Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Golden Living Center – Grand Island Lakeview
Docket No. A-11-17
Decision No. 2364
March 2, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE RULING

Golden Living Center – Grand Island Lakeview (Golden) appealed the October 20, 2010 ruling of Administrative Law Judge (ALJ) Richard J. Smith denying Golden's motion to vacate the ALJ's September 9, 2010 dismissal of Golden's request for a hearing (ALJ Ruling). The ALJ concluded that the Centers for Medicare & Medicaid Services (CMS) had withdrawn the only remedy which it had proposed to impose on Golden, so that no initial determination, as defined in the regulations, remained on which to hold a hearing.

For the reasons explained below, we agree with the ALJ that Golden failed to show good cause to vacate the dismissal and that a claim of some possible future enforcement action is merely speculative and does not demonstrate the existence of an appealable initial determination. We therefore uphold the ALJ's ruling not to vacate his dismissal.

Background

Golden is a nursing facility in Nebraska.[1] A state agency survey ending April 22, 2010 found that Golden was not in substantial compliance with federal requirements, specifically for failing to prevent sexual abuse of two residents in violation of 42 C.F.R. § 483.13(b)(1). P. Ex. 1, at 1. The residents involved were in an Alzheimer's unit and engaged in repeated physical contact which the surveyors viewed as inappropriate and nonconsensual in light of the residents' cognitive limitations. *Id. passim*. Based on the survey, CMS imposed a denial of payment for new admissions (DPNA) which went into effect for three days before CMS concluded that Golden had resumed substantial compliance. Golden challenged the survey results by filing a request for an ALJ hearing, followed by a motion for summary disposition. CMS did not file a response to the motion for summary judgment but withdrew the DPNA retroactively, leaving no remedy in place based on the survey findings.

[1] The facts set out in this section are based on the ALJ's ruling and were not disputed before us. They are summarized here for the convenience of the reader, and our discussion does not constitute any new findings of fact.

On September 9, 2010, Golden filed a withdrawal of its hearing request. On the same date, the ALJ dismissed the hearing request pursuant to 42 C.F.R.§ 498.68 (authorizing the ALJ to dismiss a hearing request if a party withdraws the request). Order Dismissing Case, Sept. 9, 2010. In the Order, the ALJ advised the parties that they could request that the dismissal be vacated pursuant to section 498.72. That section provides in relevant part as follows:

> 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.

(Emphasis added.) On October 14, 2010, Golden filed a timely motion to vacate the dismissal. On October 20, 2010, the ALJ issued a ruling denying the motion. This appeal ensued.

Standard of review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole and a disputed conclusion of law to determine whether it is erroneous. *See* Departmental Appeals Board, Guidelines—Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, http://www.hhs.gov/dab/guidelines/prov.html.

We review an ALJ's exercise of discretion to dismiss a hearing request where dismissal is authorized by law (or as in the case now before us to deny a request to vacate such a dismissal) for abuse of discretion. *Capitol House Nursing and Rehab Center*, DAB No. 2252, at 3 (2009); *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

1. We decline to revisit the longstanding jurisprudence establishing that, under the governing regulation, no right to a hearing attaches absent the imposition of a remedy.

Golden acknowledges that the current appeal comes to the Board in a "peculiar procedural context," given that Golden initially withdrew its hearing request voluntarily. Golden Request for Review (RR) at 1. Golden does not claim that it was misled or

unaware of relevant facts at the time it withdrew.[2] Golden nevertheless asks that we revisit the Board's longstanding conclusion that no hearing right accrues in the absence of the imposition of any remedy by CMS or persists once all remedies are rescinded. *Id*.

As the ALJ correctly noted, the regulations make clear that a provider is entitled to a hearing when dissatisfied with an "initial determination," but that not every administrative action constitutes an "initial determination" subject to appeal. ALJ Ruling at 2; 42 C.F.R. § 498.3. In the case of long-term care facilities, section 498.3(b)(13) provides that a "finding of noncompliance that results in the imposition of a remedy specified in § 488.406" is an appealable initial determination. Section 488.406 lists specific remedies which may be imposed in addition to or as alternatives to the termination of the provider agreement of a facility found not to be in substantial compliance. They include temporary management, DPNAs, civil money penalties, state monitoring, transfer of residents (with or without closure of the facility), directed plans of correction or in-service training, and others that a state may include in its state plan under circumstances set out in the regulation.

The Board has long held, as Golden recognizes, that section 498.3(b)(13) means that CMS's withdrawal of all remedies extinguishes any right to a hearing even if the rescission occurs after the hearing request has been filed. *See, e.g., Lakewood Plaza Nursing Center*, DAB No. 1767 (2001). Golden argues that the regulation is invalid, at least if interpreted in this way, because it is inconsistent with the governing statute or conflicts with due process requirements. Golden Br. at 7-8.

The Board has previously rejected a similar challenge to the validity of "regulations precluding the right to a hearing unless sanctions are imposed and otherwise limiting the scope of administrative review" on the grounds that "challenges to the constitutionality of a statute or of a regulation promulgated by an agency are generally beyond the power or the jurisdiction of an ALJ or an administrative review body." *Northern Montana Care Center*, DAB No. 1930 (2004), citing *Sentinel Medical Laboratories, Inc.*, DAB No. 1762, at 9 (2001), *aff'd, Teitelbaum v. Health Care Financing Admin.*, No. 01-70236 (9th Cir. Mar. 15, 2002), *reh'g denied*, No. 01-70236 (9th Cir. May 22, 2002). Golden agrees that the Board lacks authority to declare regulations invalid, but suggests that the regulation could be interpreted and applied in a manner that would harmonize it with Golden's view of statutory and constitutional requirements. Golden Br. at 7-8.

[2] In explaining its abrupt reversal of position, Golden asserts that it became aware of a tightening of CMS's policy on designating special focus facilities (SFFs) only after the dismissal was granted. We discuss Golden's argument based on this policy in the next section.

We find no merit to Golden's argument that the regulation providing for hearings to challenge deficiency findings that result in the imposition of a specified remedy is ambiguous or requires interpretation to conform it to the statute or due process requirements as applied here. The Board has previously explained its reasoning as follows:

> Applying the plain language of the regulations, the Board has long held that a [long-term care facility] has no right to an ALJ hearing to contest survey deficiency findings where CMS has not imposed any of the remedies specified at section 488.406 based on those findings, or where CMS imposed, but subsequently rescinded, any such remedies. See, e.g., Fountain Lake Health & Rehabilitation, Inc., DAB No. 1985 (2005); Lakewood Plaza Nursing Center, DAB No. 1767 (2001); The Lutheran Home -Caledonia, DAB No. 1753 (2000); Schowalter Villa, DAB No. 1688 (1999); Arcadia Acres, Inc., DAB No. 1607 (1997). In resolving these appeals, the Board has noted that when the Secretary promulgated the nursing home regulations in 1994, the preamble expressly rejected comments seeking to provide hearings to facilities found not to be in substantial compliance where no remedy (or only a minor remedy such as state monitoring) was imposed. See, e.g., Lakewood Plaza at 9, citing 59 Fed. Reg. 56,116, at 56,158 (1994). The Secretary concluded that, absent the imposition of a remedy identified in the regulations, the deficiency findings alone do not result in such a degree of harm as to create hearing rights. Id. Accordingly, the Board has concluded that "no right to a hearing survives merely to 'correct [a] compliance record' upon rescission of all remedies listed in 42 C.F.R. § 488.406." Fountain Lake at 6, citing Schowalter Villa at 2-3.

Columbus Park Nursing and Rehab. Center, DAB No. 2316, at 6 (2010); *see also Florida Health Sciences Center, Inc., d/b/a/ Tampa General Hospital*, DAB No. 2263, at 4 (2009). This reasoning is consistent with section 1866(h)(1) of the Social Security Act extending hearing rights to providers "dissatisfied . . . with a determination described in subsection (b)(2)" which provides, inter alia, for termination of provider agreements on a determination that the provider has failed to comply substantially with applicable regulations. The remedies listed at section 488.406 identify alternative enforcement actions short of termination, and section 498.3 similarly extends hearing rights to providers subjected to those alternative remedies. As the Board held in *Arcadia Acres, Inc.*, the agency regulations reasonably balance the right to hearings where an adverse determination affects a provider with the needs for beneficiary protection and efficient

use of agency resources by limiting hearings to situations where an ALJ could provide meaningful relief.

Golden points, however, to the Supreme Court decision in *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) as requiring "channeling" all challenges to agency decisions adversely affecting providers through the administrative appeals process before judicial review is available. Golden Br. at 11. Golden's theory that the requirement to present an issue to the agency before seeking judicial review compels agency adjudicators to provide a hearing on a "general attack on a regulation, policy or procedure" is misconceived. *Id.* at 13. The requirement to channel such attacks through the appeals process before going to court simply demands that the provider exhaust its administrative remedies and raise all arguments at the administrative level, which Golden is doing here, before seeking judicial review.

Golden also contends that various cases establish that a court's jurisdiction, once invoked, should not be undone by subsequent events. Golden Br. at 16-19. None of the cases cited involve administrative adjudication, which is governed by controlling statutes and regulations rather than federal court procedures. Furthermore, Golden admits that even federal courts frequently dismiss appeals for lack of jurisdiction when they become moot at some point after filing. *Id*. at 17-18.

The ALJ did not err in concluding that the situation before him was more analogous to those federal court cases dismissing for mootness, in that there was no longer a dispute before him in which he could grant any relief once CMS withdrew all remedies.

2. The possibility of designation as a SFF (or even an actual SNF designation) does not constitute an appealable remedy.

Golden contends that its decision to seek to vacate the dismissal after its voluntary withdrawal was based on a September 17, 2010 memorandum sent by CMS to state survey agency directors relating to procedures for the identification of facilities to be designated for special focus (SFF Memorandum). Golden Br. at 4. The SFF program is aimed at facilities with a history of "yo-yo" compliance with quality of life and quality of care issues. SFF Memorandum at 1. Each state selects an assigned number of facilities as SFFs from a list of candidates provided by CMS based on compliance history. The number of SFFs per state reflects the number of facilities in the state. *Id*. SFFs are subject to two standard surveys a year (instead of one) and may be subject to more severe remedies if they are found not to be in substantial compliance and fail to make "significant progress" towards correcting deficiencies. SFF Memorandum, Appendix A. The SFF program is not new. *See, e.g., Life Care Center of Tullahoma*, DAB No. 2304, at 51-52 (2010). The SFF Memorandum announced an adjustment in the number of SFF

slots "to reflect the current population of nursing homes in each State and a ten percent increase in SFF slots nationally." SFF Memorandum at 2.

Golden does not claim that it has ever been designated an SFF or that such designation in any case would constitute a remedy subject to challenge in these proceedings. Designation as a SFF does not appear among the remedies listed in 42 C.F.R. § 488.406. Thus, even had Golden in fact been designated an SFF, that would not make the finding of noncompliance at issue appealable under the regulatory requirements, absent imposition of any of the remedies specified in that section.

Golden asserts that its concern is that the increase in the number of candidates sent to states for possible SFF designation makes it now "very possible that a single 'G' citation *could* make Petitioner eligible for such status."[3] Golden Br. at 6 (italics in original). Furthermore, although Golden refers to this possibility as a "very real, not speculative threat," the language in its own discussion reflects the highly conditional nature of the concern, i.e., only that it is "possible" and "could" make it "eligible" to be a candidate for SFF designation. *Compare* Golden Br. at 5 with *id*. at 6. Moreover, even assuming Golden was designated at some point as a SFF, that designation would not necessarily result in a finding of noncompliance or imposition of a remedy, merely in increased frequency of surveys to assess compliance. Any finding of noncompliance in a later survey that did result in imposition of an enforcement remedy listed in section 488.406 would itself be subject to appeal.

We conclude that the ALJ correctly found that no initial determination adverse to Golden exists to support a hearing right under the circumstances here.

[3] The noncompliance finding in the survey at issue had been rated as "G" level, a designation meaning that the surveyors considered it to constitute an isolated instance of noncompliance that caused actual harm but not immediate jeopardy. *See* CMS State Operations Manual § 7400E. No information about Golden's compliance history apart from this survey is in the record before us.

Conclusion

For the reasons explained above, we affirm the ALJ Ruling.

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Constance B. Tobias

_____/s/_____
Leslie A. Sussan
Presiding Board Member