

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Elmwood Care Center,
(CCN: 55-5819),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-1694

ALJ Ruling No. 2015-7

Date: January 28, 2015

DISMISSAL

For the reasons set forth below, I conclude that Petitioner, Elmwood Care Center, is not entitled to Administrative Law Judge (ALJ) review of a determination made by the Centers for Medicare & Medicaid Services (CMS) following a May 30, 2014 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 Berkeley, California, that participates in the Medicare program as a provider of services. On May 30, 2014, 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 June 6, 2014, the State Agency (as authorized by CMS) advised Petitioner that, based on the survey findings, a penalty (denial of payment for new admissions) would be effectuated unless the facility achieved substantial compliance prior to August 30, 2014. CMS Ex. 2.

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

The facility submitted an acceptable plan of correction, and, following a revisit survey, the State Agency (and CMS) determined that it had corrected its deficiencies as of July 14, 2014. No penalties were imposed. CMS Ex. 3.

By letter dated August 5, 2014, Petitioner requested a hearing to challenge the May 30 survey findings.

CMS now moves to dismiss Petitioner's hearing request. Petitioner has not responded to CMS's motion.

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 (with a very limited exception, not applicable here) 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). 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).

Because CMS has imposed no remedies, Petitioner has no right to an ALJ hearing, and this matter must be dismissed. 42 C.F.R. § 498.70(b). I therefore grant CMS's motion.

/s/

Carolyn Cozad Hughes
Administrative Law Judge