Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Forum at Lincoln Heights,
(CCN: 45-5870),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-11-275

Decision No. CR2359

Date: April 20, 2011

DECISION DISMISSING REQUEST FOR HEARING

This matter is before me on the Motion to Dismiss filed by the Centers for Medicare & Medicaid Services (CMS) on March 21, 2011. The Forum at Lincoln Heights, Petitioner, opposes the CMS Motion. For the reason set out below, I GRANT the Motion to Dismiss.

I. Background

The Texas Department of Aging and Disability Services (TDADS) completed a survey of Petitioner's facility on November 18, 2010. By notice letter dated December 9, 2010, CMS advised Petitioner that it was not in substantial compliance with federal requirements that govern participation of nursing homes in Medicare and Medicaid. The notice letter informed Petitioner that CMS would impose the following remedies: termination of Petitioner's provider agreement if substantial compliance was not achieved by April 18, 2011; two per-instance civil money penalties (CMPs) of $3,750 each for deficiency tags F-224 and F-323, for a total of $7,500; a denial of payment for new admissions (DPNA); and withdrawal of approval of a nurse aide training and competency evaluation program (NATCEP). Significantly, the parties now agree that Petitioner neither operated a NATCEP during relevant times nor sought approval to do so.

By notice letter dated December 21, 2010, CMS informed Petitioner that it had rescinded the two per-instance CMPs but that the termination of Petitioner's provider agreement, the DPNA, and the withdrawal of NATCEP approval would remain in effect.

Petitioner's Request for Hearing was filed February 4, 2011. Then, by notice letter dated February 17, 2011, CMS informed Petitioner that it had achieved substantial compliance with participation requirements as of February 8, 2011. The notice advised Petitioner that CMS was rescinding the proposed enforcement actions of the DPNA and termination of Petitioner's provider agreement.

Petitioner's Request for Hearing was received and docketed by the Civil Remedies Division on February 17, 2011. My Acknowledgment and Initial Docketing Order of that date, at Paragraph 2, gave the parties 30 days to submit Reports of Readiness or file dispositive motions. Petitioner filed a timely Report of Readiness. CMS filed a timely Motion to Dismiss and an incorporated memorandum of law. CMS filed three exhibits (CMS Exs. A-C). Petitioner filed a response opposing the CMS Motion along with two exhibits (P. Exs. 1 and 2). All proffered exhibits are admitted as designated.[1]

II. Discussion

CMS asserts that all enforcement remedies it sought to impose against Petitioner have been rescinded. Petitioner does not contest this assertion. Thus, the issue before me is whether a long-term care facility has a right to a hearing when CMS withdraws the enforcement remedies provided for in 42 C.F.R. § 488.406. This is an issue that has been addressed many times by the Administrative Law Judges (ALJs) of the Civil Remedies Division, and without exception each has come to the same resolution of that issue that I announce here. I find and conclude that The Forum at Lincoln Heights is not entitled to a hearing, and on the basis of 42 C.F.R. § 498.70(b), I grant CMS's Motion to Dismiss.

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 CMS's initial determination is entitled to further review, but administrative actions that do not constitute initial determinations are not subject to appeal. 42 C.F.R. § 498.3(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.

[1] It is not immediately clear why CMS chose to mark its three exhibits CMS Ex. A, CMS Ex. B, and CMS Ex. C. In my Order of February 17, 2011, the parties were "encouraged to review the CRDP (Civil Remedies Division Procedures) carefully, because they govern the form and content of all filings made subject to Paragraphs 2, 3, 4, and 5 of this Order . . . ." CRDP § 9 specifies a different system for marking exhibits, *e.g.* CMS Ex. 1, CMS. Ex. 2, CMS Ex. 3, etc.

§ 488.406 is an initial determination for which a facility may request a hearing. 42 C.F.R. § 498.3(b)(13). Unless the finding of noncompliance results in the actual imposition of a specified remedy the finding is not an initial determination. 42 C.F.R. § 498.3(d)(10)(ii). Where, as here, CMS rescinds all proposed remedies, a facility has no hearing right because no determination properly subject to a hearing exists. It is the final imposition of an enforcement remedy or sanction and not the citation of a deficiency that triggers a facility's right to a hearing pursuant to 42 C.F.R. Part 498. *Golden Living Center-Grand Island Lakeview*, DAB No. 2364 (2011); *Fountain Lake Health and Rehabilitation, Inc.*, DAB No. 1985 (2005); *Lakewood Plaza Nursing Center*, DAB No. 1767 (2001); *The Lutheran Home-Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997).

Petitioner resists the CMS Motion maintaining that not permitting it to appeal the underlying survey findings or the scope and severity of the deficiencies as cited could leave it subject to inclusion in CMS's Special Focus Facility program[2] which Petitioner claims would adversely affect its reputation, and thus potentially would limit its ability to compete in the marketplace, and would jeopardize its income. Although Petitioner seeks to use this forum to protect its reputation by attempting to refute the citations of deficiencies, there simply is no relief that I can afford Petitioner. The potential for Petitioner to be included in the Special Focus Facility program list is neither an enforcement remedy nor an initial determination subject to my review. 42 C.F.R. §§ 488.406, 498.3(b). *See, e.g., Golden Living Center-Grand Island Lakeview*, DAB No. 2364, at 5-6.

Petitioner also asserts that it would be denied its due process rights if not allowed to appeal the deficiencies and scope and severity ratings determined by CMS. However, similar arguments have not found success when they have been raised in this forum or before the Departmental Appeals Board (Board). Neither the ALJs of this forum nor the Board may consider such challenges to CMS actions. *Carrington Place of Muscatine*, DAB No. 2321, at 24 (2010); *Columbus Park Nursing and Rehabilitation Center*, DAB No. 2316, at 10 (2010).

The regulations and prior decisions in this forum and before the Board uniformly adhere to the doctrine that there is no right to a hearing where deficiencies are identified, but where CMS had thereafter rescinded the initial determination to impose enforcement sanctions or remedies. Here, the two CMPs, the DPNA, and the termination of Petitioner's provider agreement were all rescinded, and the purported disapproval of

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[2] Long-term care facilities that have a record of substandard quality of care may be selected by their respective state for inclusion in CMS's Special Focus Facility program list. Upon placement on the list, a facility would be subject to twice the number of standard surveys. P. Ex. 1.

Petitioner's NATCEP was a nullity because Petitioner did not operate one in the first place. After the CMS letter of February 17, 2011 Petitioner faced no sanctions or remedies.[3] The authority delegated to me by the Secretary of this Department in cases involving CMS is specified at 42 C.F.R. §§ 498.3 and 498.5. The regulations limit my authority to hear and decide only cases involving specified initial determinations by CMS, and since February 17, 2011 none have been present in this case.

Section 498.70(b) authorizes me to dismiss a hearing request when a petitioner does not have a right to a hearing, and, for that reason I do so now in this matter. Petitioner's February 4, 2011 Request for Hearing must be, and it is, **DISMISSED**. The parties may request that an order dismissing a case be vacated pursuant to 42 C.F.R. § 498.72.

/s/
Richard J. Smith
Administrative Law Judge

[3] A substandard quality of care citation provides a facility with an independent basis to appeal the remedy of withdrawal of approval of its NATCEP, but here review is not available to Petitioner as it was neither operating a NATCEP nor seeking approval to operate one. 64 Fed. Reg. at 39,934 (July 23, 1999); 42 C.F.R. § 498.3(b)(16). Petitioner does not dispute the essential nugatory character of CMS's proposed disapproval of a program Petitioner never operated.