Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Great Lakes Healthcare, LLC,
(CCN: 14-8322),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-16-299

ALJ Ruling No. 2016-14

Date: July 25, 2016

RULING

Petitioner, Great Lakes Healthcare LLC, is a home health agency (HHA) located in Chicago, Illinois, that participated in the Medicare program until December 2015. Following a survey, completed June 19, 2015, the Centers for Medicare & Medicaid Services (CMS) terminated the HHA's program participation because it failed to maintain substantial compliance with Medicare conditions of participation and did not correct its deficiencies prior to December 19, 2015. Although Petitioner has requested a hearing, it does not challenge CMS's finding of substantial noncompliance. Instead Petitioner complains that neither CMS nor the state survey agency "formally" advised it that they rejected the plan of corrections it submitted in response to the survey findings.

CMS moves to dismiss Petitioner's hearing request under 42 C.F.R. § 498.70(c) because it was not filed timely. In the alternative, CMS argues that Petitioner's hearing request must be dismissed under section 498.70(b) because Petitioner does not have the right to a hearing on the issue it has raised.

I agree that Petitioner does not have the right to a hearing on the issues it raises and dismiss Petitioner's hearing request.

Discussion

Petitioner's hearing request must be dismissed because Petitioner is not entitled to a hearing on CMS's rejection of its plan of correction nor on CMS's purported failure to notify it of the rejection. 42 C.F.R. § 498.70(b) .[1]

An HHA is a public agency or private organization that "is primarily engaged in providing skilled nursing services and other therapeutic services" to patients in their homes. Social Security Act (Act) section 1861(o). It may participate in the Medicare program as a provider of services if it meets that statutory definition and complies with certain requirements, called conditions of participation. Act §§ 1861(o), 1891; 42 C.F.R. Part 484; 42 C.F.R. § 488.3. But if the provider fails to comply with the provisions of section 1861 or the relevant regulations, CMS, acting on behalf of the Secretary of Health and Human Services, may terminate its provider agreement. Act § 1866(b)(2); 42 C.F.R. § 489.53(a)(1).

To monitor compliance, CMS contracts with state agencies that periodically survey the HHAs. 42 C.F.R. § 488.10.

Section 1866(h) of the Act authorizes administrative review of determinations that a provider fails to comply substantially with Medicare program requirements "to the same extent as is provided in section 205(b) of the [Act]." Under section 205(b), the Secretary of Health and Human Services must provide reasonable notice and opportunity for a hearing "upon request by [the affected party] who makes a showing in writing that his or her rights may be prejudiced" by the Secretary's decision. The hearing request "must be filed within sixty days" after receipt of the notice of CMS's determination. Act § 205(b). The 60-day time limit is thus a statutory requirement. *See Cary Health & Rehab. Ctr.*, DAB No. 1771 at 8-9 (2001); 42 C.F.R. § 498.40(a) (requiring the affected party to "file the request in writing within 60 days from receipt of the notice . . . unless that period is extended . . . .").

Under the regulations, a provider dissatisfied with an initial determination – which includes a finding of noncompliance that results in CMS imposing a remedy – may request a hearing, and hearings are conducted in accordance with procedures set forth in 42 C.F.R. Part 498. 42 C.F.R. §§ 498.5, 488.810(g) (providing that the part 498 appeal provisions apply when the HHA "requests a hearing on a determination of noncompliance leading to the imposition of a sanction, including termination of the provider agreement."). Only initial determinations are appealable. The regulations list actions that are initial determinations and thus subject to appeal (discussed below).

[1] I make this one finding of fact/conclusion of law.

On motion of a party, or his/her own motion, the administrative law judge may dismiss a hearing request where that request was not timely filed and the time for filing was not extended. 42 C.F.R. § 498.70(c). The administrative law judge may also dismiss if the requesting party does not have a right to a hearing. 42 C.F.R. § 498.70(b).

Here, the Illinois Department of Public Health (State Agency) completed Petitioner's recertification survey on May 8, 2015, and cited six condition-level deficiencies. CMS Exs. 1, 6.[2] In a notice letter dated August 6, 2015, CMS advised the HHA that it was not in substantial compliance and that CMS would therefore terminate its program participation effective December 19, 2015, and impose a $2,000 per day civil money penalty (CMP), beginning June 19, 2015. CMS Ex. 6 at 1, 2. A section of the notice letter – prominently captioned "**Appeal Rights**" – advised the HHA of its right to request a hearing before an administrative law judge if it believed that the determination was not correct. The letter then advised: "To do this, you must file your appeal within 60 calendar days after the date of receipt of this decision." CMS Ex. 6 at 4. The letter then explained how to file and cited the regulations that govern such appeals (42 C.F.R. Part 498). CMS Ex. 6 at 4-5.

CMS sent the notice letter by overnight mail. CMS Ex. 6 at 1. No one disputes that the HHA received its notice on August 7, 2015, which means that its hearing request was due no later than October 6, 2015. Petitioner did not request review of CMS's findings of substantial noncompliance, and the deadline (October 6, 2015) passed.

Instead, Petitioner filed an appeal on February 8, 2016, complaining that it submitted a plan of corrections on August 12, 2015, but "was never told that the [plan] was accepted and approved" or that the plan "did not meet Conditions of Participation." Hearing Request at 1. When, in a letter dated December 7, 2015, CMS advised Petitioner that its provider status was revoked, Petitioner understood that its plan of correction had not been accepted. *See* CMS Ex. 10. In Petitioner's view, the state agency's (and CMS's) failure to respond formally to its plan of correction "effectively voids the revocation process . . . ." Hearing Request at 1.

As a threshold matter, CMS is not required to afford a provider the opportunity to correct a condition-level deficiency before terminating its program participation. 42 C.F.R. § 488.830(a); *Blossom South, LLC v. Sebelius*, 987 F. Supp. 289, 302 (W.D.N.Y. 2013)

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[2] A "condition of participation" represents a broad category of home health services. If deficiencies are of such character as to "substantially limit the provider's . . . capacity to furnish adequate care or which adversely affect the health and safety of patients," the provider is not in compliance with conditions of participation. 42 C.F.R. § 488.24(b). CMS may terminate program participation if the HHA fails to meet even one condition of participation. Act §§ 1866(b)(2)(B), 1861(o)(6); 42 C.F.R. § 489.53(a)(3); *Cmty. Home Health*, DAB No. 2134 (2007).

(acknowledging that CMS has the authority to order immediate termination, without giving the provider an opportunity "to rectify matters, once the decision had been made."); *see Oaks of Mid City Nursing & Rehab. Ctr.,* DAB No. 2375 at 29-30 (2011); *Cmty. Home Health*, DAB No. 2134 at 14 (2007); *Excelsior Health Care Srvs., Inc.*, DAB No. 1529 at 6-7 (1995). This is a matter wholly within CMS's discretion, and I have no authority to review it.

Nor may I review either the state agency's/CMS's determination to reject a provider's plan of correction or their failure to act on the provider's plan of correction. Those actions (inaction) are not listed as initial determinations and are therefore not reviewable. 42 C.F.R. §§ 498.3(b); 498.5; *HRT Lab., Inc.*, DAB No. 2118 at 11 (2007); *Hermina Traeye Mem'l Nursing Home*, DAB No. 1810 at 13 (2002) (In affirming the termination of a provider, the "ALJ properly concluded that he lacked authority to adjudicate the question of whether [CMS] abused its discretion in deciding to reject the [plan of correction].").

Conclusion

Because Petitioner has not timely appealed any issue that I have the authority to review, I dismiss its hearing request pursuant to 42 C.F.R. § 498.70(b).

/s/
Carolyn Cozad Hughes
Administrative Law Judge