Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Chateau Nursing and Rehabilitation Center
Docket No. A-11-104
Decision No. 2427
December 8, 2011

REMAND OFADMINISTRATIVE LAW JUDGE ORDER DISMISSING HEARING REQUEST

Chateau Nursing and Rehabilitation Center ("Chateau" or "Petitioner") appeals the May 11, 2011 Order of Administrative Law Judge (ALJ) Richard J. Smith dismissing Chateau's request for hearing (May 11 Order) and his June 8, 2011 Ruling denying Chateau's motion to vacate the dismissal (June 8 Ruling). The ALJ dismissed Chateau's hearing request because he found it had abandoned its appeal within the specific terms of 42 C.F.R. § 498.69(b) by failing to submit a notice of appearance for its new counsel by April 29, 2011, as required by the ALJ's order dated April 15, 2011 (April 15 Order). The ALJ alternatively dismissed Chateau's hearing request pursuant to section 1128A(c)(4)(E) of the Social Security Act (Act),[1] 42 U.S.C. §1320a-7a(c)(4)(E), based on his conclusions that Chateau's failure to comply with the April 15 Order constituted a substantial and material interference with the speedy, orderly, and fair progress of the appeal *and* that the dismissal was reasonably related to the severity of that interference. In his June 8 Ruling, the ALJ denied Chateau's motion to vacate the dismissal because he concluded that Chateau did not show "good cause" pursuant to 42 C.F.R. § 498.72.

As discussed below, we conclude that the ALJ lacked authority to dismiss Chateau's hearing request pursuant to section 489.69(b) because he failed to first issue a "show cause" order as required by the plain language of the regulation. We also conclude that CMS was not prejudiced by any delay that may have resulted from the failure of Chateau's attorney to file a notice of appearance by April 29 and that the dismissal sanction pursuant to section 1128A(c)(4)(E) of the Act does not reasonably relate to the severity of that failure. Because the ALJ's dismissal of Chateau's hearing request was not authorized under the applicable legal standards, we vacate the May 11 Order and remand the case to the ALJ to conduct further proceedings consistent with this decision.

[1] The current version of the Act can be found at http://www.ssa.gov/OP Home/ssact/ssact.htm.

Applicable Legal Authority

Section 498.69 of the regulations governing the conduct of ALJ hearings provides that the ALJ may dismiss a hearing request under the following circumstances:

> **Dismissal for abandonment.**
>
> (a) The ALJ may dismiss a request for hearing if it is abandoned by the party that requested it.
> (b) The ALJ may consider a request for hearing to be abandoned if the party or its representative –
> (1) Fails to appear at the prehearing conference or hearing without having previously shown good cause for not appearing; and
> (2) Fails to respond, within 10 days after the ALJ sends a "show cause" notice, with a showing of good cause.

Section 498.72 further provides: "An ALJ may vacate any dismissal of a request for hearing if a party files a request to that effect within 60 days from receipt of the notice of dismissal and shows good cause for vacating the dismissal."

Section 1128A(c)(4) of the Act, made applicable to civil money penalty proceedings involving nursing facilities by section 1819(h)(2)(B)(ii) of the Act, provides:

> The official conducting a hearing under this section may sanction a person, including any party or attorney, for failing to comply with an order or procedure, failing to defend an action, or other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. Such sanction shall reasonably relate to the severity and nature of the failure or misconduct.

Section 1128A(c)(4) of the Act further provides that such sanctions may include prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense, striking pleadings (in whole or in part), staying the proceedings, dismissal of the action, entering a default judgment, ordering the party or attorney to pay attorney's fees and other costs caused by the failure or misconduct, and refusing to consider any motion or other action which is not filed in a timely manner.

Procedural and Case Background

Chateau filed a timely hearing request disputing CMS's finding of a violation of 42 C.F.R. § 483.65 (Infection Control, Prevent Spread, Linens) based on a survey conducted by the Illinois Department of Public Health (IDPH). CMS imposed a per-instance civil money penalty (CMP) of $5,000 for the alleged violation. On February 18, 2011, the ALJ issued an Acknowledgment and Initial Docketing Order that required the parties to confer and file within 30 days either potentially case dispositive motion(s) or report(s) of readiness for hearing. The parties, by their counsel, filed a Joint Report of Readiness for Hearing on March 21, 2011. The ALJ issued an Order on March 28, 2011 establishing the schedule for the development of the case for hearing, which required the parties to exchange exhibit and witness lists with each other by April 29, 2011, as well as additional scheduling deadlines for the case.

On April 13, 2011, Chateau's then counsel of record, an employee of Extended Care, LLC (Extended Care), filed a motion to withdraw as Chateau's attorney, requesting that "all actions pertaining to this matter be stayed pending the new attorney taking over my position," and thus implying that she was leaving her position as Chateau's corporate counsel.[2] May 11 Order at 2. On or about April 14, 2011, Chateau's counsel apparently terminated her employment with Extended Care, though the record indicates that neither she nor anyone else from Chateau informed the ALJ or CMS of this development. *See* Chateau's Motion to Vacate Dismissal at 1; May 11 Order at 2.

On April 15, 2011, the ALJ entered an order addressed to counsel of record granting Chateau's motion generally, permitting Chateau's attorney to withdraw, but effective only upon the filing of an appearance by the attorney or other person succeeding her in the representation of Chateau. April 15 Order at 1. The April 15 Order also extended other filing deadlines in the case by 30 days, most notably establishing new deadlines of May 27, 2011 (to exchange proposed exhibits, a witness list, etc.) and June 29, 2011 (to file final exhibit lists, final witness lists, written direct statements of witnesses, and requests for the issuance of subpoenas). *Id.* at 2. In addition, the April 15 Order imposed an April 29, 2011 deadline for the attorney/person succeeding Chateau's original counsel to file a notice of appearance. *Id.* at 1. The April 15 Order further stated: "Should such an appearance not be timely made, I will regard this appeal as abandoned and will dismiss it without further notice or additional proceedings pursuant to the terms of 42 C.F.R. 498.69." *Id.* The ALJ noted in his April 15 Order that Chateau's original attorney remained counsel of record until such notice was filed. *Id.* Finally, the ALJ specifically

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[2] Extended Care's website describes it as a "consulting company serving the long term care community" and indicates that it employs nurses and other clinical professionals. *See* http://extendedcarellc.com. Thus, it appears that Extended Care functioned as Chateau's agent by providing legal counsel in this matter. *See* CMS's Response Br. at 4 n.1.

directed Chateau's original attorney to deliver a copy of his April 15 Order to the person(s) in Chateau's administration responsible for obtaining an attorney or other person to succeed her in representing Chateau in this case. *Id.* at 2.

It is undisputed that Chateau failed to file a notice of appearance for its new attorney or representative by April 29, 2011 as required by the April 15 Order.

On May 9, 2011, CMS's counsel sent the ALJ's staff attorney an e-mail indicating that, as of that date, she had not received a notice of appearance from Chateau's new counsel. June 8 Ruling at 2-3. However, CMS did not object to the tardiness of Chateau's submission. The record indicates that the ALJ's staff attorney informed CMS's counsel, *but not Chateau's counsel of record*, via e-mail that if the ALJ did not receive a notice of appearance from Chateau by May 11, 2011, the case would be dismissed for abandonment. *Id.* at 3.

The ALJ did not receive a notice of appearance from Chateau's new counsel by May 11. Thus, on that date, the ALJ *sua sponte* issued an order dismissing Chateau's hearing request, finding that Chateau had abandoned its appeal pursuant to section 498.69(b). May 11 Order at 2. The ALJ based his May 11 Order on the following relevant facts:

> 4. The attorney or person succeeding [Chateau's original attorney of record] was required to file an entry of appearance not later than April 29, 2011. . . .
>
> 5. My Order of April 15, 2011 made it clear that if the entry of appearance by new counsel for Petitioner were not timely made, I would regard this appeal as abandoned and would dismiss it without further notice or additional proceedings pursuant to the terms of 42 C.F.R. 498.69.
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> 6. Although more than 10 days have elapsed since April 29, 2011, no entry of appearance by new counsel for Petitioner has been filed, and no other communication from [the attorney of record] has been received. . . .

Id. Without any additional discussion, the ALJ stated that "I further find and conclude that the circumstances set out above represent a substantial and material interference with the speedy, orderly, and fair progress of this appeal toward hearing, and that the sanction authorized by section 1128A(c)(4)(E) of the [Act] relates reasonably to the severity of that interference." *Id.*

On May 9, 2011, Extended Care hired a new attorney as corporate counsel whose duties included representation of Chateau in this matter. *See* Chateau's Motion to Vacate Dismissal, Ex. A at 1. When the new corporate counsel began working for Extended Care, Chateau's original attorney was no longer working at Extended Care. *Id.* Chateau's new corporate counsel at Extended Care had previously been employed at IDPH as an attorney and believed that a conflict of interest precluded her from entering an appearance to represent Chateau in the present case because IDPH had conducted the survey at issue in this action. *Id.* at 2. Chateau's new corporate counsel further asserted that she could not review the entire case file due to the conflict and was unaware of the April 29 deadline because the exit memorandum prepared by Extended Care's original attorney before her departure did not mention either the April 15 Order or the April 29 deadline for Chateau to file a notice of appearance for its new counsel. *Id.* at 3; *see also* Petitioner's Request for Review (RR) at 3 ("Petitioner was not aware of the existence of the April 15, 2011 Order or the terms contained therein. Therefore, neither Chateau, nor the current legal counsel for Chateau, were on notice, prior to its receipt of the May 11, 2011 dismissal order, that new counsel was to file an Appearance by April 29, 2011.").

After Chateau's new corporate counsel received the May 11 Order, she retained independent outside counsel to represent Chateau (its current counsel of record), on May 26, 2011. Chateau Motion to Vacate Dismissal Order at 2; June 8 Ruling at 4. On the same day, May 26, 2011, Chateau's current counsel of record (*i.e.*, the newly retained outside counsel, not Extended Care's newly hired corporate counsel) filed her notice of appearance, a motion to vacate the May 11 Order dismissing the case, and a motion to obtain a new pre-hearing schedule. *See* June 8 Ruling at 3 n.2. CMS did not file any response opposing either of Chateau's motions.

On June 8, 2011, the ALJ denied Chateau's Motion to Vacate finding that it had not shown good cause to vacate the dismissal because Chateau's failure to timely file the required notice on April 29 was a circumstance within its ability to control.[3] June 8 Ruling at 4. The ALJ alternatively found that Chateau's "neglect" represented a substantial and material interference with the speedy, orderly, and fair progress of the proceedings, and that the dismissal sanction, authorized by section 1128A(c)(4)(E) of the Act, was reasonably related to the severity of that interference. *Id.* at 4-5.

[3] "Good cause" is not defined in the Act or regulations and its meaning has been the subject of dispute in this and other cases. *See The Carlton at the Lake*, DAB No. 1829, at 1 (2002). The ALJ stated in his June 8 Ruling that in similar situations, "good cause" consists of "circumstances that are beyond a party's ability to control." June 8 Ruling at 4.

Standard of Review

We review a disputed conclusion of law to determine whether it is erroneous. *See Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs* at: http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html. We review an ALJ's exercise of his or her discretion to dismiss a hearing request, where such a dismissal has been committed by regulation to the discretion of the ALJ, to determine whether the ALJ abused his or her discretion. *See Florida Health Sciences Center, Inc. d/b/a Tampa General Hospital*, DAB No. 2263, at 3-4 (2009), *citing 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[4]

1. The ALJ's dismissal of Chateau's hearing request for abandonment pursuant to section 498.69(b) was erroneous because he failed to issue a "show cause" order beforehand.

Chateau argues that this matter should not be deemed abandoned and dismissed pursuant to section 498.69(b) because it did not receive, or fail to respond to, a "show cause" order from the ALJ prior the ALJ's May 11 Order dismissing the case. RR at 6. CMS specifically acknowledges that the ALJ's "dismissal based upon a finding of abandonment under [section] 498.69(b) appears to be contrary to the Board's preceden[t] in [*Kermit Healthcare Center*, DAB No. 1819 (2002).]" CMS Response Br. at 7. We agree.

In *Kermit*, the Board found that the plain language of section 498.69(b)(2) requires the ALJ to issue a show cause order before the ALJ may dismiss a hearing request for abandonment under section 489.69(b). *Kermit* at 7; *see also Arkady B. Stern, M.D.*, DAB No. 2417, at 6 (2011), *citing Kermit* at 7; *St. Joseph Villa Nursing Center*, DAB No. 2210, at 8 (2008) (Before a hearing request may be dismissed for abandonment under section 498.69, "the ALJ must first send a 'show cause' notice to the party that gives the party 10 days to respond."). Thus, the Board concluded in *Kermit* that "to the extent that the provision upon which the ALJ based dismissal of Kermit's hearing request was section 498.69(b), failure to issue an order to show cause was an error." *Kermit* at 7.

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[4] Although we do not specifically discuss all of the evidence and arguments presented, we have fully considered all arguments raised on appeal and reviewed the entire record.

It is undisputed here that the ALJ dismissed Chateau's hearing request for abandonment pursuant to section 498.69(b) without first issuing an order requiring Chateau to show cause why it failed to comply with his April 15 Order. As the Board recently stated in *Stern*, "when we apply section 498.69 to the record before us, the ALJ's dismissal here does not meet the requirements for abandonment under that regulation because he did not issue a 'show cause' notice, as required by subsection (b)(2)." *Stern* at 6, *citing Kermit* at 7. Because the ALJ failed to issue the required "show cause" order to Chateau, his dismissal of Chateau's hearing request pursuant to section 498.69(b) was erroneous.

Accordingly, we vacate the May 11 Order to the extent that it was based on section 498.69(b).

2. The ALJ's dismissal of Chateau's hearing request as a sanction pursuant to section 1128A(c)(4)(E) of the Act was erroneous because it was not authorized under the applicable legal standards.

Having found that the ALJ's dismissal of Chateau's hearing request pursuant to section 498.69(b) was erroneous, we next consider whether dismissal was nonetheless appropriate pursuant to section 1128A(c)(4) of the Act. In *Guardian Care Nursing & Rehabilitation Center*, DAB No. 2260, at 21 (2009), the Board stated that it has an "overarching responsibility to ensure the efficiency and integrity of proceedings before the Departmental Appeals Board as a whole, which encompasses a concern that the orders of ALJs not be disregarded by counsel without consequence." In *Guardian*, we upheld the ALJ's authority to impose sanctions under section 1128A(c)(4) but modified the sanction based upon the particular circumstances of that case.

CMS points out that this issue involves a determination of whether Chateau's failure represented a substantial and material interference with the speedy, orderly and fair progress of the proceedings before the ALJ and whether the sanction of dismissal was reasonably related to the severity of Chateau's failure. CMS Response Br. at 1, 7-8. However, CMS does not argue that the Board should affirm the ALJ's use of the dismissal sanction under the statute as legally correct. Instead, CMS states: "*If this Board finds* that Petitioner's failures or omissions or inaction interfered with the speedy, orderly, and fair progress of these proceedings, the Board may sustain the dismissal sanction, or impose a lesser sanction authorized by section 1128A(c)(4), *based on its judgment of the circumstances of this case*." *Id.* at 8 (italics added). Chateau argues that dismissal pursuant to section 1128A(c)(4)(E) is not appropriate because its failure was "purely procedural and inconsequential to the progression of this case, insofar as it would not have caused a delay in the substantive proceedings but for [the ALJ's] erroneous dismissal of the case." RR at 8. Chateau further argues that "[d]ismissal as a sanction does not fit the circumstances of this situation." *Id.* In essence, Chateau argues that its failure was not a "substantial and material interference with the speedy, orderly and fair progress of the proceedings" and also does not "reasonably relate to the severity and

nature of the failure" because the loss of the opportunity to contest the noncompliance finding and CMP is too severe a sanction for missing a deadline involving a purely procedural, non-substantive submission. We agree.

In *Osceola Nursing and Rehabilitation Center*, DAB No. 1708, at 11 (1999), the Board recognized that "dismissal pursuant to section 1128A(c)(4) in a civil money penalty proceeding against a nursing facility results in the loss of an important, statutorily conferred right to an opportunity for a hearing." Accordingly, as the Board did first in *Osceola* and later in *Kermit*, we look for guidance to cases analyzing dismissals pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, which vests district courts with discretion to dismiss an action "[i]f the plaintiff fails to prosecute or to comply with [the Federal Rules] or a court order." In *Osceola*, the Board further stated:

> A review of Rule 41(b) cases demonstrates that, while the appellate courts acknowledge the importance of a district court's ability to manage its own docket, they repeatedly declare that dismissal is a remedy to be used with great caution: "Rule 41(b) dismissals are a 'harsh remedy' that are 'appropriate only in extreme circumstances.'" *Spencer v. Doe*, 139 F.3d 107, 112 (2nd Cir. 1998) (citations omitted); "Dismissal with prejudice is an extreme sanction and should be used only in cases of willful disobedience of a court order or . . . persistent failure to prosecute a complaint." *Rodgers v. University of Missouri*, 135 F.3d 1216, 1219 (8th Cir. 1998); "[D]ismissal with prejudice 'is a harsh sanction' which runs counter to our 'strong policy favoring the disposition of cases on the merits.'" *Benjamin v. Aroostook Medical Center, Inc.*, 57 F.3d 101, 107 (1st Cir. 1995) (citations omitted). Dismissal should be used "as a weapon of last, rather than first, resort." *Meade v.Grubbs*, 841 F.2d 1512, 1520 (10th Cir. 1988).

Osceola at 11-12.

In *Kermit*, we subsequently relied upon a similar analysis set forth in *McNeal v. Papasan*, 842 F.2d 787 (5th Cir. 1988), where the court articulated the following considerations in reviewing a Rule 41(b) dismissal for failure to prosecute:

> We have repeatedly recognized, however, that a dismissal with prejudice for failure to prosecute is an extreme sanction which is to be used only when the "plaintiff's conduct has threatened the integrity of the judicial process [in a way which] leav[es] the court no choice but to deny that plaintiff its benefits." *Rogers v. Kroger Co.*, 669 F.2d 317, 321 (5th Cir. 1982). Therefore, under our abuse of discretion review, we have consistently refused to permit a court

> to impose this sanction unless the history of a particular case discloses both (1) a clear record of delay or contumacious conduct by the plaintiff, and (2) that a lesser sanction would not better serve the best interests of justice. *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1159 (5th Cir. 1985); *Rogers*, 669 F.2d at 321 (collecting cases); *see also Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986) . . . . Moreover, because of our reluctance to visit such a harsh sanction upon a party solely because of the *sins of his counsel*, in close cases we have often looked for proof of one of the following "aggravating factors" – (1) the plaintiff's personal contribution to the delay, (2) the defendant's actual prejudice because of the delay, and (3) delay that can be characterized as intentional. *Sturgeon*, 778 F.2d at 1159; *Rogers*, 669 F.2d at 320.

Kermit at 8-9, *quoting McNeal*, 842 F.2d at 790 (italics added). Viewed in this light, we first observe that CMS concedes that it "cannot claim that it was prejudiced" by the delay in the filing of Chateau's notice of appearance for its new counsel. CMS Response Br. at 8. CMS also did not file a motion to dismiss for abandonment after the April 29 deadline had passed, nor did it object to Chateau's motion to vacate the ALJ's dismissal of its hearing request. Indeed, CMS does not even contend on appeal before us that the ALJ's use of the dismissal sanction pursuant to section 1128A(c)(4)(E) should be affirmed.

There is also no evidence in the record indicating, and the ALJ did not find in his May 11 Order, that Chateau had engaged in a pattern of conduct demonstrating a clear record of delay or other "contumacious conduct." For example, Chateau did not violate any other deadlines or requirements contained in either the ALJ's initial scheduling order or his subsequent April 15 Order. Indeed, Chateau argues that it was aware of the May 27 deadline to disclose exhibits and witnesses and intended to comply with the deadline but for the ALJ's May 11 Order dismissing the case, thereby obviating the need to do so.[5] RR at 2. Chateau also filed its Motion to Vacate Dismissal on May 26, which was only 15 days after the ALJ's dismissal and 45 days *before* the deadline under section 498.72 to file a motion to vacate the dismissal.

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[5] In his June 8 Ruling, the ALJ found that Chateau "admits it received my Orders." June 8 Ruling at 4. Although the ALJ does not cite the basis for this statement, the exit memorandum purportedly drafted by Chateau's original counsel of record contains the May 27 and June 29 deadlines that were set forth in the ALJ's April 15 Order, which indicates that Chateau's original counsel had indeed received that order. However, the ALJ did not rely on this fact in dismissing Chateau's hearing request in his May 11 Order.

In addition, the ALJ did not find that Chateau's failure to meet the April 29 deadline was intentional or otherwise undertaken to purposefully delay the proceedings for a substantial period of time.[6] The May 26 filing by itself indicates that Chateau did not knowingly abandon its appeal. Furthermore, Chateau's failure to meet the requirement of the April 15 Order may not have been entirely its own fault. The record demonstrates that, in response to an e-mail from CMS's counsel on May 9, the ALJ's staff attorney informed CMS via e-mail that the ALJ would dismiss the hearing request on May 11 if he did not receive Chateau's notice of appearance by that date. *See* June 8 Ruling at 4-5; e-mail from ALJ staff attorney to CMS counsel dated May 9, 2011. However, our review of the e-mails indicates that the attorney still of record representing Chateau (*i.e.*, Chateau's original corporate counsel) was not included on the responsive e-mail to CMS and, therefore, was *not notified* about the ALJ's informal determination to extend the deadline until May 11. Although this oversight may not ultimately be determinative, and the counsel of record might not have acted having left Extended Care, Chateau was still deprived of an opportunity to file a notice of appearance within the additional two-day window. We are particularly concerned that the ALJ dismissed Chateau's hearing request without first giving Chateau an opportunity to explain why it failed to comply with his April 15 Order when CMS had been given advance notice of his intent to do so absent receipt of a notice of appearance by May 11.

Finally, in his May 11 Order, the ALJ does not explain how Chateau's failure to file a timely notice of appearance for counsel constitutes a substantial and material interference with the progression of the appeal, especially given that *no substantive deadline would have been missed* had the ALJ not dismissed the case beforehand. Similarly, the ALJ did not explain how dismissal reasonably related to the severity and nature of Chateau's failure to file a notice of appearance by April 29. Moreover, there is no indication in the record that the ALJ considered whether a lesser sanction would better serve the best interests of justice. As we stated in *Kermit*, "[c]onsideration of lesser sanctions mandated by courts in Rule 41 cases is consistent with the statute authorizing ALJ dismissals in civil money penalty cases, which directs consideration of a variety of sanctions, and the selection of one that reasonably relates to the severity and nature of the failure or misconduct." *Kermit* at 9. Here, we are unable to discern any reason why a lesser sanction would not have been more appropriate to ensure the efficiency and integrity for the proceedings and that orders of ALJs are not disregarded without consequence.

In summary, applying the standards set forth in *Oceola* and *Kermit* to the present case addressed above, we decline to affirm the ALJ's dismissal of Chateau's hearing request pursuant to section 1128(c)(4)(E) because the dismissal here is not reasonably related to the severity and nature of Chateau's failure. Although we recognize the importance of ensuring speedy, orderly, and fair proceedings and do not take lightly conduct that

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[6] In his June 8 Ruling, the ALJ found to the contrary that Chateau's failure to meet the April 29 deadline was the result of "neglect" and, therefore, was not intentional or purposeful. June 8 Ruling at 4.

disregards an ALJ's order and unnecessarily delays or complicates adjudicative processes, we can not reasonably find that the conduct of Chateau's counsel has threatened the integrity of the proceedings in a way that left the ALJ "no choice" but to deny Chateau the right to contest the noncompliance finding and CMP that CMS imposed against it. Indeed, as we found in *Kermit*, the loss of the opportunity to contest a remedy, a right conferred by statute, is too severe a sanction where no substantive deadlines had been missed and CMS admittedly was not prejudiced. *Kermit* at 9.

Accordingly, we conclude that the ALJ's dismissal of Chateau's hearing request pursuant to section 1128A(c)(4) of the Act is erroneous because it was not authorized under the applicable legal standards and, therefore, the May 11 Order is vacated. [7]

Conclusion

Based on the analysis above, we vacate the dismissal of Chateau's request for hearing and remand the case to the ALJ for further proceedings consistent with this decision.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member

[7] Because we vacate the ALJ's dismissal of Chateau's hearing request in his May 11 Order, we do not need to address Chateau's alternative argument that the ALJ abused his discretion in denying Chateau's motion to vacate that dismissal in his June 8 Ruling.