Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Clean Heart Home Health Services, Inc, d/b/a CHHHS, (CCN: 45-7887)	
Petitioner,	Date: October 11, 2007
- v. -	Docket No. C-07-425
Centers for Medicare & Medicaid Services.	Decision No. CR1671

DECISION AND ORDER

This matter is before me on CMS's motion for summary judgment filed August 2, 2007 and its motion to dismiss filed May 24, 2007, and is illuminated by all pleadings filed in this case since my Order of June 11, 2007. On the basis of those filings, and based on the reasons, findings, and conclusions set out below, I AFFIRM the termination of Petitioner, or Clean Heart Home Health Services, Inc., (CHHHS) from participation in the Medicare program as a home health agency.

Those filings all relate to the request for hearing filed by CHHHS on April 30, 2007. Until March 20, 2007 CHHHS was a participant in Medicare's home health agency program, but on March 1, 2007 CMS notified CHHHS that its non-compliance with two conditions of program participation warranted its termination from the Medicare program. The Request for Hearing identified no factual findings or legal conclusions with which CHHHS disagreed, set out no particular basis for its appeal, and merely promised that, "[d]ocumentations identifying issues, facts and findings relevant to a fair and just adjudication of the requested hearing will be submitted under separate cover." No such separately-submitted documents appear in this record.

My Order of June 11, 2007 noted that Petitioner's request for hearing was defective and allowed Petitioner an opportunity to amend its request for hearing so as to make it compliant with the content requirements of 42 C.F.R. § 498.40(b). That Order was the result of the position CMS marked out in its May 24, 2007 motion to dismiss, and was guided by the principle that petitioners should be given a reasonable opportunity to preserve their appeals by correcting defectively-pleaded requests for hearings. *High Tech Home Health, Inc.*, DAB No. 2105 (2007); *The Carlton at the Lake*, DAB No. 1829 (2002); *Alden Nursing Center - Morrow*, DAB No. 1825 (2002). This forum does not lightly conclude that a petitioner has failed in a good-faith effort to perfect its appeal and take advantage of its right to a hearing, and expects its administrative law judges (ALJs) to extend reasonable latitude to a petitioner who seeks a hearing but has faltered "on minor procedural grounds, in a way that somehow caught the (p)etitioner unaware." *High Tech Home Health, Inc.*, DAB No. 2105, at 14. Accordingly, my Order of June 11, 2007 directed CHHHS's attention to the language of 42 C.F.R. § 498.40(b) and pointed out the specific items it must include in an amended pleading.

CHHHS filed its amended request for hearing on June 29, 2007. At page four of the amended request for hearing, and in explicit reference to 42 C.F.R. § 484.55 (G-330), appears the unequivocal concession that, "CHHHS does not object to the fact that some conditions under this referenced Regulation were violated and were brought to the attention of CHHHS during the . . . survey." CMS responded on August 2, 2007 with a motion for summary judgment, in which CMS asserted that Petitioner's amended request for hearing conceded its violation of the condition-level standard of Medicare program participation set out at 42 C.F.R. § 484.55 (G-330). CMS acknowledged that the amended request for hearing challenged Petitioner's citation for non-compliance with the condition-level standard set out at 42 C.F.R. § 484.36 (G-202), but argued in its motion that the amended request for hearing raised no material issues of fact as to Petitioner's citation for non-compliance with 42 C.F.R. § 484.55 (G-330).

It is CMS's present position that the unappealed deficiency cited pursuant to 42 C.F.R. § 484.55 (G-330) has become final through Petitioner's concession, and that it is fully adequate without more to support Petitioner's termination as a Medicare program provider. 42 C.F.R. § 488.28(a). Put in a slightly different way, CMS asserts that there is presently no disputed issue of fact relative to the unappealed and final 42 C.F.R. § 484.55 (G-330) citation; that the fact of its finality is sufficient in itself pursuant to 42 C.F.R. § 488.28(a) to support the termination of Petitioner's participation in the Medicare program; and that it is as a matter of law entitled to summary judgment affirming that termination.

Petitioner filed its "Opposition to Respondent's Motion for Summary Judgment" on August 27, 2007. The "opposition" it sets out is unclear at best. It does not adequately reply to CMS's motion for summary judgment in general, and it fails completely to take advantage of its opportunity to challenge the 42 C.F.R. § 484.55 (G-330) citation. My review of that pleading left me persuaded that it remained defective, and my Order of September 5, 2007 again extended Petitioner an opportunity to correct the defect. Petitioner's "Addendum on Opposition to Respondent's Motion for Summary Judgment" was filed on September 14, 2007, and CMS filed its response on September 19, 2007. Disregarding the final paragraph of the September 5, 2007 Order, Petitioner, on September 21, 2007 filed its "Supplementary Information to Opposition to Respondent's Motion for Summary Judgment."

Dispositions by summary judgment are authorized in this forum, and this forum looks to FED. R. CIV. P. 56 for guidance in addressing motions for summary judgment. Summary judgment may be entered when the record shows that there is no genuine dispute as to any material fact, and that the moving party is entitled to judgment as a matter of law. *White Lake Family Medicine, P.C.*, DAB No. 1951 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). The party moving for summary judgment bears the initial burden of showing the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden may be discharged by showing that there is no or insufficient evidence proffered to support a judgment for the non-moving party. *Id*. at 325.

On the basis of its motion for summary judgment and all of the other pleadings filed thus far, CMS has made a *prima facie* showing that there are no material facts in dispute as to Petitioner's non-compliance with 42 C.F.R. § 484.55 (G-330), that Petitioner's citation for non-compliance with 42 C.F.R. § 484.55 (G-330) has now become final, and that Petitioner's termination is therefore justified as a matter of law.

To defeat an adequately-supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings, but must furnish evidence of a genuine dispute concerning a material fact — a fact that, if proven, would affect the outcome of this case under the governing law of this forum. Petitioner's amended request for hearing does not reflect that it contests its citation for non-compliance with 42 C.F.R. § 484.55 (G-330), and neither does its August 27, 2007 "Opposition" nor its September 14, 2007 "Addendum" go beyond oblique suggestions of near-compliance with the cited

regulation. Each fails completely to furnish evidence of a dispute concerning a material fact in connection with 42 C.F.R. § 484.55 (G-330), and read together they accomplish nothing more. Petitioner's unauthorized September 21, 2007 filing entitled "Supplementary Information" adds nothing.

Thus, at this point, Petitioner's termination for noncompliance with 42 C.F.R. § 484.55 (G-330) is subject to summary affirmation. My September 5, 2007 Order told Petitioner, in language as plain as the adversary process will permit, that if it intended to resist CMS's motion for summary judgment, it must furnish evidence sufficient to raise a genuine issue of fact as to its non-compliance with 42 C.F.R. § 484.55 (G-330) on February 1, 2007, the date of the survey in question. It was advised to be guided in its efforts by FED. R. CIV. P. 56.

In the face of these plain admonitions, Petitioner has failed to bring the issue of its non-compliance with 42 C.F.R. § 484.55 (G-330) on February 1, 2007 into genuine question before me. CMS argues that the citation has become administratively final by operation of Petitioner's failure to appeal it timely, a result Petitioner might have avoided by properly pleading its amended request for hearing, or even more lately by correcting the defects in the amended request for hearing by adequate pleading in its "Opposition" or its "Addendum." But the record before me now is clear: Petitioner simply does not now assert a material basis for contesting its citation for non-compliance with 42 C.F.R. § 484.55 (G-330). In point of fact, it has never colorably asserted that it was in substantial compliance with that regulation on February 1, 2007. CMS is entitled to summary judgment because the predicate for its termination of CHHHS, the citation for non-compliance with 42 C.F.R. § 484.55 (G-330), is not before me in this appeal.

Once that result has been explained, there is little left to debate. The regulation is clear that even a single uncorrected condition-level deficiency will support the stern remedy of termination of a facility's participation in the Medicare program as an home health agency. 42 C.F.R. § 488.28(a). Non-compliance with 42 C.F.R. § 484.55 (G-330) is a condition-level deficiency, and CHHHS was non-compliant with that regulation on February 1, 2007. CMS's action in terminating CHHHS was authorized, and even if CHHHS were to prevail here in its challenge to the citation based on 42 C.F.R. § 484.36 (G-202), its termination from the Medicare program would not be reversed or invalidated. In general, this forum recognizes that in those circumstances, an ALJ need not adjudicate challenges that, even if successful, could not affect the imposition of sanctions. *Comprehensive Professional Home Visits*, DAB No. 1934 (2004); *Ross Healthcare Center*, DAB No. 1896 (2003); *Bethel Health Care Center*, DAB CR1067 (2003); *EagleCare, Inc., d/b/a Beech Grove Meadows*, DAB CR923 (2002); *Orchard Grove Extended Care Center*, DAB CR541 (1998).

For the reasons set forth above, I find and conclude as follows:

1. Petitioner failed to comply substantially with the condition of participation in the Medicare program as a home health agency as set out at 42 C.F.R. § 484.55 (G-330) when surveyed on February 1, 2007.

2. CMS was authorized to terminate Petitioner's participation in the Medicare program effective March 20, 2007.

ACCORDINGLY, this Decision granting judgment in favor of CMS, in conformity with the reasons, findings, and conclusions set out above, is entered herewith. The termination of Petitioner from participation in the Medicare program as a home health agency must be, and it is, in all respects AFFIRMED.

/s/
Richard J. Smith
Administrative Law Judge