Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
High Tech Home Health, Inc.,	)	
	)	Date: April 3, 2007
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-442
	)	Decision No. CR1583
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION AND ORDER DISMISSING CASE

This matter is before me on my own motion, and is illuminated by the history of this case since CMS's Motion *in Limine* filed December 28, 2006. My Order *in Limine* of January 17, 2007 granted most of CMS's Motion *in Limine*, and ruled that Petitioner's presentation at the hearing of this matter would be limited to evidence and arguments properly before me pursuant to the terms of sections 1866(b)(2) and 1866(h)(1) of the Social Security Act (Act), 42 U.S.C. §§ 1395cc(b)(2) and 1395cc(h)(1), and 42 C.F.R. Part 498. Petitioner has failed to plead its case in conformity with that Order *in Limine* and my subsequent Notice and Order to Show Cause, in spite of having been repeatedly offered opportunities to do so. In particular, Petitioner has failed to identify the specific justiciable issues, findings of fact, and conclusions of law in CMS's initial determination of April 13, 2006 with which it disagrees, and has failed to specify its basis for contending that the findings and conclusions of that initial determination are incorrect.[1]

[1] The "initial determination" to which this Decision refers is incorporated in two letters from CMS to Petitioner. The first is dated March 23, 2006, and it charges Petitioner's noncompliance with three conditions of Medicare program participation: 42 C.F.R. § 484.24 (Organization Services and Administration), 42 C.F.R. § 484.18 (Acceptance of Patients, Plan of Care, and Medical Supervision), and 42 C.F.R. § 484.30 (Skilled Nursing Services). This first letter notifies Petitioner of its termination as a

Petitioner is therefore not in compliance with 42 C.F.R. §§ 498.40(b)(1) and (b)(2). Because its noncompliance is manifestly a matter of choice, it is apparent that Petitioner has abandoned its right to a hearing, and that this appeal must be dismissed pursuant to 42 C.F.R. § 498.69(b). Moreover, Petitioner has no right to a hearing on those issues it does purport to appeal. This matter must, for that additional reason, be dismissed pursuant to 42 C.F.R. § 498.70(b).

I

CMS's Motion *in Limine* was precipitated by Petitioner's Prehearing Memorandum filed on December 22, 2006. Petitioner's Prehearing Memorandum began: "It is important for this Appeals Board to understand just how historically awful CMS, HCFA ('Health Care Finance Administration'), and AHCA ('Florida's Agency for Healthcare Administration') have been in managing and regulating the Medicare home health program in Florida and the United States for the past twenty years." Petitioner's Prehearing Memorandum concluded its introductory section by asserting that "the Medicare data base over time is relevant and material to this case, and access to that database is a primary objective of this litigation, both at this Departmental Appeals Board level and on appeal to federal district court." Petitioner thereafter set out five "Counts" it proposed to litigate: they were entitled, respectively, "Wasting of Federal Funds," "Mass Felony Murder," "Breach of Contract," "CMS Improperly Used the Survey Process," and "HIGH TECH Is Not a Threat to Patients."[2]

My Order *in Limine* made it clear that the issues to be considered in this appeal are limited to those over which the Administrative Law Judges (ALJs) of this forum have been granted jurisdiction by the provisions of sections 1866(b)(2) and 1866(h)(1) of the Act. That grant of jurisdiction includes the authority to review certain "initial determinations" made by CMS. The term "initial determinations" is defined exhaustively and comprehensively at 42 C.F.R. § 498.3(b), and CMS has taken the position that its

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program participant effective March 26, 2006. The second letter is dated April 13, 2006, and confirms that Petitioner's termination became effective on March 26, 2006. Because Petitioner's May 4, 2006 hearing request was timely with reference to either of the two CMS letters, I have treated the April 13, 2006 CMS letter as the "initial determination" in this case.

[2] My Orders of January 17, 2007 and February 12, 2007 incorrectly characterized Petitioner's Prehearing Memorandum as framed in four "Counts." My characterization failed to mention Petitioner's additional "Count" entitled "CMS Improperly Used the Survey Process," which "Count" was set out as the fourth in the full sequence of five.

"initial determination" in this case is its termination of Petitioner's Medicare provider agreement, listed at 42 C.F.R. § 498.3(b)(8). Individuals or entities may appeal only "initial determinations" and have no right to appeal other questions. *Mira Vista Care Center, Inc.*, DAB No. 1789 (2001); *Comprehensive Mental Health Center of Baton Rouge, et al.*, DAB No. 1774 (2001); *Specialty Hospital of Southern California-La Mirada*, DAB No. 1730 (2000); *Metropolitan Methodist Hospital*, DAB No. 1694 (1999); *Mira Vista Care Center, Inc.*, DAB CR1459 (2006); *but see Mira Vista Care Center, Inc.*, DAB App. Div. Docket No. A-06-114 (August 10, 2006).

The comprehensive and exhaustive list of "initial determinations" set out at 42 C.F.R. § 498.3(b) does not include any of the five "Counts" that Petitioner proposed to litigate in this appeal. Those five "Counts" simply and categorically are not subject to consideration in this appeal because they are not "initial determinations" by CMS.

My Order *in Limine* made that point unambiguously, and extended Petitioner an opportunity to amend its Prehearing Memorandum so as to identify and address each deficiency for which it had been cited and sanctioned by CMS, and to specify the exhibits and witnesses on which Petitioner would rely in challenging each specific deficiency it might dispute. The amended Prehearing Memorandum was required to specify the exhibits and witnesses on which Petitioner would rely to support any affirmative defenses it intended to assert. Petitioner was explicitly cautioned that exhibits not fully described in its amended Prehearing Memorandum would not be admitted into evidence, and witnesses whose testimony was not fully described in its amended Prehearing Memorandum would not be permitted to testify. Petitioner was allowed 10 days to file an amended Prehearing Memorandum.

Petitioner did not file an amended Prehearing Memorandum or any other pleading having or purporting to have that effect. It therefore appeared by February 12, 2007 that Petitioner might have abandoned its request for hearing and this appeal, and that its request for hearing might thus be subject to dismissal pursuant to 42 C.F.R. § 498.69. Moreover, the most generous reading of Petitioner's pleadings before me at that point simply did not reflect the specific justiciable issues, findings of fact, and conclusions of law in CMS's initial determination with which Petitioner disagreed, and did not specify Petitioner's basis for contending that the findings and conclusions were incorrect. *See* 42 C.F.R. §§ 498.40(b)(1) and (b)(2). A request for hearing deficient in those particulars is subject to dismissal if the deficiencies remain uncorrected after notice and a reasonable opportunity to amend. *Care Inn of Gladewater*, DAB No. 1680 (1999); *Regency Manor Healthcare Center, et. al.*, DAB No. 1672 (1998); *Birchwood Manor Nursing Center*, DAB No. 1669 (1998).

In order to provide Petitioner with every possible opportunity to amend its pleadings so as to raise justiciable issues within the terms of sections 1866(b)(2) and 1866(h)(1) of the Act and 42 C.F.R. Part 498, and to allow Petitioner a further opportunity to comply with the specific requirements of 42 C.F.R. §§ 498.40(b)(1) and (b)(2), on February 12, 2007, I issued a Notice and Order to Show Cause requiring Petitioner to show cause why its request for hearing in this matter should not be dismissed as abandoned. I ordered that any such showing must include, as a specific demonstration that Petitioner had not abandoned its request for hearing, an amended Prehearing Memorandum in full compliance with the Order *in Limine* and 42 C.F.R. §§ 498.40(b)(1) and (b)(2). The importance of Petitioner's compliance with 42 C.F.R. §§ 498.40(b)(1) and (b)(2) was conspicuous in my February 12, 2007 Notice and Order to Show Cause: Petitioner's litigating strategy had up to that point resisted pleading a case over which I could exercise jurisdiction, a strategy which up to that point had deliberately and unmistakably forfeited its right to appeal legal and factual issues that I might hear and decide. By the terms of my Notice and Order to Show Cause, Petitioner was clearly on notice that unless it brought its appeal within the ambit of this forum's jurisdiction by complying with 42 C.F.R. §§ 498.40(b)(1) and (b)(2), its failure to do so would be treated as an abandonment of its May 4, 2006 request for hearing and of the appeal based on it. Both my Order *in Limine* and my Notice and Order to Show Cause were obedient to the doctrine of *The Carlton at the Lake*, DAB No. 1829 (2002) and *Alden Nursing Center-Morrow*, DAB No. 1825 (2002) in permitting — indeed, by requiring — Petitioner to correct the deficiencies in its invocation of this forum's jurisdiction.

Petitioner filed its Response to the Notice and Order on February 20, 2007. CMS was given the opportunity to reply to Petitioner's Response not later than March 16, 2007, and did so in its letter of March 15, 2007. Those pleadings represent the final statements of both parties to this litigation.

II

From the very beginning of this litigation, Petitioner has argued propositions and has offered proof of facts not cognizable in this forum within the terms of sections 1866(b)(2) and 1866(h)(1) of the Act and 42 C.F.R. Part 498. It is true that part of Petitioner's request for hearing could, if read broadly in the spirit of *Carlton* and *Alden-Morrow*, be understood to adumbrate challenges to the deficiencies cited against it and to CMS's determination to end Petitioner's participation in the Medicare program. P. Req. Hrg., at 1, paragraph 1. It is now plain, however, that Petitioner's exclusive objective was then what it is now: the litigation of matters far beyond the jurisdictional boundaries of this forum. P. Req. Hrg., at page 1, paragraph 2 through page 3, paragraph 2, and attached exhibits.

In the earliest stages of this litigation, CMS did not move to strike the objectionable portions of Petitioner's request for hearing, but it did react vigorously to Petitioner's June 27, 2006 Motion to Revise Order to Allow Discovery. By that Motion Petitioner sought permission to conduct discovery through interrogatories to CMS. The subjects of those interrogatories appeared to be matters related only to the objectionable portions of the request for hearing. None of the proposed interrogatories appeared reasonably calculated to lead to the discovery of evidence relevant to any of the arguably-legitimate issues implicit in the first paragraph of its request for hearing. CMS responded to Petitioner's Motion on July 10, 2006, noting that Civil Remedies Division procedures normally do not contemplate discovery through interrogatories, and that the topics Petitioner sought to explore through interrogatories were not "initial determinations" properly before me in this case.

CMS filed its Report of Readiness on July 17, 2006 in compliance with paragraph D of the "60-Day" Order entered when this case was docketed on May 17, 2006. Petitioner has never filed a Report of Readiness, although filing such a Report would have allowed it an early opportunity to refine and clarify its legal and factual positions in this appeal.

While Petitioner's Motion to Revise Order to Allow Discovery was pending, and after CMS filed its Report of Readiness, Petitioner acted again: on August 2, 2006 it filed its Motion for Temporary Injunction, by which it asked that "this Departmental Appeals Board . . . grant a temporary injunction and order CMS, and its agent AHCA, to renew HIGH TECH's home health agency license and its Medicare certification." On August 9, 2006, CMS replied by noting that there appeared to be "no authority for the proposition that this tribunal may grant injunctive relief in any form . . . ."

I denied both of Petitioner's Motions in my Ruling on Pending Motions of August 23, 2006. In doing so, I explained that the fundamental flaw in Petitioner's two Motions was their insistence on debating questions and demanding relief outside the proper scope of litigation in this forum. Thus, at an early stage of these proceedings, Petitioner had ample reason to understand that it would not be permitted to litigate such questions in this appeal. That understanding was not reflected in the List of Exhibits and the List of Witnesses filed by Petitioner on or about October 30, 2006.

Although six of Petitioner's proffered exhibits are items of correspondence related to the survey and revisit that led to the termination sanction (P. Exs. 1-5, and 13), and one adopts a group of CMS exhibits (P. Ex. 14), the remaining eight (P. Exs. 6-12, and 15) reveal no apparent relationship to the survey and revisit, to the deficiencies cited, or to any facts properly at issue in this appeal. I can understand them only as addressing the five "Counts" already discussed.

Petitioner's final list of eight witnesses was non-compliant with Civil Remedies Division Procedures paragraph 4, for it omitted entirely the witnesses' addresses, provided no information to identify their relationships to the case, and, most significantly, failed completely to include brief summaries of the testimony expected from each. One named witness, M. Larkin, is the facility's administrator, but the other seven were identified only by their names. One of the eight, L. Mullin, is described at page 7 of Petitioner's Response to Motion *in Limine* as a Registered Nurse engaged in caring for one of the patients relevant to this case, but the nature of her proposed testimony is not described there or in the witness list. I have been unable to find any of the six remaining names anywhere in any of Petitioner's pleadings, documents, or attachments filed during the entire course of this litigation.

Thus, as sources of specific information about Petitioner's position on any issue properly before me, Petitioner's List of Exhibits and List of Witnesses were all but worthless. The Lists provided no assurance that Petitioner was prepared to place issues before me that I could hear and decide, and strongly suggested that Petitioner had every intention of persisting in its attempt to raise and argue issues that I have no authority to adjudicate. At that point Petitioner had one last clear chance to plead its case in conformity with this forum's jurisdiction: that chance was its Prehearing Memorandum.

Petitioner failed to submit its Prehearing Memorandum by December 4, 2006, the date originally ordered. An Order to Show Cause was issued on December 14, 2006 after inquiries suggested that Petitioner might have abandoned its appeal, but Petitioner was ultimately granted an extension of time to permit it to file its Prehearing Memorandum by December 22, 2006. That Prehearing Memorandum, prepared in full awareness of my Ruling of August 23, 2006, repeated Petitioner's insistence on litigating only matters beyond my jurisdiction and refused to identify which of its named witnesses would offer relevant testimony and which of its proposed exhibits represented relevant items of evidence. The Prehearing Memorandum made no effort to repeat, elucidate, preserve, or adopt any of the arguably-legitimate issues of fact or law implicit in the first paragraph of Petitioner's request for hearing. It refused to specify exhibits or witnesses that might address any of those arguably-legitimate issues. It was that Prehearing Memorandum that precipitated CMS's Motion *in Limine* and resulted in my Order *in Limine*; it was that Prehearing Memorandum that my Notice and Order to Show Cause required Petitioner to amend or suffer dismissal pursuant to 42 C.F.R. § 498.69(b)(2).

III

What lies before me now is a record in which Petitioner denies that it has abandoned its appeal, but in which Petitioner has refused to amend its Prehearing Memorandum and plead its case in conformity with the jurisdictional limits of this forum and the Orders issued in these proceedings. The first paragraph of Petitioner's February 20, 2007 Response (P. Resp.) made that appreciation clear:

> 1. HIGH TECH is not abandoning its lawsuit. The Departmental Appeals Board is a necessary precursor to get to federal district court, and probably on to the 11th Circuit Court of Appeals. Under ordinary conditions, to maintain an ongoing working relationship with CMS, a home health provider must step lightly when appealing a CMS ruling. As HIGH TECH has been destroyed by CMS, these are not ordinary conditions.

P. Resp., at 1.

Petitioner's answer to the Notice and Order's demand for specificity concerning its witnesses and exhibits was unresponsive at best:

> 9. HIGH TECH intends to rely on both sets of exhibits and the testimony of CMS witnesses. HIGH TECH will offer its witnesses.

P. Resp., at 4.

Finally, Petitioner declined to amend its December 22, 2006 Prehearing Memorandum, although the Notice and Order made such an amendment an essential component of a satisfactory showing of good cause in response to that Notice and Order:

> 12. HIGH TECH relies on its Pre-Hearing Memorandum and its previously-submitted list of exhibits. Those exhibits are self-explanatory and are more than 90% AHCA and HCFA documents.

P. Resp., at 5.

Petitioner's Response to the Notice and Order to Show Cause was an intentional and informed refusal to attempt a showing of cause why its request for hearing in this matter should not be dismissed as abandoned. Thus, entirely as the result of its own choice, Petitioner's February 20, 2007 Response has failed to show such good cause. I so find and conclude, and I repeat my finding and conclusion on this point below.

Petitioner's intransigent refusal to plead a case that I can hear and decide places it in a position functionally equivalent to any other petitioners whose requests for hearings fall short of invoking the jurisdiction of this forum. Most of those appeals fall into two classes.

Some of those appeals are based on requests for hearings defective because they do not comply with the content requirements of 42 C.F.R. §§ 498.40(b)(1) and (b)(2). The doctrine set out in *The Carlton at the Lake*, DAB No. 1829, and *Alden Nursing Center-Morrow*, DAB No. 1825, demands that such petitioners be given a reasonable opportunity to correct the shortcomings of their requests for hearings, or that the ALJ require more definite statements of those petitioners' substantive claims. But those ameliorative measures do not invalidate the underlying rule: if material content deficiencies are not corrected, the requests for hearing are to be dismissed. *Care Inn of Gladewater*, DAB No. 1680; *Regency Manor Healthcare Center*, DAB No. 1672; *Birchwood Manor Nursing Center*, DAB No. 1669. The ALJ is justified in evaluating a "petitioner's willingness and ability to identify the facts and legal interpretations in controversy" as a means of ensuring that "the regulations' reasonable expectation that litigation will be initiated and maintained only for legitimate reasons." *Care Inn of Gladewater*, DAB No. 1680, at 8. Put another way, when the ALJ offers a reasonable opportunity to amend a request for hearing and the opportunity is spurned, then "strong reasons . . . such as intransigency on the part of the petitioner . . . " support dismissal. *Alden Nursing Center-Morrow*, DAB No. 1825, at 12.

Another class of appeals includes requests for hearing that are defective because they challenge various CMS actions other than "final determinations." They are subject to dismissal pursuant to 42 C.F.R. § 498.70(b), since those petitioners do not have a right to a hearing on the issues they raise. *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985 (2005); *Premium Diagnostic Laboratory, Inc.*, DAB No. 1790 (2001); *Mira Vista Care Center, Inc.*, DAB No. 1789; *Lakewood Plaza Nursing Center*, DAB No. 1767 (2001); *The Lutheran Home-Caledonia*, DAB No. 1753 (2000).

As matters stand now, Petitioner's appeal has fully qualified for classification in both groups. It belongs in the first class because Petitioner has not complied with the content requirements of 42 C.F.R. §§ 498.40(b)(1) and (b)(2), and has repeatedly shown itself unable — or unwilling to the point of intransigence — to do so. Petitioner's final fully-volitional refusal to attempt compliance, while in full awareness of the consequences of non-compliance, constitutes an abandonment of its appeal within the meaning of 42 C.F.R. § 498.69(b)(2). I so find and conclude, and I repeat my findings and conclusions on this point below. It belongs in the second class because none of the five "Counts" Petitioner does propose to contest here is an "initial determination" and Petitioner has no

right to appeal any of them. On the case it has pleaded, Petitioner "does not . . . have a right to a hearing" as that concept is understood at 42 C.F.R. § 498.70(b). I so find and conclude, and I repeat my findings and conclusions on this point below.

IV

The terms of 42 C.F.R. § 498.74(a) require that this Decision recite "separate numbered findings of fact and conclusions of law." Accordingly, based on the entire record before me in this case, I find and conclude as follows:

1. Petitioner's February 20, 2007 Response to Order to Show Cause fails to comply with the Order and Notice to Show Cause of February 12, 2007, and fails to show cause why Petitioner's request for hearing should not be dismissed as abandoned.

2. Petitioner has not satisfied the content requirements of 42 C.F.R. §§ 498.40(b)(1) and (b)(2), and has abandoned its appeal within the meaning of 42 C.F.R. § 498.69(b)(2).

3. Because Petitioner has abandoned its appeal, its request for hearing is subject to dismissal pursuant to 42 C.F.R. § 498.69(b)(2).

4. Petitioner does not propose in these proceedings to contest an "initial determination" within the meaning of 42 C.F.R. § 498.3(b), and therefore does not have a right to a hearing within the meaning of 42 C.F.R. § 498.70(b).

5. Because Petitioner does not have a right to a hearing, its request for hearing is subject to dismissal pursuant to 42 C.F.R. § 498.70(b).

For all of the reasons set forth above, and based on the findings of fact and conclusions of law here recited, Petitioner's May 4, 2006 request for hearing and this appeal must be, and they are, DISMISSED, pursuant to 42 C.F.R. §§ 498.69(b)(2) and 70(b).

/s/
Richard J. Smith
Administrative Law Judge