

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Riverwood Nursing Center f/k/a)	
Southwood Nursing Center,)	Date: January 8, 2008
(CCN: 02509700))	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-133
)	Decision No. CR1721
Centers for Medicare & Medicaid)	
Services.)	
_____)	

**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 Riverwood Nursing Center on the grounds that Petitioner does not have a right to a hearing. Petitioner opposes the motion. It is my decision to 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 Jacksonville, Florida, certified to participate in the Medicare and Medicaid programs as a provider of services. Southwood Nursing Center¹ was sued for damages in the Fourth Judicial District of Duval County, Florida. Plaintiff prevailed, and obtained a \$750,000 jury verdict. Following entry of final judgment, which Southwood did not appeal, Plaintiff filed a certified copy of the judgment with Mutual of Omaha, CMS's fiscal intermediary, requesting assignment of

¹ The request for hearing in this case was filed by Riverwood Nursing Center inasmuch as that is the name by which Southwood is officially known.

Medicare receivables due Petitioner pursuant to 42 U.S.C. § 1395g (c)(1) and 42 C.F.R. § 424.90. On October 3, 2007, Mutual of Omaha notified Petitioner that it was accepting the judgment as valid and would be redirecting Medicare reimbursements to Plaintiff.

Petitioner filed a request for hearing before the Civil Remedies Division of the Departmental Appeals Board (DAB) dated November 30, 2007, asking that redirection of Medicare payments be reversed and vacated.² CMS filed a Motion to Dismiss dated December 14, 2007. Petitioner filed a response dated December 21, 2007.

Petitioner's Contentions (As reflected in the request for hearing)

Petitioner contends that 42 C.F.R. § 424.90(a) does not authorize CMS to redirect Medicare payments merely upon presentation of judgment and the Plaintiff's statement that the judgment is unpaid. Instead, asserts Petitioner, a court order is required in aid of execution of the judgment providing for assignment or reassignment of the Medicare benefits to satisfy the judgment.

In the alternative, Petitioner argues that even if 42 C.F.R. § 424.90(a) authorizes CMS to redirect Medicare payments merely upon presentation of judgment and the Plaintiff's statement that the judgment is unpaid, such regulatory provision is unconstitutional.

CMS's Contentions

CMS contends that redirection of Medicare payments does not create a hearing right. Specifically, CMS maintains that, in general, a participating long-term care facility will have a right to a hearing if an initial determination to impose a remedy against a facility is issued. In the instant case, states CMS, a remedy has not been imposed.

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

² Although Petitioner seeks relief on behalf of Riverwood Nursing Center and Souhwood Nursing Center, it asserts that Riverwood was formerly known as Southwood.

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).

As indicated by CMS, no remedies have been imposed against Petitioner. Therefore, it is not entitled to a hearing.

Petitioner argues that the list of initial determinations set forth in the regulations under consideration here is non-inclusive, and that redirection of Medicare payments is not expressly excluded as subject to appellate action before the DAB. Petitioner equivocates in alleging that the redirection of Medicare payments is appealable because the list of initial determinations contained in the regulations is non-inclusive. Moreover, Petitioner has advanced no cogent reason in support of such argument. Additionally, Petitioner cannot rely on the fact that redirection of Medicare payments is not expressly excluded from administrative appeal under 42 C.F.R. § 498(3)(d). The burden rests with Petitioner to show that such action is one of the initial determinations that allow for appeal to the DAB. Petitioner has failed to do so.

Petitioner has not addressed in its brief the allegations made in the request for hearing, that redirection of Medicare payments is not authorized upon mere presentation of a judgment. In view of Petitioner's silence in its brief as to this issue and the basis for dismissal of this action, I need not address this point of contention. Additionally, I do not have authority to decide Petitioner's claim that the regulations are unconstitutional if they allow for redirection of benefits upon mere presentation of a judgment.

None of Petitioner's ancillary arguments warrants consideration in the absence of a right to file a request for hearing.

III. Conclusion

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 that this case be dismissed.

/s/

José A. Anglada
Administrative Law Judge