Department of Health and Human Service

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	Date: March 30, 2009
Roscoe Community Nursing Home (CCN: 33-5316),	)	
	)	Docket No. C-08-730
Petitioner,	)	Decision No.CR1935
v.	)	
Centers for Medicare & Medicaid Services.	)	

DECISION

Petitioner's request for hearing is dismissed pursuant to 42 C.F.R. § 498.70(b) and the hearing scheduled to begin on March 31, 2009, is cancelled.

I. Background

Petitioner, Roscoe Community Nursing Home, requested a hearing before an administrative law judge (ALJ) by letter dated September 11, 2008. In its statement in support of its appeal attached to its September 11, 2008 letter, Petitioner requested review of the determination made by the Centers for Medicare & Medicaid Services (CMS), reflected in CMS's notice letter dated July 14, 2008, to impose a per instance civil money penalty (PICMP) of $1000. Petitioner asserted that a federal comparative monitoring survey that ended on June 24, 2008, cited Petitioner for three regulatory violations or deficiencies that amounted to substantial noncompliance and that a life safety survey completed on June 17, 2008, also cited Petitioner for three deficiencies. In its statement in support of its appeal, Petitioner addressed each of the deficiencies from both surveys arguing that the alleged violations were unfounded and that the $1000 PICMP based upon the alleged violation of 42 C.F.R. § 483.25 was excessive. Petitioner acknowledged

in its statement in support of its appeal that the July 14, 2008 CMS notice specified that the PICMP was based upon the alleged violation of 42 C.F.R. § 483.25(h) (Tag F323 of the State Operations Manual (SOM)).

Petitioner attached as Exhibit B to its request for hearing the July 14, 2008 CMS notice. The CMS notice referred to both surveys and advised Petitioner that a mandatory denial of payment for new admissions (MDPNA) would be triggered effective September 24, 2008, if Petitioner did not return to substantial compliance by that date; that Petitioner's provider agreement would be terminated effective December 24, 2008, if Petitioner did not return to substantial compliance before that date; and that a $1000 PICMP was being imposed based upon Tag F323. On December 1, 2008, the parties filed their Joint Stipulations and Statement of Issues (Jt. Stip.). The parties stipulated that Petitioner was subject to a revisit survey on September 23, 2008, and was found to have returned to substantial compliance effective that date. Jt. Stip. ¶ 6. Because Petitioner returned to substantial compliance effective September 23, 2008, the MDPNA and termination of Petitioner's provider agreement were not triggered. The parties further stipulated that the PICMP of $1000 was imposed based upon the alleged violation of 42 C.F.R. § 483.25(h) (Tag F323). Jt. Stip. ¶ 5.

On January 14, 2009, CMS filed its prehearing brief. CMS asserted in its prehearing brief that only Tag F323 and Tag K043 resulted in imposition of the PICMP and CMS requested an order limiting the scope of the hearing to those two alleged deficiencies. CMS Prehearing Brief at 7-9. On February 19, 2009, Petitioner opposed the motion. On March 10, 2009, I issued a Ruling addressing Jurisdiction and Scope of Review. In my Ruling, I concluded that only the alleged violation of 42 C.F.R. § 483.25(h) (Tag F323) from the survey completed on June 24, 2008, and upon which CMS proposed to impose a $1000 PICMP against Petitioner, was within my authority to review. I also ruled that the issue of whether or not the $1000 PICMP was reasonable in amount was subject to my review and decision.

On March 16, 2009, CMS filed a motion to dismiss Petitioner's request for hearing, accompanied by an attachment marked "DAB Doc. No. 1." On March 23, 2009, Petitioner filed its response in opposition to the CMS motion to dismiss (P. Opp.).

II. Findings of Fact, Conclusions of Law, and Discussion

My conclusions of law are set forth in bold followed by my findings of fact and discussion.

A. CMS rescinded the only enforcement remedy in this case and thereby eliminated Petitioner's basis for review by an ALJ.

B. I have no jurisdiction or authority to review allegations of deficiency from a survey in the absence of imposed enforcement remedies.

C. Dismissal of Petitioner's request for hearing pursuant to 42 C.F.R. § 498.70(b) is appropriate because Petitioner has no right to a hearing.

CMS notified Petitioner by letter dated March 13, 2009, that it had reopened its initial determination and concluded after administrative review to rescind the $1000 PICMP previously imposed and that no other remedies were imposed based upon the revised determination. DAB Doc. No. 1, at 1.

CMS argues in its motion to dismiss that Petitioner is no longer subject to an enforcement remedy; that Petitioner has no right to a hearing; and that dismissal of the request for hearing is required. Petitioner argues that the request for hearing should not be dismissed and Petitioner should be accorded a hearing. Petitioner requests in the alternative that "CMS's withdrawal of the CMP should be conditioned upon, or deemed to include, the removal of the underlying alleged findings of noncompliance." P. Opp. at 5. I am aware of no authority that permits me to order CMS to withdraw the findings of noncompliance and Petitioner cites none. Because CMS rescinded the only enforcement remedy, Petitioner has no right to review and I have no authority to render a decision that addresses the merits of the alleged deficiency upon which the CMP was initially imposed.

I conclude that the theories Petitioner presents in its opposition to the motion to dismiss are without merit. Petitioner does not dispute that CMS has rescinded the only enforcement remedy imposed in this case. Petitioner acknowledges that rescission of all enforcement remedies in prior cases has been found to deprive a petitioner of its right to ALJ and Board review, requiring that the case be dismissed pursuant to 42 C.F.R. § 498.70(b). P. Opp. at 4, 13. Petitioner asserts, however, that there are "emerging initiatives" that rely on the results of compliance and enforcement surveys to affect a nursing home's ability to admit residents and seek reimbursement from Medicare, such as the Five-Star system, the Pay for Performance program, the Nursing Home Value-Based Purchasing Demonstration, and other emerging initiatives. Petitioner asserts that the "emerging initiatives" warrant re-examination of whether dismissal is appropriate or required when CMS rescinds all enforcement remedies but does not withdraw the

underlying allegations of deficiencies or reduce their scope and severity to a level that would not support an enforcement remedy because, even absent enforcement remedies, adverse survey findings result in prejudice to Petitioner under the "emerging initiatives."[1] While I understand Petitioner's concerns,[2] Petitioner's concerns are not a sufficient basis for me to depart from the reasoning of various appellate panels of the Departmental Appeals Board (the Board) and other ALJs in cases prior to the existence of the "emerging initiatives" that concern Petitioner.[3] P. Opp. at 4, 15-16.

Petitioner argues that nothing in the regulations permits CMS to deprive a facility of the right to obtain review of alleged deficiencies by an ALJ or the Board by withdrawing the enforcement remedy while leaving the underlying deficiency in place, particularly where, as here, jurisdiction has already attached. P. Opp. at 2. A provider does not have a right to a hearing to challenge every action by CMS with which it disagrees. Only certain

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[1] Petitioner also argues that nursing homes have a constitutionally protected interest in the benefits flowing from participation in the Medicare and Medicaid programs; that denying it a hearing in this instance creates significant due process issues; and that it suffers a loss of a protectable liberty interest in safeguarding its reputation through this forum. P. Opp. at 2, 17-21. I do not have the authority to address Petitioner's constitutional challenges to the Social Security Act (the Act) or the regulations promulgated under the authority of the Act. Petitioner's arguments are noted and preserved for judicial review in the appropriate forum.

[2] Petitioner also raises a concern that depriving it of the opportunity to challenge the allegations in the Statement of Deficiencies (DAB Doc. No. 1, at 3-12) in this forum would frustrate the intent of the Act to have appeals addressed by the agency and may result in remand from the federal court to the Board for creation of an evidentiary record resulting in waste of administrative and judicial resources. P. Opp. at 4-5, 22-23. If Petitioner should prevail on appeal in federal court, a remand may be ordered by the federal court. However, a possible remand is not grounds for me to depart from well-reasoned rationales expressed in prior cases or a sufficient basis for me to conclude that Petitioner has a right to review in the absence of an enforcement remedy. Whether a federal court may conclude that Petitioner has a right to review not provided or recognized by the Secretary through regulations, is an issue to be addressed before the federal court.

[3] The relief Petitioner seeks may be addressed through regulatory and legislative reform, such as was done to obtain authority for ALJ and Board review of a facility's loss of authority to conduct nurse aide training and competency evaluation programs. *See, e.g.*, 64 Fed. Reg. 39,934 (Jul. 23, 1999).

actions by CMS or its delegates trigger hearing rights.[4] 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. *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985 (2005); *The Lutheran Home - Caledonia*, DAB CR674, *aff'd*, DAB No. 1753 (2000); *Schowalter Villa*, DAB CR568 (1999), *aff'd*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB CR424, *aff'd*, DAB No. 1607 (1997); *Twin Pines Nursing and Rehabilitation Center*, DAB CR1601 (2007). The Secretary of Health and Human Services (the Secretary) specifically rejected a proposal to grant hearing rights for deficiency findings that were made without the imposition of remedies. 59 Fed. Reg. 56,116, 56,158 (Nov. 10, 1994) ("if no remedy is imposed, the provider has suffered no injury calling for an appeal").

Contrary to Petitioner's argument that nothing in the regulations permits CMS to deprive a facility of the right to pursue its appeal by withdrawing the remedy, there is nothing in the regulations that prohibits CMS from reopening and revising its initial determination pursuant to 42 C.F.R. § 498.30 within 12 months of the date of notice of the initial determination. It is specifically 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. When the enforcement remedy is eliminated so to is Petitioner's right to review and my authority to conduct the review. *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985; *Twin Pines Nursing and Rehabilitation Center*, DAB CR1601; *see EagleCare, Inc. d/b/a/ Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607; s*ee also The Lutheran Home-*

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[4] Petitioner analogizes to federal court jurisdiction and argues that my jurisdiction is most appropriately viewed as attaching at the time a hearing request is made and that CMS cannot deprive Petitioner of the right to pursue its appeal by unilaterally withdrawing one of the predicates to its appeal. P. Opp. at 4, 13-17. Petitioner recognizes that its analogy is not perfect. P. Opp. at 13, n. 3. Petitioner also recognizes that the "mootness doctrine" may even be applied in the federal courts to deprive the court of jurisdiction. P. Opp. at 14. Petitioner asserts that the "mootness doctrine" has no application here due to the "collateral consequences" suffered by Petitioner under the "emerging initiatives." P. Opp. at 14-17. Petitioner points to no current regulatory provision that grants Petitioner a right to ALJ or Board review based upon adverse impact upon Petitioner under "emerging initiatives" and I am aware of no such right. I refer Petitioner to my footnote 3. In the absence of an enforcement remedy, Petitioner's request for review is arguably moot but the more appropriate analysis is that absent a specific delegation of authority to conduct review, I have no authority.

Caledonia, DAB No. 1753; *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); *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 Board and the ALJs 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 42 C.F.R. Part 498.

Petitioner does not have a right to a hearing in this case. The undisputed facts establish that while CMS initially determined to impose a PICMP against Petitioner, CMS rescinded the enforcement remedy. 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 request for hearing is dismissed pursuant to 42 C.F.R. § 498.70(b) and the hearing scheduled for March 31, 2009 is cancelled.

/s/
Keith W. Sickendick
Administrative Law Judge