Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Penobscot Nursing Home
Docket No. A-15-34
Decision No. 2642
June 11, 2015

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

ELR Care Maine, LLC (ELR), the owner of Penobscot Nursing Home (PNH), a Maine nursing facility, requested review by the Departmental Appeals Board (Board) of an Administrative Law Judge's ruling that ELR was not authorized to request a hearing on a determination by the Centers for Medicare & Medicaid Services (CMS) to terminate PNH's provider agreement and impose a civil money penalty (CMP) on PNH. Ruling that Progressive Management Systems, L.L.C. Is Entitled to Represent Petitioner, Docket No. C-14-1696 (November 17, 2014) (ALJ Ruling). The ALJ concluded that ELR's court-appointed receiver, Progressive Management Systems, LLC (Progressive), is the only entity with authority to make decisions on PNH's behalf under Maine receivership law. Since Progressive requested an extension of time to file a hearing request but never filed one, the ALJ closed the case without considering ELR's request for hearing.

We conclude that the ALJ did not err in closing the case although we rely on a different rationale from that relied on by the ALJ. As explained below, we conclude that ELR's hearing request, even after amendment, did not identify any issue on which ELR had a right to hearing. Since ELR's request for hearing was subject to dismissal on that basis, we need not decide whether ELR or Progressive is the entity authorized to request a hearing.

Legal Authority

Long-term care facilities must comply with Medicare participation requirements that are set forth at 42 C.F.R. Part 483. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id.* State agencies under contract with CMS perform surveys to assess compliance with the requirements. 42 C.F.R. §§ 488.300, 488.305. A facility found not

to be in substantial compliance may be subject to various enforcement remedies, including termination and CMPs. 42 C.F.R. §§ 488.402, 488.406, 488.408. A facility may appeal to an ALJ a finding of noncompliance resulting in imposition of a remedy but may not appeal CMS's choice of which remedy to impose. 42 C.F.R. §§ 498.3(b)(13); 488.408(g); *see also Northlake Nursing & Rehab. Ctr.*, DAB No. 2376, at 5-6 (2011). An ALJ may dismiss a hearing request for cause where the "party requesting a hearing is not a proper party or does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b).

The standard of review for an ALJ's exercise of discretion to dismiss a hearing request is whether the discretion has been abused. *High Tech Home Health, Inc*., DAB No. 2105, at 7-8 (2007), *aff'd, High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008); Ruling on Request for Removal of Hearing to Board, *Four States Care Ctr.*, Appellate Division Docket No. A-99-66 (June 7, 1999, attached to *Lakewood Plaza Nursing Ctr.* DAB No. 1767 (2001). Where an ALJ dismisses a hearing request addressing only issues that as a matter of law are not initial determinations, and, thus, are not matters within the ALJ's review authority, the standard of review is whether the ALJ erred in dismissing the hearing request. *Riverview Psychiatric Ctr.*, DAB No. 2586, at 4 (2014), *citing* DAB No. 2105, at 12-13.

Case Background

In a June 11, 2014 letter addressed to PNH's Administrator, CMS gave notice that it would be terminating PNH's Health Insurance Benefits Agreement and Certification in the Medicare and Medicaid programs effective June 30, 2014 based on PNH's failure to achieve and maintain substantial compliance with numerous Medicare participation requirements. 6/11/14 ltr. at 3. CMS's letter also gave notice that CMS was imposing a $2,350 per-day CMP effective May 23, 2014 until substantial compliance is achieved or termination occurs. *Id*. at 4. These enforcement remedies were based on a series of surveys conducted by the Maine State Survey Agency that found deficiencies involving numerous participation requirements, including three deficiencies at the immediate jeopardy level. *Id.* at 1-3. CMS previously imposed per-instance CMPs totaling $19,000 based on the three immediate-jeopardy level deficiencies as well as a denial of payment for new admissions effective May 1, 2014. *Id*. at 1. CMS's June 11, 2014 letter stated, "If you disagree with the determination of these newly imposed remedies, you or your legal representative may request a hearing" before an ALJ within 60 calendar days after receipt of the letter in accordance with the procedures in 42 C.F.R. § 498.40 *et seq*. *Id*. at 5. The letter further stated that if PNH waived its right to a hearing in writing within that time period, the amount of the CMP would be reduced by 35%. *Id*. at 6.

CMS issued a "Revised Notice of Termination" by letter dated June 18, 2014 addressed to PNH's Administrator, changing the effective date of the termination to July 4, 2014 after CMS determined that PNH's plan of correction was unacceptable.[1]

In an August 14, 2014 letter addressed to PNH's Managing Member, CMS stated, inter alia, that the provider agreement "was terminated as of July 4, 2014" and that, although the CMP would not be reduced by 35% since PNH did not waive its right to a hearing in accordance with the regulatory procedures, CMS had reduced the CMP by 60% because it appeared from financial documentation submitted on behalf of PNH that PNH would have difficulty paying the existing CMP of $120,050.00. Ltr. dated 8/14/14, at 1-2.

By letter dated August 8, 2014, Progressive identified itself as ELR's receiver and requested an extension of time to file a request for a hearing or waiver of right to hearing, stating it had requested informal dispute resolution [IDR] and that until that process is complete, it "cannot prudently decide whether to request or waive the hearing." Progressive ltr. dated 8/8/14, at 2. By letter also dated August 8, 2014, ELR stated that it "timely file[s] this appeal …against the decisions taken by CMS…." ELR ltr. dated 8/8/14, at 1. ELR further stated: "ELRCare Maine LLC and its shareholders are aggrieved by this decision, and now timely file this under Federal regulations 42 CFR § 498.40, et seq. and a hearing request for your consideration. Additional and complete details shall be provided upon your procedures and input." *Id.* (emphasis omitted).

The Civil Remedies Division (CRD), which provides support for the ALJs, docketed Progressive's request for an extension of time, which CRD received first, and returned to ELR its letter requesting a hearing, noting that counsel for Progressive had already requested an extension of time to file a request for hearing or waiver of right to a hearing. The ALJ subsequently denied Progressive's extension request on the ground that "[t]here is no requirement that State IDR be exhausted before a party can file a hearing request." CRD ltr. dated 8/19/14. On August 23, 2014, ELR wrote CRD that "ELRCare did not authorize the receiver…to represent it and/or to waive its appeal rights" and that "ELRCare filed a timely appeal of CMS decision" and "would like to have its right to a hearing honored…." ELR ltr. dated 8/23/14. The ALJ then held a telephone conference with both Progressive and ELR and issued an order setting a date (later extended to October 24, 2014) for "the parties seeking to file a hearing request on [PNH's] behalf…to determine who should file a hearing request on behalf of [PNH] and to file a hearing request that complies with 42 C.F.R. § 498.40." Order dated 9/11/14, 1st page (bolding omitted).

[1] The June 18, 2014 letter states that a hearing request "must be filed no later than 60 calendar days from the date of your receipt of our June 12, 2014 letter." 6/18/14 ltr., 2nd page (emphasis omitted). It appears that CMS meant to refer to its June 11, 2014 letter.

By letter dated October 1, 2014, ELR filed an amended request for hearing (referring to it as an amended "notice of appeal") which we quote in the Analysis below. ELR also asked the Federal District Court in Maine to issue a declaratory judgment regarding which entity had a legal right to request a hearing since ELR and Progressive were unable to resolve this issue. The court declined to consider the issue absent exhaustion of administrative remedies, and the ALJ provided an opportunity for ELR and Progressive to brief the issue. Each maintained that it was the proper party, although Progressive stated that it had decided not to request a hearing. The ALJ then issued the ruling of which ELR now seeks review.

Analysis

Although the ALJ Ruling does not cite to 42 C.F.R. § 498.70(b), the ALJ in effect dismissed ELR's hearing request on the ground that ELR was not a proper party. We need not reach this issue because we conclude that dismissal pursuant to section 498.70(b) was warranted on the ground that ELR had no right to a hearing on the issue identified in its request for hearing.

Section 498.3(b)(13) provides that nursing facilities may appeal "initial determinations," defined (as relevant here) to include "a finding of noncompliance that results in the imposition of a remedy specified in section § 488.406…of this chapter, but not the determination as to which sanction was imposed." The remedies in section 488.406 include termination of the provider agreement and CMPs. Similarly, section 488.408(g) states that a facility "may appeal a certification of noncompliance leading to an enforcement remedy" but "may not appeal the choice of remedy[.]" Thus, the choice of remedies imposed by CMS is placed expressly outside the scope of review by regulation. It is clear from the language of ELR's amended hearing request, however, that ELR was appealing only CMS's choice of termination as a remedy and not any of the findings of noncompliance leading to imposition of that remedy.

ELR's amended hearing request states in relevant part as follows:

> ELR Care Maine, LLC is appealing from CMS' decision, dated June 18, 2014, to terminate ELR Care's Provider Agreement for its Penobscot Nursing Home….
>
> That decision was apparently based on the current Receiver's noncompliance with the Federal requirements and the Receiver's submission of an unacceptable plan of correction.

> ELR Care is not in a position to question those findings of fact. ELR Care knows virtually nothing about those facts. Its Penobscot Nursing Home facility has been in receivership since October of 2008, and by court order ELR Care has not been able to assert any control over the operation of that facility for almost 7 years now!
>
> Apparently the current Receiver (who is the fourth Receiver that the court has appointed to run PNH in the past 7 years) is incapable of running a nursing home and is incapable of submitting a proper plan of correction. However, ELR Care had nothing to do with that, and had only very limited knowledge of what was going on there.
>
> In this appeal, ELR Care questions CMS' conclusion that ELR Care's Provider Agreement should be terminated. ELR Care believes that sanction against it is unreasonable, under the circumstances.
>
> ELR Care believes that it should be given an opportunity to petition the court to appoint another Receiver – on[e] who can run a nursing home, and who can submit a proper plan of correction – rather than terminate its Provider Agreement.

Ltr. dated 10/1/14, 1st and 2nd pages. Notably, ELR acknowledges that it is not in a position to question any of the findings of fact supporting CMS's conclusion that PNH was not in compliance with the Medicare requirements. ELR proceeds to argue that the sanction of termination is unreasonable because PNH could come into compliance with the Medicare requirements if the court appointed a new receiver to run PNH. On its face, this amounts to no more than a challenge to CMS's choice of termination as a remedy. Nor is there any indication in ELR's initial hearing request (which the ALJ found insufficient) that ELR intended to challenge any specific finding of noncompliance. Thus, ELR raised no issue as to which it has a right to hearing.

We therefore find neither error nor abuse of discretion in the ALJ's action closing the case and thereby dismissing ELR's request for hearing.

Because we conclude that ELR has not established a hearing right to challenge CMS's initial determination to impose remedies on PNH based on the deficiency findings, we need not engage the question of which entity (ELR or Progressive) might have had the legal authority to make such a challenge under state or federal law.

Conclusion

For the foregoing reasons, we uphold the dismissal.

/s/
Sheila Ann Hegy

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member