DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

Brookdale Mountain View
(CCN: 06-5392)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-688

ALJ Ruling No. 2016-18

Date: August 30, 2016

ORDER OF DISMISSAL

On July 1, 2016, Petitioner, through counsel, submitted a request for hearing appealing the determination of the Centers for Medicare & Medicaid Services (CMS) "to impose a denial of payment for new admissions . . . as a result of a Recertification Survey ending on January 14, 2016." Request for Hearing at 1. Petitioner also contended that "[a]lternatively, and contrary to CMS's and [the state agency's] contentions, Brookdale Mountain View asserts that it had achieved and maintained substantial compliance as of February 26, 2016 . . . ." Request for Hearing at 2. In an Attachment 5 that was referenced in its hearing request, Petitioner stated "[t]he facility was in compliance with the requirements under [Tag] F315 [42 C.F.R. § 483.25(d)] by February 26, 2016."

On July 22, 2016, in lieu of issuing an Acknowledgment and Pre-Hearing Order, I ordered Petitioner to show cause why its hearing request should not be dismissed. At that time, I explained that it appeared that Petitioner had filed an untimely hearing request. Petitioner filed a response to my Order (P. Response), and CMS in turn filed a reply (CMS Reply). Petitioner, with prior approval, filed a sur-reply on August 22, 2016 (P. Sur-reply).

Discussion

On January 14, 2016, the Colorado Department of Public Health and Environment (CDPHE) completed a recertification survey in conjunction with an abbreviated survey of Petitioner and assessed 18 deficiencies with Medicare program requirements. Request for Hearing, Attachment 4. On February 17, 2016, CMS notified Petitioner, as relevant for the purposes of this Order, that it would impose a per-instance civil monetary penalty (CMP) for one deficiency (42 C.F.R. § 483.25(j) (Tag F327)), and that effective March 3, 2016, it would impose a denial of payment for new admissions (DPNA).[1] Request for Hearing, Attachment 1 at 1-2. On April 1, 2016, Petitioner notified CMS that it had waived its right to a hearing based on the January 14, 2016 survey. CMS Exhibit (CMS Ex.) 2. Although Petitioner had been explicitly informed by CMS's February 17, 2016 letter that it could request a hearing before an administrative law judge (ALJ) within 60 days of receipt of the letter, Petitioner did not timely request a hearing. *See* Request for Hearing, Attachment 1.

Another survey on February 26, 2016, revealed that Petitioner was out of compliance with seven additional participation requirements. CMS notified Petitioner of the survey results in a letter dated March 9, 2016, at which time CMS informed Petitioner that the DPNA remedy, which had been in effect since March 3, 2016, would continue until the facility substantially complied with program requirements. CMS once again provided notice that Petitioner could appeal to an ALJ within 60 days of receipt of the letter, but the facility did not appeal the March 9, 2016 determinations that it continued to be out of compliance following a February 26, 2016 survey and that the previously imposed DPNA would continue. CMS Ex. 1.

CDPHE conducted a re-visit survey on May 3, 2016, and determined that the facility was back in compliance with participation requirements as of that date. CDPHE reported that the date of compliance for 17 of the deficiencies cited in the January 14, 2016 survey was February 26, 2016, but that the date of compliance for the remaining deficiency cited in the January 14, 2016 survey, cited as Tag F315, was May 3, 2016. CMS Ex. 4. With respect to the seven deficiencies cited in the February 26, 2016 survey, a Post-Certification Revisit Report indicates that the facility returned to substantial compliance in April 2016. CMS Ex. 5. A May 9, 2016 letter from CMS informed Petitioner that the DPNA had been discontinued as of midnight on May 3, 2016, although CMS contends in its reply that the correct end date for the DPNA was midnight on May 2, 2016. Request for Hearing, Attachment 3; CMS Response at 3 n.1.

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[1] CMS may deny payment for all new admissions to a facility when a facility is not in substantial compliance with Medicare requirements; payments may resume when a "facility achieves substantial compliance as indicated by a revisit or written credible evidence acceptable to CMS . . . ." 42 C.F.R. § 488.417(c)(1).

Petitioner argues that dismissal is inappropriate. Petitioner contends that it "was in substantial compliance as of February 26, 2016[,] with all deficiencies cited during the January 14, 2016 survey." P. Response at 4 (emphasis omitted). Petitioner further contends that "[t]he hearing request was clearly filed within 60 days of CMS's May 9 notice" and "the hearing request challenging the date of substantial compliance is timely filed."[2] P. Response at 4. In response, CMS argues that Petitioner failed to file a timely request with respect to the relief sought in its request for hearing. CMS contends that "Petitioner did not file a timely hearing request to challenge the findings of substantial noncompliance as a result of the January 14, 2016 and the February 26, 2016 surveys and cannot establish good cause for failing to meet the filing deadline." CMS Reply at 5. CMS argues that Petitioner waived its right to challenge the findings of noncompliance from the January 14, 2016 survey and did not timely request a hearing after receiving the letters dated February 17 and March 9, 2016. CMS Reply at 6-7.

As relevant for purposes of the instant discussion, Petitioner did not submit a request for hearing within 60 days of receipt of the February 17, 2016 letter that informed it that CMS had imposed remedies based on deficiencies identified at a January 14, 2016 survey. In fact, Petitioner waived its right to a hearing pursuant to 42 C.F.R. § 488.436 so that the CMP would be reduced by 35 percent. CMS Ex. 2. Petitioner, in its request for hearing, "appeals from a decision . . . to impose a . . . DPNA . . . as a result of a Recertification Survey ending on January 14, 2016." Request for Hearing at 1. However, Petitioner failed to timely appeal following receipt of the February 17, 2016 letter that informed it that a CMP and DPNA would be imposed. As Petitioner did not timely appeal the imposition of the DPNA, Petitioner's appeal on this basis is untimely.

The subsequent March 9, 2016 letter informed Petitioner that CMS had identified another seven deficiencies at the time of the February 26, 2016 survey. With respect to the DPNA, the letter informed Petitioner that "[t]his remedy was effective March 3, 2016, and will continue until the facility is in substantial compliance with all participation requirements." CMS Ex. 1 at 3. Petitioner was given appeal rights, but it did not request

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[2] Petitioner inexplicably does not reference either the February 26, 2016 survey or CMS's March 9, 2016 letter that notified it of new deficiencies and continued remedies in either its request for hearing or its initial response to the Order to Show Cause. Furthermore, Petitioner explicitly stated that it appealed the imposition of the DPNA "as a result of the Recertification Survey ending on January 14, 2016," and alternatively, "maintained substantial compliance as of February 26, 2016 as alleged in the Plan of Correction addressing the alleged non-compliance . . . identified in Form CMS-2567L for the January 15, 2016 survey . . . ." Request for Hearing at 1-2. Thus, Petitioner, in its request for hearing, seeks relief only with respect to the remedies imposed as a result of the January 14, 2016 survey. Petitioner did not assert that it was challenging any remedy that resulted from the February 26, 2016 survey.

a hearing to challenge the deficiencies noted during the February 26, 2016 survey or the continued remedy of the DPNA at the time of the March 9, 2016 letter. While Petitioner raised an "alternative" argument in its request for hearing that "it achieved substantial compliance as of February 26, 2016" (Request for Hearing at 2), it did not timely submit a request for hearing following receipt of the March 9, 2016 notice imposing continued remedies based on the noncompliance found at the February 26, 2016 survey. CMS specifically notified Petitioner on March 9, 2016, that it had identified another seven deficiencies and that Petitioner had *not* returned to substantial compliance as of that date; therefore, Petitioner had 60 days from the date of receipt of the notice to challenge this finding, which it did not do. Thus, any current argument that Petitioner returned to substantial compliance as of February 26, 2016, is simply untimely.

Relevant to this Order, Petitioner stated two bases for challenging CMS's actions in its request for hearing: 1) the imposition of the DPNA as a result of the January 14, 2016 survey; and 2) that it had, alternatively, returned to compliance on a specific date – February 26, 2016 – following the January 14, 2016 survey. Request for Hearing at 1-2. Only after I ordered Petitioner to show cause why its appeal should not be dismissed did Petitioner raise, for the first time, that it is also challenging the duration of the DPNA remedy. However, other than stating in its request for hearing that it had returned to compliance on the specific date of February 26, 2016, a date prior to the imposition of the DPNA, Petitioner has not made any allegation that it came back into compliance at a date prior to May 3, 2016, such that the DPNA should be shorter in duration.[3] Thus, while Petitioner contends that a party *can* properly challenge the duration of noncompliance, Petitioner has not actually argued that it returned to compliance on any date *other than* February 26, 2016, which is the date of the survey that was the basis for a determination of continued noncompliance and remedies. Furthermore, Petitioner's request for hearing addressed only the January 14, 2016 survey and is silent regarding the additional noncompliance cited at the February 26, 2016 survey that was a basis for the continuation of the DPNA.

I agree with Petitioner, as does CMS, that the Departmental Appeals Board "has determined that a provider may appeal the duration of a remedy outside of the 60-day deadline of the original imposition notice, once it receives notice of the full duration of

[3] It is difficult to reconcile Petitioner's argument that it returned to compliance on February 26, 2016, in light of its failure to appeal the March 9, 2016 determination citing seven new deficiencies that were identified at the survey on February 26, 2016. In making such an argument, Petitioner is essentially contending that not only had it returned to substantial compliance based on the original 18 deficiencies cited in the January 2016 survey, but that it should not have been cited for the additional seven deficiencies documented in the February 2016 survey. However, I reiterate that Petitioner did not timely appeal any of the 25 deficiencies found during the two surveys.

the remedy," and I acknowledge that Petitioner "has the right to demonstrate it achieved substantial compliance earlier than the date found" in the May 9, 2016 letter. CMS Reply at 8; P. Response at 5; *see, e.g., Mimiya Hosp.,* DAB No. 1833 (2002); *Taos Living Ctr.,* DAB No. 2293 (2009); *Elant at Fishkill,* DAB No. 2468 (2012). I further acknowledge that Petitioner could have appealed the May 9, 2016 CMS determination with respect to the date it was found to have returned to substantial compliance – had it chosen an alleged date of return to substantial compliance not already foreclosed by a final, unappealed CMS determination.

However, Petitioner, in its request for hearing, has contended as an alternative argument that it returned to substantial compliance *on* February 26, 2016; CMS determined, in a final and unappealed determination issued on March 9, 2016, that Petitioner did not return to substantial compliance as of that date. Request for Hearing at 2; CMS Ex. 1 at 1, 2. Petitioner has not otherwise disputed the *duration* of the DPNA (i.e., by arguing that it returned to substantial compliance on a date after the DPNA went into effect but before CMS determined it ended); in fact, based on Petitioner's assertions in the request for hearing, Petitioner contends that a DPNA should not have been imposed at all (based on its alleged return to substantial compliance on February 26, 2016). Petitioner does not seek any relief in its request for hearing that has not already been precluded by a final and unappealed determination, and Petitioner has not amended its request for hearing. 42 C.F.R. § 498.40(b) (request for hearing must identify specific issues, findings of fact, and conclusions of law and the basis for contending that the findings and conclusions are incorrect). Nor has Petitioner requested an extension of the filing deadline. 42 C.F.R. § 498.40(c). As such, Petitioner has no right to a hearing on the specific issues raised in its request for hearing. 42 C.F.R. § 498.70(b). I therefore dismiss Petitioner's request for hearing.

It is so ordered.

/s/

Leslie C. Rogall
Administrative Law Judge