

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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|                                 |   |                     |
|---------------------------------|---|---------------------|
| In the Case of:                 | ) |                     |
|                                 | ) |                     |
| Byrd Haven Nursing Home         | ) |                     |
| (CCN: 04-5209),                 | ) | Date: June 13, 2008 |
|                                 | ) |                     |
| Petitioner,                     | ) |                     |
|                                 | ) |                     |
| - v. -                          | ) | Docket No. C-08-369 |
|                                 | ) | Decision No. CR1805 |
| Centers for Medicare & Medicaid | ) |                     |
| Services.                       | ) |                     |

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**DECISION DISMISSING  
REQUEST FOR HEARING**

For the reasons set forth below, I conclude that Petitioner, Byrd Haven Nursing Home, is not entitled to a hearing because the Centers for Medicare and Medicaid Services (CMS) withdrew the enforcement remedies provided for in 42 C.F.R. § 488.406. I grant CMS's motion to dismiss pursuant to 42 C.F.R. § 498.70(b).

***Petitioner has no right to a hearing if CMS does not impose a remedy.\****

Petitioner is a skilled nursing facility located in Searcy, Arkansas participating in the Medicare program as a provider of services. On January 25, 2008, the Arkansas Department of Human Services (state agency) conducted a survey of Petitioner and found the Petitioner not in substantial compliance with federal regulations. Hearing Request. By letter dated February 13, 2008, the state agency informed Petitioner that CMS had imposed a per-instance civil money penalty in the amount of \$3000, \$1500 per instance for noncompliance with 42 C.F.R. § 483.10(b)(11) and 42 C.F.R. § 483.25. The letter also informed Petitioner that a denial of payment for all new Medicare and Medicaid admissions would go into effect on April 25, 2008. Hearing Request.

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\* I make this one finding of fact/conclusion of law.

On March 26, 2008, Petitioner timely filed its request for a hearing. By letter dated April 23, 2008, CMS notified Petitioner that it was rescinding the civil money penalty. CMS Ex. 2. On April 24, 2008, CMS moved to have this case dismissed. Petitioner has not responded to CMS's motion.

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 sets 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. *Lutheran Home – Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). The remedy, not the citation of a deficiency, triggers the right to a hearing. *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). Where, as here, CMS withdraws the remedies, Petitioner no longer has a hearing right because the determination that is subject to a hearing no longer exists. *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985 (2005).

Because CMS has rescinded all remedies, 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/

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Carolyn Cozad Hughes  
Administrative Law Judge