Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Riverview Psychiatric Center,
(CCN: 204007),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-84

ALJ Ruling No. 2014-18

Date: January 3, 2014

RULING DISMISSING PETITIONER'S REQUEST FOR HEARING

I dismiss the hearing request filed by Petitioner, Riverview Psychiatric Center. Petitioner has no right to a hearing to challenge the declination by the Centers for Medicare & Medicaid Services (CMS) to reopen its determination to terminate Petitioner's participation in the Medicare program.

CMS filed 13 exhibits, designated as CMS Ex. 1 – CMS Ex. 13, in support of its motion to dismiss. Petitioner filed two exhibits, designated as P. Ex. 1 and P. Ex. 2, in its opposition to the motion. I am receiving these exhibits into the record of this case. However, none of the material facts, as are described in the exhibits or represented by the parties, is in dispute.

I. Undisputed Facts and Background

Petitioner is a psychiatric hospital in the State of Maine. It participated in Medicare. In March and May 2013 the Maine Department of Health and Human Services, Division of Licensing and Regulatory Services (Maine State agency) conducted surveys of Petitioner in order to determine whether it was complying with Medicare conditions of participation. CMS Ex. 2; CMS Ex. 3. At both surveys the Maine State agency found that Petitioner was not complying substantially with conditions of participation. On June 4, 2013, CMS sent a letter to Petitioner advising Petitioner that its Medicare participation agreement would be terminated effective September 2, 2013. CMS Ex. 3.

The letter advised Petitioner that Petitioner could avoid termination by correcting its deficiencies in a timely manner. CMS advised Petitioner that it could submit a plan of correction in which it specified how it would correct its deficiencies and it told Petitioner that a revisit survey would be conducted of Petitioner's facility to ascertain compliance, but only if CMS found Petitioner's plan of correction to be acceptable. CMS Ex. 3 at 2.

Petitioner submitted plans of correction on June 14 and July 18, 2013. Both of these plans were unacceptable. CMS Ex 4; CMS Ex. 12. On August 14, 2013, CMS advised Petitioner that it was proceeding with termination of Petitioner's provider agreement effective September 2, 2013. CMS Ex. 6. However, CMS gave Petitioner a final chance to submit an acceptable plan of correction, advising Petitioner that if it did so "immediately" a survey would be conducted to determine whether compliance had been achieved. *Id*. at 3.

On August 16, 2013, Petitioner submitted a third plan of correction, which it subsequently supplemented. CMS Ex. 8 at 1; CMS Ex. 12 at 3. This plan of correction was found to be acceptable and an additional survey was conducted of Petitioner on September 17, 2013, after termination of Petitioner's Medicare participation had gone into effect. Upon review of the results of this survey CMS determined not to reopen or revise its initial determination to terminate Petitioner's Medicare participation and that determination remained in effect. On September 27, 2013, CMS notified Petitioner of its declination to reopen and revise. CMS Ex. 9.

Petitioner filed a hearing request on October 11, 2013 and requested an expedited hearing and a decision. I granted that request. CMS then moved to dismiss Petitioner's hearing request and, in the alternative, for summary judgment. Petitioner opposed the motion to dismiss and cross-moved for summary judgment. Neither party contends that there are disputed issues of material fact.

II. Analysis

Petitioner's hearing rights are governed by regulations at 42 C.F.R. Part 498. These regulations state that any provider that is dissatisfied with an initial determination to terminate its Medicare participation (provider agreement) may request a hearing before an administrative law judge. 42 C.F.R. § 498.5(b). The term "initial determination" is defined at 42 C.F.R. § 498.3(b). The subsection enumerates specific actions by CMS that comprise initial determinations. It is clear from the regulation that only actions that are specifically listed as initial determinations create hearing rights. Other decisions or actions by CMS that are not initial determinations confer no right to a hearing. The regulation specifically states that termination of a provider agreement for failure to comply with Medicare participation requirements is an initial determination. 42 C.F.R. §498.3(b)(8). The regulation does not define as an initial determination CMS's declination to reopen or revise an initial determination after the date that the determination to terminate participation has gone into effect.

The undisputed facts of this case show that on June 4, 2013, CMS determined that Petitioner was failing to comply substantially with Medicare participation requirements. CMS invoked the remedy of termination of Petitioner's provider agreement. That determination by CMS to terminate Petitioner's Medicare participation for noncompliance with participation requirements was an initial determination and Petitioner had the right to challenge that determination by requesting an administrative hearing.

However, Petitioner did not challenge that determination. It never specifically contested the findings of noncompliance that led to CMS's determination that termination of Petitioner's provider agreement was in order. Petitioner allowed the initial determination to go into effect without challenging it and, on September 2, 2013, CMS terminated the provider agreement.

Petitioner waited until October 11, 2013 to file a hearing request that challenged something entirely different than CMS's termination of its provider status. On that date, Petitioner challenged CMS's declination to reopen its initial determination based on Petitioner's August 16, 2013 plan of correction and the September 17, 2013 survey of Petitioner. In short, Petitioner did not file a hearing request timely in which it denied

CMS's initial findings of noncompliance that are the basis for the termination of Petitioner's provider status. Rather, it challenged CMS's refusal to rescind those findings as a consequence of CMS's declination to accept certain corrective actions that Petitioner allegedly took subsequently.

While Petitioner had a right to challenge the initial findings of noncompliance – a right that it failed to exercise – it had no right to challenge CMS's discretionary act not to reopen and revise those findings. Whether or not CMS accepts a plan of correction or decides to reopen and revise its original findings of noncompliance based on acceptance of a plan of correction and a follow-up survey is not an initial determination as is defined at 42 C.F.R. § 498.3(b). There is no right to a hearing to challenge these actions. Consequently, Petitioner has no hearing rights in this case. It may not now challenge the initial findings leading to the determination to terminate participation and it has no right to challenge CMS's subsequent actions.

Petitioner now argues that it would challenge the merits of CMS's initial determination if these are relevant to the outcome of this case. But, in fact, Petitioner has offered no challenge to those findings. It has never argued that the substantive findings of noncompliance made by the Maine State agency surveyors at the March and May 2013 surveys were incorrect. It has offered no evidence to show that those findings were incorrect and it has not represented that it would offer such evidence if given the opportunity to do so. So, this case rests on unchallenged findings of condition-level noncompliance by Petitioner. CMS's determination to terminate Petitioner's participation based on those findings is unchallenged and Petitioner never timely filed a hearing request challenging those findings.

What Petitioner really argues is that it has a right to prove that CMS should have accepted the remedial actions that Petitioner undertook as expressed in its August 16 plan of correction. But, CMS's declination to accept those remedial actions cannot be a basis for hearing rights because it is not an initial determination defined at 42 C.F.R. § 498.3(b).

Much of Petitioner's argument relates to what it contends is a purely legal issue. That, according to Petitioner, is whether it could attain compliance with Medicare participation requirements *after CMS had determined to terminate Petitioner's participation* by undergoing a structural reorganization that allegedly subdivided its hospital facility into

two components, a "distinct part psychiatric hospital" and a "forensic unit." Petitioner alleges that by doing so it removed from its Medicare operations activities and staffing that constituted noncompliance with the provision of Medicare items and services and, thus, eliminated any basis for noncompliance with Medicare participation requirements.

But, as is clear from Petitioner's own arguments this action – even if it occurred and was effective as Petitioner alleges – took place after CMS determined to terminate Petitioner's participation based on the noncompliance that existed in March and May. CMS may have had discretion to accept this reorganization as a way of curing deficiencies. But, nothing in the regulations gives Petitioner a right to a hearing to challenge CMS's refusal to exercise that discretion.

Petitioner argues also that new hearing rights were created when CMS "accepted" Petitioner's plan of correction. That, according to Petitioner, was tantamount to a finding by CMS that all deficiencies were eliminated that Petitioner was now qualified to participate. There is nothing in the regulations that suggests that Petitioner's analysis is correct. "Acceptance" of a plan of correction doesn't mean, necessarily that deficiencies have been corrected; it means only that CMS is willing to evaluate a provider's performance based on what the provider has represented to CMS. There is no right to a hearing should CMS subsequently survey the facility and find that the facility has failed to comply with its own plan of correction. That finding is not an initial determination as is defined by 42 C.F.R. § 498.3(b). Nor is there a right to a hearing generated by CMS's decision to rescind an earlier conclusion that a plan of correction is acceptable. That is an act of discretion that confers no regulatory hearing rights.

An administrative law judge may dismiss a request for hearing where there is no right to a hearing. 42 C.F.R. § 498.70(b). I dismiss Petitioner's request because Petitioner has no right to challenge CMS's refusal to reconsider or reopen its initial determination in this case.

/s/
Steven T. Kessel
Administrative Law Judge