Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Golden Living Center – Trussville,
(CCN: 01-5131),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-853

ALJ Ruling No. 2015-9

Date: February 20, 2015

DISMISSAL

Petitioner, Golden Living Center – Trussville, is a skilled nursing facility located in Trussville, Alabama, that participates in the Medicare program as a provider of services. Based on its poor compliance history, the Centers for Medicare & Medicaid Services (CMS) designated it a "special focus facility," which, by law, CMS must survey at least once every six months. Petitioner now asks me to review CMS's purported determination "to require the facility to remain on its Special Focus Facility . . . list." Hearing Request at 1.

For the reasons set forth below, I conclude that Petitioner is not entitled to Administrative Law Judge (ALJ) review of CMS's determination that it remain a special focus facility, if, indeed, CMS has made that determination (which is far from clear). I therefore dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 498.70(b).

Background

The Social Security Act (Act) sets forth requirements for nursing facility participation in the Medicare program and authorizes the Secretary of Health and Human Services to

promulgate regulations implementing those statutory provisions. Act § 1819. The Secretary's regulations are found at 42 C.F.R. Part 483. To participate in the Medicare program, a nursing facility must maintain substantial compliance with program requirements. To be in substantial compliance, a facility's deficiencies may pose no greater risk to resident health and safety than "the potential for causing minimal harm." 42 C.F.R. § 488.301.

The Secretary contracts with state survey agencies to conduct periodic surveys to determine whether skilled nursing facilities are in substantial compliance. Act § 1864(a); 42 C.F.R. § 488.20. The regulations require that each facility be surveyed once every twelve months and more often, if necessary, to ensure that identified deficiencies are corrected. Act § 1819(g)(2)(A); 42 C.F.R. §§ 488.20(a); 488.308. If, as here, a facility has consistently demonstrated failure to maintain compliance, and its practices have harmed residents, it will be designated a "special focus facility," which must be surveyed at least once every six months. Act § 1819(f)(8); *See* CMS State Survey and Certification Notice, S&C-10-32-NH (September 17, 2010)).

CMS's policies with respect to special focus facilities have been relatively lenient. Although it has the authority to terminate facilities that are not in substantial compliance, it apparently has allowed these substandard facilities to continue as special focus facilities, for at least two additional years, without demonstrating correction. To "graduate," i.e. shed the designation, a facility must have two consecutive surveys with no deficiencies cited at scope and severity level "F" or higher. An F-level deficiency is not trivial; although it does not involve actual harm, the facility's noncompliance is widespread and presents the potential for more than minimal harm. S&C-10-32-NH at 5.

Although the record in this case is spotty, it appears that the facility was designated a special focus facility in February 2012. P. Response at 3.[1] Petitioner claims that, following a survey completed October 31, 2013, CMS determined that, among other deficiencies, the facility was not in substantial compliance with 42 C.F.R. § 483.35(i) (dietary services – sanitary conditions) at scope and severity level F – widespread noncompliance that has caused no actual harm, with the potential for more than minimal

[1] These facts are derived from Petitioner's submissions, to which CMS has not objected. CMS submitted only a virtually analysis-free motion to dismiss, citing 42 C.F.R. § 498.3(b)(13) and the Departmental Appeals Board's decision in *Golden Living – Grand Island Lakeview*, DAB No. 2364 (2011). But a district court in Nebraska reversed and remanded that case more than two years earlier. *Golden Living Ctr. – Grand Island Lakeview v. Sebelius*, 2011 WL 6303243 (D. Neb. Dec. 16, 2011). Petitioner, naturally, cited the reversal in its response to CMS's motion, and CMS did not reply. Nevertheless, the shortcomings in CMS's advocacy do not relieve me of my obligation to follow the regulations, particularly with respect to my jurisdiction.

harm. According to Petitioner, the October survey finding might keep it a special focus facility for an additional year.

Discussion

Petitioner has no right to a hearing because CMS has not made an initial determination that is reviewable in this forum.[2]

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 an initial determination is entitled to further review, but administrative actions that are not initial determinations are not subject to appeal. 42 C.F.R. § 498.3(a). 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. § 488.406* is an initial determination for which a facility may request an ALJ hearing. 42 C.F.R. § 498.3(b)(13). But a facility has no right to a hearing unless CMS imposes one of the specified remedies. *San Fernando Post Acute Hosp.*, DAB No. 2492 (2012); *Lutheran Home – Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc*., DAB No. 1607 (1997). The remedy, not the citation of a deficiency, triggers the right to a hearing. *San Fernando*, DAB No. 2492 at 7 ("Thus, the regulations do not provide a hearing right for a noncompliance finding alone."); *Schowalter Villa*; *Arcadia Acres, Inc.* Where CMS declines to impose one of the specified remedies, Petitioner has no hearing right. *See Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005).

Notwithstanding the explicit language of the regulations, Petitioner suggests that the prospect of it remaining a special focus facility is sufficient to create a hearing right. But I am bound by the regulations; the regulations are unequivocal; not every potential injury creates a hearing right. *See San Fernando*, DAB No. 2492 at 9-10, *citing Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1 (2000) (finding that, consistent with the statute, the regulations authorize a hearing only if a facility's program participation is terminated or other *specified* remedies are imposed.").[3]

Moreover, Petitioner has not even alleged an actual injury. It speculates that CMS may take certain adverse actions if the facility remains special focus. But Petitioner's position

[2] I make this one finding of fact/ conclusion of law.

[3] I recognize that the district court in *Golden Living Center – Grand Island Lakeview* carved out an exception to the regulations, noting there that survey findings of sexual abuse and actual harm to a resident could be particularly problematic to that facility. But the Nebraska decision is not controlling, and the regulations (which have, after all, withstood Supreme Court scrutiny) are.

suggests a fundamental misunderstanding of CMS's enforcement authority. CMS has the authority to take the actions Petitioner fears without regard to the facility's special focus status.

First, Petitioner assumes – wrongly – that, but for the October survey, it would be exempt from any heightened scrutiny. In fact, CMS and the state survey agencies have broad authority to survey facilities, and any determination to do so is not an initial determination that is subject to review in this forum. 42 C.F.R. §§ 498.3(b); 498.5. In addition to conducting the mandatory annual survey, the agencies may survey a facility "as frequently as necessary" in order to:

> (1) determine whether a facility complies with participation requirements; and
>
> (2) confirm that the facility has corrected deficiencies previously cited.

42 C.F.R. § 488.308(c). Inasmuch as facilities must, at all times, maintain substantial compliance with program requirements, they can hardly claim that they are prejudiced by the state agency's decision to survey them. See Act §§ 1819(g)(2)(B) ("Any other facility may, at the Secretary's or State's discretion, be subject to such an extended survey (or a partial extended survey.")); 1819(g)(3)(D) (authorizing the Secretary to survey a facility and make independent and binding determinations if she "has reason to question" its compliance); 1819(g)(4) (mandating that the state agency investigate complaints). Indeed, Petitioner's poor compliance history would justify heightened scrutiny without regard to the October survey findings or the facility's special focus status.

Petitioner also complains that the October survey findings could ultimately cause it to suffer "severe sanctions" for what it characterizes as a potentially "relatively minor deficiency citation."[4] As a matter of law, CMS has broad discretion to select a penalty whenever a facility is not in substantial compliance, and that discretion is not diminished because the agency is reluctant to terminate any but the "most egregious recidivist institutions." *See Ill. Council*, 529 U.S. at 22. CMS may terminate a facility's program participation whenever that facility is not in substantial compliance with program requirements. Act §§ 1819(h)(2); 1866(b)(2)(A); 42 C.F.R. § 488.412(a). A facility is not in substantial compliance if its deficiencies pose the potential for causing more than

[4] Although this argument is often presented and has some surface appeal, I am not aware of any case in which an unreviewable survey finding has, in fact, had a significant – or any – impact on a later penalty. Petitioner has cited none. Moreover, Petitioner seems to trivialize deficiencies that Congress took seriously. It authorized the Secretary to terminate program participation if the facility was not in substantial compliance (i.e., had "D" and "E" level deficiencies) because such deficiencies pose potential harm to residents.

minimal harm. 42 C.F.R. § 488.301. Thus, CMS may terminate a facility's program participation for deficiencies cited at the "D" and "E" levels of scope and severity. *See Beverly Health & Rehab. Servs., v. Thompson*, 223 F. Supp. 2d 73, 111 (D.D.C. 2002) (holding that the agency's authority to terminate is not limited to immediate jeopardy cases, but "*may span all noncompliant facility behavior*.") (emphasis in original).

Conclusion

Because CMS has not made an initial determination that is reviewable in this forum, Petitioner has no right to an ALJ hearing, and this matter must be dismissed. 42 C.F.R. § 498.70(b). I therefore grant CMS's motion to dismiss.

/s/
Carolyn Cozad Hughes
Administrative Law Judge