Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Houston Nursing and Rehabilitation, L.P. (CCN: 67-5297),	)	Date: March 25, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-254
	)	Decision No. CR1763
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION DISMISSING HEARING REQUEST

I consider the Centers for Medicare & Medicaid Services' (CMS) March 24, 2008 unopposed Motion to Dismiss Petitioner's hearing request. CMS states that it has rescinded all enforcement remedies against Petitioner. Therefore, I must consider 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. I conclude that the facility is not entitled to a hearing and grant CMS's motion to dismiss.

Petitioner has no right to a hearing if CMS has not imposed a remedy.[1]

Petitioner, Houston Nursing and Rehabilitation, L.P., is a skilled nursing facility located in Houston, Texas, that is certified to participate in the Medicare and Medicaid programs as a provider of services. In a letter dated January 22 2008, Petitioner asked to appeal deficiencies cited during November 8 and November 12, 2007 surveys conducted by the Texas Department of Aging and Disability Services, the State survey agency. Petitioner acknowledges that CMS has withdrawn all remedies initially proposed, and recognizes that, by a long line of cases, the Departmental Appeals Board has ruled that, once CMS rescinds those remedies, Petitioner no longer has a hearing right.

[1] There being no dispute of fact in this case, I make this one conclusion of law.

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 an administrative law judge (ALJ) hearing. 42 C.F.R. § 498.3(b)(13). Unless the finding of noncompliance results in the 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, Petitioner has no hearing right because no determination that is subject to a hearing exists. *See, Lakewood Plaza Nursing Center*, DAB No. 1767 (2001); *Schowalter Villa*, DAB No. 1688 (1999).

In *Desert Knolls*, the Board found a right to hearing not because the penalty imposed was so onerous, but because the regulations include among the list of appealable initial determinations the finding of substandard quality of care that results in the loss of approval for nurse aide training programs. DAB No. 1769, at 2; 42 C.F.R. § 498.3(b)(15); *see also* 64 Fed. Reg. 39,934, 39,937 (July 23, 1999). Here, since both the proposed termination action and the proposed Denial of Payment remedies were rescinded because the facility achieved substantial compliance, Petitioner is not subject to loss of approval of Nurse Aide Training and Competency Evaluation Program as that would require effectuation of both those remedies.

CMS has imposed no remedy; consequently, Petitioner has no right to an ALJ hearing. An ALJ may dismiss a hearing request where a party has no right to a hearing. 42 C.F.R. § 498.70(b). I therefore grant CMS's motion to dismiss and order this case dismissed.

/s/ Alfonso J. Montano
Administrative Law Judge