Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Burien Nursing and Rehabilitation Center,
(CCN: 50-5252),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-813

ALJ Ruling No. 18-1

Date: October 16, 2017

RULING DENYING MOTION TO VACATE ORDER DISMISSING REQUEST FOR HEARING

I deny the motion of Petitioner, Burien Nursing and Rehabilitation Center, to vacate my order of July 24, 2017, dismissing its request for hearing.

Petitioner, a skilled nursing facility in the State of Washington, filed a hearing request on June 15, 2017, challenging deficiencies found at a survey of its facility on February 24, 2017, and appealing the determination of the Centers for Medicare & Medicaid Services (CMS) to impose civil money penalties against it. On July 19, 2017, Petitioner withdrew its hearing request and I issued an order dismissing that request.

Now, Petitioner seeks to vacate that order of dismissal on the ground that a new development constitutes good cause for vacating the order and granting Petitioner a hearing. The new development cited by Petitioner is a determination by Washington's Department of Social and Health Services (DSHS) to rescind the imposition of state penalties against Petitioner. Those penalties emanated from the same survey that is the basis of CMS's determination to impose penalties.

Petitioner files its motion pursuant to 42 C.F.R. § 498.72. This regulation authorizes an administrative law judge to vacate an order dismissing a hearing request where "good cause" exists for doing so. The authority to vacate is discretionary (the regulation says that the judge "may" vacate a previously entered dismissal). It does not define "good cause."

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. For example, "good cause" in a circumstance where a party files a request for hearing untimely has universally been interpreted to mean some event that the party could not control and that prevented the party from filing its request.

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 even if Petitioner might have thought incorrectly that they were grounds to continue its appeal.

Petitioner does not meet that burden because it offers no evidence that might even potentially affect the outcome of its dismissed appeal.

The DSHS letter, dated September 11, 2017, in which it announces rescission of State penalties, recites that the rescission is based on unspecified "unique circumstances." It reiterates, however, that substantial evidence supports the findings of noncompliance that were the basis for the determination to impose State penalties and it states specifically that: "[t]he federal 2567 Statement of Deficiencies remains unchanged." Declaration of Carin A. Marney in Support of Motion to Vacate Order of Dismissal, Ex. 2. In other words, although DSHS rescinded its penalty determination based on unspecified "unique circumstances," it reiterated that the findings of noncompliance that were the basis for imposing a penalty and the supporting evidence are unaltered.

CMS's determinations finding noncompliance by skilled nursing facilities and its determinations to remedy noncompliance usually emanate from findings of noncompliance made by surveyors employed by State survey agencies such as DSHS. However, CMS's authority to impose remedies is independent of actions by State agencies. A State agency may determine not to impose remedies against a facility, or to rescind remedies that it previously imposed, without vitiating CMS's independent

authority. Furthermore, irregularities in the survey process, including possible surveyor bias or other violations of State protocol, are not affirmative defenses against CMS's noncompliance findings. *Jewish Home of Eastern Pennsylvania*, DAB No. 2254 at 8 (2009), *aff'd*, *Jewish Home of Eastern Pennsylvania v. CMS*, 696 F.3d 359 (2012).

What matters in all cases brought under federal regulations governing skilled nursing facilities is objective proof of noncompliance or compliance with Medicare participation requirements. How that evidence is obtained is irrelevant. State officials may be intensely biased against a facility and may even have improper personal reasons for targeting that facility in a compliance survey. If, however, they obtain objective proof establishing a prima facie case of noncompliance by the facility, that proof will be sufficient to impose on the facility the burden of proving its compliance. Conversely, State officials may have the purest of hearts, but if they fail to adduce evidence of substantial noncompliance by a facility, then there can be no prima facie case of noncompliance.

Here, Petitioner offers no previously unavailable evidence to show that it complied with participation requirements. Its argument for vacation of the dismissal order rests exclusively on assertions that the State investigation of its facility may have been tainted by personal bias by an individual or individuals within DSHS. That assertion, even if true, is irrelevant. The possible existence of proof of bias has no bearing on the objective evidence on which CMS relies. Moreover, it provides nothing to show that Petitioner in fact complied with participation requirements. If I were to hold a hearing in this case, I would exclude all proffers of surveyor or State agency bias against Petitioner and would rest my decision exclusively on evidence of facility noncompliance or compliance without regard to how that evidence is obtained.

/s/
Steven T. Kessel
Administrative Law Judge