

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Capitol House Nursing and Rehab Center
(CCN: 19-5476),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-854

Decision No. CR2258

Date: October 1, 2010

DECISION

The July 23, 2010 request for hearing filed by Petitioner, Capitol House Nursing and Rehab Center, is dismissed pursuant to 42 C.F.R. § 498.70(b), as Petitioner has no right to a hearing.¹

I. Background.

Petitioner is located in San Antonio, Texas, and participates in Medicare as a skilled nursing facility (SNF) and in the state Medicaid program as a nursing facility (NF). On April 14, 2010, the Louisiana Department of Health and Hospitals (state agency) completed a survey of the facility and found that it was not in substantial compliance with federal requirements. The state agency notified Petitioner by letter dated April 27, 2010, that a statutory or mandatory denial of payments for new admissions (DPNA)

¹ All references are to the 2009 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

would be effective July 14, 2010, unless the facility achieved substantial compliance prior to that date. CMS Ex. 1.²

On July 23, 2010, Petitioner filed its hearing request. The case was assigned to me for hearing and decision on July 30, 2010. On August 30, 2010, the Centers for Medicare and Medicaid Services (CMS) filed a motion to dismiss the request for hearing on grounds that no enforcement remedy was imposed, and Petitioner had no right to a hearing. On September 21, 2010, Petitioner filed a response opposing the CMS motion to dismiss on grounds that the motion to dismiss was premature, as Petitioner had not received notice that no enforcement remedies would be imposed.

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

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

A. CMS has imposed no enforcement remedies in this case, and, therefore, Petitioner has no right to hearing before an Administrative Law Judge (ALJ).

B. I have no jurisdiction or authority to review alleged deficiencies from a survey absent enforcement remedies based upon those deficiencies.

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.

The state agency advised Petitioner by its letter dated April 27, 2010, that the statutory DPNA would be triggered effective July 14, 2010, if Petitioner did not return to substantial compliance prior to that date. The state agency advised Petitioner by letter dated August 2, 2010, that a revisit survey found that Petitioner returned to substantial compliance on May 29, 2010. Accordingly, the statutory DPNA was not triggered. There is no dispute that CMS has never given Petitioner notice that CMS was imposing an enforcement remedy based upon the findings of the survey that ended on April 14, 2010. If CMS decides to impose enforcement remedies, notification is required. 42 C.F.R. §§ 488.402(f); 498.20.

² CMS submitted two documents with its motion to dismiss marked as CMS Ex. 1 and CMS Ex. 2. Petitioner has not objected to my consideration of either exhibit, and they are admitted as evidence.

CMS argues in its motion to dismiss: that no remedy was imposed; that Petitioner has no right to a hearing; and that dismissal of the request for hearing is required. Petitioner argues that the request for hearing should not be dismissed, because it has not been notified that CMS will not impose an enforcement remedy. I accept the CMS motion to dismiss as an affirmative statement of CMS that there is no present intention to impose an enforcement remedy based upon the April 14, 2010 survey.

A provider does not have a right to a hearing to challenge every action by CMS with which it disagrees. Only certain actions by CMS or its delegates trigger hearing rights. In general, a participating long-term care facility will have a right to a hearing if CMS makes an initial determination to impose an enforcement remedy against that facility. 42 § 498.3(b)(13). The possible remedies that CMS might impose against a facility are specified at 42 C.F.R. § 488.406(a). No right to a hearing exists pursuant to 42 § 498.3(b)(13), unless CMS determines to impose - and actually imposes - one of the specified remedies. 42 C.F.R. § 488.408(g) (“facility may appeal a certification of noncompliance leading to an enforcement remedy”); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *The Lutheran Home - Caledonia*, DAB CR674, *aff’d*, DAB No. 1753 (2000); *Schowalter Villa*, DAB CR568, *aff’d*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB CR424, *aff’d*, DAB No. 1607 (1997); *Twin Pines Nursing and Rehab. Ctr.*, DAB CR1601 (2007). The Secretary of Health and Human Services specifically rejected a proposal to grant hearing rights for deficiency findings that were made without the imposition of remedies. 59 Fed. Reg. 56,116, 56,158 (Nov. 10, 1994) (“[I]f no remedy is imposed, the provider has suffered no injury calling for an appeal.”).

It is specifically the imposition or proposed imposition of an enforcement remedy and not the citation of a deficiency that triggers the right to a hearing under 42 C.F.R. Part 498. When the enforcement remedy is eliminated, so too, is Petitioner’s right to review and my authority to conduct the review. *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985; *Twin Pines Nursing and Rehab. Ctr.*, DAB CR1601; *see EagleCare, Inc. d/b/a/ Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607; *see also The Lutheran Home – Caledonia*, DAB No. 1753; *Walker Methodist Health Ctr.*, DAB CR869 (2002); *Charlesgate Nursing Ctr.*, DAB CR868 (2002); *D.C. Association 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). In each of these cases, the failure or inability of the petitioner to demonstrate that the appealed survey findings and deficiency determinations had resulted in a remedy was fatal to its appeal. In each of the cases, the appeal was dismissed. The appellate panels of the Board and the ALJs who decided the cases 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.

I conclude, based upon the Secretary's regulations and the rationale of prior decisions by the Board and ALJs, that Petitioner does not have a right to a hearing in this case. and I have no jurisdiction to grant the review requested. Accordingly, I conclude that Petitioner's request for hearing must be dismissed. However, this dismissal is without prejudice to the extent that, if CMS imposes an enforcement remedy based upon the April 14, 2010 survey subsequent to this decision, CMS will give notice as required by the regulations, including notice that Petitioner may request a hearing within the period specified by 42 C.F.R. § 498.40(a)(2).

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge