

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
North Adams Commons Nursing)	
and Rehabilitation Center,)	Date: April 30, 2008
(CCN: 22-5342),)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-106
)	Decision No. CR1781
Centers for Medicare & Medicaid)	
Services.)	

DECISION DISMISSING REQUEST FOR HEARING

This matter is before me on the Centers for Medicare & Medicaid Services' (CMS) March 28, 2008 Motion to Dismiss Petitioner's Request for Hearing. Petitioner opposes the CMS Motion.

CMS asserts that it has rescinded the only enforcement remedy it actually sought to impose against Petitioner. Petitioner does not contest this assertion. Thus, the issue before me is whether a long-term care facility has a right to a hearing when CMS withdraws the enforcement remedies provided for in 42 C.F.R. § 488.406. This issue is hardly novel: all of the Administrative Law Judges (ALJs) of the Civil Remedies Division, including myself, have addressed it many times, and have without exception come to the same resolution of that issue I announce here. I find and conclude that North Adams Commons Nursing and Rehabilitation Center is not entitled to a hearing, and on the basis of 42 C.F.R. § 498.70(b) I GRANT CMS's motion to dismiss.

Petitioner North Adams Commons Nursing and Rehabilitation Center is a skilled nursing facility located in North Adams, Massachusetts. It is certified to participate in the Medicare and Medicaid programs as a provider of services. In a letter dated November 13, 2007, Petitioner perfected its appeal of CMS's September 19, 2007 determination to impose a sanction, in the form of a \$10,000 per-instance Civil Monetary Penalty

(PICMP), based on alleged deficiencies cited as the result of a survey conducted by the Massachusetts Department of Public Health's Division of Health Care Quality (MDHC).

Petitioner acknowledges that CMS has withdrawn the PICMP, the only remedy actually proposed. Although MDHC and CMS had at certain points apparently discussed the possibility of imposing an additional sanction against Petitioner's Nurse Aide Training and Competency Evaluation Program (NATCEP), it is clear that the NATCEP sanction was never imposed and has never been at issue in this appeal.

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 do not constitute 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. 42 C.F.R. § 498.3(b)(13). Unless the finding of noncompliance results in the actual imposition of a specified remedy, however, the finding is not an initial determination. 42 C.F.R. § 498.3(d)(10)(ii). Where, as here, CMS does not impose a remedy, or rescinds all proposed remedies, a facility has no hearing right because no determination properly subject to a hearing exists. It is the final imposition of an enforcement remedy or sanction, and not the citation of a deficiency, that triggers a facility's right to a hearing pursuant to 42 C.F.R. Part 498. *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).

Petitioner resists the CMS Motion because it maintains that the survey findings were wrong. It denies that it allowed an instance of isolated immediate jeopardy to exist at its facility during the time in question, and vigorously asserts that it was then in substantial compliance with the requirements of 42 C.F.R §§ 483.20(k), 483.25, and 483.25(h)(2). It seeks in these proceedings to vindicate its position and its reputation. Petitioner's position relies heavily on interpretations of the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, and the due process clause of the U.S. Constitution that have not found success in this forum or before the Departmental Appeals Board (Board). In particular, neither the ALJs of this forum nor the Board possess the authority to consider such challenges to CMS actions. *See Charlesgate Nursing Center*, DAB CR868 (2002).

For the reasons set out above, I GRANT the CMS Motion to Dismiss. Petitioner's November 13, 2007 Request for Hearing must be, and it is, DISMISSED.

/s/

Richard J. Smith
Administrative Law Judge