Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Gilroy Healthcare and Rehabilitation Center (CCN: 05-5797),	)	Date: November 14, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-404
	)	Decision No. CR1865
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

For the reasons set forth below, I conclude that Petitioner, Gilroy Healthcare and Rehabilitation Center, is not entitled to Administrative Law Judge (ALJ) review of determinations made by the Centers for Medicare & Medicaid Services (CMS) following surveys completed on November 20, 2007, and January 23, 2007, because CMS has withdrawn any enforcement remedies. I therefore grant CMS's motion to dismiss pursuant to 42 C.F.R. § 498.70(b).

I. Background

Petitioner is a skilled nursing facility located in Gilroy, California, participating in the Medicare program as a provider of services. On November 20, 2007, and January 23, 2008, the California Department of Public Health (state agency) completed surveys of the facility and found that it was not in substantial compliance with federal requirements. By letter dated February 22, 2008, CMS advised Petitioner that, based on the survey findings, it would deny payment for new admissions, effective March 8, 2008. Denial of payment for new admissions is one of the remedies that CMS may impose to ensure prompt compliance with program requirements. 42 C.F.R. §§ 488.402, 488.406.

CMS subsequently determined that the facility had returned to substantial compliance as of February 15, 2008, and, by letter dated March 10, 2008, notified Petitioner that it was rescinding the proposed remedy. CMS Attachment 3.

Nevertheless, by letter dated April 22, 2008, Petitioner requested a hearing to challenge the November 20, 2007 and January 23, 2008 survey findings. CMS moves to dismiss the hearing request.

II. Discussion

A. Petitioner has no right to a hearing if CMS has not imposed a remedy.[1]

The hearing rights of a long-term care facility are established by federal regulations at 42 C.F.R. Part 498. A provider dissatisfied with CMS's initial determination is entitled to further review, but administrative actions that are not initial determinations are not subject to appeal. 42 C.F.R. § 498.3(d). The regulations specify which actions are "initial determinations" and sets forth examples of actions that are not. A finding of noncompliance that results in the imposition of a remedy specified in 42 C.F.R. § 488.406 is an initial determination for which a facility may request an ALJ hearing. 42 C.F.R. § 498.3(b)(13). However, a finding of noncompliance is *not* an initial determination unless CMS then imposes one of the specified remedies. 42 C.F.R. § 498.3(d)(10)(ii). The imposition of a remedy, not the citation of a deficiency, triggers the right to a hearing. *Schowalter Villa,* DAB No. 1688 (1999). Where, as here, CMS withdraws the remedies, Petitioner no longer has a hearing right because the determination that is subject to a hearing no longer exists. *Fountain Lake Health & Rehabilitation, Inc*., DAB No. 1985 (2005).

B. CMS has the authority to impose penalties whenever it finds substantial noncompliance and the facility has no right to an opportunity to correct.

Citing what it labels the "Double G" rule, Petitioner argues that it is entitled to a hearing on the November 20 survey findings because those findings ultimately – if indirectly – "led to" CMS's imposing a penalty. Following a subsequent survey, completed April 30, 2008, CMS again determined that the facility was not in substantial compliance, and that at least one of its deficiencies was at the G-level of scope and severity (isolated instance

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[1] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions.

of noncompliance that causes actual harm that is not immediate jeopardy). Based on the April 2008 survey findings, CMS imposed a remedy ($2500 civil money penalty) without first affording the facility the opportunity to correct.[2] According to Petitioner, but for the November 2007 survey findings, which included two G-level deficiencies, CMS would have afforded it an opportunity to correct before imposing any penalty. So (the argument goes), if Petitioner establishes that the November 2007 G-level deficiencies were erroneous, CMS would have to give the facility an opportunity to correct before it could impose any penalty based on the April 2008 survey findings.

As support for its position, Petitioner points to a provision from the Medicare State Operations Manual (SOM) that *requires* the imposition of a penalty, without first affording the opportunity to correct, where, for two consecutive surveys, the State Agency and/or CMS finds deficiencies of actual harm or worse. SOM, section 7304B1 (Rev. 1, 05-21-04).

But Petitioner's logic is flawed. That the regulations *require* imposition of a penalty when a state agency and/or CMS finds consecutive, exceptionally serious deficiencies does not mean that they *preclude* imposition of a penalty in the absence of consecutive, exceptionally serious deficiencies.

Moreover, Petitioner's argument ignores the plain language of the statute and regulations, which give CMS the authority to impose one or more enforcement remedies – including a CMP – whenever a facility is not in "substantial compliance," *i.e.*, its deficiencies pose no actual harm but have the potential for causing more than minimal harm. Social Security Act § 1819(h); 42 C.F.R. § 488.402; 42 C.F.R. § 488.301; 42 C.F.R. § 488.406. If I sustain deficiency findings at the scope and severity level D (isolated instance of noncompliance that causes no actual harm with the potential for more than minimal harm) or above, thereby finding a basis for the imposition of remedies, I have no authority to review CMS's determination to impose a remedy. 42 C.F.R. § 488.438(e).

Thus, whenever it finds substantial noncompliance, CMS may impose a remedy without affording the facility an opportunity to correct, notwithstanding its (or a state agency's) routine practice of allowing facilities such an opportunity. *See* 59 Fed. Reg. 56,171 (Nov. 10, 1994)("[N]either the Act nor the Constitution require that providers have the opportunity to correct deficiencies before sanctions are imposed.") *See also Beechwood Sanitarium*, DAB No. 1824, at 15 (2002); *Guardian Care Nursing & Rehabilitation Center*, DAB CR1858, at 6-7 (2008).

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[2] Petitioner has appealed that determination, and its appeal is pending. *Gilroy Healthcare and Rehabilitation Center*, DAB No. C-08-490.

III. Conclusion

Because CMS has rescinded all remedies, Petitioner has no right to an ALJ hearing. I therefore grant CMS's motion to dismiss and order this case dismissed. 42 C.F.R. § 498.70(b).

/s/
Carolyn Cozad Hughes
Administrative Law Judge