Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Wildcreek Healthcare, Inc., d/b/a
Rosewood Rehabilitation Center,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-700

Decision No.: CR2655

Date: October 25, 2012

DECISION

I dismiss Petitioner's hearing request in this case because CMS did not impose a remedy specified in 42 C.F.R. § 488.406, and therefore Petitioner has no right to a hearing.

I. Background:

Petitioner is a nursing facility located in Reno, Nevada. On July 20, 2011, the Nevada Department of Health and Human Services, Health Division, Bureau of Health Care and Compliance (state agency) completed a complaint survey of Petitioner's facility. By letter dated July 26, 2011 (notice letter), the state agency informed Petitioner that the July 20 complaint survey found isolated deficiencies that constituted no actual harm, but with the potential for more than minimal harm. The state agency noted that based on this noncompliance it was imposing two remedies on Petitioner "as authorized by CMS or the SMA" consisting of: (1) a "[d]irected plan of correction effective fifteen (15) days after receipt of this notice, no later than 08/10/11. [§488.422] (See attachment)"; and, (2) a "[d]enial of payment for new admissions" (DPNA).[1] Petitioner was also required to file a plan of correction. The attachment referenced in the notice letter stated "Directed Plan of Correction" and noted "Rosewood Rehabilitation Center must submit documented evidence that the corrective action detailed in the facility's plan of correction for all

[1] Both parties agree that the DPNA remedy was never effectuated.

deficiencies cited at a "D" level or higher has been implemented. Rosewood Rehabilitation Center may submit the above documentation to this agency with the Plan of Correction, but not later than August 10, 2011. Please indicate in the POC if additional documents will be submitted after the POC has been submitted." CMS Exhibit (Ex.) 1, at 1-5; Petitioner's Exhibit (P. Ex.) 1, at 1-5.

Petitioner filed a hearing request on August 11, 2011. The case was docketed as Rosewood Rehabilitation Center, Docket No. C-11-676. CMS moved to dismiss the case on September 15, 2011 (CMS September 15 motion), and Petitioner opposed the CMS motion on October 3, 2011 (P. October 3 response). The point debated in the motion practice was whether CMS or the state agency had imposed a remedy on Petitioner as a result of the July 20 survey. My review of the pleadings and the attachments to Petitioner's hearing request persuaded me that a directed plan of correction had been imposed and that the imposition of that directed plan of correction gave Petitioner a right to appeal and to request a hearing. My Ruling and Order of October 28, 2011 (October 28 Ruling) denied the CMS motion and established a schedule for further case development. CMS sought reconsideration of my denial by motion dated November 7, 2011 (CMS Br.). Petitioner opposed the motion on November 25, 2011 (P. Br.). I stayed proceedings in the case on December 20, 2011, to permit the parties to attempt settlement of the case. On January 25, 2012, Petitioner's counsel of record, Michael L. Matuska, filed a request asking that I dismiss the hearing request. I did so by Order dated January 31, 2012.

At the same time that Mr. Matuska was litigating and then requesting dismissal of the case, a series of unofficial communications between December 5, 2011 and January 31, 2012, with Petitioner's current counsel of record, Beverly B. Wittekind, indicated that Petitioner underwent a change in ownership in December 2011. Mr. Matuska's relationship to the new owner was not clear during these communications. While it appeared possible that Mr. Matuska might not have had the authority to file the January 25, 2012 request asking me to dismiss the case, no other counsel formally entered the case as counsel of record prior to January 25, 2012 (although Ms. Wittekind was in contact with CMS and with my office during this period). By motion dated April 5, 2012, Petitioner requested that I vacate the dismissal of the case for good cause shown, arguing that the January 25 request for dismissal filed by Mr. Matuska was done without the approval of Petitioner's new owner. After allowing CMS an opportunity to respond, by my Ruling dated May 18, 2012, I granted Petitioner's request and reinstated Petitioner's case under a new name, Wildcreek Healthcare, Inc., d/b/a Rosewood Rehabilitation Center, and docket number, C-12-700.

I held a prehearing conference in this case on June 27, 2012. My Order of June 27, 2012, reflects the parties' agreement that I should consider CMS's November 7, 2011 motion for reconsideration and the briefs the parties filed regarding it; CMS's November 7, 2011 motion for reconsideration (CMS Br.) and Petitioner's November 25, 2011 opposition (P.

Br.). My June 27, 2012 Order also gave the parties a final opportunity to supplement the briefs they filed in November 2011. Petitioner filed a supplemental brief on July 13, 2012 (P. Supplemental Br.) and CMS filed a supplemental brief on July 17, 2012 (CMS Supplemental Br.). The only exhibits filed in this case are CMS Exs. 1-3 and P. Exs. 1-3 (which were filed with the parties' November 2011 submissions). In the absence of objection I admit CMS Exs. 1-3 and P. Exs. 1-3 into evidence.

II. Issue

The only issue in this case is whether Petitioner is entitled to a hearing based on an initial determination imposing the remedy of a directed plan of correction.

III. Finding of Fact, Conclusion of Law and Analysis

1. Petitioner is not entitled to request a hearing because neither CMS nor the state agency imposed a directed plan of correction.

A facility such as Petitioner may request a hearing to contest an administrative action that is an" initial determination." 42 C.F.R. § 498.3(a). The regulations define an initial determination to include, with regard to a skilled nursing facility (SNF) or a nursing facility (NF), "a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 of this chapter, except the State monitoring remedy." 42 C.F.R. § 498.3(b)(13). The regulation at 42 C.F.R. § 488.406 includes as an available remedy a directed plan of correction. The Departmental Appeals Board (DAB) has held that a facility has the right to hearing based on a directed plan of correction, whether or not it is CMS, or a state agency acting on behalf of CMS, which imposes the remedy. *Beechwood Sanitarium*, DAB No. 1824 (2002), *aff'd, in pertinent part, Beechwood Restorative Care Center v. Thompson*, 494 F. Supp. 2d 181 (2007).

The regulations differentiate a "directed plan of correction" from a "plan of correction." A directed plan of correction is where:

> CMS, the State survey agency, or the temporary manager (with CMS or State approval) may develop a plan of correction and CMS, the State, or the temporary manager require a facility to take action within specified time-frames.

42 C.F.R. § 488.424. A directed plan of correction thus involves CMS or the state agency developing specific corrective actions that a facility must implement in order to come back into substantial compliance with the regulations. For a plan of correction, on the other hand, "each facility that has deficiencies with respect to program requirements must submit a plan of correction for approval by CMS or the survey agency." 42 C.F.R. § 488.402(d)(1). For a plan of correction, it is the facility, not CMS or the state agency,

that proposes the corrective actions it will take to come back into compliance with regulatory requirements, and it is the facility that submits the corrective actions it develops to CMS or the state agency for approval.

Petitioner argues that the state agency imposed a directed plan of correction in this case, whereas CMS argues that it did not. I originally held that the state agency's July 26, 2011 notice letter did impose a directed plan of correction. I made this determination because the notice letter sent to Petitioner by the state agency stated quite explicitly, and using that term of art, that a directed plan of correction was being imposed. Upon reconsideration, however, I revise my determination. I find the state agency's use of the phrase "directed plan of correction" was an erroneous description of what it was asking Petitioner to submit. Specifically, the attachment referred to as a directed plan of correction in the July 26, 2011 notice letter was not a state agency-, CMS-, or temporary manager-developed plan that the facility was required — or directed, to choose the term of art explicitly — to follow. Instead, Petitioner was merely asked to submit evidence that the corrective action detailed in its plan of correction for all deficiencies cited at a "D" level or higher had actually been implemented. This erroneous description on the part of the state agency does not, should not, and cannot, change what was and is a plan of correction into a directed plan of correction.

Petitioner relies on the decision in *Golden Living Center-Grand Island Lakeview v. Sebelius*, No. 8:11CV119 (D. Nebraska Dec. 16, 2011); 2011 WL 6303243 (D. Neb), in arguing that it is entitled to a hearing. In *Golden Living*, however, the United States District Court found a remedy was actually imposed — a DPNA which was in effect for three days and affected the provider's admissions and reimbursements during that period — although the DPNA was subsequently rescinded. *Golden Living Center-Grand Island Lakeview v. Sebelius,* No. 8:11CV119 (D. Nebraska July 6, 2012); 2012 WL 2685001 (D. Neb). In contrast, in this case, I have found that CMS never imposed any of the remedies specified at 42 C.F.R. § 488.406(a). Where, as here, CMS has imposed no remedies in the first place, 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. *Golden Living Center-Grand Island Lakeview*, DAB No. 2364 (2011); *Columbus Park Nursing and Rehabilitation Center*, DAB No. 2316 (2010); *Fountain Lake Health and Rehabilitation, Inc.*, DAB No. 1985 (2005); *Lakewood Plaza Nursing Center*, DAB No. 1767 (2001); *The Lutheran Home-Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). Moreover, while acknowledging that the United States District Court's resolution of that case represents a direct contradiction of the Board's decision in *Golden Living Center-Grand Island Lakeview*, DAB No. 2364, and implicitly of mine in that appeal when it was before me — I note that the instant case arises in neither the District of Nebraska nor the Eighth Circuit, and that of the Board decisions on which I rely above, three — *Fountain Lake*, *Lakewood Plaza*, and *Lutheran-Caledonia* — are longstanding Board

precedents that did arise in the Eighth Circuit. Thus, even if I were obliged to follow the United States District Court's decision as controlling for cases arising in the District of Nebraska, it is far from clear that in cases from other Districts of the Eighth Circuit, let alone this case arising in the Ninth Circuit, I would be so obliged.

It is true that the court in *Golden Living* was also concerned about adverse collateral consequences to a facility where the facility is barred from appealing survey findings unless a remedy has been imposed. However, I am not authorized to give a petitioner a hearing based on collateral consequences to a facility that are not included as bases for hearing in the Act or regulations. I am also not authorized to entertain Petitioner's argument that it has a constitutionally-protected property interest which has been harmed by being precluded from contesting the survey findings. I am bound by applicable statutes and regulations and I may not ignore or refuse to apply those laws on any ground, even a constitutional one. *Oaks of Mid City Nursing and Rehabilitation Center*, DAB No. 2375, at 30-31 (2011) (citations omitted).

IV. Conclusion

For the reasons discussed above, I dismiss Petitioner's hearing request because no remedy specified in 42 C.F.R. § 488.406 was imposed, and therefore Petitioner has no right to a hearing.

/s/
Richard J. Smith
Administrative Law Judge