**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Generations at Neighbors,
(CCN: 145440),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-19-2

ALJ Ruling No. 2019-2

Date: January 10, 2019

# DISMISSAL

The Centers for Medicare & Medicaid Services (CMS) moved to dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 498.70(b), arguing Petitioner had no right to an administrative law judge hearing because no enforcement remedies were imposed in this case. CMS Motion to Dismiss (MTD) at 3. As discussed below, I concur and dismiss this case pursuant to 42 C.F.R. § 498.70(b) because Petitioner has no right to a hearing before me.

## I. Background

Petitioner, Generations at Neighbors, is a skilled nursing facility that participates in the Medicare program. On July 24, 2018, the Illinois Department of Public Health (IDPH or state agency) completed a survey of Petitioner's facility and found it was not in substantial compliance with federal participation requirements. Docket No. 1. By letter dated July 26, 2018, IDPH informed Petitioner of the opportunity to submit a plan of correction to address the deficiencies. Docket No. 1a. IDPH further stated that to avoid the imposition of remedies, all deficiencies had to be corrected by September 7, 2018. *Id.* On August 17, 2018, IDPH confirmed receipt of Petitioner's plan of correction and

advised it had determined the facility returned to substantial compliance with all certification regulations. CMS Ex. 1.

On September 26, 2018, Petitioner filed a request for hearing and attached the state agency's notice letter. Docket Nos. 1 and 1a. Petitioner's hearing request contests "the IDPH Notice, the Statement of Deficiencies, and the CMS remedies imposed on the Facility" and also "contests both the factual and legal basis for the imposition of the sanctions and citations." Docket No. 2.

On November 8, 2018, CMS moved to dismiss Petitioner's hearing request, asserting that Petitioner had no right to ALJ review because no enforcement remedies were imposed. MTD at 3. CMS also moved to sanction Petitioner's counsel because she had previously filed requests for hearing in six other cases where the state agency letter similarly conferred no right to a hearing. *Id.* at 3-6 (adding that Petitioner's counsel violated Civil Remedies Division Procedure § 2(c)). CMS submitted CMS Exs. 1-5 with its motion. On November 28, 2018, Petitioner filed a response opposing CMS's motion to dismiss and motion for sanctions (P. Resp.), along with P. Exs. 1-6.

## II. Applicable Law

Medicare providers like Petitioner may seek review of administrative actions related to the survey and certification process in accordance with the regulations codified at 42 C.F.R. Part 498. A provider dissatisfied with an "initial determination" by CMS or its agent can seek further review. 42 C.F.R. § 498.3(a). By contrast, some administrative actions are not initial determinations and therefore not subject to appeal. *Id.*

The regulations explicitly identify actions taken by CMS that are considered initial determinations. 42 C.F.R. § 498.3(b). They also identify examples of actions taken by CMS that are not considered initial determinations. 42 C.F.R. § 498.3(d). Relevant here, "a finding of noncompliance leading to the imposition of enforcement remedies specified in [42 C.F.R.] § 488.406 [e.g., CMPs and DPNA]" is an appealable initial determination. 42 C.F.R. § 498.3(b)(13) (emphasis added); *see also* 42 C.F.R. § 488.408(g)(1) ("[a] facility may appeal a certification of noncompliance leading to an enforcement remedy.").

In applying these regulations, the Departmental Appeals Board (the Board) has long held that there is no right to a hearing under 42 C.F.R. Part 498 unless CMS determines to impose—and actually imposes—a remedy. *Lutheran Home – Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc*., DAB No. 1607 (1997); *see San Fernando Post Acute Hosp.*, DAB No. 2492 at 7-8 (2012). The imposition of a *remedy*, not the citation of a deficiency, triggers the right to a hearing. *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607. Where CMS does not impose a remedy, a party has no right to a hearing. *Fla. Health Sciences Ctr.,*

*Inc.*, DAB No. 2263 (2009); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005).

## III. Analysis

### A. Petitioner has no right to a hearing because CMS did not impose any enforcement remedies and dismissal is therefore appropriate.

Despite the fact that neither CMS nor IDPH have actually imposed any of the penalties identified in the July 26, 2018 notice, Petitioner maintains its right to a hearing persists because the citation of deficiencies by these agencies directly affects its "constitutionally protected property rights." P. Resp at 3-4. Petitioner also asserts a right to hearing arose because the adverse consequences it could suffer constitute "other alternative remed[ies]" under 42 C.F.R. § 431.151. *Id.* at 2. Petitioner also opposes CMS's motion for sanctions, arguing that the circumstances have changed since the relevant regulations defining the right to a hearing were last interpreted by federal courts, and points out that the matter is currently under appeal before the Board in a separate case. *Id.* at 2, 13.

Petitioner's claim to a right to hearing is unavailing. Petitioner appears to argue that a general right to hearing arises as a matter of due process whenever its property rights[1] are implicated by regulatory enforcement action. *Id.* at 10-13. But insofar as Petitioner has raised what may be a constitutional claim, I have no authority to review it, or to provide an avenue of relief that is not expressly permitted under the Secretary's regulations which govern both the types of actions that can be appealed, and my own jurisdiction to hear such appeals. 42 C.F.R. § 498.3. The Board has instead concluded that neither it nor ALJs can assess the constitutionality of unambiguous statutes or regulations. *Fla. Health Sciences Ctr., Inc.*, DAB No. 2263 at 5-6.

Petitioner's argument can in any event be disposed of on non-constitutional grounds. It contends that a right to appeal stems from the negative impact the finding of deficiencies will have on its rating under the CMS Five-Star Quality Rating System. P. Resp. at 4-9. Even if this were more than a speculative concern, the Board has specifically addressed this argument and held that the negative impact of noncompliance findings on a facility's Five-Star Quality Rating does not create an appeal right. *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316 at 5-9 (2010). The Board has also explained that "no right to a hearing survives merely to correct [a] compliance record." *See, e.g.*, *San Fernando Post Acute Hosp.*, DAB No. 2492 at 8, *quoting Fountain Lake*, DAB No. 1985 at 6 (internal quotation marks omitted); *see also Fla. Health Sciences Ctr.*, DAB No. 2263 at 5 ("a JCAHO-accredited hospital, such as [the petitioner], has no right to an ALJ hearing solely to contest findings of noncompliance with the Medicare conditions of participation

[1] In this case, an adverse effect on the facility's public reputation as reflected in its facility rating maintained by CMS. P. Resp. at 11.

. . . when a proposed termination has been rescinded"). Thus, absent the imposition of an actual enforcement remedy, Petitioner does not have a right to a hearing to repair any perceived damage to its reputation caused by a deficiency citation.

Petitioner also attempts to outline what it believes to be likely negative impacts from a finding of deficiency, arguing that such impacts proves a deficiency is therefore an alternative remedy described in 42 C.F.R. § 431.151. P. Resp. at 3-9. But the Secretary's regulations simply do not support the notion that the potential adverse impact of a deficiency finding on a regulated entity means it is an intentional enforcement remedy subject to appeal. 42 C.F.R. § 431.151(a)(1) instead establishes that a state must make available certain appeal procedures to a nursing facility "that is dissatisfied with a State's finding of noncompliance that has resulted in" the denial or termination of its provider agreement, imposition of a civil money penalty, or "other alternative remedy" (emphasis added).

The phrase "other alternative remedy" is informed by 42 C.F.R. § 488.406(c), which provides that a state has the authority to specify remedies in a state Medicaid plan that are "either additional or alternative to those specified" in 42 C.F.R. §§ 488.406(a) and (b). 42 C.F.R. § 488.406(c). There is no evidence before me to suggest that IDPH intended to impact Petitioner's business interests or affect its Five-Star Rating by CMS as an enforcement remedy. 42 C.F.R. § 431.151 and the appeals procedures it triggers under 42 C.F.R. § 431.153 are inapplicable to this proceeding.

Because CMS did not impose any enforcement remedies, Petitioner has no right to a hearing. Dismissal of a hearing request is appropriate when a petitioner does not have a right to a hearing. 42 C.F.R. § 498.70(b). Accordingly, I conclude Petitioner does not have a right to a hearing, and this matter must be dismissed. 42 C.F.R. § 498.70(b).

**B. CMS's request for sanctions is denied.**

While I have found that the governing regulations and applicable Board cases clearly foreclose Petitioner's right to a hearing, I nevertheless decline to impose sanctions on Petitioner. Petitioner argues that changed circumstances should persuade the DAB to revisit its longstanding interpretation of the regulations. P. Resp. at 13. And certainly, Petitioner has made at least a colorable argument that CMS's incorporation of unappealable deficiency findings into a publically available ratings system that could adversely impact a facility's ability to conduct operations should trigger some greater form of scrutiny, though such an argument is entirely beyond my purview.

Moreover, it is not unreasonable for Petitioner to make the same argument before various ALJs to preserve its litigation position while the Board considers the validity of that argument in Petitioner's pending appeals. Similarly, if Petitioner's ultimate strategy is to seek judicial review of constitutional arguments that administrative law judges and

appellate panels of the DAB are without authority to consider or decide, it would be improper to impose sanctions for Petitioner's counsel's attempts to preserve these arguments.[2]

## IV. Conclusion

For the foregoing reasons, I dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 498.70(b). The parties may request that I vacate this order of dismissal pursuant to 42 C.F.R. § 498.72.

/s/
Bill Thomas
Administrative Law Judge

[2] CMS argues that there is no right to judicial review of an administrative law judge's dismissal of a party's hearing request. MTD at 5. While 42 C.F.R. § 498.5 states that a provider of services "dissatisfied with a hearing decision" has the right to judicial review, 42 C.F.R. § 498.71 states that a dismissal is binding unless it is vacated by the administrative law judge or by an appellate panel of the DAB. This suggests CMS's interpretation is correct. However, I need not decide whether Petitioner retains any rights to judicial review in such a case, and thus I cannot conclude Petitioner's efforts to preserve this argument are frivolous.