Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Hartford HealthCare at Home, Inc.
(PTAN: 07-7041, NPI: 1073529566),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-419

Decision Number CR4695

Date: August 30, 2016

DECISION

I sustain the imposition of civil money penalties against Petitioner, Hartford HealthCare at Home, Inc., in amounts of $5,000 per day for each day of a period that began on December 7, 2015, and that ran through January 7, 2016.

I. Background

Petitioner, a home health agency, filed a hearing request to challenge the determination by the Centers for Medicare & Medicaid Services (CMS) to impose civil money penalties against it. CMS filed a motion for summary judgment along with nine proposed exhibits that it identified as CMS Exhibit (Ex.) 1-CMS Ex. 9. Petitioner opposed the motion and filed six proposed exhibits that it identified as P. Ex. 1-P. Ex. 6. I receive the parties' exhibits into the record.

It is unnecessary that I decide whether the criteria for summary judgment are met here. CMS did not offer any witnesses' testimony. Petitioner offered affidavits from three witnesses, but CMS did not request to cross-examine these individuals. Consequently, no point would be served by holding an in-person hearing. I decide the case based on the parties' written exchanges.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether CMS may be estopped from imposing a remedy against Petitioner.

B. Findings of Fact and Conclusions of Law

This case involves a single and narrow issue, that being whether I should estop CMS from imposing civil money penalties against Petitioner. Petitioner has not disputed the findings of noncompliance on which CMS bases its penalty determination, nor has it disputed the duration of its noncompliance or the reasonableness of the penalty amount. Rather, Petitioner's sole argument is that it was misled by statements made to it by a representative of the State of Connecticut into believing that, if it corrected its noncompliance by a date certain, no penalties would be imposed against it.

Petitioner's argument is without merit. As a matter of law, CMS generally may not be estopped from imposing remedies, including civil money penalties, against a noncompliant facility. *Office of Pers. Mgmt. v. Richmond,* 496 U.S. 414 (1990). That principle has been upheld repeatedly. *Amber Mullins, N.P.*, DAB No. 2729 (2016). Indeed, neither the administrative law judge nor the Departmental Appeals Board has authority to redress claims for equitable relief. *US Ultrasound*, DAB No. 2302 (2010).

Petitioner argues that this case falls within an exception to the general rule, asserting that a government agent affirmatively misled it into delaying correcting its deficiencies. Petitioner characterizes the statements made to it by this agent as active malfeasance rather than mere error.

I find no basis in the record to support Petitioner's argument. Petitioner rests its case on statements that are, at worst, ambiguous. There is nothing in those statements suggesting malfeasance.

Petitioner received a series of notices from a representative of the State of Connecticut in the wake of a survey in which it was found noncompliant with Medicare participation requirements. P. Ex. 1. These letters, which plainly were intended to warn Petitioner of the adverse consequences of its noncompliance, all contained the following language:

> If you believe these deficiencies have been corrected, you may contact . . . with your written credible allegation of compliance. If you choose and so indicate, the . . . [plan of correction] may constitute your allegation of compliance. We *may* accept the written allegation of compliance and

> presume compliance until substantiated by a revisit . . . or other means. *In such a case*, neither the CMS Regional Office nor the State Medicaid Agency will impose the previously recommended remedy(ies) at that time.

P. Ex. 1 at 2 (emphasis added).

The State superseded these notices with an amended notice, dated January 8, 2016, in which it deleted language concerning possible non-imposition of remedies. *Id.* at 10-11.

The language in the quoted paragraph in the pre-January 8 notices suggests that remedies might not be imposed against Petitioner if it submitted allegations of compliance that were subsequently verified. But, it contains nothing suggesting that either the State of Connecticut or CMS would *definitely* withhold imposition of remedies in that event. The use of the word "may" and the subsequent reference to "in such a case" plainly implies that the State and CMS had discretion to decide whether, and under what circumstances, they would impose remedies.

Petitioner can argue with some justification that the communications between it and the representative of the State were ambiguous. It cannot argue credibly that anyone promised it that remedies would be withheld if it corrected its deficiencies. I note that Petitioner's witnesses do not aver that a State representative ever made such a promise to them. P. Ex. 4; P. Ex. 5; P. Ex. 6. These witnesses aver only that the State's representative neither warned them explicitly that remedies would be imposed nor did she ever state anything in meetings that contradicted the quoted language of the notices.

These notices and the subsequent meetings with the State's representative could have given Petitioner reason to believe that remedies might ultimately be withheld. But, these notices do not affirmatively tell Petitioner that remedies would be withheld. Therefore, Petitioner has not established grounds for finding an exception to the rule that estoppel will not lie against the government.

________/s/________________
Steven T. Kessel
Administrative Law Judge