Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sunset Estates
(CCN: 37-5446),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-387

Decision No. CR2117

Date: April 19, 2010

DECISION

This matter is before me on the Parties' Joint Response to Request for Position Statements, dated March 26, 2010. Petitioner's Request for Hearing, dated January 26, 2010, was received and docketed by the Civil Remedies Division on February 4, 2010. My Acknowledgement and Initial Docketing Order gave the parties 30 days to file Reports of Readiness. The parties submitted a timely Joint Report of Readiness accompanied by a March 3, 2010 letter from the Centers for Medicare and Medicaid Services (CMS) rescinding all remedies. In a letter, dated March 16, 2010, I noted that if all remedies have been rescinded, well-settled Departmental Appeals Board precedent would suggest that there was no remaining right to a hearing for Petitioner. I directed the parties to respond with their position on this issue by March 26, 2010.

1. Background

Sunset Estates, Petitioner, received a notice from the Oklahoma State Department of Health (OSDH) stating that as a result of an October 15, 2009 Life Safety Code survey and an October 19, 2009 Health Safety Code survey, Petitioner was determined to be out of substantial compliance with Medicare and Medicaid requirements. By notice, dated

November 30, 2009, CMS informed Petitioner that it would terminate the facility's provider agreement, effective April 19, 2010, if substantial compliance was not achieved by that date. Additionally, the November 30, 2009 CMS notice letter stated that CMS would impose a denial of payment for all new Medicare and/or Medicaid admissions (DPNA), effective December 15, 2009, and would impose a civil money penalty (CMP) in the amount of $5,800 per day for October 16 and 17, 2009, and then a CMP in the amount of $1,250 per day beginning October 18, 2009. Subsequently, by notice letter dated February 4, 2010, CMS informed Petitioner that it had added another per-day CMP of $50 starting January 5, 2010 and that the CMP of $1,250 per day would be in effect for the period beginning October 18, 2009 through January 4, 2010.

Petitioner achieved substantial compliance in a follow-up survey. OSDH determined the date of substantial compliance to be January 7, 2010.

On March 3, 2010, CMS informed Petitioner that the termination was rescinded and that all the CMPs were also rescinded. Further, the March 3, 2010 letter from CMS informed Petitioner that the DPNA effective date beginning December 15, 2009 was revised to an effective date of January 19, 2010. The March 3, 2010 letter stated that since Petitioner had achieved substantial compliance as of January 8, 2010, which is prior to the date the DPNA was to take effect, the DPNA would not take effect and that the DPNA remedy was also rescinded.

CMS asserts that it has rescinded all the enforcement remedies it sought to impose against Petitioner. Petitioner does not contest this assertion. Thus, the issue before me is whether a long-term care facility has a right to a hearing when CMS withdraws the enforcement remedies provided for in 42 C.F.R. § 488.406. This issue is hardly novel. All of the Administrative Law Judges (ALJs) of the Civil Remedies Division, including myself, have addressed it many times, and have without exception come to the same resolution of that issue I announce here. I find and conclude that Sunset Estates is not entitled to a hearing, and, on the basis of 42 C.F.R. § 498.70(b), I dismiss Petitioner's hearing request.

42 C.F.R. Part 498 set forth the hearing rights of a long-term care facility. A provider dissatisfied with CMS's initial determination is entitled to further review, but administrative actions that do not constitute initial determinations are not subject to appeal. 42 C.F.R. § 498.3(d). 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 a hearing. 42 C.F.R. § 498.3(b)(13). Unless the finding of noncompliance results in the actual imposition of a specified remedy, however, the finding is not an initial determination. 42 C.F.R. § 498.3(d)(10)(ii). Where, as here, CMS does not impose a remedy, or rescinds all proposed remedies, a facility has no hearing right because no determination properly

subject to a hearing exists. It is the final imposition of an enforcement remedy or sanction and not the citation of a deficiency that triggers a facility's right to a hearing pursuant to 42 C.F.R. Part 498. *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *Lakewood Plaza Nursing Ctr.*, DAB No. 1767 (2001); *Lutheran Home-Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997).

In the Parties' March 26, 2010 Joint Response to Request for Position Statements, the parties conceded that my jurisdiction over this matter has "ended with the rescission of CMS's proposed remedies in CMS's letter issued March 3, 2010." March 26, 2010 Response at 4. However, Petitioner did not follow up by withdrawing its hearing request or by asking that this case be dismissed. I am authorized to dismiss a hearing request when a petitioner does not have a right to a hearing pursuant to 42 C.F.R. § 498.70(b) and, for that reason, I do so now in this matter. Petitioner's January 26, 2010 Request for Hearing must be, and it is, DISMISSED. The parties may request that an order dismissing a case be vacated pursuant to 42 C.F.R. § 498.72.

/s/
Richard J. Smith
Administrative Law Judge