Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: May 7, 2010
Columbus Park Nursing and Rehabilitation Center,	
Petitioner,	Civil Remedies CR2037 App. Div. Docket No. A-10-41
- v. -	Decision No. 2316
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Columbus Park Nursing and Rehabilitation Center (Columbus Park) appeals the November 27, 2009 decision of Administrative Law Judge (ALJ) Keith W. Sickendick dismissing Columbus Park's September 21, 2009 hearing request. Columbus Park Nursing & Rehabilitation, DAB CR2037 (2009) (ALJ Decision). Columbus Park requested the hearing to contest July 2009 survey findings that it was not in substantial compliance with Medicare and Medicaid participation requirements. The ALJ concluded that Columbus Park had no right to a hearing under the regulations at 42 C.F.R. Parts 488 and 498 because CMS did not impose against Columbus Park any of the enforcement remedies specified in section 488.406.

For the reasons discussed below, we sustain the ALJ's action.

Legal Background

The Social Security Act (Act) and regulations provide for state agencies to conduct surveys of Medicare skilled nursing facilities (SNF) and Medicaid nursing facilities (NF) to evaluate their compliance with the Medicare and Medicaid participation requirements. Sections 1819 and 1919 of the Act; 42 C.F.R. Parts 483, 488, and 498.[1] A "deficiency" is defined as a "failure to meet a participation requirement specified in the Act or [42 C.F.R. Part 483]." 42 C.F.R. § 488.301. Section 488.301 defines "substantial compliance" as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." "Noncompliance means any deficiency that causes a facility to not be in substantial compliance." Id.

The Act and regulations also provide for the imposition of various remedies on a facility found to be not in substantial compliance. Sections 1819 and 1919 of the Act; 42 C.F.R. Parts 483, 488, and 498. Section 488.406 states that, in addition to the remedy of termination, the alternative remedies available include civil money penalties (CMPs), denials of payment for new admissions (DPNAs), and directed in-service training.

CMS determines the seriousness of each deficiency found during a survey in order to select the appropriate remedies, if any, to impose on the facility. See 42 C.F.R. § 488.404. The level of seriousness is based on an assessment of the scope of the problem within the nursing home (whether the deficiency is isolated, a pattern, or widespread) and severity (the degree of actual, or potential, harm to resident health and safety posed by the deficiency). Id. Under section 488.402(f)(1), CMS or a state survey agency (as authorized by CMS) gives the provider notice of a determination of noncompliance and the remedies imposed.

Sections 1866(h)(1) and 1866(b)(2) of the Act provide hearing rights for specified determinations involving provider participation in Medicare, and sections 1819 and 1919 provide

[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

hearing rights where a CMP has been imposed on an SNF or NF. These provisions are implemented by the regulations in 42 C.F.R. Parts 488 and 498. Section 498.3 sets forth a list of administrative actions that are "initial determinations by CMS" subject to review, as well as a list of other types of "administrative actions that are not initial determinations (and therefore not subject to appeal under [Part 498])." 42 C.F.R. §§ 498.3(b), 498.3(d). The "initial determinations" include, "[w]ith respect to an SNF or NF, a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 . . . , except the State monitoring remedy." 42 C.F.R. § 498.3(b)(13). An ALJ may dismiss a hearing request where the party requesting the hearing "does not . . . have a right to a hearing." 42 C.F.R. § 498.70(b).

Case Background

On July 20, 2009, the Illinois Department of Public Health (state agency) conducted a complaint survey of Columbus Park, a long-term care facility certified as a Medicare SNF and Medicaid NF. On July 23, 2009, the state agency issued a letter to Columbus Park stating that the facility was not in substantial compliance, as reflected in the survey statement of deficiencies (SOD) enclosed with the letter. CMS Ex. 2. The SOD specified that Columbus Park failed to comply substantially with the requirements at sections 483.13(b) and 483.13(b)(1)(i), involving resident abuse, at scope and severity level G (isolated actual harm that is not immediate jeopardy). CMS Ex. 1. The July 23 letter further stated:

> As a result of the above-referenced survey, *proposed* remedies for this facility are the following:
>
> - Directed In[-]service Training
>
> - Civil Money Penalty of $200.00 per day effective July 20, 2009
>
> The facility will be allowed an "opportunity to correct" the cited deficiencies before remedies are actually imposed. If all deficiencies are found to be in "Substantial Compliance" at the first revisit after the opportunity to correct date, the Department will withdraw its proposal that remedies be imposed.

CMS Ex. 2, at 2 (emphasis in original). The July 23 letter also informed Columbus Park that it could challenge the survey

noncompliance findings through the Informal Dispute Resolution (IDR) process. Id. at 3.

On September 21, 2009, Columbus Park submitted a request for hearing "[p]ursuant to [the] July 23, 200[9] notice." Hearing Request at 1. Columbus Park sought the hearing to contest, among other things, "the findings of the alleged non-compliance for the July 29, 2009 survey cycle" and "any recommended or imposed remedies." Id. at 2. Columbus Park stated in its request that it "recognize[d] that [it had] not been offered a hearing pursuant to the Medicare Act or other federal regulations." Id. at 1-2. Nevertheless, Columbus Park asserted, the publication of the July survey allegation of abuse and "the potential for imposition of remedies must not occur in this case without providing [the facility] the opportunity to be heard." Id. at 2. Further, Columbus Park stated, a "hearing on this matter is Columbus Park's only remedy [and] Columbus Park vehemently denies the allegation of abuse . . . ." Id. at 2.

On October 5, 2009, CMS notified Columbus Park that a revisit survey conducted on August 24, 2009 "found that [the] facility was in substantial compliance as of August 4, 2009." CMS Ex. 3, at 1. The notice stated that, based on the revisit survey findings, "**no remedies will be imposed against your facility for this enforcement cycle.**" Id. (emphasis in original).

On October 15, 2009, CMS moved to dismiss Columbus Park's hearing request under section 498.70(b) of the regulations, arguing that the facility had no right to a hearing where no remedies had been imposed. Columbus Park opposed CMS's motion.

The ALJ Decision

By decision dated November 27, 2009, the ALJ dismissed Columbus Park's appeal. The ALJ made the following findings of fact and conclusions of law:

> A. CMS imposed no enforcement remedies in this case and therefore [Columbus Park] has no right to a hearing before an ALJ.
>
> B. [The ALJ has] no jurisdiction or authority to review alleged deficiencies from a survey absent enforcement remedies based upon those deficiencies.
>
> C. Dismissal of [Columbus Park's] request for hearing pursuant to 42 C.F.R. § 498.70(b) is appropriate because [Columbus Park] has no right to a hearing.

ALJ Decision at 2. In reaching the conclusion that Columbus Park had no right to a hearing with respect to the July-August survey cycle, the ALJ noted that the Board and ALJs have "uniformly concluded that a citation of deficiency that is not the basis for an enforcement remedy, or that results in the imposition of a remedy that is later rescinded or reduced to zero, does not trigger the right to a hearing under 42 C.F.R. Part 498." ALJ Decision at 3-4 (citing cases therein).

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence in the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. See Departmental Appeals Board, Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs (Board Guidelines), http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html. We review an ALJ's exercise of discretion to dismiss a hearing request, where such dismissal is authorized by law, for abuse of discretion. See, e.g., High Tech Home Health, Inc., DAB No. 2105, at 7-8 (2007) (and cases cited therein), aff'd, High Tech Home Health, Inc. v. Leavitt, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

Analysis

In the discussion below we first explain that the ALJ properly applied the plain language of the governing regulations to the facts presented in the record. We conclude that the ALJ did not err in determining that Columbus Park had no right to a hearing to contest the July 2009 survey findings in the absence of any enforcement remedy based on those findings. We next address a new argument raised by Columbus Park on appeal, that it was entitled to an ALJ hearing to contest the July survey findings because the remedies imposed after a survey in October 2009 were in part based on the July survey findings. We explain that Columbus Park waived its opportunity to make this argument since it failed to raise it before the ALJ.

> *The ALJ's findings of fact and conclusions of law are supported by substantial evidence in the record and free from legal error.*

On appeal to the Board, Columbus Park disputes each of the ALJ's findings and conclusions. Columbus Park argues that when "a facility suffers an 'adverse and direct legal consequence' under the Medicare program, the facility is entitled to administrative

and judicial review." P. Br. at 5, quoting 64 Fed. Reg. 39,934, at 39,935 (1999). Columbus Park further states that under section 488.408(g) of the regulations, a facility may "appeal a certification of noncompliance leading to an enforcement remedy." P. Br. at 5. Columbus Park contends that the issuance of the July 2009 survey findings "is a type of punishment and should be considered an enforcement remedy" because the findings will "become public record, shall be published on the Internet, and will directly and negatively impact the facility in Medicare's '5 Star Rating System.'"[2] P. Br. at 4; P. Reply at 2-3. Columbus Park argues that to deny it an ALJ hearing under these circumstances would be "contra the spirit of [the regulations]" and violate "principles of fundamental fairness and due process." P. Reply at 2-3.

These arguments fail to take into account the plain language of the regulations governing provider appeals. As the ALJ observed, there is no general right to appeal CMS administrative actions. With respect to CMS determinations that affect a long-term care facility's participation in Medicare and Medicaid, section 498.3 of the regulations provides that a facility is entitled to an ALJ hearing where CMS has made an adverse "initial determination" of a kind specified in 42 C.F.R. § 498.3(b). 42 C.F.R. § 498.3(a)(1). Subsection 498.3(b)(13) defines as an initial determination "[w]ith respect to an SNF or NF, a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 of this chapter, except the State monitoring remedy." Further, section 488.408, "Selection of remedies," addresses how "the remedies specified in section 488.406(a) are grouped into categories and applied to deficiencies according to how serious the noncompliance is." 42 C.F.R. § 488.408(a). Section 488.408(g), in turn, states that a facility may "appeal a certification of noncompliance leading to an enforcement remedy." Thus, consistent with section 498.3(b), section 488.408 provides that a facility has a right to an ALJ hearing where a certification of noncompliance has led to one or more of the enforcement remedies specified at section 488.406(a).

[2] The Five-Star Quality Rating System was developed to help consumers compare nursing homes and identify areas about which they might have questions. Ratings are based on facility surveys, staffing information, and quality measures. Consumers may access the facility ratings on the "Nursing Home Compare" web site at http://www.medicare.gov/NHCompare/.

Applying the plain language of the regulations, the Board has long held that a SNF or NF has no right to an ALJ hearing to contest survey deficiency findings where CMS has not imposed any of the remedies specified at section 488.406 based on those findings, or where CMS imposed, but subsequently rescinded, any such remedies. See, e.g., Fountain Lake Health & 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). In resolving these appeals, the Board has noted that when the Secretary promulgated the nursing home regulations in 1994, the preamble expressly rejected comments seeking to provide hearings to facilities found not to be in substantial compliance where no remedy (or only a minor remedy such as state monitoring) was imposed. See, e.g., Lakewood Plaza at 9, citing 59 Fed. Reg. 56,116, at 56,158 (1994). The Secretary concluded that, absent the imposition of a remedy identified in the regulations, the deficiency findings alone do not result in such a degree of harm as to create hearing rights. Id. Accordingly, the Board has concluded that "no right to a hearing survives merely to 'correct [a] compliance record' upon rescission of all remedies listed in 42 C.F.R. § 488.406." Fountain Lake at 6, citing Schowalter Villa at 2-3. More recently the Board held that a hospital had no right to a hearing to contest deficiency findings where a proposed termination of the facility was rescinded, notwithstanding the provider's claim that the publication of the survey findings in local newspapers posed potential harm to the facility's reputation and financial status. Florida Health Sciences Center, Inc., d/b/a Tampa General Hospital, DAB No. 2263 (2009).[3]

In this case, Columbus Park filed its September 21, 2009 hearing request to challenge the survey findings referenced in the state agency's July 23, 2009 notice regarding its findings of noncompliance. The July 23 notice, however, set forth only *proposed* remedies that *might be* imposed if the facility did not return to substantial compliance as of the "first revisit after the opportunity to correct date." CMS Ex. 2. The state

[3] The decision in Florida Health Sciences Center was based primarily on the language of 42 C.F.R. §§ 498.3(b)(8), 489.53, 498.5(b) and 498.3(d)(9) governing hospital appeal rights, which are not applicable here, but similarly addressed a situation wherein CMS ultimately decided not to impose remedies against the facility.

agency's notice imposed no remedies. Furthermore, as reflected in the subsequent, October 5, 2009 notice from CMS, CMS decided not to impose any remedies on the facility for the July-August survey cycle because CMS determined that Columbus Park timely corrected the alleged deficiencies. CMS Ex. 3. Thus, Columbus Park's appeal sought to challenge survey findings that did not result in the imposition of any of the remedies specified under section 488.406 for the July-August enforcement cycle. Consequently, applying the plain language of the regulations in this case, we conclude that the ALJ did not err in determining that Columbus Park had no right to an ALJ hearing and in dismissing Columbus Park's September 21, 2009 hearing request pursuant to section 498.70(b) of the regulations.

Columbus Park fails to acknowledge the plain language of the governing regulations and, instead, repeatedly misstates the applicable legal standard for determining whether a long-term care facility has the right to appeal noncompliance findings to an ALJ. Specifically, Columbus Park misattributes to "the United States Legislature" (and takes out of context) the statement in the July 23, 1999 *Federal Register* that it is "only if a facility suffers an adverse and direct legal consequence under the Medicare program that it is entitled to administrative and judicial review." P. Br. at 4-5, 9, quoting 64 Fed. Reg. at 39,935. According to Columbus Park, "CMS has not addressed" this statement, "in which the United States Government has recognized that when a facility suffers [any] adverse and direct legal consequence under the Medicare Program, the facility is entitled to administrative and judicial review." P. Br. at 9.

The statement on which Columbus Park relies was not made by the United States Congress, however. Rather, it appears in the preamble to July 1999 interim final regulations. The 1999 rule revised the 1994 long-term care facility regulations to provide a participating SNF an opportunity for an ALJ hearing to challenge a finding of substandard quality of care resulting in the facility's loss of its approved nurse aide training program. 42 C.F.R. § 498.3(b)(15)(1999)(currently codified at 42 C.F.R. § 498.3(b)(16)). The preamble to the 1999 rule stated that the regulations issued in 1994 had "provided only for an informal hearing when facilities [lost] training programs and [did] not otherwise face enforcement remedies under the Medicare and Medicaid programs." 64 Fed. Reg. at 39,934. The preamble explained that, while the agency could continue its previous policy, experience had convinced the agency that the loss of a nurse aide training program could have a sufficiently serious impact on some facilities, given existing constraints in availability of nurse aides and training programs, to warrant a

full evidentiary hearing. Id. at 39,935. Consequently, the Secretary concluded that where loss of nurse aide training was based on substandard quality of care findings, the provider was entitled to a full evidentiary hearing to review the underlying factual bases for those findings, even where no remedies were imposed. Id. To implement this change, a new subsection to section 498.3(b) of the regulations was added to explicitly provide such an appeal right.

We therefore reject Columbus Park's contention that the "United States Government" has provided long-term care facilities the right to an ALJ hearing to contest noncompliance findings that result in any adverse, direct impact on a facility. The regulatory preamble cited by Columbus Park instead indicates that the Secretary may determine, based on reliable information and experience, that a particular consequence of survey noncompliance findings "ris[es] to the level of deprivation marked by sanctions described elsewhere in the statute, such as facility agreement terminations or civil money penalties." 64 Fed. Reg. 39,935. Under such circumstances, the Secretary may choose to grant facilities the right to an ALJ hearing to challenge the underlying survey findings, as she did in the case of substandard quality of care findings resulting in the loss of nurse aide training programs. Thus, to confer on facilities the right to an ALJ hearing in the absence of a statutory right requires a revision to the existing regulations. The regulations have not been revised to treat the state agency decision Columbus Park sought to appeal here as an initial determination subject to appeal.

Furthermore, as the ALJ concluded, the harm Columbus Park alleges will result from the publication of the July survey findings is based on mere speculation. ALJ Decision at 4. In Columbus Park's own words, as a result of the publication on the Internet of the July survey findings, "[p]atient admissions and referrals are *likely* to suffer," and the facility's "reputation and financial situation [are] *likely* to be damaged . . . ." P. Br. at 4-5 (emphasis added). This speculation is indistinguishable from the harm alleged by providers in other cases in which the Board has held that there is no right to a hearing where none of the remedies set forth under section 488.406 have been imposed. See, e.g., Tampa General at 6; Lakewood at 9.

Moreover, Columbus Park's assertion that it had no other opportunity to refute the July survey findings is factually incorrect. Under section 488.331(a) of the regulations, a state must offer a facility an informal opportunity to dispute survey

noncompliance findings, regardless whether a remedy is imposed. If a provider is successful in showing that the deficiencies should not have been cited, the deficiencies are removed from the SOD and any enforcement actions imposed solely as a result of those deficiency citations are rescinded. 42 C.F.R. § 488.331(c). Thus, while CMS is not required to accept IDR results, and a revised SOD issued by a state agency based on an IDR proceeding does not trigger appeal rights under Part 498, the IDR process does provide an opportunity for the provider to challenge the allegations of noncompliance. See, e.g., Rafael Convalescent Hospital v. Shalala, 1998 W.L. 196469 (N.D. Cal. Apr. 15, 1998); Britthaven of Chapel Hill, DAB No. 2284 (2009); Capitol House Nursing and Rehab Center, DAB No. 2252, at 5-8 (2009). In this case, Columbus Park was notified of that opportunity in the July 23, 2009 notice of survey findings.

We also reject Columbus Park's argument that we should reverse the ALJ Decision on constitutional grounds. According to Columbus Park, to deny the facility a full evidentiary hearing in this matter deprives it "of a liberty or property interest that entitles it to due process of law" under the United States Constitution. P. Br. at 5-8. As the Board has previously explained, "it is 'well-established that administrative forums, such as this Board and the Department's ALJs, do not have the authority to ignore unambiguous statutes or regulations on the basis that they are unconstitutional.'" Florida Health Sciences Center at 5-6, quoting Sentinel Medical Laboratories, Inc., DAB No. 1762, at 9 (2001), aff'd sub nom., Teitelbaum v. Health Care Financing Admin., No. 01-70236 (9th Cir. Mar. 15, 2002), reh'g denied, No. 01-70236 (9th Cir. May 22, 2002). While we do not lightly conclude that a provider is not entitled to a hearing, the applicable regulations in this case unambiguously support the ALJ's determination that Columbus Park had no right to an ALJ hearing based on the July 23, 2009 notice. Thus, it is simply not within our authority to consider whether any constitutional right to due process was implicated in this case.

Based on the foregoing discussion, we sustain the ALJ's findings of fact and conclusions of law.

We do not reach Columbus Park's argument for reversal of the ALJ Decision based on the imposition of remedies for the October 2009 survey cycle.

Columbus Park also argues that while CMS "ultimately did not impose 'enforcement remedies' immediately following the July 2009 'G' violation at issue in this case," enforcement remedies that CMS subsequently imposed after an October 2009 survey were,

in part, based on the July 2009 survey findings. P. Br. at 1-2. Specifically, Columbus Park contends that under CMS's "double G" policy, a facility cited with a deficiency at actual harm or above (level G or above) on the current survey, as well as a deficiency at actual harm or above on the previous standard survey, or any survey between the current and last standard survey, will have no opportunity to correct deficiencies before remedies are imposed. P. Br. at 2-4, citing CMS State Operations Manual (SOM), §§ 7304A, 7304B1, 7510A; Testimony of Kathryn G. Allen, Director, Health Care, United States Government Accountability Office, before the Special Committee on Aging, U.S. Senate, May 2, 2007, GAO-07-794T, at 7. As a result of this policy, Columbus Park argues, it was not given an opportunity to correct G-level deficiencies cited in an October 2009 survey, but was instead immediately subjected to enforcement remedies (including a per-day CMP) because of the July 2009 survey G-level finding. Columbus Park contends that the "subsequent enforcement remedies would not have been imposed following the . . . October 14, 2009 survey *but for* the unsubstantiated 'G' violation issued following the July 20, 2009 survey." P. Reply at 2 (emphasis in original). Accordingly, Columbus Park argues that the ALJ's finding that CMS imposed no enforcement remedies is incorrect and, "in this way," Columbus Park "should have a right to a hearing on any 'G' violation." Id.

Columbus Park, however, waived its opportunity to make this argument since it failed to raise it below. The Board's Guidelines provide that the "Board need not consider issues . . . which could have been presented to the ALJ but were not." Board Guidelines, Completion of the Review Process, ¶ (c); Palm Garden of Gainesville, DAB No. 1922, at 6, n.3 (2004). Columbus Park was informed of the October 14, 2009 survey findings and immediate imposition of remedies by a state agency notice dated October 30, 2009. The ALJ Decision was issued on November 27, 2009. Thus, Columbus Park had an opportunity prior to the issuance of the ALJ Decision in which to submit argument to the ALJ (or to request an extension of time to do so) that the remedies imposed following the October survey were based in part on the July noncompliance finding and that, therefore, its September 21, 2009 hearing request should not be dismissed. Columbus Park acknowledges that it did not present this argument to the ALJ, yet provides no reason why it could not have done so. P. Reply at 1-2. Since Columbus Park did not timely raise this argument below, we need not consider it now.

In any event, the issue before the ALJ was whether to dismiss Columbus Park's request seeking a hearing on the July 23, 2009

notice of noncompliance proposing remedies that were never in fact imposed. The ALJ Decision on this limited issue did not bar Columbus Park from raising, in an appropriate context, the question whether the imposition of remedies following the later, October 2009 survey was at least in part a result of the July 2009 G-level noncompliance finding. The documents Columbus Park submitted to us regarding the October 2009 survey include two notices informing Columbus Park of its right to request a hearing: A notice from the state agency giving Columbus Park an opportunity for an ALJ hearing on the state agency determination to impose some remedies authorized by CMS; and a notice from CMS giving Columbus Park an opportunity for a hearing on CMS's determination to impose a CMP. Thus, Columbus Park was given ample opportunity, in a properly filed appeal of either of the later determinations, to raise the issue of whether the remedies imposed after the October 2009 survey were in part based on the findings of noncompliance from the July survey.

Conclusion

For the reasons stated above, we sustain the ALJ Decision dismissing Columbus Park's September 21, 2009 hearing request.

_____/s/_____
Stephen M. Godek

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Judith A. Ballard
Presiding Board Member