

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Van Allen Nursing Home,	)	
(CCN: 33-5586),	)	Date: August 12, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-224
	)	Decision No. CR1829
Centers for Medicare &	)	
Medicaid Services.	)	
_____	)	

**DECISION DISMISSING REQUEST FOR HEARING**

I dismiss the hearing request filed on behalf of Petitioner, Van Allen Nursing Home. Consequently, the Centers for Medicare & Medicaid Services (CMS) may impose remedies against Petitioner consisting of:

- civil money penalties of \$5500 per day for each day of a period beginning on October 30, 2007 and running through November 12, 2007;
- civil money penalties of \$50 per day for each day of a period beginning on November 13, 2007 and running through February 8, 2008; and
- denial of payment for new Medicare admissions for each day of a period beginning on November 7, 2007 and running through February 8, 2008.

**I. Background**

Petitioner is a skilled nursing facility doing business in the State of New York. It participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act (Act) and by implementing regulations at 42 C.F.R. Parts 483 and 488. Its right to a hearing in this case is governed by section 1128A of the Act and by regulations at 42 C.F.R. Part 498.

Petitioner was inspected for compliance with Medicare participation requirements in a survey that ended on October 31, 2007. The surveyors found that Petitioner manifested deficiencies and these deficiencies included noncompliance that was so egregious as to pose immediate jeopardy for Petitioner's residents. An "immediate jeopardy" level deficiency is one that is so severe as to cause, or which is likely to cause, serious injury, harm, impairment, or death to a facility's residents. 42 C.F.R. § 488.301. CMS concurred with the surveyors' findings and determined to impose the remedies that I describe in the opening paragraph of this decision.

Petitioner, through its counsel, requested a hearing and the case was assigned to me for a hearing and a decision. On January 15, 2008 I issued an initial pre-hearing order in the case. I directed the parties, as a mandatory element of the pre-hearing process, to exchange proposed exhibits including the written direct testimony of all proposed witnesses and pre-hearing briefs. Acknowledgment and Initial Pre-Hearing Order (initial pre-hearing order), at 2, paragraphs 1-2. I gave CMS an exchange deadline of May 22, 2008. *Id.* Petitioner's deadline was June 23, 2008. *Id.* The initial pre-hearing order explicitly warned the parties that I could sanction them for their noncompliance with its requirements. *Id.*, at 5, paragraph 11.

CMS complied with the pre-hearing order. Petitioner did not make a filing on June 23. On July 7, I sent an order to show cause to Petitioner's counsel directing him to either make a satisfactory filing or to explain why Petitioner had not filed its pre-hearing exchange. I gave counsel 10 days within which to reply. On July 11, 2008 I received a reply from Petitioner's counsel advising me that he had withdrawn from the case and that he no longer represented Petitioner. He made no substantive filing. On July 17, 2008 I issued a second order to show cause which I directed to Petitioner and to its owner and administrator. I recited that Petitioner's counsel had withdrawn from the case and I gave Petitioner an additional 10 days either to file a pre-hearing exchange or to give me a satisfactory explanation for its failure to file an exchange. I gave Petitioner the name and telephone number of an attorney on the Civil Remedies Division staff to whom Petitioner could direct any inquiries. I warned Petitioner that failure to file a response could result in my dismissing its hearing request.

Petitioner failed to file any response to the second order to show cause or to call the contact person whose name and phone number I had supplied to Petitioner.

## II. Issue, findings of fact and conclusions of law

### A. Issue

The issue in this case is whether grounds exist 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 in this case. I set forth each Finding below as a separate heading.

*1. I may dismiss a party's hearing request where that party has not complied with my initial pre-hearing order and has failed to explain its failure to do so.*

*a. I may sanction a party to a civil money penalty case by dismissing its hearing request in the circumstance where that party has not complied with my pre-hearing order.*

Section 1819(h) of the Act gives the Secretary the authority to impose remedies against skilled nursing facilities that fail to comply with Medicare participation requirements. These remedies include civil money penalties. This section provides specifically that the provisions of section 1128A of the Act shall apply to any civil money penalty that is imposed by the Secretary against a skilled nursing facility. Act, section 1819(h)(2)(B)(ii).

Section 1128A creates a general framework governing the imposition of civil money penalties by the Secretary. This section gives hearing rights to a party against whom penalties are imposed. Act, section 1128A(c). That section provides that the official conducting a hearing may sanction an individual or entity for failing to comply with an order or procedure, failing to defend an action, or other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. *Id.*, section 1128A(c)(4). Sanctions may include dismissal of the action. *Id.*, section 1128A(c)(4)(E).

Dismissal is obviously a remedy which should not be imposed lightly. But, it is appropriate in those circumstances where a party fails to comply with a pre-hearing order and fails to explain its noncompliance after having been given more than one opportunity to do so.

***b. I may dismiss a hearing request where a party has abandoned it.***

As I discuss above this case is governed by procedural hearing regulations at 42 C.F.R. Part 498. These regulations provide that an administrative law judge may dismiss a hearing request if it is abandoned by the party that requested it. 42 C.F.R. § 498.69(a). The regulation states that an administrative law judge may consider a hearing request to be abandoned if the party or its representative:

- (1) Fails to appear at the pre-hearing conference or hearing without having previously shown good cause for not appearing; and
- (2) Fails to respond, within 10 days after the . . . [administrative law judge] sends a “show cause” notice, with a showing of good cause.

Failure to comply with the requirements of a pre-hearing order directing exchanges of proposed evidence and briefs is, effectively, failure by a party to appear at and participate in a hearing. A purpose of requiring pre-hearing exchanges is to assure that each party files its affirmative evidence in advance of taking cross-examination or redirect testimony of witnesses. That is as much an element of the actual hearing of the case as is an appearance to conduct cross-examination. Thus, I may dismiss a hearing request for abandonment where a party fails to file its pre-hearing exchange and fails also to respond with a showing of good cause, within 10 days of its receipt of an order to show cause.

***2. Grounds exist for me to dismiss Petitioner’s hearing request.***

There are two grounds for dismissing Petitioner’s hearing request. First, Petitioner has willfully not complied with my initial pre-hearing order. Second, Petitioner has abandoned its request for a hearing.

Dismissal of Petitioner’s hearing request is an appropriate sanction. I gave Petitioner two extensions of time within which to comply with my initial pre-hearing order, either by filing a satisfactory pre-hearing exchange or by explaining its failure to do so. It has provided me with nothing substantive in response and has not even replied to the second order to show cause that I sent to it. Petitioner’s failure to provide me even with an explanation for its noncompliance with my pre-hearing order amounts to a deliberate obstruction of the hearing process that I established.

Dismissal is also appropriate because Petitioner has abandoned its request for a hearing. Petitioner has failed to participate in any meaningful sense in the hearing and decision process that I established and has not provided good cause (or, in fact, any explanation) for its failure to do so.

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/s/  
Steven T. Kessel  
Administrative Law Judge