

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

San Francisco Health Care,
(CCN: 05-6272),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-16-116

ALJ Ruling No. 2016-10

Date: May 3, 2016

RULING

For the reasons set forth below, I conclude that Petitioner, San Francisco Health Care, is not entitled to Administrative Law Judge (ALJ) review of determinations made by the Centers for Medicare & Medicaid Services (CMS) following an August 21, 2015 survey. I therefore dismiss its hearing request pursuant to 42 C.F.R. § 498.70(b).

Discussion

Petitioner has no right to a hearing because CMS did not impose a remedy.¹

Petitioner is a skilled nursing facility located in San Francisco, California, that participates in the Medicare program as a provider of services. On August 21, 2015, the California Department of Public Health (state agency) completed a survey of the facility and found that it was not in substantial compliance with federal requirements. CMS Ex. 1. By letter dated September 4, 2015, the state agency (as authorized by CMS) advised Petitioner that, based on the survey findings, the facility was not in substantial compliance with program requirements, and directed it to submit a plan of correction

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

within ten days. The letter warned that, unless the facility achieved substantial compliance by September 20, 2015, the state agency would recommend that CMS impose penalties (civil money penalties and termination). If the facility did not achieve substantial compliance by November 21, 2015, the state agency would deny payments for new admissions. CMS Ex. 2.

Based on the facility's acceptable plan of corrections, the state agency subsequently determined that the facility had returned to substantial compliance with program requirements, and CMS imposed no penalties. CMS Ex. 3. Nevertheless, by letter dated October 26, 2015, Petitioner requested a hearing to challenge one of the August 21 survey findings. CMS Ex. 4.

CMS now moves to dismiss Petitioner's hearing request. Petitioner opposes.

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 an initial determination is entitled to further review, but administrative actions that are not initial determinations are not subject to appeal. 42 C.F.R. § 498.3(a). 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 (except the state monitoring remedy) is an initial determination for which a facility may request an ALJ hearing. 42 C.F.R. § 498.3(b)(13). But a facility has no right to a hearing unless CMS imposes one of the specified remedies. *Lutheran Home – Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997); see *San Fernando Post Acute Hosp.*, DAB No. 2492 at 7-8 (2012). The *remedy*, not the citation of a deficiency, triggers the right to a hearing. *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607. Where CMS does not impose a remedy, Petitioner has no hearing right. See *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005).

Petitioner argues that CMS has, in fact, imposed a remedy: a directed plan of correction. If true, the facility would be entitled to a hearing because a "directed plan of correction" is among the remedies specified in section 488.406. 42 C.F.R. § 488.406(a)(7); see 42 C.F.R. § 498.3(b)(13). But Petitioner is mistaken. Like all facilities with deficiencies, it was required to submit a plan of correction for approval by CMS or the state agency. 42 C.F.R. § 488.402(d)(1). That its initial submissions were not approved does not transform Petitioner's plan of correction into a directed plan of correction. A directed plan of correction is defined by regulation as a plan developed by *CMS, the state agency, or the facility's temporary manager*,² that requires the facility to act within a specified

² One of the remedies available, but not imposed here, is appointment of temporary management to oversee the facility. 42 C.F.R. § 488.406(a)(1).

