Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

NMS Healthcare of Hagerstown, LLC
(CCN: 21-5256),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-1199

Decision No. CR3825

Date: April 30, 2015

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the request for hearing filed by Petitioner, NMS Healthcare of Hagerstown, LLC. I do so because the Centers for Medicare & Medicaid Services (CMS) did not impose a remedy against Petitioner. Consequently, there is nothing left for me to hear and decide.

1. Background

Petitioner is a skilled nursing facility that participates in the Medicare program. The Maryland Office of Health Care Quality (state agency) completed a survey of Petitioner's facility on October 20, 2014 and determined that Petitioner was not in substantial compliance with program requirements. Based on a revisit survey on December 17, 2014, CMS determined that Petitioner had not regained substantial compliance. By letter dated January 5, 2015, CMS notified Petitioner that it planned to impose a denial of payment for new admissions (DPNA) effective January 20, 2015. Petitioner filed its hearing request on January 12, 2015, before the DPNA was to go into effect. By letter dated January 20, 2015, CMS notified Petitioner that it has regained substantial compliance with Medicare requirements effective January 9, 2015 and that, as a result,

the DPNA would not go into effect. To date, CMS has not imposed any enforcement remedies as a result of Petitioner's noncompliance from October 20, 2014 until January 8, 2015.

On March 29, 2015, CMS filed a Motion to Dismiss because Petitioner has refused to withdraw its hearing request despite CMS notifying it that the DPNA would not be imposed. CMS Ex. 2.

CMS asserts that it had not imposed any remedy against Petitioner. Petitioner does not contest this assertion. Thus, the issue before me is whether a facility has a right to a hearing when the enforcement remedy provided for in 42 C.F.R. § 488.406 does not go into effect. This issue is hardly novel. All of the Administrative Law Judges (ALJs) of the Civil Remedies Division have addressed it many times, and have without exception come to the same resolution. I find that Petitioner is not entitled to a hearing, and, on the basis of 42 C.F.R. § 498.70(b), I dismiss Petitioner's hearing request.

42 C.F.R. Part 498 sets forth the hearing rights of a nursing facility. A provider dissatisfied with CMS's initial determination is entitled to further review, but administrative actions that do not constitute 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 a hearing. 42 C.F.R. § 498.3(b)(13). Unless the finding of noncompliance results in the actual imposition of a specified remedy, however, the finding is not an initial determination. 42 C.F.R. § 498.3(d)(10)(ii). Where, as here, CMS does not impose a remedy, rescinds all proposed remedies, or a remedy does not go into effect, a facility has no hearing right because no determination subject to a hearing exists. It is the final imposition of an enforcement remedy or sanction and not the citation of a deficiency that triggers a facility's right to a hearing pursuant to 42 C.F.R. Part 498. *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316 (2010); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *Lakewood Plaza Nursing Ctr.*, DAB No. 1767 (2001); *Lutheran Home-Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997).

In Petitioner's April 27, 2015 Response to CMS's Motion to Dismiss, Petitioner argues that: 1) the underlying alleged deficiencies were inappropriately cited, without merit and should be stricken; 2) CMS cannot "sua sponte, vitiate the right to a hearing simply by announcing that it has rescinded the penalty, but leave in place damaging allegations of noncompliance;" 3) there are constitutional concerns if there is no right to review of CMS's actions. Petitioner's Response at 1-2. I cannot reach Petitioner's first argument until I decide that it has a right to a hearing and I do not do so. As to Petitioner's third argument, I cannot address constitutional issues.

Petitioner cites as support of its second argument *Grace Healthcare of Benton v. DHHS*, 603 F. 3d 412 (8th Cir. 2009) and *Golden Living Center-Grand Island Lakeview v. Sebelius*, 2011 WL 6303243 (D. Neb. 2011). However, Petitioner does not support its argument to administrative proceedings before an ALJ by citation of any statute or regulation that permits me to hear and decide cases when all remedies imposed by CMS have been rescinded or never went into effect. Additionally, the Departmental Appeals Board's (Board's) decision in *NMS Healthcare of Hagerstown*, DAB No. 2601 (2014) makes it clear that the Board was unmoved by the decisions in *Graceland* or *Golden Living*. In this case, no remedy was ever imposed; the hearing request was filed before the DPNA was to go into effect and the facility regained substantial compliance prior to the date of the hearing request and, therefore, no DPNA ever went into effect.

The regulations and prior Board decisions are clear — there is no right to a hearing where deficiencies are identified, but where CMS has thereafter rescinded the initial determination to impose a CMP, and no other enforcement remedy has been imposed. My authority in cases involving CMS is limited to hearing and deciding those issues which the Secretary of this Department has delegated authority for me to hear and decide. That authority is specified at 42 C.F.R. §§ 498.3 and 498.5. The regulations authorize me only to hear and decide cases involving specified initial determinations by CMS. I am authorized to dismiss a hearing request when a petitioner does not have a right to a hearing pursuant to 42 C.F.R. § 498.70(b) and, for that reason, I do so now in this matter. Petitioner's January 12, 2015 request for hearing is dismissed. The parties may request that an order dismissing a case be vacated pursuant to 42 C.F.R. § 498.72.

/s/
Steven T. Kessel
Administrative Law Judge