

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Centers for Medicare & Medicaid Services,

Petitioner,

v.

Landmark Healthplan of California, Inc.,

Respondent.

Docket No. C-14-1278

CR3430

Date: October 23, 2014

DECISION DISMISSING CASE

The June 5, 2014 request for hearing filed by Respondent, Landmark Healthplan of California, Inc., is dismissed pursuant to 45 C.F.R. § 150.411(c).

I. Background

On May 12, 2014, the Centers for Medicare & Medicaid Services (CMS) notified Respondent that CMS intended to impose a civil money penalty (CMP) in the amount of \$390,000 against Respondent for violation of the Medical Loss Ratio (MLR) requirements. 42 U.S.C. § 300gg-18; 45 C.F.R. § 158.613. Specifically, CMS alleged in the notice that Respondent failed to submit its 2011 MLR Reporting Form and pay any rebates owed. The notice acknowledges Respondent's argument that it is not subject to MLR requirements. The notice informed Respondent that it had the right to request a hearing before an administrative law judge (ALJ) with the Departmental Appeals Board within 30 days after the date of the notice letter as provided in 45 C.F.R. §§ 150.405 and 158.614. A copy of the notice was filed by Respondent with its request for hearing.

On June 5, 2014, Landmark filed a timely request for hearing. On June 19, 2014, the case was assigned to me and an Acknowledgment and Prehearing Order was issued.

On August 15, 2014, Respondent filed its brief on the merits, a motion for summary judgment, an affidavit of its President and Chief Executive Officer, and a waiver of oral hearing.

On September 16, 2014, CMS moved to dismiss the request for hearing on grounds that the proposed CMP was rescinded. CMS filed with its motion a copy of the September 16, 2014 notice to Respondent rescinding the proposed CMP. CMS states in the notice that it rescinded the proposed CMP so that it could consider a new argument raised by Respondent for the first time in its request for hearing. CMS purports to reserve the right to impose a new CMP and acknowledges that if it does Respondent will again have the right to request ALJ review. Respondent filed an opposition to the motion to dismiss on September 17, 2014, and requested oral argument. CMS filed a motion for leave to file a reply with its reply on September 18, 2014. Respondent filed its objection to CMS's motion for leave to file a reply on September 19, 2014. Respondent's objection to the CMS motion for leave to file a reply is overruled. Both the CMS reply and Respondent's objection, which is actually in the nature of a sur-reply, provide helpful elaboration of the parties' positions and legal analysis. Therefore, the CMS reply and Respondent's sur-reply are accepted and considered. Respondent's motion for oral argument is denied. The parties have skillfully set forth their arguments and legal analysis and I have no questions that require discussion in an oral argument. I conclude that an oral argument would not aid my decision and oral argument is, therefore, unnecessary.

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

My conclusions of law are in bold followed by the pertinent facts and analysis.

- 1. CMS has not proposed or assessed a CMP against Respondent.**
- 2. Dismissal of Respondent's request for hearing is required by 45 C.F.R. § 150.411(c).**

CMS advised Respondent in its May 12, 2014 notice that it proposed to impose a \$390,000 CMP against Respondent for failure to submit its 2011 MLR report and to pay any rebates owed. The legal authority cited by CMS for imposition of the CMP was 42 U.S.C. § 300gg-18 and 42 C.F.R. § 158.601-.615. Among other requirements 42 U.S.C. § 300gg-18 imposes upon certain health insurance issuers the obligation to report to the Secretary of Health and Human Service (the Secretary) its MLR for each plan year and, under certain circumstances, to pay a rebate to each enrollee in its plan. The Secretary was required to promulgate regulations for enforcement of 42 U.S.C. § 300gg-18 and granted authority to impose appropriate enforcement remedies. Authorized enforcement remedies are established by 42 U.S.C. § 300gg-22. Under 42 U.S.C. § 300gg-22(b)(2)(D), only an entity assessed a CMP is required to be afforded a hearing before an ALJ if requested within 30 days after the date of issuance of the notice

of assessment of the CMP. Judicial review is only available to an entity after an order imposing a CMP is issued following an ALJ hearing. 42 U.S.C. § 300gg-22(b)(2)(E).

The Secretary promulgated regulations at 45 C.F.R. pt. 158 establishing reporting and rebate requirements for certain insurance issuers. Regulations that delegate authority to Health and Human Services (HHS) to impose CMPs are at 45 C.F.R. § 158.601-.615. HHS is required to give an insurance issuer notice of its intent to assess a penalty and advise the issuer of its right to request a hearing within 30 days after the date of the notice. The notice must also advise the issuer that if a hearing is not requested the CMP may be assessed with no right to further review. 45 C.F.R. § 158.613. Issuers against which HHS has assessed a CMP may seek review in accordance with 45 C.F.R. § 150.400. 45 C.F.R. § 158.614. The authority to impose CMPs is delegated to CMS for any insurer that is subject to CMS's enforcement authority. 45 C.F.R. § 150.301. If CMS proposes to assess a CMP, CMS must give notice to the entity, including notice of the right to request a hearing under 45 C.F.R. § 150.401, within 30 days and that failure to timely request a hearing permits CMS to assess the CMP without further appeal. 45 C.F.R. § 150.343. Pursuant to 45 C.F.R. § 150.345, an "entity against which CMS has assessed" a CMP may request administrative and judicial review in accordance with 45 C.F.R. § 150.401-.465.

In this case CMS proposed a CMP against Respondent, but CMS has now rescinded the proposed CMP. Because there is no longer an action by CMS proposing to assess a CMP against Respondent, Respondent no longer has a right to ALJ review under 42 U.S.C. § 300gg-22(b)(2)(D) and 45 C.F.R. § 150.345. The plain language of the statute and regulation require no interpretation. Respondent is no longer a "respondent" within the meaning of 45 C.F.R. § 150.401, because the notice of intent to impose a CMP has been rescinded. I am required to order the dismissal of a hearing request of an entity that is not a "respondent" within the meaning of 45 C.F.R. § 150.401. 45 C.F.R. § 150.411(c). Accordingly, dismissal of Respondent's request for hearing is required.

Respondent raised several objections to dismissal, all of which are without merit. My delegated authority under 45 C.F.R. § 150.401-.455 is limited. The issues that I may hear and decide are:

- (1) Whether a basis exists to assess a civil money penalty against the respondent.
- (2) Whether the amount of the assessed civil money penalty is reasonable.

45 C.F.R. § 150.417. I am granted no authority to: adjudicate a matter involving an entity that is not a "respondent" within the meaning of 45 C.F.R. § 150.401; render an advisory opinion on a legal issue; or grant equitable relief. Respondent argues that CMS

