

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Mahmoud H. Aly, M.D. (CLIA)	Date: June 23, 2008
No. 33D0949772),)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-51
)	Decision No. CR1807
Centers for Medicare &)	
Medicaid Services.)	
)	

DECISION DISMISSING HEARING REQUEST

I dismiss the hearing request of Petitioner, Mahmoud H. Aly. I find that Petitioner abandoned his request for a hearing but also that he has no right to a hearing due to his failure to comply with my orders.

I. Background

This is a case brought pursuant to the Clinical Laboratory Improvement Amendments of 1988 (CLIA), CLIA's implementing regulations, and regulations governing hearings involving the Centers for Medicare & Medicaid Services (CMS) at 42 C.F.R. Part 498.

On September 5, 2007 CMS notified Petitioner that it had determined to impose remedies against him for failure to comply with CLIA requirements. CMS advised Petitioner that it had made its determination to impose remedies based on Petitioner's failure to comply with CLIA proficiency testing requirements. The remedies included: suspension of Petitioner's CLIA certificate; cancellation of Petitioner's Medicare payments; and a civil money penalty of \$500.

Petitioner timely requested a hearing to challenge CMS's determination and the case was assigned to me for a hearing and a decision. I ordered the parties to submit pre-hearing exchanges which included their proposed evidence and briefs addressing the issues in the case. CMS filed its pre-hearing exchange. Petitioner's exchange was due on April 21, 2008, but he failed to file one. On May 5, 2008, at my direction, the staff attorney assigned to assist me in hearing and deciding this case called Petitioner and advised him that his exchange had not been timely filed. Petitioner failed to file anything in response to this notice. On May 27, 2008 I sent an order to show cause to Petitioner directing him to file his pre-hearing exchange no later than June 9, 2008. I warned him that I would consider that he had abandoned his hearing request if he failed to comply with the order to show cause. Petitioner did not respond to the order to show cause.

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether reason exists for me to dismiss Petitioner's hearing request.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision. I set forth each Finding below as a separate heading.

There exist two grounds for me to dismiss Petitioner's hearing request. First, his failure to comply with my initial pre-hearing order and to respond to the order to show cause establish that he has abandoned his request for hearing. Second, he has lost his right to a hearing due to his failure to comply with the orders that I issued in this case.

1. I dismiss Petitioner's hearing request because he has abandoned it.

An administrative law judge may dismiss a party's request for hearing where that party has abandoned it. 42 C.F.R. § 498.69(a). "Abandonment" occurs when a party fails to appear at a pre-hearing conference or hearing without previously showing good cause for failing to do so and where that party fails to respond with good cause to an administrative law judge's order to show cause. 42 C.F.R. § 498.69(b).

The regulation doesn't define what is meant by a "hearing". However, it is clear from my initial pre-hearing order that the filing of a pre-hearing brief and proposed evidence (which includes the written direct testimony of proposed witnesses) is part of the hearing in the sense that it is the commencement of a stage in the process where the parties

present their substantive arguments and evidence to the administrative law judge. Thus, failure by Petitioner to file his pre-hearing exchange pursuant to my order is just as much a failure to appear at a hearing as would be failure by him to appear at an in-person session where I received oral testimony. Consequently, Petitioner's failure to file his pre-hearing exchange and his failure to make any response to my order to show cause is abandonment within the meaning of 42 C.F.R. § 498.69(b).

2. I dismiss Petitioner's hearing request because he no longer has a right to a hearing.

An administrative law judge may dismiss a party's hearing request where that party has no right to a hearing. 42 C.F.R. § 498.70(b). Petitioner had a right to a hearing in this case because CMS made a determination to impose remedies against him and because he timely requested a hearing. But, that right was not given to Petitioner unconditionally. A party loses his or her right to a hearing where he or she fails completely to comply with the orders of the administrative law judge. Petitioner forfeited his right to a hearing by failing to comply – at even the most basic level – with my initial pre-hearing order in this case and by failing to respond to the order to show cause that I sent to him.

/s/
Steven T. Kessel
Administrative Law Judge