Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Burien Nursing and Rehabilitation Center
Docket No. A-18-20
Decision No. 2870
May 11, 2018

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE RULING

Burien Nursing and Rehabilitation Center (Petitioner) appeals an October 16, 2017 ruling by an administrative law judge (ALJ), *Burien Nursing and Rehabilitation Center, Ruling Denying Motion to Vacate Order Dismissing Request for Hearing*, ALJ Ruling No. 18-1 (2017) (ALJ Ruling). The ALJ denied Petitioner's motion to vacate the voluntary dismissal of Petitioner's hearing request on the grounds that Petitioner failed to show "good cause" pursuant to 42 C.F.R. § 498.72.

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

Legal Background

In order to participate in the Medicare program, a skilled nursing facility (SNF) must meet that program's requirements for participation. Social Security Act (Act) § 1819(a)(3), (b)-(d);[1] 42 C.F.R. § 483.1. State health agencies, under agreements with the Secretary of Health and Human Services, are responsible for conducting surveys of non-state-owned or operated SNFs in order to verify those facilities' compliance with Medicare participation requirements. *See* Act §§ 1819(g)(1)(A), 1864(a); 42 C.F.R. §§ 488.10(a), 488.11, 488.20.

The Act and implementing regulations authorize, and in some instances require, the Centers for Medicare & Medicaid Services (CMS) to take enforcement action against a SNF – including imposing civil money penalties (CMPs) and other "remedies" – if it determines, on the basis of a state agency's "recommendation," that the SNF does not meet one or more Medicare participation requirements. Act § 1819(h)(2)(A); 42 C.F.R. Part 488, subpart F; *see also North Ridge Care Ctr.*, DAB No. 1857, at 11 (2002)

[1] The current version of the Act can be found at *https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm*. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

(explaining that "CMS's authority to impose CMPs, as well as other enforcement remedies, is based on section 1819(h) of the Act").

A SNF may request a hearing before an ALJ to challenge a "finding of noncompliance" that has resulted in the imposition of a CMP or other enforcement remedy. 42 C.F.R. §§ 498.3(b)(13), 498.5(b), 488.408(g)(1). An ALJ may dismiss an appeal if a party withdraws its request for a hearing. *Id*. § 498.68. An ALJ may vacate the dismissal "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." *Id*. § 498.72.

Case Background

Petitioner is a skilled nursing facility located in the state of Washington. Request for Hearing at 1. On April 17, 2017, CMS issued a letter (CMS Letter) notifying Petitioner that it was imposing a CMP based on deficiencies found during a survey conducted by the Washington Department of Social and Health Services (DSHS) on February 24, 2017. CMS Letter at 1. On June 16, 2017, Petitioner filed a request for hearing challenging the deficiencies resulting in the CMP. Petitioner asserted that the Statement of Deficiencies (SOD) did not reflect multiple, prior surveys conducted by DSHS resulting in no findings of deficiencies. Request for Hearing at 2. Petitioner also argued bias on the part of DSHS because one of the residents whose care was the basis for the finding of deficiencies is the mother of a high-ranking DSHS official. *Id*.

On July 19, 2017, Petitioner filed a motion to withdraw its appeal without stating its reasons. The ALJ issued an order (Order) granting Petitioner's motion on July 24, 2017.

On September 11, 2017, DSHS sent a letter notifying Petitioner that it was rescinding its citations and a state CMP that resulted from the February 24, 2017 survey. P. Ex. 2.[2] The DSHS letter stated, in relevant part:

> This letter provides formal notice that the state citations described in the department's March 8, 2017 state survey report and state civil fines of $11,500 are rescinded. The federal 2567 Statement of Deficiencies remains unchanged. Although there is substantial evidence to support these citations, the Department has concluded, due to the unique circumstances of this case, rescission of the state's actions is consistent with the best use of state resources and the effective and economic operation of the nursing home licensing program.

Id. at 1.

[2] Petitioner's counsel submitted a written declaration and three exhibits (P. Exs. 1-3) with a motion to vacate, discussed later. The exhibit quoted here was one of these.

Petitioner filed a motion to vacate the Order on September 20, 2017 (Motion to Vacate), arguing that good cause exists to vacate under 42 C.F.R. § 498.72. Petitioner asserted the following:

> The recent decision by DSHS to rescind all state citations, which serve as the very foundation for the federal citations and enforcement remedies, is significant, new evidence which did not exist at the time the Order of Dismissal was entered. . . . Good cause exists to vacate the Order of Dismissal and permit Petitioner to pursue discovery and similar rescission of the federal citations and enforcement remedies. The foundation to the federal citations and enforcement remedies has been withdrawn.

Motion to Vacate at 4-5. CMS filed a brief (CMS Brief) in opposition to Petitioner's motion to vacate, arguing that "DSHS's decision to rescind the citations related to state licensing requirements does not provide 'good cause' for vacating the dismissal. . . ." CMS Brief at 3.

ALJ Decision

On October 16, 2017, the ALJ issued a ruling denying Petitioner's motion to vacate. The ALJ began by addressing the definition of "good cause" under 42 C.F.R. § 498.72. ALJ Ruling at 2. Noting first that the regulations do not define the term "good cause," the ALJ then wrote, in relevant part:

> As a general rule, "good cause" in cases involving CMS has been held to mean a situation that is beyond a party's ability to control that interferes with a party's exercise of its rights.
>
> * * *
>
> Here, "good cause" assumes a slightly different character. When a party voluntarily withdraws its hearing request it engages in an act that plainly is within its ability to control. In most circumstances, "good cause" to vacate an order dismissing a case based on a voluntary withdrawal must mean that the moving party proves the presence of some potentially outcome-determinative evidence that it could not have known about and obtained prior to requesting that the case be dismissed. The moving party must prove, therefore, that it was misled into withdrawing its hearing request by its lack of knowledge about facts that it could not have known about. Those facts must be relevant to the case. If they do not potentially affect the outcome then they are irrelevant and would not support a finding of "good cause" for vacating a dismissal…

Id.

The ALJ next concluded that Petitioner failed to show good cause because it presented "no evidence that might even potentially affect the outcome of its dismissed appeal." *Id.* The ALJ noted that the DSHS letter rescinding the state's citations and penalty explicitly stated that the deficiencies which were the bases for imposing the penalties remain unchanged. *Id*.

The ALJ also addressed Petitioner's assertions that DSHS's investigation of its facility may have been tainted by personal bias. *Id*. at 3. The ALJ concluded that such assertions are irrelevant because "[t]he possible existence of proof of bias has no bearing on the objective evidence on which CMS relies" and "it provides nothing to show that Petitioner in fact complied with [the] participation requirements." *Id*.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it is erroneous. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, accessible at http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/index.html?language=en.

Analysis

Petitioner argues in its Request for Review (RR) that the ALJ erred in his conclusion that Petitioner failed to show good cause to vacate its voluntary dismissal under 42 C.F.R. § 498.72. For the following reasons, we reject Petitioner's arguments and affirm the ALJ's Ruling.

I. *CMS has independent authority to impose a civil money penalty on Petitioner.*

As a preliminary matter, we address the basis for CMS's enforcement action against Petitioner. Petitioner argued before the ALJ that the "state citations are the very underpinnings of the federal citations and enforcement remedies." Motion to Vacate at 5. Petitioner also argues before the Board that the civil money penalty imposed by CMS is "based solely upon a survey *and* citations issued by DSHS." RR at 2 (emphasis added). Petitioner's assertion that CMS's enforcement action is based on the state citations predicates its argument that "the rescission of all citations and penalties by DSHS is 'new evidence' indicating compliance with Medicare Participation Requirements." Reply at 3.

We disagree. The Act and implementing regulations establish a scheme in which state health agencies conduct surveys to determine if SNFs are in compliance with Medicare participation requirements and make recommendations to CMS regarding their findings.

Act §§ 1819(g)(1)(A), 1864(a); 42 C.F.R. §§ 488.10(a), 488.11, 488.12, 488.20. CMS makes its own, independent determinations of whether to pursue enforcement actions based on the survey findings. Act § 1819(h)(2)(A); *Avon Nursing Home*, DAB No. 2830, at 10, 14 (2017); *Lifehouse of Riverside Healthcare Ctr.*, DAB No. 2774, at 12 (2017). CMS is not bound by determinations made by state agencies, including whether a state chooses to pursue or rescind its own enforcement actions. *See, e.g., Brookshire Health Care Ctr.*, DAB No. 2190, at 18 n.10 (2008) (holding that the state agency's determinations did not bind CMS because "the law clearly provides CMS with authority to determine the existence of noncompliance and its scope and severity"). Thus, CMS's authority to impose an enforcement action on Petitioner stands separate and apart from the citations pursued by the state of Washington. The decision by DSHS to rescind the state's citations is therefore immaterial to the matter on appeal.

II. *The ALJ did not abuse his discretion when determining that Petitioner failed to show good cause to vacate the dismissal.*

The governing regulations grant an ALJ the authority to vacate a dismissal if the moving party shows "good cause." 42 C.F.R. § 498.72. The regulations do not define "good cause," and the Board has never provided a complete and authoritative definition. *See, e.g., Axion Healthcare Services, LLC*, DAB No. 2783, at 4 (2017); *NBM Healthcare, Inc.*, DAB No. 2477, at 3 (2012). The Board may review an ALJ's finding of whether a party has shown good cause to determine whether the ALJ abused his or her discretion. *Consolidated Community Resources, Inc.*, DAB No. 2676, at 5, n.5 (2016); *Meridian Nursing & Rehab at Shrewsbury*, DAB No. 2504, at 7-8 (2013) (rejecting the suggestion that the 42 C.F.R. Part 498 regulations do not specifically recognize the right to appeal an ALJ's decision not to vacate a dismissal and stating that "the Board has regularly reviewed ALJs' denials of motions to vacate dismissals under the same standard as the original dismissal order," that is, for abuse of discretion where the regulation provides that the ALJ "may" dismiss), *aff'd, Meridian Nursing & Rehab at Shrewsbury v. CMS*, 555 F. App'x 177 (3d Cir. 2014).

As noted above, the ALJ suggested that, "[i]n most circumstances, 'good cause' to vacate" a dismissal after a voluntary withdrawal "must mean that the moving party proves the presence of some potentially outcome-determinative evidence that it could not have known about and obtained prior to requesting that the case be dismissed." ALJ Ruling at 2. He also stated that the movant "must prove, therefore, that it was misled into withdrawing its hearing request by its lack of knowledge" about some relevant facts. *Id.*

Petitioner argues that the ALJ erred by "dramatically narrow[ing] the definition of 'good cause.'" RR at 5. Petitioner also argues that the ALJ's interpretation of the "good cause" standard is not supported by authority and "cannot be correct because it impermissibly narrows the time for events that would show good cause to the period at or before the voluntary dismissal occurred." Reply at 2.

We disagree that the ALJ somehow imposed an "impermissibly narrow burden" on Petitioner. RR at 5. We do not read the ALJ's language as creating a bright-line test for "good cause" in all cases where a party voluntarily withdraws its request for hearing, nor limiting "good cause" to circumstances where the moving party was "misled" by a lack of knowledge. Rather, we read the ALJ's analysis as offering examples of what a showing of "good cause" could entail in such circumstances, while concluding that nothing in the Petitioner's situation amounts to such a showing.

Moreover, we find no error, let alone abuse of discretion, in the ALJ's determination that Petitioner has failed to show good cause to vacate the dismissal. We conclude that Petitioner has failed to show "good cause" under *any* reasonable interpretation of the term.

We are unpersuaded by Petitioner's argument that the voluntary withdrawal of its appeal should not be "used against it." Reply at 3. The bases and circumstances of a dismissal can be relevant to the ALJ's good cause analysis of whether to vacate. For instance, an ALJ weighing a request to vacate a dismissal for abandonment may properly consider the actions of the abandoning party in its good cause analysis. *Axion* at 4 (holding that "no reasonable definition of 'good cause' encompasses the lapses" for which the abandoning party was responsible). Likewise, a party's voluntary withdrawal, and the knowledge and arguments it possessed prior to withdrawal, are material factors that an ALJ may weigh when determining whether to vacate a dismissal emanating from that withdrawal. To hold otherwise would, in effect, minimize to an unreasonable degree the "good cause" burden of section 498.72 in cases of party withdrawal and potentially reward gamesmanship in litigation.

Petitioner's "good cause" argument is based, in part, on the assertion that the September 11, 2017 letter rescinding the state citations was "misleading." Petitioner claims that the letter "did not disclose" "multiple prior investigations regarding the same complaints" which "revealed no deficiencies." RR at 4. Petitioner also states that CMS accepted "at face value" DSHS's claim that the "Statement of Deficiencies remains unchanged," and refused to withdraw its penalties. *Id.*; P. Ex. 2. Petitioner asserts that these "outcome determinative events" were "beyond Petitioner's control" and should compel a finding of good cause to vacate the dismissal. RR at 5.

We find no error with the ALJ's conclusion that Petitioner "offers no previously unavailable evidence to show that it complied with participation requirements." ALJ Ruling at 3. The only new development since Petitioner's voluntary withdrawal is the rescission of the state citations and penalty, which we have already determined is immaterial to Petitioner's appeal. Prior to withdrawal, Petitioner argued before the ALJ that the SOD "fails to reflect multiple, prior surveys conducted by the state survey agency…." Request for Hearing at 2. Petitioner's argument before the Board – that CMS refused to withdraw its civil money penalty because DSHS misleadingly failed to

reference prior surveys in its rescission letter – is merely an extension of its argument regarding prior surveys made in its request for hearing. Petitioner could have pursued this argument before the ALJ, but chose to voluntarily withdraw its appeal with the knowledge that the dismissal would only be vacated on a showing of good cause. Here, Petitioner has failed to make that showing.

Conclusion

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

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member