Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Generations Oakton Pavilion, LLC,
(CCN: 14-5626),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-18-104

ALJ Ruling No. 2019-1

Date: October 16, 2018

DISMISSAL

Petitioner, Generations Oakton Pavilion, is a skilled nursing facility which participates in the Medicare program. Its October 27, 2017 hearing request challenged the survey and subsequent imposition of remedies by Respondent, the Centers for Medicare & Medicaid Services (CMS).

CMS moved to dismiss Petitioner's hearing request pursuant to 42 C.F.R. §§ 498.70(b) and (c), arguing Petitioner had no right to an Administrative Law Judge (ALJ) hearing because no enforcement remedies were imposed in this case, and because Petitioner filed an untimely hearing request and failed to establish good cause for the untimely filing. CMS Mtn. to Dismiss (MTD) at 4-6. For the reasons outlined below, I find that dismissal is appropriate pursuant to 42 C.F.R. § 498.70(b) because without imposition of an enforcement remedy by CMS, Petitioner has no right to a hearing before me. Petitioner's hearing request was also untimely and presented me no basis to find good cause to extend the filing deadline, making dismissal of this appeal otherwise appropriate pursuant to 42 C.F.R. § 498.70(c).

I. Background

On August 9, 2017, 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. CMS Ex. 1. By letter dated August 16, 2017, IDPH notified Petitioner that, as authorized by CMS, it had imposed a denial of payment for new admissions (DPNA) beginning November 9, 2017, and recommended that CMS impose a $500 per-day civil money penalty (CMP) beginning August 8, 2017 and continuing until the facility achieved substantial compliance. *Id.* at 2. The state agency also recommended termination of Petitioner's provider agreement, effective February 9, 2018. *Id.* IDPH advised Petitioner of its appeal rights and warned, "[y]ou must file your hearing request electronically by using the Departmental Appeals Board's Electronic Filing System (DAB E-File) . . . no later than sixty (60) days after receiving this letter." *Id*. at 3.

On September 26, 2017, IDPH notified Petitioner of the findings of the independent dispute resolution (IDR) process which Petitioner had requested to challenge the deficiencies cited by CMS. That letter from the state agency granted no appeal rights to Petitioner related to that outcome. Docket No. 3.

On October 25, 2017, Petitioner electronically filed two documents via DAB E-File: (1) a request for hearing; and (2) the state agency's August 16, 2017 notice letter. Docket Nos. 1 and 1a. IDPH's notice letter at Docket No. 1a was correctly uploaded and viewable, but the document at Docket No. 1, captioned as Petitioner's hearing request, could not be viewed. Two days later, on October 27, 2017, Petitioner correctly filed its hearing request, which challenges IDPH's August 9, 2017 survey and "both the factual and the legal basis for the imposition of the sanctions . . . Civil Money Penalty, DPNA, and the Termination of Provider Agreement specified in the [state agency] Notice." Docket No. 2. That same day, Petitioner also filed IDPH's September 26, 2017 letter concerning the outcome of the IDR process. Docket No. 3.

Meanwhile, on October 31, 2017, CMS notified Petitioner that based upon a September 26, 2017 revisit survey, it found that Petitioner returned to substantial compliance as of August 24, 2017. CMS Ex. 2 at 1. CMS advised Petitioner that it had rescinded the DPNA remedy and would not impose a CMP or termination of Petitioner's provider agreement. *Id.* at 2.

On December 13, 2017, CMS moved to dismiss Petitioner's hearing request, asserting Petitioner had no right to ALJ review because no enforcement remedies were imposed. MTD at 4-6. It alternately asserted that dismissal would be appropriate because Petitioner had filed an untimely hearing request without good cause (CMS Br.). *Id.* On January 2, 2018, Petitioner filed a response opposing CMS's motion (P. Resp).

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).

Even where a party is authorized to seek review of an action taken by CMS, they must file a request for a hearing "in writing within 60 days from receipt of the notice . . . unless that period is extended . . . ." 42 C.F.R. § 498.40(a)(2). Receipt is presumed to be five days after the date of the notice unless there is a showing it was received earlier or later. 42 C.F.R. §§ 498.22(b)(3); 498.40(a)(2). I may extend the 60-day period for filing a hearing request for good cause.[1] 42 C.F.R. § 498.40(c). Alternately, I may dismiss an appeal if the affected party did not timely file and I do not find extension of the filing period appropriate. 42 C.F.R. § 498.70(c).

[1] The governing regulations do not provide a definition for good cause. The Board has not provided a definition of that term either, but has specifically declined to undermine the view of other ALJs that circumstances within a party's ability to control do not establish good cause. *See MedStar Health, Inc.*, DAB No. 2684 at 8 (2016).

III. Analysis

A. Petitioner has no right to a hearing because CMS did not impose any enforcement remedies.

Despite the fact that neither CMS nor IDPH have actually imposed any of the penalties identified in the initial August 16, 2017 notice, Petitioner maintains that its right to hearing exists because the citation of deficiencies by these agencies directly affects its "constitutionally protected property rights." P. Resp at 1. 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. Lastly, Petitioner contends that it has an express right to a hearing under 42 C.F.R. § 498.3(b)(8) because it was cited with a violation of 42 C.F.R. § 483.25(k) (Tag F309), a "Quality of Care" deficiency, which it believes relates to termination of provider agreements. *Id*. at 2. Petitioner's arguments are without merit.

Petitioner appears to argue that a general right to hearing arises as a matter of due process whenever its property rights[2] are implicated by regulatory enforcement action. 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.

Nevertheless, Petitioner's argument can be disposed of on non-constitutional grounds. It contends that a right to appeal stems from the negative impact the mere finding of deficiencies will have on its rating under the CMS Five-Star Quality Rating System (Five-Star Rating). P. Resp. at 4-10, 12. 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 . . . when a proposed termination has been rescinded"). Thus, absent the imposition of an actual enforcement

[2] In this case, an adverse effect on the facility's public reputation which could deter new business. P. Resp. at 4.

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 characterize the financial consequences potentially caused by a finding of deficiency as an alternative remedy described in 42 C.F.R. § 431.151. But the Secretary's regulations simply do not support the notion that the potential pecuniary impact of a deficiency finding on a regulated entity is in fact an intentional enforcement remedy subject to appeal. The regulation at 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 indication that IDPH intended to impact Petitioner's business interests 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.

Finally, there is no merit to Petitioner's argument that it is entitled to a hearing pursuant to 42 C.F.R. § 498.3(b)(8) because it received a citation under 42 C.F.R. § 483.25(k), Tag F309, which implicates the "quality of care" participation requirement. 42 C.F.R. § 498.3(b)(8) provides that termination of a facility's provider agreement by CMS based on a failure to meet program requirements is considered an initial determination which is subject to further review. Here, however, CMS never terminated Petitioner's provider agreement or, for that matter, imposed any other actual enforcement remedy based on the August 9, 2017 survey. CMS Ex. 2 at 2. A citation for a deficiency without an enforcement remedy does not trigger the right to a hearing. *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607.

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. Petitioner's request for hearing was untimely filed.

CMS also argues that Petitioner's request for hearing was untimely as a basis for dismissal. MTD at 5-6. Because I have already determined dismissal is appropriate on other grounds, I need not discuss this argument in any great detail. I note that under the regulations, based on the date of the notice provided to Petitioner by IDPH and applying the appropriate presumptive delivery timeframe, Petitioner had to file its request for hearing by October 20, 2017. 42 C.F.R. § 498.40(a)(2). Thus, even accepting the date of

Petitioner's earlier misfiled hearing request, Petitioner still sought a hearing five days late.

Petitioner nevertheless claims its request was not untimely. It argues its 60 days began to run after the September 26, 2017 letter it received from IDPH concerning the resolution of the IDR process, making its hearing request timely. P. Resp. at 14-15. This argument is meritless. The notice issued by IDPH on August 16, 2017 clearly notified Petitioner of the deficiencies it found and explicitly advised Petitioner as to its appeal rights. By contrast, the letter issued by IDPH on September 26, 2017 addressed only the IDR process and made no mention of appeal rights. Moreover, Petitioner clearly understood the August 16, 2017 notice to form the basis of its request for hearing, because it attached that notice with its first improperly uploaded hearing request and characterized it as the federal agency determination for which it sought appeal, resulting in the DAB E-File system identifying this document as an "Originating Case Decision." Docket Nos. 1, 1a.

Petitioner's hearing request was therefore untimely filed. Even if I had jurisdiction to exercise my discretion to extend Petitioner's time to request a hearing, I would not do so, as Petitioner failed to articulate good cause for its late filing. In any event, Petitioner has no right to a hearing. Dismissal of Petitioner's hearing request is appropriate pursuant to 42 C.F.R. § 498.70(b).

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