

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)
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Valencia Hills Health and Rehabilitation) Date: August 11, 2008
Center (CCN: 10-5301),)
)
Petitioner,)
) Docket No. C-08-187
v.) Decision No. CR1830
)
Centers for Medicare & Medicaid Services.)
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DECISION AND ORDER DISMISSING CASE

This matter is before me following the pre-hearing conference held in this matter on Tuesday, July 8, 2008, and CMS's Motion to Dismiss filed July 24, 2008. Petitioner answered the CMS Motion on August 4, 2008. The immediate procedural history of this litigation — which I shall set out briefly below — reflects that the conference established with finality a matter of critical importance to the continuing viability of Petitioner's right to a hearing as contemplated by its request for hearing of December 13, 2007.

By that request for hearing, which it entitled "Petition Appealing Imposition of Remedies," Petitioner sought review of certain deficiencies with which it was cited as the result of an October 2007 survey. Petitioner specifically challenged only three citations in its request for hearing: the three challenged citations were based on Tags F-279, F-309, and F-325. Petitioner's February 6, 2008 Readiness Report repeated Petitioner's explicit limitation of its appeal to challenges of those three citations. CMS's Report of Readiness, filed the same date, identified a total of seven citations: in addition to the three specified by Petitioner, CMS noted that Petitioner faced four other citations, issued based on Tags F-328, F-332, F-334, and F-364. For the seven citations, CMS had imposed a civil money penalty (CMP) of \$350 per day for 40 days, for a total CMP of \$14,000.

Pre-hearing memoranda were filed by both sides on May 9, 2008. CMS's memorandum outlined its legal and evidentiary position on all seven citations. Petitioner's memorandum notably addressed only the citation based on F-309, which was based on alleged non-compliance beginning with the care provided to a single resident of Petitioner's facility on October 4, 2007. Petitioner's memorandum did not discuss F-279 or F-325.

In its pleading of May 30, 2008, CMS correctly noted that the only citation Petitioner appeared still to challenge at that point in the case was the single citation, F-309. Petitioner conceded that point in its June 13, 2008 pleading and explicitly abandoned its challenge to six other citations of non-compliance arising from the same survey and cited on the same CMS Form 2567. The unchallenged citations were those designated Tags F-279, F-325, F-328, F-332, F-334, and F-364. I ruled to that effect on June 20, 2008, repeated that ruling during the July 8, 2008 conference, and elucidated that ruling in the Order of July 8, 2008.

Since Petitioner left unchallenged all citations except F-309, the six citations left unchallenged clearly are now conclusive and final. It is also clear that because those six unchallenged citations are final, they are in themselves, and without reference to F-309, entirely sufficient to justify the proposed CMP, both as to amount and as to duration. The proposed daily CMP of \$350 falls toward the lower end of the range of penalties (\$50 – \$3,000) for deficiencies that do not constitute immediate jeopardy. 42 C.F.R. § 488.438(a)(ii).

Petitioner nevertheless expresses its belief that it can prevail on F-309, but does not explain how prevailing in that challenge would affect its liability to the proposed CMP. Although it declares on page 2 of its response to the motion to dismiss that "It is, and always has been, the Petitioner's position that the facts resulting in the imposition of Tag 309 were misinterpreted by the state surveyor and such interpretation is clearly erroneous," Petitioner remains unable to demonstrate how establishing that position beyond argument could affect anything else subject to my jurisdiction in this appeal.

As I pointed out to the parties in the Order of July 8, 2008: "The posture of this case . . . is very close indeed to being governed by the rule . . . in *Briarcliff Nursing and Rehabilitation Center*, DAB CR1228 (2004), *Carrington South Health Care Center*, DAB CR1071 (2003), and *EagleCare, Inc., d/b/a Beech Grove Meadows*, DAB CR923 (2002)." The briefing now before me makes it utterly certain that the case does fall within the reach of that rule. In general, this forum recognizes that an Administrative Law Judge need not adjudicate challenges that, even if successful, could not affect the imposition of sanctions. *Briarcliff Nursing and Rehabilitation Center*, DAB CR1228; *Carrington South Health Care Center*, DAB CR1071; *Bethel Health Care Center*, DAB CR1067 (2003); *EagleCare, Inc., d/b/a Beech Grove Meadows*, DAB CR923; *Orchard*

Grove Extended Care Center, DAB CR541 (1998). Guided by and applying that rule, I find and conclude that:

(1) the imposition, amount, and duration of the CMP based on the six unchallenged citations are not before me now; and

(2) because they are not, Petitioner's request for hearing is subject to dismissal because it no longer has a right to a hearing on the challenged citation, F-309. 42 C.F.R. § 498.70(b).

Accordingly, and for all of the reasons set out above, Petitioner's December 13, 2007 request for hearing must be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge