

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Willow Tree Nursing Center,
(CCN: 055876),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-1250

ALJ Ruling No. 2013-2

Date: December 13, 2012

DISMISSAL

For the reasons set forth below, I conclude that Petitioner, Willow Tree Nursing Center, is not entitled to Administrative Law Judge (ALJ) review of a determination made by the Centers for Medicare & Medicaid Services (CMS) following a June 20, 2012 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 Oakland, California, that participates in the Medicare program as a provider of services. On June 20, 2012, 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. By letter dated July 10, 2012, the State Agency (as authorized by CMS) advised Petitioner that, based on the survey findings, it would recommend that penalties be imposed unless the facility

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

achieved substantial compliance within three months of the last day of the survey (June 20, 2012). CMS Ex. 1.

On July 30, 2012, the State Agency revisited the facility, and determined that it had corrected its deficiencies, so no penalties were imposed. CMS Ex. 3.

Nevertheless, on September 7, 2012, Petitioner requested a hearing to challenge the June 20 survey findings.

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), (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, "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) (emphasis added). 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). The remedy, not the citation of a deficiency, triggers the right to a hearing. *Schowalter Villa; Arcadia Acres, Inc.* Where CMS withdraws the remedies or otherwise declines to impose one, Petitioner has no hearing right. *See, Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985 (2005).

Petitioner concedes that CMS has not imposed any of the remedies specified in 42 C.F.R. § 488.406(a)(1) through (a)(8), but points out that § 488.406(a)(9) provides for "alternative or additional State remedies approved by CMS." Petitioner complains that, as a result of the June survey findings (coupled with deficiency findings from earlier surveys), it has been deemed a "special focus facility" and is subject to more frequent surveys. P. Ex. 1, at 3. In Petitioner's view, this designation subjects it to "an alternative or additional State remed[y]." Petitioner's argument fails because section 498.3(b)(13) explicitly excludes the state monitoring remedy from those remedies that create a hearing right. Under that section, a finding of noncompliance that results in the imposition of the state monitoring remedy, but no other, is not an initial determination and not subject to appeal. *Fountain Lake Health & Rehabilitation, Inc.* at 4.

