Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

New Annapolis Nursing, LLC
(CCN: 21-5005),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2566

Decision No. CR4877

Date: June 28, 2017

DECISION

The Maryland Department of Health and Mental Hygiene (state agency) withdrew approval of the nurse aide training and competency program (NATCEP) at New Annapolis Nursing, LLC (Petitioner or the facility) because the state agency had to conduct an extended survey due to a finding that Petitioner provided substandard quality of care. Related to that extended survey, the state agency found that Petitioner violated six other Medicare program participation requirements and, based on all of violations, recommended that the Centers for Medicare & Medicaid Services (CMS) impose enforcement remedies that included a civil money penalty (CMP). Petitioner appealed the state agency's withdrawal of approval for the NATCEP, disputing the findings that it provided substandard quality of care and violated two other Medicare program participation requirements.

Later, CMS issued an initial determination upholding all of the state agency's findings that Petitioner violated Medicare program participation requirements and imposing a $269,700 CMP. Petitioner did not appeal that determination.

CMS moves for summary judgment. CMS argues that its initial determination to impose a CMP is now binding and, regardless of Petitioner's original appeal of the state agency's

NATCEP withdrawal, the law independently requires the withdrawal of Petitioner's NATCEP approval because the CMP imposed is more than $5,000. Petitioner argues in opposition that its original appeal of the state agency determination is sufficient to fully dispute CMS's actions because, if I conclude that Petitioner did not provide substandard quality of care, then CMS's CMP would have to be reduced. Although Petitioner opposes summary judgment, Petitioner requests that I issue a decision based on the written record.

For the reasons discussed below, I issue a decision based on the written record and affirm the withdrawal of approval of Petitioner's NATCEP.

I. Background

The Social Security Act (Act) sets forth participation requirements for a skilled nursing facility (SNF) in the Medicare program and authorizes the Secretary of Health and Human Services (the Secretary) to promulgate regulations implementing those statutory provisions. 42 U.S.C. § 1395i-3. The Secretary's regulations are found at 42 C.F.R. Parts 483 and 488. To participate in the Medicare program, an SNF must maintain substantial compliance with program participation requirements. To be in "noncompliance" means "any deficiency that causes a facility to not be in substantial compliance," and "substantial compliance" means an SNF's deficiencies may "pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Substandard quality of care" means one or more deficiencies related to Medicare program participation requirements in 42 C.F.R. §§ 483.13, 483.15, or 483.25 involving immediate jeopardy, widespread actual harm that is not immediate jeopardy, or widespread potential for more than minimal harm without actual harm or immediate jeopardy. 42 C.F.R. § 488.301

The Secretary contracts with state agencies to conduct periodic surveys of SNFs to determine whether SNFs are in substantial compliance. 42 U.S.C. § 1395aa(a); 42 C.F.R. § 488.10. If a state agency concludes during a standard survey that an SNF has provided substandard quality of care, the state agency must conduct an extended survey of the SNF. 42 U.S.C. § 1395i-3(g)(2)(B)(i); 42 C.F.R. §§ 483.301 (definition of *Extended survey*), 488.310. A state agency must withdraw its approval of an SNF's NATCEP if the state agency conducted an extended survey or partial extended survey, or the SNF is assessed a CMP of not less than $5,000. 42 C.F.R. § 483.151(f)(1); *see also* 42 U.S.C. § 1395i-3(f)(2)(B)(iii)(I)(b), (c); 42 C.F.R. § 483.151(b)(2)(iii), (iv). A finding of substandard quality of care that leads to the loss of approval of an SNF's NATCEP and

the level of noncompliance (i.e., the scope and severity)[1] found in relation to the substandard quality of care finding are appealable initial determinations. 42 C.F.R. §§ 498.3(a)(1), (b)(14)(ii), (16).

The Act also authorizes the Secretary to impose enforcement remedies against SNFs that are not in substantial compliance with the program participation requirements. 42 U.S.C. § 1395i-3(h)(2). The regulations specify the enforcement remedies that CMS may impose. 42 C.F.R. § 488.406. Among other enforcement remedies, CMS may impose a per-day CMP for the number of days an SNF is not in substantial compliance. 42 C.F.R. § 488.430(a). A per-day CMP may range from either $50 to $3,000 per day for less serious noncompliance, or $3,050 to $10,000 per day for more serious noncompliance that poses immediate jeopardy to the health and safety of residents.[2] 42 C.F.R. § 488.438(a). "Immediate jeopardy" exists when "the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301. If CMS imposes a CMP based on a noncompliance determination, then the SNF may request a hearing before an administrative law judge to challenge the noncompliance finding and enforcement remedy. 42 U.S.C. §§ 1320a-7a(c)(2), 1395i(h)(2)(B)(ii)); 42 C.F.R. §§ 488.408(g), 488.434(a)(2)(viii), 498.3(b)(13). However, an administrative law judge must uphold CMS's finding as to the level of noncompliance (i.e., the scope and severity) unless that finding is clearly erroneous. 42 C.F.R. § 498.60(c).

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[1] Scope and severity levels are used by CMS and state agencies when selecting remedies. The scope and severity level is designated by letters A through L, and is selected by CMS or the state agency from the scope and severity matrix published in the State Operations Manual, chap. 7, § 7400.5 (Sep. 10, 2010). A scope and severity level of A, B, or C indicates a deficiency that has the potential for no actual harm and has the potential for no more than minimal harm. A scope and severity level of D, E, or F indicates a deficiency that presents no actual harm but has the potential for more than minimal harm that does not amount to immediate jeopardy. A scope and severity level of G, H, or I indicates a deficiency that involves actual harm that does not amount to immediate jeopardy. A scope and severity level of J, K, or L indicates a deficiency that constitutes immediate jeopardy to resident health or safety. The matrix, which is based on 42 C.F.R. § 488.408, specifies which remedies are required and optional at each level based upon the frequency of the deficiency. *See* State Operations Manual ch. 7, § 7400E.

[2] CMS recently increased the CMP amounts to account for inflation in compliance with the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, 104 Pub. L. No. 114-74, 129 Stat. 584, 599. The new adjusted amounts apply to CMPs assessed after August 1, 2016, for deficiencies occurring on or after November 2, 2015. *See* 81 Fed. Reg. 61538-01 (Sept. 6, 2016). As the deficiencies alleged in this case occurred prior to November 2, 2015, the increased CMP amounts do not apply in this case.

Petitioner is an SNF located in Annapolis, Maryland, which participates in the Medicare program. The state agency conducted an annual certification survey of Petitioner's facility from March 23-26, 2015, and an extended survey on March 26, 2015. CMS Exhibit (Ex.) 1 at 1. On April 30, 2015, the state agency sent to Petitioner a notice and a Statement of Deficiencies (SOD). CMS Ex. 1; CMS Ex. 15 at 1-8. The SOD indicated that Petitioner was not in substantial compliance with the following seven Medicare program participation requirements, one of which involved immediate jeopardy to residents:

- 42 C.F.R. §§ 483.10(e), 483.75(l)(4), F164 (Personal Privacy/Confidentiality of Records) at scope and severity level "D";
- 42 C.F.R. § 483.25(a)(3), F312 (Activities of Daily Living Care Provided for Dependent Residents) at scope and severity level "D";
- 42 C.F.R. § 483.25(c), F314 (Treatment/Services to Prevent/Heal Pressure Sores) at scope and severity level "D";
- 42 C.F.R. § 483.25(*l*), F329 (Drug Regimen is Free From Unnecessary Drugs) at scope and severity level "K";
- 42 C.F.R. § 483.25(m)(2), F333 (Residents Free of Significant Medication Errors) at scope and severity level "D";
- 42 C.F.R. § 483.75(i), F501 (Responsibilities of Medical Director) at scope and severity level; "G"; and
- 42 C.F.R. § 483.75(o)(1), F520 (QAA Committee Members/Meet Quarterly/Plans) at scope and severity level "E."

CMS Ex. 1. In its notice, the state agency informed Petitioner that it was imposing a CMP on Petitioner under state law and that Petitioner could appeal that CMP to a state administrative adjudicatory office. CMS Ex. 15 at 4-6. The notice also stated that due to its finding that Petitioner had provided substandard quality of care in violation of 42 C.F.R. § 483.25(*l*) (Unnecessary Drugs), which resulted in an extended survey, the state agency had to withdraw approval of Petitioner's NATCEP. CMS Ex. 15 at 2-3. The notice advised that Petitioner had the right to appeal the substandard quality of care finding to the United States Department of Health and Human Services, Departmental Appeals Board, Civil Remedies Division. CMS Ex. 15 at 3-4. Finally, the notice indicated that the state agency recommended that CMS impose a CMP on Petitioner, a denial of payment for new admissions commencing on June 26, 2015, and termination of Petitioner's Medicare provider agreement on September 26, 2015, if Petitioner did not achieve substantial compliance by that date. CMS Ex. 15 at 2-3. In regard to the recommended enforcement remedies, the state agency stated:

> **Please note that this notice does not constitute formal notice of imposition of alternative remedies or termination of your provider agreement. Should CMS determine that**

> **termination or any other remedy is warranted, CMS will provide you with a separate formal notification of that determination.**

CMS Ex. 15 at 3 (emphasis in original).

On May 18, 2015, Petitioner electronically filed a hearing request with the Civil Remedies Division in which it disputed three of the deficiencies cited in the SOD:

- 42 C.F.R. § 483.25(*l*), F329 (Drug Regimen is Free From Unnecessary Drugs) at scope and severity level "K";
- 42 C.F.R. § 483.75(i), F501 (Responsibilities of Medical Director) at scope and severity level "G"; and
- 42 C.F.R. § 483.75(o)(1), F520 (QAA Committee Members/Meet Quarterly/Plans) at scope and severity level "E."

Petitioner noted the following at the end of the hearing request:

> Additionally, CMS may still provide additional penalties based on these citations, which may cause further appeal.
>
> [Petitioner] reserves the right to further appeal these deficiencies should CMS impose additional remedies.

Hearing Request at 3.

In a June 4, 2015 initial determination, CMS informed Petitioner that due to the state agency's finding of substantial noncompliance with Medicare program participation requirements, it was imposing a denial of Medicare/Medicaid payment for all new admissions to Petitioner's facility, effective June 26, 2015. CMS Ex. 15 at 9. CMS advised Petitioner that it could appeal this determination to the Civil Remedies Division. CMS Ex. 15 at 9-10. Further, CMS stated that if CMS decided to terminate Petitioner's participation in the Medicare program, CMS would notify Petitioner of its appeal rights as a result of that action, but that Petitioner should "note that those appeal rights are separate and distinct from the appeal rights cited above." CMS Ex. 15 at 10. Petitioner did not appeal this initial determination.

In a June 16, 2015 initial determination, CMS informed Petitioner that it was imposing a CMP on Petitioner based on the seven violations of Medicare program participation requirements that the state agency found during the survey of Petitioner's facility. CMS Ex. 15 at 12-13. CMS imposed a CMP of $4,450 per-day for 56 days of immediate jeopardy from January 29, 2015 through March 25, 2015, i.e., the day on which Petitioner removed the immediate jeopardy situation. CMS Ex. 15 at 13. CMS also imposed a

$250 per-day CMP from March 26, 2015, until Petitioner returned to substantial compliance in the future. CMS Ex. 15 at 13. CMS informed Petitioner of the right to appeal the determination regarding the CMP or formally waive its right to appeal and receive a reduced penalty amount. CMS Ex. 15 at 14-15. The initial determination also stated:

> If you neither submit a written request for a hearing nor formally waive your right to appeal you will be assessed the full amount of the civil money penalty.

CMS Ex. 15 at 15 (emphasis in original). Also on June 16, 2015, the state agency completed a revisit survey and concluded that Petitioner had returned to substantial compliance on that date. CMS Ex. 18. As a result, CMS cancelled imposition of the denial of payments for new admissions and calculated the total CMP for Petitioner to be $269,700. CMS Ex. 15 at 18-20. In the notice regarding the total CMP amounts, dated June 24, 2015, CMS referred to Petitioner's appeal rights that had been described in the June 16, 2015 initial determination imposing the CMP and informed Petitioner that its "right to appeal the imposition of the CMP is separate from your right to appeal the denial of payments for all new admissions." CMS Ex. 15 at 19-20.

On June 18, 2015, I issued an Acknowledgment and Pre-hearing Order (Order) that established a pre-hearing submission schedule for the parties. In compliance with my Order, CMS filed a motion for summary judgment and pre-hearing brief (CMS Br.), and 23 exhibits (CMS Ex. 1-23). Petitioner filed a prehearing brief and opposition to summary judgment (P. Br.) along with 6 proposed exhibits (P. Exs. 1-6). Both parties submitted written direct testimony for its witnesses. CMS Exs. 20-23; P. Exs. 1, 4. Although both CMS and Petitioner filed reply briefs (CMS Reply, P. Reply), they did not object to any of the proposed exhibits or request to cross-examine any of the witnesses. Further, Petitioner filed a written waiver to its right to an in-person hearing.

II. Decision on the Record

Although this case primarily turns on a legal issue and summary judgment would likely be appropriate, I deny CMS's motion for summary judgment because Petitioner waived his right to an in-person hearing. 42 C.F.R. § 498.66(a). I accept Petitioner's waiver because CMS has not shown good cause that oral testimony needs to be taken and I do not believe that additional witness testimony is needed to clarify the facts at issue in this case. 42 C.F.R. § 498.66(b); *see also* Order ¶¶ 8-10, 13. Therefore, I admit CMS Exs. 1-23 and P. Exs. 1-6 without objection and render a decision based on the written record in this case.

III. Issue

Whether there was a legitimate basis for the withdrawal of approval of Petitioner's NATCEP.

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

My findings of fact and conclusions of law are set forth in bold and italics below.

1. Petitioner only appealed the state agency's initial determination to withdraw approval of Petitioner's NATCEP and effectively only contested one of the seven deficiencies (i.e., the violation of 42 C.F.R. § 483.25(l)), identified in the SOD.

Petitioner filed a request for hearing, in May 2015, with the Civil Remedies Division in response to the state agency's April 30, 2015 initial determination to withdraw approval of Petitioner's NATCEP. The state agency expressly stated that the NATCEP approval had to be withdrawn because Petitioner provided substandard quality of care in violation of 42 C.F.R. § 483.25(*l*) (Unnecessary Drugs) at the immediate jeopardy level, which required the state agency to conduct an extended survey. CMS Ex. 1 at 1, 5-11; CMS Ex. 15 at 3-4.

The state agency's withdrawal of approval of Petitioner's NATCEP was an "initial determination" subject to further appeal because it involved a "finding of substandard quality of care that le[]d to the loss by a SNF . . . of the approval of its [NATCEP]." 42 C.F.R. § 498.3(b)(16). Petitioner appealed the state agency's determination by requesting a hearing with the Civil Remedies Division and disputing three of the seven deficiencies identified in the SOD, including the substandard quality of care provision related to 42 C.F.R. § 483.25(*l*). However, the state agency's initial determination was predicated solely on the finding of substandard quality of care in relation to 42 C.F.R. § 483.25(*l*). CMS Ex. 15 at 3. While disputing a deficiency under 42 C.F.R. § 483.25(*l*) is proper, Petitioner could not, based on the state agency's April 30, 2015 initial determination, dispute any of the other deficiencies in the SOD because those deficiencies did not result in the withdrawal of the NATCEP approval under that initial determination. *See Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316, at 7 (2010) (An SNF "has no right to an [administrative law judge] hearing to contest survey deficiency findings where CMS has not imposed any of the remedies specified in section 488.406 based on those findings, or where CMS imposed, but subsequently rescinded such remedies."). Therefore, the only deficiency that Petitioner effectively appealed was 42 C.F.R. § 483.25(*l*).

2. Petitioner did not appeal CMS's initial determination to impose a CMP or timely dispute most of the deficiencies in the SOD; therefore, the CMP that CMS imposed is binding.

There is no dispute that Petitioner only requested a hearing in regard to the April 30, 2015 initial determination to withdraw approval of the NATCEP. Petitioner did not request a hearing in response to the CMP that CMS later imposed on Petitioner.

CMS argues that the CMP is binding and no longer subject to review because CMS's decision to impose a CMP is an initial determination and Petitioner did not timely appeal that determination. CMS Br. at 6. Petitioner argues in opposition that its original request for hearing encompasses CMS's CMP and, even if it did not, its original appeal can result in reversal of the immediate jeopardy finding against Petitioner, which would then require CMS to reduce the CMP it imposed on Petitioner. P. Br. at 4. Petitioner also asserts that CMS should impose all remedies at one time and that CMS acted in bad faith to issue multiple notices at different times. P. Br. at 5. CMS responds that Petitioner's hearing request cannot encompass the CMP because Petitioner filed its hearing request before CMS imposed the CMP, making Petitioner's hearing request "untimely" because it was filed outside of the 60-day filing period to appeal an initial determination. CMS Reply at 2-3. Finally, Petitioner replies that it has appealed the deficiencies that underlay the CMP and the CMP cannot stand if those deficiencies are reversed. P. Reply at 2.

Petitioner has not provided any authority that states that CMS must issue one notice for all of the actions it is taking in regard to the results of a survey. To the contrary, the regulations provide differing notice requirements for different actions.

The imposition of a CMP on an SNF for noncompliance is an enforcement remedy under 42 C.F.R. § 488.406 and thus an initial determination. 42 C.F.R. § 498.3(b)(13). Further, CMS's decision to impose a CMP is discretionary. 42 C.F.R. § 488.438(e)(2); *see also* 42 U.S.C. § 1395 (h)(2)(B)(ii). In addition to the general notice requirements for initial determinations (42 C.F.R. § 498.20), CMS must comply with special notice requirements for CMPs. 42 C.F.R. § 488.434. One such requirement is to provide "[i]nstructions for responding to the notice, including a statement of the facility's right to a hearing, and the implication of waiving a hearing . . . ." 42 C.F.R. § 488.434(a)(2)(viii). CMS sets the effective date for the CMP and a date by which the SNF must pay the CMP if the SNF fails to request a hearing or formally waive the right to a hearing. 42 C.F.R. §§ 488.440(b)(3), 488.442(a)(2).

In contrast to the imposition of a CMP, the withdrawal of an NATCEP under the circumstances presented in this case is: (1) the responsibility of state agencies;

(2) not discretionary; (3) not an enforcement remedy; and (4) is subject to minimal notice requirements. 42 C.F.R. §§ 483.151(f)(1), (4)(i), 488.406. Therefore, I have no reason to conclude that CMS was required to issue a single notice to inform Petitioner of separate initial determinations rendered under 42 C.F.R. § 498.3(b)(13) and (b)(16).

Although Petitioner asserts bad faith on CMS's part for issuing more than one notice for the initial determinations it made, CMS clearly told Petitioner it needed to file separate hearing requests for each initial determination that Petitioner wanted to contest. CMS Ex. 15 at 3 (informing Petitioner that the state agency recommended the imposition of enforcement remedies, but that CMS would issue a separate formal notice should CMS impose any such remedies), 9-10 (notice of initial determination that CMS was denying payment for new admissions provided detailed instructions for filing a request for hearing and stated that if CMS terminated Petitioner's participation in the Medicare program, Petitioner's appeal right regarding the termination would be separate and distinct from the appeal rights provided for the denial of payment for new admissions), 14-15 (notice of initial determination that CMS was imposing a CMP provided detailed instructions for filing a request for hearing and stated: "If you neither submit a written request for a hearing nor formally waive your right to appeal you will be assessed the full amount of the civil money penalty."), 20 (notice that Petitioner's right to appeal a CMP is separate from Petitioner's right to appeal the denial of payment for new admissions). There was no reason for Petitioner to conclude that filing a single hearing request based on the state agency's initial determination would be sufficient to appeal subsequent initial determinations issued by CMS. *Cf. Park Manor Nursing Home*, DAB No. 2005 at 5-6 (2005) (case history showing the SNF filed a request for hearing based on a state agency withdrawal of approval of a NATCEP and another hearing request in response to CMS's imposition of a CMP). In fact, Petitioner indicated that it knew it would need to appeal additional initial determinations that CMS might issue because it expressly reserved the right to do so at the end of its hearing request. Hearing Request at 3.

A party affected by an initial determination must file a written request for hearing within 60 days from receipt of the notice of the initial determination unless the 60 day period is extended for good cause shown. 42 C.F.R. § 498.40(a)(2), (c). Petitioner did not request a hearing within the time permitted and made no request that I extend the time to file a request for hearing. Therefore, CMS's initial determination to impose a CMP is binding. 42 C.F.R. § 498.20(b).

3. Because CMS's determination to impose a CMP of more than $5,000 on Petitioner is binding, Petitioner's approval for its NATCEP must be withdrawn as a matter of law.

CMS asserts that the CMP that CMS imposed on Petitioner is significantly higher than $5,000 and that the CMP is now binding. As a result, CMS argues that it is no longer necessary to consider Petitioner's appeal of the withdrawal of the NATCEP based on a

finding of substandard quality of care because withdrawal of the NATCEP is required by law since Petitioner has been assessed a CMP of more than $5,000. Even excluding the deficiency Petitioner appealed in its request for hearing, CMS states that the remaining deficiencies that have not been appealed are sufficient to conclude that a CMP of at least $5,000 has been assessed against Petitioner. CMS Br. at 5-7; CMS Reply at 3.

Petitioner responds that CMS's argument is circular in that CMS wants to use a subsequent imposition of a CMP to justify a previous withdrawal of approval of the NATCEP. P. Reply at 2.

CMS is correct that Petitioner was assessed a total CMP of $269,700 based on $4,450 per day for 56 days and $250 per day for 82 days. CMS Ex. 15 at 19. As concluded above, this CMP is now binding. Applying this CMP amount to the regulatory provisions governing NATCEPs, it is clear that Petitioner has been assessed a CMP that is "not less than $5,000." 42 C.F.R. § 483.151(b)(2)(iv). Therefore, approval of Petitioner's NATCEP must be withdrawn. 42 C.F.R. § 483.151(f)(1).

The present case is complicated by the fact that CMS's CMP, to a great extent, rests on the deficiency under 42 C.F.R. § 483.25(*l*), which was the only deficiency cited at the immediate jeopardy level and the only deficiency that Petitioner effectively appealed in its request for hearing. The period of immediate jeopardy required a minimum CMP of $3,050 per day, which obviously influenced CMS to impose a $4,450 per day CMP amount for the first 56 days. 42 C.F.R. §§ 488.408(d)(3)(ii), 488.438(a)(i). However, even if Petitioner were to prevail in its appeal of the deficiency under 42 C.F.R. § 483.25(*l*), Petitioner estimates that its CMP would still be $15,750 based on the deficiencies that it had not appealed. P. Br at 9. Accepting this estimate, a CMP of that amount is three times more than the threshold for the mandatory withdrawal of Petitioner's NATCEP.

In concluding that the withdrawal of the NATCEP can be upheld on the basis of 42 C.F.R. § 483.151(b)(2)(iv) rather than 42 C.F.R. § 483.151(b)(2)(iii), I note that the April 30, 2015 initial determination to withdraw approval of Petitioner's NATCEP informed Petitioner that a ground for that action could include an assessment of a CMP that was not less than $5,000. CMS Ex. 15 at 3. Further, CMS gave notice of an alternate basis for the withdrawal of Petitioner's NATCEP in its briefs in this case, and Petitioner had an opportunity to respond in its brief and reply brief. CMS Br. at 5-7; CMS Reply at 3. This was sufficient notice for Petitioner. 42 C.F.R. § 498.56(a); *Green Hills Enterprises, LLC*, DAB No. 2199 at 8 (2008); *United Medical Home Care, Inc.*, DAB No. 2194 at 13 (2008); *Texas Health and Human Services Commission*, DAB No. 2187 at 5 n.3 (2008).

V. Conclusion

I affirm the withdrawal of approval of Petitioner's NATCEP.

___/s/_____
Scott Anderson
Administrative Law Judge