

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

St. John of God Retirement and Care Center  
(CCN: 055253),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-865

ALJ Ruling No. 2014-40

Date: August 13, 2014

**ORDER OF DISMISSAL**

The Centers for Medicare & Medicaid Services (CMS) determined that Petitioner, St. John of God Retirement and Care Center, was not in substantial compliance with Medicare participation requirements. CMS decided that it would impose remedies against Petitioner if Petitioner did not reach substantial compliance with participation requirements within certain specified time-frames. Petitioner timely achieved substantial compliance with Medicare participation requirements and no remedy went into effect. Subsequently, Petitioner filed a request for hearing (RFH) before an administrative law judge. Because the remedies imposed by CMS never went into effect, Petitioner does not have a right to a hearing. Therefore, I dismiss Respondent's RFH.

**I. Procedural History and Background**

Petitioner is a skilled nursing facility (SNF) located in Los Angeles, California, that participates in the Medicare program. In a January 28, 2014 letter, the California Department of Public Health, County of Los Angeles (State Agency), as authorized by CMS, informed Petitioner that it recommended CMS to impose remedies against Petitioner because it was not in substantial compliance with federal requirements.

Specifically, the State Agency stated that it conducted an abbreviated survey of Petitioner on January 24, 2014, and found that Petitioner had a single deficiency at the “D” scope and severity level (no actual harm with the potential for more than minimal harm that is not immediate jeopardy). CMS Ex. 2, at 1; *see* CMS Ex. 1.

The letter informed Petitioner of the specific remedies that the State Agency recommended that CMS impose if Petitioner did not achieve substantial compliance by certain dates: a civil money penalty (CMP) if Petitioner did not achieve substantial compliance by February 6, 2014;<sup>1</sup> denial of payment for new admissions (DPNA) would be imposed effective April 24, 2014, unless Petitioner demonstrated substantial compliance prior to that date; and termination of Petitioner’s Medicare provider agreement if Petitioner did not achieve substantial compliance by July 24, 2014. CMS Ex. 2, at 2-3. The State Agency offered Petitioner the opportunity to submit a plan of correction within 10 days of receiving the statement of deficiencies (also referred to as the “CMS-2567”) and notified Petitioner of its right to request a hearing before an administrative law judge within 60 days of receiving the January 24, 2014 letter. CMS Ex. 2, at 2-3. Petitioner appears to have provided a plan of correction by February 6, 2014. CMS Ex. 1, at 1; *see also* RFH at 1.

On March 27, 2014, Petitioner filed a RFH in which Petitioner challenged the deficiency findings. Petitioner complained that the State Agency posted information about the January 2014 survey results that were not accurate and that one of the investigators committed misconduct. Petitioner later submitted copies of letters dated April 8 and 9, 2014, sent by its attorney to an individual in charge of the Health Facilities Inspection Division.

On May 21, 2014, CMS filed a motion to dismiss the RFH (CMS Motion). CMS asserted that Petitioner was found in substantial compliance on February 6, 2014, based on its Plan of Correction, and CMS did not impose any remedies on Petitioner. CMS Motion at 2, 4. CMS argued that dismissal was appropriate because Petitioner did not have a right to a hearing where no remedies had been imposed. 42 C.F.R. § 498.70(b).

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<sup>1</sup> It is unclear from the January 28, 2014 letter whether CMS meant to impose a CMP on Petitioner or the reference to a CMP was a typographical error. However, this has no impact on my discussion because CMS ultimately determined that no remedies, including a CMP, would be imposed against Petitioner.

On June 18, 2014, I issued an order staying the prehearing exchange schedule in this case to consider the CMS Motion. I noted in the order that I had not yet received a response from Petitioner. Petitioner had 20 days from the date of receipt of the CMS Motion to file a response. April 8, 2014 Acknowledgment and Initial Pre-hearing Order, at 7 ¶ 17; *see* 42 C.F.R. § 498.17; Civil Remedies Division Procedures ¶15. To date, I have not received a response from Petitioner.

## II. Issue

Whether Petitioner has a right to a hearing before an administrative law judge where CMS has imposed no enforcement remedies against Petitioner.

## III. Discussion

***CMS has imposed no enforcement remedies in this case, therefore, Petitioner has no right to hearing before an administrative law judge.***

An SNF has a right to a hearing before an administrative law judge when CMS has “made an adverse ‘initial determination’ of a kind specified in 42 C.F.R. § 498.3(b).” *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316, at 6 (2010); *see also* 42 C.F.R. § 498.3(a)(1). When CMS makes a finding that a SNF is noncompliant and CMS imposes a remedy under 42 C.F.R. § 488.406, the SNF has received an initial determination that is subject to further review. 42 C.F.R. § 498.3(b)(13); *see also* 42 C.F.R. §§ 488.330(e)(3), 488.408(g)(1), 498.3(a)(3)(ii). Consistent with this, a SNF “has no right to an [administrative law judge] hearing to contest survey deficiency findings where CMS has not imposed any of the remedies specified in section 488.406 based on those findings, or where CMS imposed, but subsequently rescinded, any such remedies.” *Columbus Park*, DAB No. 2316, at 7. Remedies specified at 42 C.F.R. § 488.406 include termination of a provider agreement, a DPNA, CMPs, and directed in-service training.

In the present matter, the State Agency advised Petitioner that it recommended that CMS impose a CMP, DPNA, and termination of Petitioner’s provider agreement if Petitioner did not achieve substantial compliance with program participation requirements within certain specified time-frames. However, because Petitioner returned to substantial compliance on February 6, 2014, CMS never imposed any enforcement remedy based on the January 24, 2014 survey. CMS Motion at 2, 4. Therefore, Petitioner does not have any hearing rights based on the remedies originally recommended. *See, e.g., Golden Living Ctr.-Grand Island Lakeview*, DAB No. 2364 (2011) (holding that it is the imposition of a remedy, not the citation of a deficiency, that triggers a facility’s right to a hearing under 42 C.F.R. Part 498).

**IV. Conclusion**

I may dismiss an RFH if Petitioner does not have a right to a hearing. 42 C.F.R. § 498.70(b). Because Petitioner does not have a right to a hearing, CMS's motion to dismiss is GRANTED and Petitioner's RFH is DISMISSED.

Within 60 days of receiving this Order, either party may request that I vacate this Order. 42 C.F.R. § 498.72.

It is so ordered.

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/s/  
Scott Anderson  
Administrative Law Judge