

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Colonial Oaks Guest Care Center,)	Date: June 29, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-172
)	Decision No. CR1618
Centers for Medicare & Medicaid)	
Services.)	

DECISION

I consider once more whether a long-term care facility has a right to a hearing when the Centers for Medicare & Medicaid Services (CMS) withdraws the enforcement remedies provided for in 42 C.F.R. § 488.406. I conclude that the facility is not entitled to a hearing and grant CMS's motion to dismiss.

Petitioner has no right to a hearing if CMS has not imposed a remedy.¹

Petitioner, Colonial Oaks Guest Care Center, is a skilled nursing facility located in Bossier City, Louisiana, that is certified to participate in the Medicare and Medicaid programs as a provider of services. In a letter dated December 21, 2006, Petitioner asked to appeal deficiencies cited during a September 21, 2006 survey conducted by the Louisiana Department of Health and Hospitals (State Agency). Petitioner acknowledges that CMS has withdrawn all remedies initially proposed, and recognizes that, by a long line of cases, the Departmental Appeals Board has ruled that, once CMS rescinds those remedies, Petitioner no longer has a hearing right.

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

Petitioner asks that I reconsider this position. Citing the Board's decision in *Desert Knolls Convalescent Hospital*, DAB No. 1769 (2001), Petitioner points out that facilities are entitled to review where agency findings of substandard quality of care result in the loss of approval to provide nurse aide training. Petitioner suffered no such loss, but argues that it has been comparably damaged by the secondary consequences of the survey findings: prejudicing its ability to defend itself in potential civil litigation; increasing its liability insurance rates; and compromising its ability to market its services.

I do not doubt that, even where CMS declines to impose a penalty, findings of substantial noncompliance may damage a facility in collateral ways. However, this does not create jurisdiction for me to review those findings. 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 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. 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). Unless the finding of noncompliance results in the imposition of a specified remedy, however, the finding is not an initial determination. 42 C.F.R. § 498.3(d)(10)(ii). Where, as here, CMS does not impose a remedy, Petitioner has no hearing right because no determination that is subject to a hearing exists. *See, Lakewood Plaza Nursing Center*, DAB No. 1767 (2001); *Schowalter Villa*, DAB No. 1688 (1999).

In *Desert Knolls*, the Board found a right to hearing not because the penalty imposed was so onerous, but because the regulations include among the list of appealable initial determinations the finding of substandard quality of care that results in the loss of approval for nurse aide training programs. DAB No. 1769, at 2; 42 C.F.R. § 498.3(b)(15); *see also* 64 Fed. Reg. 39,934, 39,937 (July 23, 1999).

CMS has imposed no remedy; consequently, Petitioner has no 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/

Carolyn Cozad Hughes
Administrative Law Judge