

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)
)
) Date: May 25, 2007
)
Twin Pines Nursing and)
Rehabilitation Center,)
(CCN: 67-5638))
)
Petitioner,) Docket Nos. C-07-13 & C-07-122
) Decision No. CR1601
)
- v. -)
)
Centers for Medicare & Medicaid)
Services.)
)

DECISION

The requests for hearing are dismissed pursuant to 42 C.F.R. § 498.70(b).

I. Background

Petitioner is a skilled nursing facility located in Victoria, Texas, licensed by the State of Texas and authorized to participate in the federal Medicare program and the state Medicaid program. On September 15, 2006, the Texas Department of Aging and Disability Services (the state agency) completed a survey of Petitioner's facility. The state agency alleged, based on the survey, that Petitioner was in violation of 42 C.F.R. § 483.25(h)(2). The Centers for Medicare & Medicaid Services (CMS) subsequently notified Petitioner that it was imposing a per instance civil money penalty (PICMP) of \$1500 for the alleged violation 42 C.F.R. § 483.25(h)(2) and the remedies of termination and denial of payment for new admissions (DPNA). Joint Stipulation of Fact filed February 16, 2007 (Jt. Stip.).

Petitioner requested a hearing by letter dated October 10, 2006. The case was docketed as C-07-13 and assigned to me for hearing and decision. Petitioner filed a second request for hearing on November 27, 2006, which was docketed as C-07-122 and assigned to me for hearing and decision. By Order dated December 18, 2006, the two cases were consolidated for hearing and decision. The case is presently set for hearing on May 31, 2007.

CMS advised Petitioner by letter dated December 27, 2006, that it rescinded the termination and DPNA remedies but that the PICMP remained in effect. CMS Prehearing Brief at 2.

On May 15, 2007, CMS filed a motion to dismiss Petitioner's request for hearing with a supporting memorandum (CMS Brief) and exhibits (CMS Exs.) 1 through 3. On May 17, 2007, Petitioner filed its response in opposition to the CMS motion to dismiss (P. Brief).

II. Discussion

CMS notified Petitioner by letter dated December 27, 2006, that it rescinded the remedies of termination and DPNA it previously proposed. CMS Ex. 2. CMS notified Petitioner by letter dated May 11, 2007, that it rescinded the \$1500 PICMP it previously proposed. CMS Ex. 3. CMS argues that because Petitioner is no longer subject to enforcement remedies, it has no right to a hearing. CMS Brief at 2-3. Petitioner acknowledges that all remedies have been rescinded in this case and that rescission of all enforcement remedies resulted in dismissal in prior cases. Petitioner nevertheless argues that the request for hearing should not be dismissed in this case because it is necessary to have an adjudication of the allegation of deficiency to correct potentially erroneous information regarding the deficiency finding that has been publicly released. P. Brief at 3-4.

A provider does not have a right to a hearing to challenge every action by CMS with which it disagrees. Only certain actions create 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 a remedy against that facility. 42 C.F.R. § 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 C.F.R. § 498.3(b)(13), unless CMS determines to impose – and actually imposes – one of the specified remedies. *Lutheran Home – Caledonia*, DAB CR674 (2000), *aff'd*, DAB No. 1753 (2000); *Schowalter Villa*, DAB CR568 (1999), *aff'd*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB CR424 (1996), *aff'd*, DAB No. 1607 (1997). Indeed, the Secretary of Health and Human Services (Secretary) specifically rejected a proposal to grant hearing rights for deficiency findings that were made without the imposition of remedies. 59 Fed. Reg. 56116, 56158 (Nov. 10, 1994).

It is 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. See *Eaglecare, Inc., d/b/a Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). See also, *The Lutheran Home-Caledonia*, DAB No. 1753 (2000), *Walker Methodist Health Center*, DAB CR869 (2002), *Charlesgate Nursing Center*, DAB CR868 (2002), *D.C. Association for Retarded Citizens*, DAB CR776 (2001), *Alpine Inn Care, Inc.*, DAB CR728 (2000), *Woodland Care Center*, DAB CR659 (2000), and *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 these cases, the appeal was dismissed. The appellate panels of the Departmental Appeals Board and the administrative law judges who decided these 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 Part 498.

Petitioner does not have a right to a hearing in this case. The undisputed facts establish that while CMS initially determined that Petitioner was deficient and imposed a PICMP against Petitioner, CMS has now rescinded all enforcement remedies. Petitioner no longer suffers any injury that I am authorized to redress and Petitioner no longer has a right to hearing pursuant to 42 C.F.R. Part 498.

III. Conclusion

Based upon the foregoing reasons, Petitioner's requests for hearing are dismissed pursuant to 42 C.F.R. § 498.70(b) and the hearing scheduled for May 31, 2007, is cancelled.

/s/

Keith W. Sickendick
Administrative Law Judge