Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Evergreen Washington Healthcare Frontier, d/b/a Frontier Health and Rehabilitation Center II, (CCN: 50-5276),	)	Date: April 24, 2008
	)	
Petitioner,	)	
	)	Docket No. C-08-160
- v. -	)	Decision No. CR1777
	)	
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

In this case, we revisit the narrow question as to whether a long-term care facility has a right to a hearing when the Centers for Medicare & Medicaid Services (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, Evergreen Washington Healthcare Frontier d/b/a Frontier Health and Rehabilitation Center, is a skilled nursing facility located in Longview, Washington, certified to participate in the Medicare and Medicaid programs as a provider of services. On September 12, 2007, the Washington State Division of Residential Care Services, Aging and Disability Services Administration completed a survey of Petitioner's facility and found noncompliance. In a notice letter dated October 9, 2007, CMS advised Petitioner that, based on those survey findings, it intended to impose the remedy of denial of payment for new admissions (DPNA), effective October 24, 2007. However, in a letter to Petitioner dated November 7, 2007, CMS informed Petitioner that a revisit survey confirmed that Petitioner had achieved and maintained substantial compliance with Medicare participation requirements. The November 7 letter further informed Petitioner that no action would be taken regarding the DPNA. Petitioner requested a hearing on December 6, 2007.

On March 5, 2008, CMS filed a Motion to Dismiss and a Memorandum in Support of Motion to Dismiss arguing that Petitioner has no right to a hearing because no enforcement remedy has been imposed. CMS also attached 10 Exhibits (CMS Exs. 1-10) to support its motion to dismiss. By Order dated March 11, 2008, I directed Petitioner to file a response to CMS's motion within twenty days of its receipt. Petitioner did not respond to the motion, and the time for response has since passed.

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

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 CMS rescinds its remedy determination, Petitioner no longer has a hearing right because the determination that is subject to a hearing no longer exists. *Schowalter Villa*, DAB No. 1688 (1999).

CMS's letters of November 7, 2007 and February 14, 2008 plainly state that the DPNA was rescinded, and nothing else suggests that any other remedy has been imposed. CMS Ex. 6, CMS Ex. 10. Petitioner therefore no longer has a right to an ALJ hearing, and I may dismiss pursuant to 42 C.F.R. § 498.70(b).

Accordingly, I order that this case be dismissed.

/s/
Carolyn Cozad Hughes
Administrative Law Judge

[1] I make this one finding of fact/conclusion of law.