Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Memorial Medical Center,
(CCN: 05-0557),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-185

ALJ Ruling No. 2017-18

Date: May 12, 2017

RULING DISMISSING CASE

For the reasons set forth below, I conclude that Petitioner, Memorial Medical Center, is not entitled to Administrative Law Judge (ALJ) review of determinations made by the Centers for Medicare & Medicaid Services (CMS) following a December 31, 2015 survey. I therefore dismiss its hearing request pursuant to 42 C.F.R. § 498.70(b).

Discussion

Petitioner has no right to a hearing because CMS did not impose a remedy.[1]

Petitioner is a hospital located in Modesto, California, that participates in the Medicare program as a provider of services. On December 31, 2015, the California Department of Public Health (state agency) completed a survey of the facility and found that it was not in compliance with the Emergency Medical Treatment and Labor Act (EMTALA). CMS Exhibit (Ex.) 1. By letter dated October 11, 2016, CMS notified Petitioner that based on two EMTALA violations, CMS "*may* terminate [Petitioner's] participation in the Medicare program" if Petitioner did not correct the deficiencies. CMS Ex. 1 at 1

[1] I make this one finding of fact/conclusion of law.

(emphasis added). The October 11, 2016 letter went on to state: "If termination is to be imposed [on 01/09/2017], a final notice will be sent to you concurrently with notice to the public in accordance with regulations at 42 C.F.R. § 489.53." *Id.* On December 12, 2016, Petitioner electronically filed a hearing request to challenge the December 31, 2015 survey findings and the October 11, 2016 letter regarding possible termination of Petitioner's provider agreement. CMS did not send a subsequent termination notice in accordance with regulations at 42 C.F.R. § 489.53, nor did CMS terminate Petitioner's Medicare agreement on January 9, 2017.[2]

CMS has moved to dismiss Petitioner's hearing request. Petitioner opposes the motion.

Medicare providers, such as Petitioner, may seek review of administrative actions related to the survey and certification process in accordance with federal regulations codified at 42 C.F.R. Part 498. Under those regulations, a provider dissatisfied with an "initial determination" by CMS or its agent is entitled to further review. 42 C.F.R. § 498.3(a). By contrast, administrative actions that are not initial determinations are not subject to appeal. *Id.* The regulations specify the matters on which CMS makes initial determinations. 42 C.F.R. § 498.3(b). The regulations also include examples of actions that are not considered initial determinations. 42 C.F.R. § 498.3(d). As relevant here, the termination of a facility's Medicare provider agreement is an appealable initial determination. 42 C.F.R. § 498.3(b)(8).

However, it is well-established 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 *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. *Florida Health Sciences Ctr., Inc.*, DAB No. 2263 (2009); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005). Here, CMS sent no written notice of termination and Petitioner's Medicare agreement has not been terminated. Accordingly, there is no appealable initial determination and Petitioner has no right to a hearing.

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[2] There is no document of record stating that CMS rescinded the proposed termination of Petitioner's provider agreement effective January 9, 2017. CMS offered a letter dated January 12, 2017, in which CMS proposed to terminate Petitioner's provider agreement at a later date (i.e. April 12, 2017), based on Petitioner's alleged failure to comply with conditions of participation unrelated to EMTALA. CMS Ex. 2. One can infer from this letter that CMS did not terminate Petitioner's provider agreement on or about January 9, 2017. In any event, Petitioner's opposition does not contend that its provider agreement was, in fact, terminated.

Petitioner argues that its hearing request should not be dismissed because it filed its hearing request at a time when a termination action was pending; because dismissing Petitioner's hearing request would deprive it of due process; and because Petitioner ought to have the opportunity to disprove CMS's allegations, which have harmed Petitioner's reputation. Petitioner's arguments are unavailing.

First, the fact that termination was *possible* at the time Petitioner filed its hearing request does not create a hearing right in this case. In its *San Fernando Post Acute Hospital* decision, the Departmental Appeals Board (Board) rejected the argument that "once CMS has issued an initial determination to impose a remedy hearing rights attach regardless of subsequent events." DAB No. 2492 at 7. Ultimately, CMS did not impose a remedy based on the December 31, 2015 survey. As it is the imposition of a remedy that constitutes an initial determination triggering a right to a hearing, Petitioner has no right to a hearing.

Second, insofar as Petitioner has raised Constitutional claims, I have no authority to review them. The Board has concluded that neither the Board nor administrative law judges can ignore unambiguous statutes or regulations on the basis that they are unconstitutional. *Florida Health Sciences Ctr.*, DAB No. 2263, at 5-6.

Third, the Board has 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 Florida 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 . . . when a proposed termination has been rescinded"). Thus, if CMS has not imposed a remedy, Petitioner does not have a right to a hearing to repair any perceived damage to its reputation caused by a deficiency citation.

For the reasons stated, Petitioner has no right to a hearing, and this matter must be dismissed. 42 C.F.R. § 498.70(b). I therefore grant CMS's motion and dismiss Petitioner's hearing request.

/s/
Leslie A. Weyn
Administrative Law Judge