

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Day Surgery
(CCN: 44-C0001111),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-502

Decision No. CR2599

Date: August 22, 2012

DECISION

The request for hearing filed by Petitioner, Center for Day Surgery, on March 14, 2012, is dismissed pursuant to 42 C.F.R. § 498.70(b), because Petitioner has no right to a hearing.¹

I. Background

Petitioner is located in Tullahoma, Tennessee, and participates in Medicare as an ambulatory surgical center (ASC), subject to 42 C.F.R. Part 416. On November 14, 2011, the Tennessee State Survey Agency (state agency) completed a revisit survey of the facility and found that it was not in substantial compliance with federal program participation requirements due to an alleged violation of 42 C.F.R. § 416.44(a)(2). The Centers for Medicare and Medicaid Services (CMS) notified Petitioner by letter dated February 24, 2012, that it was denying Petitioner's waiver request and that Petitioner's

¹ All references are to the version of the Code of Federal Regulations (C.F.R.) in effect at the time of the survey, unless otherwise indicated.

ASC agreement would be terminated effective April 24, 2012, if noncompliance continued at that time.

On March 14, 2012, Petitioner requested a hearing. The case was assigned to me for hearing and decision on March 29, 2012, and an Acknowledgment and Prehearing Order (Prehearing Order) was issued at my direction. On June 21, 2012, CMS filed a motion (CMS Motion) to dismiss the request for hearing on grounds that the termination action was rescinded and Petitioner no longer had a right to a hearing. CMS filed CMS exhibits (CMS Exs.) 1 through 11. CMS also filed a motion for leave to file its motion to dismiss out-of-time² and a motion to stay proceedings pending my ruling on the motion to dismiss. Petitioner's response to the motion to dismiss was due on July 11, 2012, pursuant to the Prehearing Order, paragraph II.D.1 and 42 C.F.R. § 498.17(b)(1).³ No response was received from Petitioner as of July 25, 2012, and I issued an order for Petitioner to show cause why the request for hearing should not be dismissed for abandonment or as a sanction for Petitioner's failure to comply with my Prehearing Order. On August 1, 2012, Petitioner filed a response to the order to show cause; a response to the CMS motion for leave to file out-of-time; and a response (P. Response) opposing the CMS motion to dismiss.⁴ Only CMS Ex. 8 is admitted and considered as evidence relevant to the issue of whether or not I must dismiss for lack of jurisdiction and because Petitioner no longer has a right to a hearing.

² There is good cause to grant the CMS motion for leave to file out-of-time. In its response to the motion for leave to file out-of-time, Petitioner disputes representations made by CMS in its motion. However, Petitioner does not successfully argue that I should not consider the CMS challenge to my jurisdiction, even though it was not raised in a timely fashion according to the Prehearing Order.

³ Pursuant to paragraph 5 of the Civil Remedies Division Procedure (CRDP), written material is filed when deposited in the U.S. mail or with an express delivery service. Section 498.17(a), (b) of 42 C.F.R. provides that in responding to any "written argument, contention, suggested finding of fact, conclusion of law, or any other written statement" a party "will have 20 days from the date of mailing or personal service to submit any rebuttal statement or additional evidence." The regulation does not provide for an additional five days for response to a motion that is served by mail. Thus, Petitioner's response was due 20 days after June 21, 2012, the date CMS certified service by certified mail.

⁴ Petitioner also timely filed its prehearing exchange of its exhibits and lists of exhibits and witnesses on July 27, 2012.

II. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by my findings of fact and analysis.

A. Petitioner has no right to a hearing because CMS rescinded the termination of Petitioner's ASC agreement with the Secretary.

B. I have no jurisdiction.

C. Dismissal of Petitioner's request for hearing pursuant to 42 C.F.R. § 498.70(b) is appropriate because Petitioner has no right to a hearing.

An ASC is a distinct entity that operates exclusively to provide surgical services to patients not requiring hospitalization and for which the duration of services will not exceed 24 hours following admission. An ASC must have an agreement with the Secretary to participate in Medicare as an ASC and must meet the conditions for participation of an ASC. Social Security Act (Act) §§ 1832(a)(2)(F)(i); 1833(i)(1); 42 C.F.R. § 416.2. Pursuant section 1866(h) of the Act and 42 C.F.R. § 416.26(f), if CMS refuses to enter an agreement with an ASC or terminates an agreement with an ASC, the ASC is entitled to a hearing in accordance with 42 C.F.R. Part 498. An ASC is a supplier pursuant to 42 C.F.R. § 498.2. A provider or supplier whose enrollment in Medicare is revoked, has a right to appeal pursuant to 42 C.F.R. Part 498. Pursuant to 42 C.F.R. § 498.3(b)(6) and (17) CMS initial determinations include determinations as to whether the services of a supplier continue to meet the conditions for coverage and whether to deny or revoke a provider's or supplier's enrollment in Medicare. A supplier dissatisfied with an initial determination that its services no longer meet the conditions for coverage is entitled to a hearing before an administrative law judge (ALJ). 42 C.F.R. § 498.5(e).

The pertinent facts are not in dispute. The state agency completed a survey of Petitioner and concluded that Petitioner was not in substantial compliance with federal program participation requirements due to an alleged violation of 42 C.F.R. § 416.44(a)(2). CMS notified Petitioner by letter dated February 24, 2012, that Petitioner's request for a waiver of the regulatory requirement was denied and that Petitioner's participation agreement would be terminated effective April 24, 2012, if the noncompliance continued at that time. Petitioner's right to request a hearing by an ALJ was triggered by the CMS initial determination to terminate Petitioner's ASC agreement and participation in Medicare. Petitioner timely requested a hearing on March 14, 2012. However, CMS notified Petitioner by letter dated April 24, 2012, that it granted Petitioner a waiver on April 24, 2012, therefore Petitioner was back in substantial compliance, and CMS rescinded the termination action. CMS Ex. 8.

The issue is whether the CMS determination to rescind the termination of Petitioner's supplier agreement extinguished Petitioner's right to a hearing. I conclude it did. An

appellate panel of the Departmental Appeals Board (the Board) has affirmed the dismissal of a request for hearing when the termination of a hospital's provider agreement was rescinded by CMS on grounds that the CMS action extinguished the hospital's right to a hearing. *Florida Health Sciences Ctr., Inc., d/b/a/ Tampa General Hosp.*, DAB No. 2263 (2009); *see also Cumberland County Hosp. Sys., Inc., d/b/a Cape Fear Valley Health Sys.*, DAB CR1957 (2009). The Board has also consistently affirmed ALJ decisions dismissing hearing requests in long-term care facility cases because CMS rescinded termination or other enforcement remedies eliminating the facility's right to a hearing. *Golden Living Ctr.*, DAB No. 2364, at 2-3 (2011); *Columbus Park Nursing and Rehab. Ctr.*, DAB No. 2316 (2010); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *Lakewood Plaza Nursing Ctr.*, DAB No. 1767 (2001); *see Eagle Care, Inc. d/b/a/ Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997); *see also The Lutheran Home – Caledonia*, DAB No. 1753 (2000); *Walker Methodist Health Ctr.*, DAB CR869 (2002); *Charlesgate Nursing Ctr.*, DAB CR868 (2002); *D.C. Assoc. for Retarded Citizens*, DAB CR776 (2001); *Alpine Inn Care, Inc., d/b/a Ansley Pavilion*, DAB CR728 (2001); *Woodland Care Ctr.*, DAB CR659 (2000); *Fort Tryon Nursing Home*, DAB CR425 (1996). Petitioner has cited no authority to support a different result in this case.

Petitioner argues that it has a right to a hearing pursuant to 42 C.F.R. §§ 498.3(b)(6) and 498.5(e). P. Response at 1. Section 498.3(b)(6) provides that the CMS decision as to whether or not the services of a supplier continue to meet the conditions for coverage is an initial CMS determination. Section 498.5(e), provides that a supplier is entitled to an ALJ hearing if there is an initial determination that the supplier's services no longer meet the conditions for coverage. Petitioner is correct that the state agency concluded that Petitioner did not meet the conditions for coverage; however, CMS granted a waiver of the noncompliance and concluded that Petitioner's provider agreement should not be terminated. Pursuant section 1866(h) of the Act and 42 C.F.R. § 416.26(f), it is the termination of Petitioner's ASC agreement that triggers the right to a hearing not the conclusion that there was noncompliance with a condition for participation. Petitioner also argues that the severe consequences in this case associated with the need for Petitioner to regain compliance without a waiver, should warrant a hearing. However, the authorities cited by Petitioner neither grant nor recognize any authority for me to grant Petitioner a hearing on equitable grounds.

Accordingly, I conclude that the CMS decision to rescind the termination of Petitioner's ASC agreement extinguished Petitioner's right to a hearing. Petitioner no longer has a right to a hearing; I have no jurisdiction to grant the review Petitioner requests; and dismissal is appropriate pursuant to 42 C.F.R. § 498.70(b).

