Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: August 9, 2007
High Tech Home Health, Inc.,	
Petitioner,	Civil Remedies CR1583 App. Div. Docket No. A-07-98
	Decision No. 2105
- v.-	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

High Tech Home Health Care, Inc. (High Tech, Petitioner), a home health agency, appealed the April 3, 2007 decision and order of Administrative Law Judge (ALJ) Richard J. Smith dismissing this case pursuant to 42 C.F.R §§ 498.69(b)(2) and 498.70(b) (2006). High Tech Home Health, Inc., DAB CR1583 (2007) (ALJ Decision).

The ALJ found, based on Petitioner's request for hearing and its subsequent filings and omissions in the administrative litigation, that Petitioner had failed to contest an "initial determination" within the meaning of 42 C.F.R. § 498.3(b) and had not satisfied the requirements of 42 C.F.R. § 498.40(b)(1) and (b)(2) (governing the content of a request for hearing).[1] On these bases, and after providing Petitioner with multiple opportunities over ten months to remedy key omissions, the ALJ dismissed the request for hearing, determining that High Tech did

[1] We cite to the 2006 Code of Federal Regulations throughout this decision; all the relevant regulations were unchanged during the times at issue here.

not have a right to a hearing (42 C.F.R. § 498.70(b)) and had abandoned its hearing request by failing to respond to a good cause notice with a showing of good cause (42 C.F.R. § 498.69(b)(2)).

For the reasons stated below, we conclude that the ALJ did not err or abuse his discretion in dismissing this case on these grounds. Accordingly, we sustain the ALJ's Decision.

Applicable Legal Authority

At 42 C.F.R. § 498.3, the federal regulations list "initial determinations" by the Centers for Medicare & Medicaid Services (CMS) for which there is a right to an ALJ hearing and to review by the Departmental Appeals Board (Board) under Part 498. Section 498.3 provides, in pertinent part:

> (a) *Scope*. (1) This part sets forth procedures for reviewing initial determinations that CMS makes with respect to the matters specified in paragraph (b) of this section, ...
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> * * * *
>
> (b) *Initial determinations by CMS.* CMS makes initial determinations with respect to the following matters:
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> * * * *
>
> (8) The termination of a provider agreement in accordance with § 489.53. . ..

Section 489.53 defines the circumstances under which CMS may terminate a provider agreement, including an instance in which the provider is not complying with the provisions of title XVIII of the Social Security Act (Act) and the applicable CMS regulations or with the provisions of the agreement.

Section 498.40(b) sets forth the requirements for a hearing request, in relevant part:

> (b) *Content of request for hearing.* The request for hearing must —
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> (1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
>
> (2) Specify the basis for contending that the findings and conclusions are incorrect.

The regulations also enumerate the bases upon which a request for a hearing may be dismissed. Section 498.69 defines the circumstances in which an ALJ may exercise discretion to dismiss a hearing request as abandoned, in these terms:

> (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.

Under the regulations, an ALJ may also dismiss a hearing request "for cause." Section 498.70 (Dismissal for cause), provides in relevant part:

> On his or her own motion, or on the motion of a party to the hearing, the ALJ may dismiss a hearing request either entirely or as to any stated issue, under any of the following circumstances:
> * * * *
> (b) *No right to a hearing.* The party requesting a hearing is not a proper party or does not otherwise have a right to a hearing. . . .

Factual and Procedural Background

Home health agencies such as High Tech Home Health, Inc. are authorized to provide home health services and may be approved to participate in the Medicare program. Sections 1861(m) and (o) of the Act; 42 C.F.R. Part 484; see 42 C.F.R. §§ 484.10 to 484.55 (setting the conditions for program participation). CMS is responsible for evaluating home health agencies for their compliance with the conditions of participation in the Medicare program. 42 C.F.R. § 484.52; see also 42 C.F.R. Part 488 (Survey, Certification, and Enforcement Procedures). The survey process is the recognized means for assessing compliance with federal health, safety, and quality standards. 42 C.F.R. § 488.26. State survey agencies that have entered into agreements with the Secretary of Health and Human Services may conduct the survey process. 42 C.F.R. §§ 488.10 to 488.12.

Pursuant to this authority and prompted by a complaint concerning a patient's death, the Florida Agency for Health Care

Administration (AHCA) conducted a complaint investigation and survey at High Tech on February 27 to March 3, 2006, reporting its results on the CMS survey form. See AHCA Survey on Form CMS-2567 (128 pages), dated Mar. 6, 2006 (Petitioner's Proposed Exhibit P-5 (Pet. Proposed Ex. P-5; AHCA survey)). In its survey, AHCA found that High Tech was not in compliance with three of the conditions for participation in Medicare, that it manifested 16 standard-level deficiencies, and that its noncompliance posed immediate jeopardy to patient health and safety. Id. Based on these findings, CMS notified High Tech on March 9 that its Medicare agreement would be terminated on March 26. See Letter from Sandra M. Pace (CMS) to Mimi Larkin (High Tech), dated March 23, 2006, at ¶ 3 (Pet. Proposed Ex. P-2). High Tech responded with a plan of correction and sent a March 23 letter to AHCA making a "credible allegation of compliance." Pet. Proposed Ex. P-3. In response, AHCA conducted a resurvey on March 24. Finding that High Tech had failed to correct its noncompliance with the conditions of participation and had failed to remove the immediate jeopardy, CMS notified High Tech by letter on April 13 that the March 26 termination would remain in effect. Pet. Proposed Ex. P-5.[2]

On May 4, 2006, High Tech filed its request for a hearing before an ALJ. The first paragraph of High Tech's Request for Hearing referred to the termination of its Medicare provider agreement, alleged that High Tech could show it had corrected the deficiencies identified in the survey, and stated that High Tech had "historical evidence of above average patient care results." Pet. Request for Hearing at 1. The remainder of High Tech's Request for Hearing addressed matters other than the deficiencies identified in the survey and resurvey and High Tech's alleged corrective actions. These other matters in the request included, in the words of High Tech: "(1) the wasting of federal funds by CMS; (2) the destruction of the health care data base in the United States; and (3) the felony murder of Medicare patients in Florida." Id. at 2.

On May 17, 2006, the ALJ issued an order directing the parties, if they believed an evidentiary proceeding would be needed, to submit a Report of Readiness including stipulations, if any; admissions, if any; legal issues and positions; factual disputes,

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[2] Petitioner appears to have assigned Exhibit No. 5 to two documents, the 128-page AHCA survey on Form CMS-2567 and the one page letter of April 13, 2006 again notifying High Tech that its Medicare agreement was being terminated. Where not otherwise noted, our citations to Pet. Proposed Ex. 5 refer to the 2567.

positions, and forms of proof; and informal discovery and witness information, within 60 days.[3] High Tech failed to produce such a report within the required time. Nor did it produce a Report of Readiness at any point later in the litigation.[4]

Instead, High Tech filed a motion for discovery and a motion for a temporary injunction. See Pet. Motion to Revise Order to Allow Discovery, dated July 3, 2006; and Motion for Temporary Injunction, dated Aug. 7, 2006. High Tech sought discovery in two categories: materials that the parties had already been ordered to exchange as part of the Report of Readiness or other prehearing processes (for example, information about witnesses), and detailed information about the Outcome and Assessment Information Set (OASIS), "Medicare billing," and "Medicare home health agency" databases. Pet. Motion to Revise Order to Allow Discovery. High Tech also sought an injunction "order[ing] CMS, and its agent AHCA, to renew HIGH TECH's home health agency license and its Medicare certification." Motion for Temporary Injunction. The ALJ responded promptly to both motions, ruling that much of the discovery sought and the temporary injunction were beyond the scope of the proceeding as defined by the law and regulations. ALJ's Ruling on Pending Motions and Procedures and Schedule for Hearing, dated Aug. 23, 2006. In addition, the ALJ set out a series of steps and deadlines, including detailed prehearing memoranda requirements, for the remaining prehearing process. Id. at 2-7.

On October 30 and November 2, 2006, the parties filed their prehearing exchanges with the ALJ. High Tech's witness list contained only names, lacked sufficient information to identify each witness or that witness' relationship to the case, and omitted summaries of their anticipated testimony. Compare Pet.

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[3] The Order explained that these requirements were "intended to eliminate extraneous issues, delineate the scope of the proceedings, provide a fair opportunity for each party to prepare its position and evidence for presentation, and avoid undue surprises or delays at an in-person hearing." Order at ¶ 4. Broadly speaking, these procedural requirements serve purposes similar to those of Federal Rules of Civil Procedure 16 and 26(a) & (f). See advisory committee's notes (notes) to 1983 and 1993 amendments to Rule 16; notes to 1980 amendment adding subdivision (f) to Rule 26; notes to 1983 and 1993 amendments to Rule 26, subdivisions (a) and (f); and notes to 2000 amendment to 26(a).

[4] CMS filed its Report of Readiness on July 16, 2006.

Witness List, dated Nov. 2, 2006 with DAB CMS Case Procedures (incorporated in the ALJ's Ruling on Pending Motions and Procedures and Schedule for Hearing at ¶ 4).

Prehearing memoranda were due December 4, 2006. CMS filed a detailed submission, in compliance with the ALJ's Ruling. High Tech did not file a prehearing memorandum at all. On December 14, 2006, the ALJ issued an Order to Show Cause, based on High Tech's failure to file a prehearing memorandum, as to why the case should not be dismissed for abandonment. On December 24, 2006, High Tech filed its prehearing memorandum. The memorandum failed to comply with the requirements of the ALJ's ruling to "set forth in detail Petitioner's basis for contending that CMS' determinations of deficiencies were incorrect, as well as Petitioner's defenses, if any." Compare Pet. Prehearing Memorandum with Ruling on Pending Motions and Procedure and Schedule for Hearing at ¶ 4.c. High Tech's submission also failed to "address each deficiency in dispute, and . . . cross-reference the exhibits and witnesses on which Petitioner relies to the specific F-tag citations that Petitioner disputes," and failed to "cross-reference the exhibits and witnesses on which Petitioner relies to support its affirmative defenses, if applicable." Id.

High Tech's December 24, 2006 prehearing memorandum instead identified five counts it sought to litigate in the proceeding: "Wasting of Federal Funds," "Mass Felony Murder," "Breach of Contract," "CMS Improperly Used the Survey Process," and "HIGH TECH Is Not a Threat to Patients." On January 17, 2007, the ALJ issued an Order In Limine stating that the topics described in High Tech's five "counts" were entirely outside the scope of its appeal, and that the only legitimate topics of the appeal were those related to the factual and legal sufficiency of CMS's initial determination to terminate High Tech's Medicare provider agreement. In his order, the ALJ provided the High Tech with ten days to correct the defects in its prehearing memorandum. High Tech did not respond.

On February 12, 2007, the ALJ issued a Notice and Order to Show Cause as to why the case should not be dismissed as abandoned since High Tech had failed to comply with the provisions of 42 C.F.R. Part 498, including 42 C.F.R. § 498.40(b)(1) and (b)(2), and the ALJ's previous orders. High Tech was allowed an additional ten days in which to provide an amended prehearing memorandum, and was put on notice that a failure to comply would result in summary dismissal of its case. High Tech's response on February 20, 2007 did not provide an amended prehearing memorandum, nor did it otherwise provide the prehearing

disclosures the ALJ had sought. Hence, on April 3, 2007, the ALJ dismissed the case pursuant to 42 C.F.R. §§ 498.69(b)(2) and 498.70(b), with a written decision explaining his reasons. This appeal followed.

ALJ Decision

The ALJ's April 3, 2007 decision dismissing High Tech's hearing request and appeal listed numerous opportunities the ALJ had given High Tech to present specific cognizable issues, and to identify findings of fact and conclusions of law in CMS's initial determination of April 13, 2006 with which High Tech disagreed and High Tech's bases for that disagreement. Also, the ALJ had noted in his instructions to High Tech that the issues it had identified, such as "Medicare waste," "data base destruction," and "felony murder of Medicare patients," were outside the scope of the ALJ's review authority. In his findings of fact and conclusions of law, the ALJ determined, inter alia:

- Petitioner does not propose in these proceedings to contest an "initial determination" within the meaning of 42 C.F.R. § 498.3(b), and therefore does not have a right to a hearing within the meaning of 42 C.F.R. § 498.70(b).

- Petitioner has not satisfied the content requirements of 42 C.F.R. §§ 498.40(b)(1) and (b)(2), and has abandoned its appeal within the meaning of 42 C.F.R. § 498.69(b)(2).

- Petitioner's February 20, 2007 Response to Order to Show Cause fails to comply with the Order and Notice to Show Cause of February 12, 2007, and fails to show cause why Petitioner's request for hearing should not be dismissed as abandoned.

ALJ Decision at 9.

Standard of Review

The standard of review for disputed issues of law is whether the ALJ decision is erroneous. 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/guidelines/prov.html; Birchwood Manor Nursing Center, DAB No. 1669, at 2 (1998), aff'd Birchwood Manor Nursing Ctr. v. Dep't of Health & Human Servs., No. 98-60695 (5th Cir. June 29, 1999)(reh'g denied Sept. 8, 1999). The standard of

review for disputed issues of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. See, e.g., Lake Cook Terrace Nursing Center, DAB No. 1745 (2000). The standard of review for an ALJ's exercise of discretion to dismiss a hearing request where such dismissal is committed by regulation to the discretion of the ALJ is whether the discretion has been abused. See Ruling on Request for Removal of Hearing to Board, Four States Care Center, Appellate Division Docket No. A-99-66 (June 7, 1999) (regulation specifying that an ALJ "may" dismiss means ALJ has discretion to determine whether dismissal is appropriate based on the circumstances of the case) attached to Lakewood Plaza Nursing Center, DAB No. 1717 (2001).

Analysis

In its request for review by the Board, High Tech raises the same issues that the ALJ concluded were not properly before him. Request for Appellate Review of Administrative Law Judge Decision and Order Dismissing Case, dated May 16, 2007; Reply to Response for Appellate Review, dated June 26, 2007. For the reasons set forth below, this Board determines that the ALJ correctly ruled that the issues High Tech sought to litigate were not material to the subject matter the ALJ had authority to review, i.e., whether the termination of High Tech's Medicare provider agreement was warranted based on the findings of the AHCA survey and resurvey. See 42 C.F.R. § 498.3(b)(8).

The Board also upholds the ALJ in his determination that High Tech failed to identify issues that were material to the termination of its provider agreement, despite repeated instructions, orders, and warnings to do so. In this regard, the Board further sustains the ALJ in his holding that High Tech's repeated refusals to comply with these orders (including an order to show cause) amounted to an abandonment of its case pursuant to 42 C.F.R. § 498.69(b)(2).

A. High Tech failed to state any material basis for appealing the termination of its Medicare provider agreement.

The regulation at 42 C.F.R. § 498.3(b)(8) provides for review of an initial determination by CMS with respect to the termination of a provider agreement. See also sections 1866(h)(1) and (b)(22) of the Act. In the instant case, CMS terminated High Tech's Medicare provider agreement based on the results of AHCA's surveys ending March 3 and March 24. When High Tech filed its request for hearing on May 4, 2006, the termination of that

provider agreement was the basis for its appeal.[5] No other initial determination was challenged or implicated in this appeal.

To properly place at issue this initial determination, High Tech had to challenge either the legal conclusions supporting CMS's action or a material fact related to the basis for the termination. High Tech did neither, however, despite repeated requests and orders from the ALJ.

None of High Tech's filings with the ALJ during the 11 months the matter was pending before him indicated whether and how High Tech was planning to contest the bases for the specific findings of noncompliance in the survey or resurvey. These findings in the survey, based on ten patients, included, inter alia, High Tech's failure to:

> ensure that patient services were furnished under the supervision of a physician or registered nurse;
>
> ensure that the registered nurse regularly re-evaluates the patients' nursing needs;
>
> ensure that nursing services were effectively coordinated;
>
> ensure that the clinical record or minutes of case meetings establishes that effective interchange, reporting, and coordination of patient care does occur;
>
> establish, follow, and periodically review a thorough written plan of care for each patient, reviewed by a doctor;
>
> ensure that the registered nurse prepares clinical and progress notes, coordinates services, regularly re-evaluates the patient's nursing needs; informs the physician and other personnel of changes in the patient's condition and needs; and
>
> adequately prepare and maintain clinical records.

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[5] The first sentence of High Tech's Request for Hearing states "High Tech Home Health, Inc. . . . requests a hearing before the Departmental Appeals Board regarding the termination of Provider Number 10-7281 agreement with the Secretary of Health and Human Services as a provider of home health services."

Pet. Proposed Ex. P-5, at 1-63, 67-123 (AHCA survey).[6] Each of these deficiency findings was cited in regard to the care of Patient #3 (who died after a week in High Tech's care), as to which CMS found immediate jeopardy. In addition, allegations regarding several other patients in the survey were cited in support of the deficiency findings.

High Tech failed to articulate any dispute of law or fact relating to any of the patients other than Patient #3. High Tech failed to articulate any dispute of law or fact relating to the revisit survey. High Tech failed to articulate any reason that the unchallenged findings would not be a sufficient basis for termination.

In regard to Patient #3, High Tech made some comments before the ALJ about why it should not be held responsible for her death. See Pet. Prehearing Memorandum at 12-14. None of the factual assertions that High Tech makes in this regard, however, even if accepted as true, would undercut the basis for CMS's determination that High Tech's care of Patient #3 was seriously deficient whether or not it led directly to her death. Briefly, it is undisputed that Patient #3 was discharged from the hospital to the care of High Tech on Sunday, August 7, 2005 with doctor's orders for continuing administration of anticoagulants and for daily monitoring of her blood levels by laboratory analysis. Pet. Proposed Ex. P-5, at 6-8. It is further undisputed that Home Tech nurses did not draw blood for monitoring Patient #3 until Tuesday and that that blood sample clotted without being tested. Pet. Prehearing Memorandum at 13. Another draw was not made until Thursday and the laboratory reports indicated that the sample was not received until the following Tuesday (August 16). Id. at 14; Pet. Proposed Ex. P-5, at 7. It is also undisputed that, by Friday, Patient #3 was experiencing discomfort; by Sunday, she was hospitalized; and by Thursday, August 18, 2005, she was dead from anticoagulation toxicity. Pet. Proposed Ex. P-5, at 1, 4.

High Tech claimed that its standard practice was to ask a doctor to change such an blood level monitoring order from daily to three times a week. Pet. Prehearing Memorandum at 12-14. High

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[6] Before the ALJ, High Tech at one point referred to "94 instances of disputed material fact regarding the AHCA findings," of which it says 36 relate to Patient #3. Pet. Response to Motion in Limine at 6. At no time in this proceeding, however, does High Tech identify any of these "94 instances."

Tech suggested to the ALJ that, therefore, the "single point error" that it made was in "failing to get the doctor's order changed," which should be considered "a mistake" and not cited as a condition-level deficiency. Id. at 14.

High Tech cannot plausibly characterize as a simple mistake the cascade of undisputed failures by High Tech to even attempt critical blood work for Patient #3 twice in her week under High Tech's care (instead of daily as her physician ordered) with only one of those samples actually tested and that one belatedly. Its argument that the mistake lay in not getting a doctor to change the orders to suit High Tech's usual practice actually amounts to an admission that its nurses failed to follow doctor's orders. The undisputed events in Patient #3's case make clear, furthermore, that no effective communication occurred among the various nurses visiting Patient #3 nor was her changing situation re-evaluated by High Tech or her needs re-assessed by a physician. We conclude that High Tech's claims regarding Patient #3 do not place into dispute any fact material to the deficiency findings relating to her. Furthermore, High Tech does not offer any comment on the deficiency findings relating to other patients.

In addition, as a result of the March 24th revisit, surveyors concluded that High Tech failed to implement any effective mechanism to address the systemic problems found in the initial survey, that instead "many of the same deficient practices" had recurred, and that the immediate jeopardy conditions had not been abated.[7] Again, High Tech does not identify any material facts in dispute or any disputes of law relevant to the bases for CMS's legal conclusions about this survey. Before the ALJ, High Tech merely complains that the revisit did not address High Tech's plan of correction and that CMS therefore should have the burden of proof regarding the "relevance" of the March 24, 2006 revisit survey. Pet. Response to Motion in Limine at 4. High Tech offered no authority for its apparent proposition that the revisit must look only at the steps planned in a plan of correction rather than reviewing whether the facility has achieved substantial compliance, and we find no such authority.

High Tech also argues that the ALJ should have considered statistical evidence which High Tech claimed would show that it was providing good care generally. High Tech's statistical

[7] The statement of deficiencies from the revisit is not in the record. CMS included it on its exhibit list but those exhibits were not submitted in light of the dismissal.

allegations are irrelevant to an appeal of its termination. High Tech claims, for example, that in a 1996 to 1998 demonstration program High Tech had a lower mortality rate, lower morbidity rate, and a lower per patient cost than other home health care providers nationally and that it has an acute hospitalization rate lower than that of other U.S. home health agencies. Request for Hearing at 1-2; see also Pet. Prehearing Memorandum at 9-12 (same types of statistical claims); Pet. Response to Motion In Limine at 2-4 (same); and Pet. Response to Order to Show Cause at 4-5. Even if true, High Tech's claims of good performance on various measures in 1996-98 is irrelevant to whether its care of patients in 2005-06 violated cited federal participation conditions in the ways set forth in the AHCA survey and resurvey reports. Contrary to High Tech's assertions, AHCA and CMS did not use a statistical survey, or extrapolate from a sample, in finding noncompliance and deficiencies. Rather, the surveyors reviewed a subset of patients and determined that the care of those specific patients demonstrated a failure to comply with Part 484 requirements. Pet. Proposed Ex. P-5; see 42 C.F.R. § 488.26(c)(2) ("The survey process uses *resident outcomes* as the primary means to establish the compliance status of facilities.") (emphasis added).

High Tech's bald characterization of the survey findings as "trivial accusations" (see Request for Appellate Review at 2) does nothing to establish that the findings were factually or legally unsupported. While the seriousness of the deficiencies might be relevant to whether they constituted standard- or condition-level deficiencies, High Tech proffers no basis to contest CMS's and the surveyors' judgment regarding the seriousness of these deficiencies based on the undisputed facts.

Hence, because High Tech has failed to challenge any facts material to CMS's case or to allege the presence of facts showing High Tech was in compliance, it has not placed at issue any appealable initial determination, within the meaning of 42 C.F.R. § 498.3(b)(8). For this reason, and because High Tech ignored repeated opportunities to specify relevant content for its hearing request (pursuant to 42 C.F.R. § 498.40(b)), the ALJ did not err in dismissing High Tech's appeal.

B. The Claims That High Tech Asserts Are Not Matters Appealable Under Section 498.3(b).

In the absence of identifying any cognizable dispute regarding CMS's initial determination, High Tech sought instead to propound a series of claims that this forum has no authority to review. In its appeal to the Board, High Tech repeats many of the same

contentions. See High Tech's Request for Appellate Review, dated May 16, 2006. A brief description of these claims will suffice to show they were well beyond the scope of review in 42 C.F.R. § 498.3(b). High Tech's "Wasting of Federal Funds" count alleges that the Health Care Financing Administration (CMS's predecessor), CMS, and AHCA have "wasted federal funds in violation of the False Claims Act" by failing to expand contracts with High Tech and other allegedly lower cost home health care providers during the past ten years. Pet Prehearing Memorandum at 2-5. Its "Mass Felony Murder" count alleges that because High Tech claims a lower "mortality rate" than the average mortality rates in Florida and the United States, fewer patients would have died had High Tech and other "low utilization" home health agencies similar to High Tech treated more patients. Id. at 5-7. High Tech's "Breach of Contract" count seeks to recover from the Department of Health and Human Services (HHS) payments of $800,000 that High Tech claims it made to settle alleged overpayments dating from 1996 and before, with the amount owed "still in controversy under an outstanding Provider Reimbursement Board (PRRB) appeal." Id. at 8-9. High Tech's fourth count is that "CMS Improperly Used the Survey Process." Here, High Tech seeks to argue that because certain databases contain information about more patients than those reviewed by the AHCA survey on February 27 to March 3, CMS should have used those broader sources instead to evaluate High Tech's compliance with federal standards. In a similar vein, High Tech's fifth count, "HIGH TECH Is Not a Threat to Patients," relies on such data to assert that, despite the findings in the AHCA survey, High Tech can demonstrate high quality patient care and does not place patients at risk or in jeopardy. Id. at 11-14. None of these "counts" in any way addresses the bases for CMS's decision to terminate High Tech's provider agreement.

We conclude that the ALJ did not err in determining that these "counts" were beyond the scope of his review authority.

C. High Tech's Repeated Refusal to Comply with the ALJ's Orders to Articulate a Cognizable Basis for Its Appeal Amounted to Abandonment.

Regulations provide that an ALJ may dismiss a request for hearing for cause or for abandonment. 42 C.F.R. §§ 498.70 and 498.69. In the instant case, High Tech repeatedly failed to comply with a series of orders from the ALJ to plead the basics of an appeal within the scope of his authority under 42 C.F.R. § 498.3. High Tech's failure justifies dismissal of its case for cause under section 498.70(b), and its repeated failures to comply with the

ALJ's orders justify dismissal under section 498.69(b)(2). We emphasize that this is not a case in which an ALJ dismissed on minor procedural grounds, in a way that somehow caught the Petitioner unaware.[8]

Rather, High Tech initially failed to plead a case within the ambit of section 498.3(b), and then failed to identify justiciable issues despite the repeated instructions and multiple opportunities the ALJ provided. On August 23, 2006, approximately three months after the start of the litigation, the ALJ issued a detailed ruling explaining why High Tech's discovery requests were beyond the scope of the proceeding, and describing the kinds of proof that High Tech would need to adduce, when, and in what form:

> By **December 4, 2006,** the parties must submit prehearing memoranda identifying the specific issues to be contested at the hearing. Petitioner's memorandum must set forth in detail Petitioner's basis for contending that CMS' determinations of deficiencies were incorrect, as well as Petitioner's affirmative defenses, if any. Petitioner's memorandum must address each deficiency in dispute, and must cross-reference the exhibits and witnesses on which Petitioner relies to support its affirmative defenses, if applicable.

Ruling on Pending Motions at 4. The ALJ warned the parties that failure to comply with these prehearing requirements could result in their exhibits not being admitted into evidence or their witnesses not being allowed to testify. Id. at 4-5.

After High Tech filed its prehearing memorandum without any of the material required by the August 23, 2006 Ruling, and instead describing various numbered "Counts" beyond the scope of the ALJ's review, the ALJ issued an additional order, again explaining to the parties that he lacked review authority to adjudicate the matters alleged in High Tech's "Counts." Order In

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[8] In addition to High Tech's failure to plead a substantive case within the scope of review set forth in section 498.3, High Tech's conduct of this litigation includes many other procedural defects. For example, High Tech failed to file the Report of Readiness (containing a detailed identification of evidence for the case) as required by the order entered May 17, 2006; failed to describe its witnesses or their proposed testimony in any way; and failed to file its prehearing memorandum on time or to request an extension.

Limine at 1-2. "The only legitimate topics of this litigation," the ALJ reiterated, "are those related to the factual and legal sufficiency of CMS' initial determination to terminate Petitioner's Medicare provider agreement." Id. at 2. High Tech did not respond, although the ALJ afforded it ten more days to respond and comply with his orders.

Therefore, on February 12, 2007, the ALJ issued his second order to show cause, and provided High Tech with ten days to respond by submitting a prehearing memorandum compliant with the earlier orders and 42 C.F.R. § 498.40(b)(1) and (b)(2). The ALJ informed High Tech that continued failure to comply with the order to show cause would result in summary dismissal of its request for hearing. Despite ample notice of what it needed to do, High Tech submitted a short unresponsive pleading which did not contain the material required by the ALJ's order to show cause. On April 3, 2007, the ALJ dismissed the case.

The record here reflects an unusual degree of recalcitrance on the part of a petitioner to take reasonable steps to bring its appeal within the scope of review under section 498.3(b), despite conscientious efforts by the ALJ to get it to do so. In this instance, dismissal is an appropriate step for the ALJ. See Birchwood Manor Nursing Center (upholding a dismissal pursuant to 42 C.F.R. §§ 498.40(b) and 498.70(c)); Osceola Nursing and Rehabilitation Center, DAB No. 1708, at 7-8 (1999)(interpreting 42 C.F.R. § 498.69(b) as authorizing dismissal for abandonment where party fails to appear in written form by not filing prehearing documents clearly ordered by an ALJ). The case before us is not one in which the Petitioner did not have a sufficient opportunity to amend, as in The Carlton at the Lake, DAB No. 1829 (2002). In fact, the ALJ in the instant case provided High Tech with a full and fair opportunity to bring its case within the scope of review set forth in section 498.3(b), and High Tech effectively refused to do so.

D. The Dismissal of High Tech's Case Comports with Procedural Fairness.

Finally, in affirming the ALJ's exercise of discretion to dismiss this case, the Board is mindful of the fact that it is foreclosing a party's right to review of the agency's action. While the Federal Rules of Civil Procedure do not apply in these proceedings, we have sometimes considered Rule 41(b) as guidance in assessing the appropriateness of a dismissal in a case before us. See, e.g., Osceola Nursing and Rehabilitation Center at 11. The Eleventh Circuit's Rule 41(b) decision in Goforth v. Owens, 766 F.2d 1533, 1534 (1985), states that there must be a "clear

record of delay or willful contempt and a finding that lesser sanctions would not suffice" to support a dismissal.

Applying these precepts in the instant administrative case, we find the dismissal fair and appropriate. Here, there is a clear record of delay and noncompliance with the ALJ's rulings, the Part 498 regulations, and the DAB CMS Case Procedures. This meets the first prong of the Eleventh Circuit's Rule 41(b) standard. The second prong requires a finding that lesser sanctions (than dismissal) would not suffice. In the instant case, the ALJ did not employ "sanctions" as that term is usually defined. Instead, as explained above, the ALJ issued a series of orders with well-delineated requirements and consequences over a period of at least five months before issuing his final Notice and Order to Show Cause. These orders, despite their precise language and emphatic warnings, did not suffice. They did not cause High Tech to comply with the requirements of the forum for exercising its review authority. These are the tools the ALJ had available, and in High Tech's case they did not work. These lesser measures, short of dismissal, did not suffice.

On this record, to have provided more opportunities for High Tech's compliance would have been futile. To have proceeded to hearing on the basis of this insufficient hearing request and woefully inadequate prehearing development would have been meaningless and wasteful.[9]

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[9] High Tech has not requested expedited access to judicial review. Its statements reflect a recognition that it is seeking to pursue issues that cannot properly be resolved in these proceedings rather than to obtain a hearing on CMS's determination to terminate it. In its recently filed Reply before the Board, High Tech "concurs" with CMS that the issues it seeks to litigate "are beyond the scope of an appeal to either the administrative law judge or this Board." Reply to Response for Appellate Review at 2. High Tech sums up its position by saying it has "met its procedural responsibility of appealing to the Departmental Appeals Board and can now proceed directly to federal district court." Id. at 2-3. In a similar comment in response to the ALJ's second order to show cause, High Tech explained: "HIGH TECH is not abandoning its lawsuit. The Departmental Appeals Board is a necessary precursor to get to federal district court, and probably on to the 11th Circuit Court of Appeals." Pet. Response to Order to Show Cause at 1.

Conclusion

For the foregoing reasons, we hold that the ALJ did not err or abuse his discretion in dismissing this case. We therefore affirm the dismissal of the case.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member