

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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|---------------------------------|---|---------------------|
| In the Case of: |) | |
| |) | |
| Family Care Center of Kingston |) | |
| (CCN: 37-5437), |) | Date: June 18, 2007 |
| |) | |
| Petitioner, |) | |
| |) | |
| - v. - |) | Docket No. C-06-611 |
| |) | Decision No. CR1609 |
| Centers for Medicare & Medicaid |) | |
| Services. |) | |

**DECISION DISMISSING
REQUEST FOR HEARING**

In this case, the Centers for Medicare & Medicaid Services (CMS) filed a motion to dismiss the hearing request of Petitioner Family Care Center of Kingston on the grounds that CMS did not impose a remedy, and thus, Petitioner has no right to a hearing. I conclude that Petitioner is not entitled to a hearing in the absence of an extant remedy determination and grant CMS's motion to dismiss pursuant to 42 C.F.R. § 498.70(b).

I. Background

Petitioner, located in Kingston, Oklahoma, is a skilled nursing facility participating in the Medicare and Medicaid programs as a provider of services. On May 17, 2006, the Oklahoma State Department of Health (OSDH) completed a survey of Petitioner and found the Petitioner not in substantial compliance with federal regulations. CMS Ex. 1. By letter dated June 8, 2006, OSDH informed Petitioner that CMS had authorized the denial of payment for all new Medicare and Medicaid admissions to the facility effective August 17, 2006. *Id.* The letter also informed Petitioner that it would have an "opportunity to correct" the identified deficiencies before the final imposition of additional remedies. *Id.* Petitioner was given a deadline of July 1, 2006 to correct the deficiencies. *Id.* A revisit survey, completed on August 7, 2006, found that the facility had achieved substantial compliance as of June 17, 2006. CMS Ex. 2. Thus, Petitioner

achieved substantial compliance before the deadline for the imposition of additional remedies and before the effective date of the mandatory denial of payment of new admissions. Consequently, CMS took no enforcement action against the facility.

On August 8, 2006, Petitioner requested a review by an administrative law judge of the findings. By letter dated September 12, 2006, Counsel for CMS sent a letter to Petitioner's representative advising her that CMS had not taken an enforcement action against the facility as a result of the May 17, 2006 survey and that there were no remaining issues for the appeal. CMS Ex. 2. To date, Petitioner has not withdrawn its appeal or responded to CMS's Motion to Dismiss.

II. Discussion

The hearing rights of a long-term care facility are established by federal regulations at 42 C.F.R. Part 498. A provider dissatisfied with CMS's initial determinations 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 sets forth examples of actions that are not. A finding of noncompliance that results in the imposition of a remedy specified in 42 C.F.R. § 488.406 is an initial determination for which a facility may request an administrative law judge (ALJ) hearing. 42 C.F.R. § 498.3(b)(13). No right to a hearing exists pursuant to 42 C.F.R. § 498.3(b)(13), unless CMS determines to impose – and actually imposes – one of the specified remedies. *Lutheran Home – Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). The remedy, not the citation of a deficiency, triggers the right to a hearing. *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). Where, as in this case, CMS rescinds its remedy determination, Petitioner no longer has a hearing right because the determination that is subject to a hearing no longer exists. *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985 (2005) and cases cited therein.

III. Conclusion

Because CMS has rescinded its remedy determination, Petitioner no longer has a right to an ALJ hearing. 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/

Alfonso J. Montano
Administrative Law Judge