the District Court of Appeal of Florida stated that, "[u]nder Florida law, a party whose interests are substantially affected by agency action is entitled to a [Florida statute] section 120.57 hearing to resolve disputed issues of fact." 979 So.2d 339. Further, the court held, the preparation of a SOD by the state survey agency is an action that can be reviewed in a state administrative hearing under section 120.57 of the Florida statutes "provided that the petitioner sets forth sufficient allegations to show . . . that, as a result of the Statement of Deficiencies, the

nursing home will suffer an immediate, substantial injury-in-fact and that the substantial injury is of a type or nature that the Legislature intended to protect when providing for section 120.57 hearings." 979 So.2d at 341. Thus, the cited decisions involved neither federal constitutional due process claims nor the right to an ALJ hearing under Title 42, Part 498 of the Code of Federal Regulations. Instead, the decisions address a provider's right to a State administrative hearing under Florida law which is not at issue in this case.

Conclusion

For the reasons stated above, we conclude that the ALJ did not err in concluding that Tampa General had no right to an ALJ hearing. Consequently, we conclude that the ALJ properly dismissed Tampa General's request for hearing under section 498.70(b) of the regulations. We sustain the ALJ Dismissal.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member