Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Chelsea Place Care Center, LLC, (CCN: 07-5299),	)	Date: December 11, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-704
	)	Decision No. CR1873
Centers for Medicare & Medicaid Services.	)	

DECISION

I dismiss the hearing request of Petitioner, Chelsea Place Care Center, because it has no right to a hearing.

I. Background

Petitioner is a skilled nursing facility located in Hartford, Connecticut. It participates in the Medicare and Medicaid programs. Its participation in Medicare and Medicaid is governed by sections 1866, 1819 and 1919 of the Social Security Act and by implementing regulations at 42 C.F.R. Parts 483 and 488. Also, its right to a hearing in this case is governed by regulations at 42 C.F.R. Part 498.

On May 8, 2008, Petitioner was surveyed for compliance with Medicare participation requirements. Based on the results of that survey, the Centers for Medicare & Medicaid Services (CMS) determined that Petitioner no longer met participation requirements. By letter dated July 1, 2008, Medicare informed Petitioner that it had determined to impose remedies against Petitioner consisting of a civil money penalty, a denial of payment for new admissions, the termination of Petitioner's Medicare provider agreement, and the loss of Petitioner's approval to conduct a nurse aide training and nurse aide competency evaluation program (NATCEP) for two years.

Petitioner requested a hearing to challenge the deficiency findings on August 29, 2008 and the case was assigned to me for a hearing and a decision on September 4, 2008.

By letter dated September 12, 2008, CMS notified Petitioner that it was not imposing the proposed enforcement remedies because the deficiencies identified during the May 8, 2008 survey had been corrected. Further, although the loss of NATCEP was imposed, it was not based on a finding of substandard quality of care.

On October 28, 2008, CMS moved to dismiss Petitioner's hearing request. CMS submitted four exhibits with its motion. Petitioner submitted a response on November 19, 2008. Petitioner submitted three exhibits with its response. In the absence of objection, I admit CMS's Exhibits (CMS Exs.) 1-4 and Petitioner's Exhibits (P. Ex.) 1-3 into the record.

II. Discussion

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 a hearing before an administrative law judge. 42 C.F.R. § 498.3(b)(13). Unless the finding of noncompliance results in the imposition of a specified remedy, the finding is not an initial determination. 42 C.F.R. § 498.3(d)(10)(ii).

In the matter before me, CMS did not impose any remedy which constitutes an "initial determination" under the regulations. Petitioner no longer has a right to hearing because the determination that is subject to a hearing no longer exists. *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres*, DAB No. 1607 (1997); *Rafael Convalescent Hospital*, DAB No. 1616 (1997).

Petitioner recognizes that where there is no initial determination under the regulations in the "usual case" a hearing request should be dismissed. Petitioner's response at 4. Petitioner asserts, however, that a special circumstance exists in this case and that I should either deny this motion or decline to rule on the motion pending Petitioner's resolution of its status as a Special Focus Facility (SFF). Petitioner asserts that as a SFF it will be terminated after three surveys if it does not significantly improve; i.e., that it have no deficiencies greater than an "E" scope and severity during a survey. As CMS found a deficiency at a “G” scope and severity level during the survey in this case, dismissal of its hearing request will mean Petitioner will have been denied the opportunity for a hearing on noncompliance which could lead to termination after three surveys. While I understand Petitioner’s concern, my authority to hear a case is limited by regulation. Under the pertinent regulations, Petitioner no longer has a right to a hearing.

III. Conclusion

I must dismiss a hearing request where the requesting party has no legal right to a hearing. 42 C.F.R. § 498.70(b). Petitioner no longer has a right to a hearing in this case because there is no CMS initial determination subject to my review. Consequently, I dismiss Petitioner’s hearing request.

/s/

Alfonso J. Montaño
Administrative Law Judge