

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Glenoaks Convalescent Hospital,
(CCN: 056317),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-204

Decision No. CR4805

Date: March 7, 2017

DECISION

The request for hearing of Petitioner, Glenoaks Convalescent Hospital, is dismissed pursuant to 42 C.F.R. § 498.70(b), as Petitioner has no right to a hearing.

I. Background

On October 20, 2016, the California Department of Public Health, Licensing and Certification Program (the state agency) notified Petitioner that a survey on October 18, 2016, found that Petitioner was not in substantial compliance with federal participation requirements. The state agency required that a plan of correction be filed within ten days. The state agency advised Petitioner that, if Petitioner did not correct all alleged deficiencies, it would propose to the Centers for Medicare & Medicaid Services (CMS) unspecified enforcement remedies. The state agency also advised Petitioner that a mandatory denial of payments would be triggered if Petitioner did not achieve substantial compliance within three months, and Petitioner's participation in Medicare and Medicaid would be terminated if Petitioner did not achieve substantial compliance within six months. CMS Exhibit (Ex.) 1.

The state agency advised Petitioner by letter dated December 9, 2016, that a revisit survey on December 1, 2016, determined that Petitioner was in substantial compliance with all federal participation requirements.

On December 16, 2016, Petitioner filed a request for hearing before an administrative law judge (ALJ). The case was assigned to me for hearing and decision and an Acknowledgement and Prehearing Order (Prehearing Order) was issued on December 28, 2016.

On January 19, 2017, CMS filed a motion to dismiss the request for hearing (CMS Motion) with CMS Exs. 1 and 2. Petitioner responded to the motion to dismiss on January 30, 2017 (P. Opp.) and filed the declaration of Henry Levine, which I treat as Petitioner's Exhibit (P. Ex.) 1. On February 3, 2017, CMS requested leave to file a reply with the reply, which is accepted. CMS Exs. 1 and 2 and P. Ex. 1 are admitted and considered evidence for purposes of this decision.

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. No enforcement remedies were imposed in this case and, therefore, Petitioner has no right to a hearing before an ALJ.

B. I have no jurisdiction or authority to review alleged deficiencies from a survey absent enforcement remedies based upon those deficiencies.

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

1. Pertinent Fact

Petitioner was subject to a survey by the state agency on October 18, 2016. The survey found Petitioner was not in substantial compliance with program participation requirements. The state agency notified Petitioner of the survey findings on October 20, 2016, and threatened imposition of enforcement remedies if Petitioner did not return to substantial compliance. CMS Ex. 1. Petitioner was notified on December 9, 2016, that a revisit survey determined that Petitioner was in substantial compliance with program participation requirements. CMS Ex. 2. Neither CMS nor the state agency imposed any of the available enforcement remedies listed in 42 C.F.R. § 488.406. Although the state agency requested that Petitioner file a plan of correction, the state agency did not impose

a “directed plan of correction” under 42 C.F.R. § 488.406(a)(7) as such a plan is described by 42 C.F.R. § 488.424.

2. Analysis

CMS argues in its motion to dismiss that no remedy was imposed; that Petitioner has no right to a hearing; and that dismissal of the request for hearing is required. CMS cites *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316 (2010) and *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005) in support of its position. Petitioner does not deny that no enforcement remedies specifically listed in 42 C.F.R. § 488.406 were imposed.

Petitioner argues it should be granted a hearing even though no enforcement remedy was imposed because of various negative impacts or penalties that Petitioner suffered because a deficiency was cited by the state agency, and because the citation was at a scope and severity of G, which represents actual harm to a resident occurred. P. Opp.; P. Ex. 1.

I conclude that neither the Social Security Act (Act) nor the regulations grant Petitioner a right to a hearing before an ALJ when no enforcement remedy is imposed. A long-term care facility, such as Petitioner, does not have a right to a hearing to challenge every action by CMS with which it disagrees. Only certain actions by CMS or its delegates, such as the state agency in this case, trigger hearing rights. In general, a participating long-term care facility will have a right to a hearing if CMS makes an initial determination to impose an enforcement 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. 42 C.F.R. § 488.408(g) (“facility may appeal a certification of noncompliance leading to an enforcement remedy”); *Columbus Park*, DAB No. 2316 at 6; *Fountain Lake*, DAB No. 1985; *The Lutheran Home – Caledonia*, DAB CR674, *aff’d*, DAB No. 1753 (2000); *Schowalter Villa*, DAB CR568, *aff’d*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB CR424 (1996), *aff’d*, DAB No. 1607 (1997); *Twin Pines Nursing & Rehab. Ctr.*, DAB CR1601 (2007). The Secretary of Health and Human Services (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”).

It is 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. pt. 498. When the enforcement remedy is eliminated, so is Petitioner’s right to review and my authority to conduct the review. *Columbus Park*, DAB No. 2316 at 7; *Fountain Lake*, DAB No. 1985; *Twin Pines*, DAB CR1601; *see EagleCare, Inc. s.*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607; *see also The Lutheran Home*

– *Caledonia*, DAB No. 1753; *Walker Methodist Health Ctr.*, DAB CR869 (2002); *Charlesgate Nursing Ctr.*, DAB CR868 (2002); *D.C. Ass’n for Retarded Citizens*, DAB CR776 (2001); *Alpine Inn Care, Inc.*, DAB CR728 (2001); *Woodland Care Ctr.*, DAB CR659 (2000); *Fort Tryon Nursing Home*, DAB CR425 (1996). In each of these cited cases, the failure or inability of the petitioner to demonstrate that the appealed survey findings and deficiency determinations resulted in an enforcement remedy was fatal to its request for hearing. In each of the cases, the appeal was dismissed. Appellate panels of the Departmental Appeals 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. pt. 498.

Petitioner lists adverse consequences, including loss of potential residents, possible trouble with vendors, and a possible drop in its Star rating. P. Ex. 1. I accept that the alleged adverse consequences are possible, but the regulations nevertheless limit my authority to reviewing those cases where an enforcement remedy authorized by the regulations is actually imposed. None of the adverse consequences foreseen by Petitioner are enforcement remedies listed in the regulations. Petitioner argues that denying it a hearing results in a violation of its right to due process and undermines principles of fundamental fairness. P. Opp. However, it is not within my authority to address Petitioner’s Constitutional challenges to either the Secretary’s regulations or the Act.

I conclude, based upon the Secretary’s regulations, that Petitioner has no right to a hearing in this case and I have no jurisdiction to grant the review requested.

III. Conclusion

For the foregoing reasons, Petitioner’s request for hearing is dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge