Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Brighton Convalescent Center
(CCN: 55-5338),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-517

ALJ Ruling No. 2017-1

Date: October 27, 2016

DISMISSAL

Brighton Convalescent Center (Brighton or Petitioner) requested a hearing before an administrative law judge (ALJ) to contest the California Department of Public Health's (state agency) determination that Brighton was not in substantial compliance with Medicare participation requirements for skilled nursing facilities (SNF). Because the Centers for Medicare & Medicaid Services (CMS) did not impose enforcement remedies on Brighton, Brighton does not have a right to a hearing. Therefore, I dismiss Brighton's hearing request.

I. Procedural History and Background

Brighton is an SNF located in Pasadena, California, that participates in the Medicare program. The state agency completed a complaint survey of Brighton's facility on March 2, 2016, which resulted in a finding that Brighton did not substantially comply with 42 C.F.R. §§ 483.13(b) and 483.13(c)(1)(i) at the "G" scope and severity level (i.e., isolated deficiencies that constituted actual harm that is not immediate jeopardy). CMS Exhibit (Ex.) 1; CMS Ex. 2 at 1. In an undated letter, the state agency: informed Brighton of its

finding; provided Brighton with an opportunity to file a plan of correction; warned Brighton that if it did not return to substantial compliance by certain dates in the future, the state agency would recommend that CMS impose a civil money penalty and terminate Brighton's Medicare provider agreement; and notified Brighton that the state agency was imposing, as authorized by CMS, a denial of payment for new admissions, to take effect in the future if Brighton did not return to substantial compliance. CMS Ex. 2 at 1-3. The letter also advised Brighton that if it disagreed with the state agency's determination of noncompliance, it could request a hearing before an ALJ, noting that "[y]ou may appeal the finding of noncompliance that led to an enforcement action, but not the enforcement action or remedy itself." CMS Ex. 2 at 3. Further, the state agency indicated that Brighton could request informal dispute resolution of this case. CMS Ex. 2 at 5-6. Finally, the state agency stated that if CMS imposed termination or any other enforcement remedy, CMS would send notice of this to Brighton. CMS Ex. 2 at 6.

On April 13, 2016, the state agency returned to Brighton for a revisit survey and noted that Brighton no longer had any deficiencies. CMS Ex. 3. On April 29, 2016, Brighton requested an ALJ hearing. Brighton disputed the state agency's finding that it was not in substantial compliance and the conclusion that the deficiency the state agency found was a "G" level deficiency.

On May 4, 2016, I issued an Acknowledgment and Pre-Hearing Order. In response, CMS filed a motion to dismiss Petitioner's hearing request, arguing that CMS did not impose any enforcement remedies and that Petitioner only has a right to a hearing when CMS imposes enforcement remedies. CMS also filed four exhibits with the motion. Petitioner opposed CMS's motion (P. Opposition) and submitted a declaration from Petitioner's administrator (P. Declaration).

II. Issue

Whether Petitioner has a right to a hearing before an ALJ if CMS did not impose enforcement remedies against Petitioner.

III. Discussion

An SNF has a right to a hearing before an ALJ when CMS has "made an adverse 'initial determination' of a kind specified in 42 C.F.R. § 498.3(b)." *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316 at 6 (2010); *see also* 42 C.F.R. § 498.3(a)(1). When CMS makes a finding that an SNF is noncompliant and imposes a remedy under 42 C.F.R. § 488.406, the SNF has received an initial determination that is subject to further review. 42 C.F.R. § 498.3(b)(13); *see also* 42 C.F.R. §§ 488.330(e)(3), 488.408(g)(1), 498.3(a)(3)(ii). Consistent with this proposition, an SNF "has no right to an ALJ hearing

to contest survey deficiency findings where CMS has not imposed any of the remedies specified in section 488.406 based on those findings, or where CMS imposed, but subsequently rescinded, any such remedies." *Columbus Park*, DAB No. 2316 at 7. Remedies specified at 42 C.F.R. § 488.406 include termination of a provider agreement, a denial of payment for new admissions, and civil money penalties. Further, there is no right to ALJ review of CMS's determination as to the level of an SNF's noncompliance unless a successful challenge would affect either the permissible range of a civil money penalty amount or a finding of substandard quality of care that results in the loss of approval of a nurse aide training program. 42 C.F.R § 498.3(b)(14), (d)(10).

In the present matter, the state agency advised Petitioner that it recommended that CMS impose civil money penalties and termination of Petitioner's provider agreement if Petitioner did not achieve substantial compliance with program participation requirements within specified time frames. CMS also authorized the state agency to impose a denial of payment for new admissions if Petitioner did not return to substantial compliance within a certain time frame. However, because Petitioner timely returned to substantial compliance on the next revisit survey, CMS never imposed any enforcement remedies. Therefore, Petitioner does not have any hearing rights based on the remedies originally recommended or imposed, but never effectuated.

Petitioner asserts that dismissal of its hearing request will violate its due process rights because it has been significantly harmed by the state agency's finding of a deficiency at the "G" level of scope and severity. P. Opposition at 1-2. Brighton alleges that the state agency's finding resulted in a reduction in Brighton's Five-Star Rating from four stars to two, which in turn made it more difficult for Brighton to contract with health maintenance organizations, attract new residents, and recruit "quality staff." P. Declaration at 2-3. Petitioner also asserts that the state agency's letter expressly provided notice of hearing rights if it disagreed with the findings of noncompliance leading to enforcement remedies. P. Opposition at 4-5. Finally, Petitioner avers that various federal courts, including the United States Court of Appeals for the Ninth Circuit, have taken positions that all allegations arising from a survey must be reviewed or dismissed. P. Opposition at 5-6.

With the exception of an unreported district court case, the cases Petitioner cites are not directly on point to the issue in this matter. Even the district court case differs, for in that case, CMS actually imposed a remedy that was in effect for three days and "affected the Medicare/Medicaid admissions and reimbursements" of the SNF. *Golden Living Ctr.-Grand Island Lakeview*, 2011 WL 6303243 *2 (D. Neb. Dec. 16, 2011). Unlike the cases Petitioner cites, *Columbus Park* is directly applicable to the present matter. DAB No. 2316 at 6-10. Therefore, I follow the rationale of that case and conclude that Petitioner has no right to an ALJ hearing.

IV. Conclusion

Dismissal of a hearing request is appropriate when a petitioner does not have the right to a hearing. 42 C.F.R. § 498.70(b). In the present matter, Petitioner does not have a right to a hearing; therefore, I dismiss its hearing request.

The parties have 60 days from receipt of this dismissal to request that I vacate this dismissal with a showing of good cause. 42 C.F.R. § 498.72.

It is so ordered.

_____/s/_____
Scott Anderson
Administrative Law Judge