

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Shawn Manor Nursing Home	)	
(CCN: 37-5194),	)	Date: August 6, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-345
	)	Decision No. CR1633
Centers for Medicare & Medicaid	)	
Services.	)	

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**DECISION DISMISSING  
REQUEST FOR HEARING**

In this case, the Centers for Medicare & Medicaid Services (CMS) filed a motion to dismiss the hearing request of Petitioner Shawn Manor Nursing Home on the grounds that all remedies have been rescinded, and thus, Petitioner has no right to a hearing. CMS indicated that Petitioner has no objection to its motion. I therefore grant CMS's motion to dismiss pursuant to 42 C.F.R. § 498.70(b).

**I. Background**

Petitioner is a skilled nursing facility located in Ponca City, Oklahoma, certified to participate in the Medicare and Medicaid programs as a provider of services. In a notice letter dated April 11, 2007, CMS advised Petitioner that a December 1, 2006 survey conducted by the state survey agency found that Petitioner was not in substantial compliance with federal regulations. CMS Ex. 1. The letter also informed Petitioner that another survey conducted on January 31, 2007, found that Petitioner had failed to achieve substantial compliance. CMS's letter advised Petitioner further that the state survey agency had since notified CMS that, as of the February 21, 2007 survey, Petitioner had achieved substantial compliance, and therefore, the termination and denial of payment for

new admissions were rescinded. However, CMS imposed a per-day civil money penalty (CMP) against Petitioner in the amount of \$32,200.00. *Id.* By another notice letter dated June 7, 2007, CMS advised Petitioner that the CMP was rescinded. CMS Ex. 2.<sup>1</sup>

Petitioner filed its request for a hearing on March 28, 2007.

On June 28, 2007, CMS filed its motion to dismiss, accompanied by two exhibits (CMS Exs. 1 and 2). As stated above, CMS indicated that Petitioner has no objection to its motion. I have admitted CMS Exs. 1 and 2 into the record.

## II. Discussion

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 determinations 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). No right to a hearing exists pursuant to 42 C.F.R. § 498.3(b)(13), unless CMS actually imposes one of the specified remedies. *Schowalter Villa*, DAB No. 1688 (1999). Where CMS rescinds its remedy determination, Petitioner no longer has a right to a hearing. *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985 (2005) and cases cited therein.

The June 7, 2007 notice letter from CMS to Petitioner clearly states that the CMP is rescinded, and also reiterates that the other remedies mentioned in its previous letter, termination and denial of payment for new admissions, were rescinded.

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<sup>1</sup> In its motion, on page one, CMS states that its "April 11, 1007" notice letter advised Petitioner that CMS intended to impose certain remedies based on a "December 4, 2007 survey" of Petitioner's facility. CMS is apparently referring to its notice letter dated April 11, 2007, and the survey conducted on December 1, 2006. Also, on page two of its motion, CMS states that no remedies were imposed for the deficiencies found during the "December 4, 2006 and January 31, 2006 (revisit) surveys." CMS is apparently referring to the surveys that were conducted on December 1, 2006 and January 31, 2007.

