Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Northlake Nursing and Rehabilitation Center
(CCN: 155731),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket Nos. C-10-572 and C-10-637

Decision No. CR2271

Date: October 20, 2010

DECISION DISMISSING PETITIONER'S HEARING REQUESTS

I dismiss the hearing requests filed by Petitioner, North Lake Nursing and Rehabilitation Center. I deny Petitioner's cross motion for summary disposition.

I. Background

Petitioner is a skilled nursing facility in the State of Indiana. It has participated in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act (Act) and by implementing regulations at 42 C.F.R. Parts 483 and 488. Its hearing rights are governed by regulations at 42 C.F.R. Part 498.

This case arises from surveys that were conducted of Petitioner's facility on November 13, 2009, December 16, 2009, December 18, 2009, February 5, 2010 (February Survey), and March 26, 2010 (March 26 Survey). Petitioner was found not to be complying substantially with Medicare participation requirements at each of these surveys, including the March 26 Survey. CMS sent notices to Petitioner advising it that CMS had determined to impose remedies against it. These remedies included: termination of Petitioner's participation in Medicare effective April 20, 2010 (originally, the proposed

termination date was April 13, 2010); civil money penalties totaling $42,500; and denial of payment for new Medicare admissions beginning December 13, 2009 and continuing through April 19, 2010.

Petitioner filed hearing two hearing requests challenging aspects of CMS's determinations. Petitioner filed its first request on March 17, 2010, and it was docketed as C-10-572 (March 17 hearing request). It filed its second request on April 15, 2010, and it was docketed as C-10-637 (April 15 hearing request). The two requests were assigned to me for hearings and decisions. At Petitioner's request, I consolidated the cases into C-10-572. CMS then moved for summary affirmance. Petitioner cross-moved for summary disposition and opposed CMS's motion. CMS then opposed Petitioner's cross-motion.

CMS filed proposed exhibits that it identified as CMS Ex. 1 – CMS Ex. 56. Petitioner filed proposed exhibits that it identified as P. Ex. 1 – P. Ex. 5. I receive the parties' exhibits into the record.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

Petitioner did not challenge CMS's determinations to impose against it the remedies of denial of payment for new admissions or civil money penalties. Consequently, CMS's authority to impose these remedies, and the reasonableness of the civil money penalty amounts, are not issues that I may hear and decide. In its March 17, 2010 hearing request, Petitioner referred to CMS's determinations to impose denial of payment for new admissions and civil money penalties, stating "Northlake has not yet filed a request for hearing or administrative appeal as to these sanctions." March 17 Hearing Request at 2. In its April 15 hearing request, Petitioner recites that remedies imposed against it included termination of participation, denial of payment for new admissions, and civil money penalties. April 15 Hearing Request at 1. However, Petitioner challenged only CMS's determination to terminate its participation in Medicare. *Id.* at 2-5.

The issue in this case is whether Petitioner has raised a challenge to CMS's determination to terminate Petitioner's Medicare participation that I may hear and decide.

B. Findings of Fact and Conclusions of Law

CMS labeled its motion in this case as a motion for "summary affirmance." However, and on close scrutiny of CMS's motion, it is evident that CMS moved to dismiss Petitioner's hearing requests. CMS's argument is that its determination to terminate Petitioner's Medicare participation is administratively final and binding, because Petitioner did not challenge the deficiency findings made at the March 26 Survey on which that determination is based. Consequently, according to CMS, there is nothing in

this case that I may hear and decide, and Petitioner has no right to a hearing. CMS argues also that the arguments that Petitioner made in opposition to CMS's motion and as an affirmative motion amount to arguments and contentions that are either irrelevant or beyond the scope of my hearing and decision authority.

I make the following findings of fact and conclusions of law (Findings).

1. Petitioner has not made a legitimate challenge in fact or in law to CMS's determination to terminate Petitioner's participation in Medicare.

CMS is authorized to terminate a skilled nursing facility's participation in Medicare, whenever that facility fails to comply with a Medicare participation requirement. Act § 1866(b)(2)(A); 42 C.F.R. § 488.456(b)(1)(i). There is no requirement in either the Act or in implementing regulations that noncompliance persist over time before termination may be imposed, nor is there a requirement that noncompliance be at a particular level of scope and severity beyond "substantial" to authorize CMS to terminate a facility's participation. Any noncompliance that is substantial is sufficient basis for CMS to terminate a facility's participation in Medicare. *Id.* Finally, CMS's authority to impose the remedy of termination of participation is not linked to, or contingent upon, action by another entity or agency. Thus, CMS may act independently of a State agency in determining to terminate a facility's participation.

In this case, CMS acted to terminate Petitioner's participation in Medicare after several consecutive surveys of Petitioner's facility revealed substantial noncompliance with Medicare participation requirements. CMS could have acted to terminate Petitioner's participation at any stage of the survey process. It chose to do so after the March 26 Survey was completed. Any substantial noncompliance existing as of the March 26 Survey establishes a sufficient basis in law for CMS to impose the remedy of termination of participation.

CMS argues, and I agree, that Petitioner did not challenge the findings of substantial noncompliance that were made at the March 26 Survey. Consequently, those findings are now administratively final, and they provide CMS with legal authority to terminate Petitioner's participation in Medicare.

Petitioner challenged findings of noncompliance that were made at surveys prior to the March 26 Survey. Petitioner's April 15 Hearing Request explicitly challenges the findings of noncompliance that were made at the February Survey, but only in the context of Petitioner's contention that CMS lacks authority to terminate its Medicare participation. Petitioner filed this request in response to a notice letter that CMS sent to Petitioner on March 31, 2010. CMS Ex. 9. That letter advised Petitioner that its participation in Medicare would be terminated on April 20, 2010, due to its failure to attain substantial compliance with Medicare participation requirements, and it was based

on the noncompliance findings that were made at the February survey and previously conducted surveys. *Id.* at 1. The April 15 Hearing Request refers to the March 31 notice letter and attaches that letter as an exhibit (Exhibit A). Referring to that letter, Petitioner states:

> Northlake contends that it was in substantial compliance with all participation requirements *as of the date of this notification* and, in any event, before the April 20, 2010 discretionary termination date.

April 15 Hearing Request at 2.

On April 30, 2010, and after Petitioner filed its April 15 Hearing Request, CMS sent an additional notice letter to Petitioner. CMS Ex. 10. In its opening paragraph, the April 30 notice refers to the March 31 notice. Then, it describes the findings of noncompliance that were made at the March 26 Survey:

> On March 26, 2010, the ISDH [Indiana State Department of Health] completed complaint investigations and revisit surveys at your facility. These surveys revealed that your facility continued not to be in substantial compliance with the most serious deficiencies cited as follows . . . .

Id. at 1. The April 30 notice listed three instances of substantial noncompliance that had been found during the March 26 Survey that were in addition to those that had been found at previously conducted surveys and that had been challenged by Petitioner in its previously filed hearing requests. These consisted of failures to comply substantially with the requirements of 42 C.F.R. §§ 483.20(k)(3)(i), 483.65, and 483.75(l)(1). *Id.*

The April 30 letter then recited those remedies that CMS had previously determined to impose against Petitioner, including termination of Petitioner's participation in Medicare. CMS Ex. 10 at 1. It advised Petitioner:

> If you disagree with the *finding of noncompliance found during the March 26, 2010 survey which resulted in the continuation of previously imposed remedies*, you or your legal representative may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board (DAB) . . . **A <u>written</u> request for a hearing must be filed <u>no later than 60 days from receipt of this notice</u>**. . . .

Id. at 3 (boldfaced and underlined text in original, italicized text added to citation for emphasis).

Petitioner filed no hearing request in response to the April 30, 2010 notice.

The April 30, 2010 notice to Petitioner was unambiguous in that it recited the findings of the March 26 Survey as an additional basis to support the remedies – including termination of participation – which CMS previously had determined to impose. Petitioner, if it wanted to challenge these findings, had to file a new hearing request in which it identified the deficiencies it was challenging and in which it stated the basis for its challenge. 42 C.F.R. § 498.40(b)(1), (2). Petitioner's failure to challenge the March 26 Survey findings in a hearing request responding to the April 30, 2010 notice meant that the noncompliance findings that were made at the March 26 Survey became administratively final and no longer subject to challenge.

The fact that there exist administratively final findings of substantial noncompliance provides CMS with the legal authority to terminate Petitioner's participation in Medicare. As I discuss above, any finding of noncompliance, if that noncompliance is substantial, provides CMS with authority to terminate participation. And, the fact that there are unchallenged and administratively final findings of substantial noncompliance here renders moot Petitioner's challenges to noncompliance findings that were made at the February Survey and previously.

In opposing CMS's motion and moving on its own behalf for summary disposition Petitioner argues, first, that:

> the surveys at issue were triggered by the State of Indiana's unlawful conduct pertaining to . . . [Petitioner's] facility license. The State's improper conduct set off a domino effect of sanctions culminating in the present action.

North Lake's Cross-Motion for Summary Disposition and Pre-Hearing Brief (Petitioner's Brief) at 1.

According to Petitioner, the issues in the consolidated case first arose from a survey that took place on January 12, 2009. It argues that a single deficiency was found at this survey. Petitioner's Brief at 2. It contends that this finding of noncompliance resulted in ISDH filing an administrative complaint to place Petitioner's license on probation. That action, according to Petitioner, was resolved by a consent decree in which Petitioner agreed to a three-month probation of its license, conditioned on its receiving an unrestricted license if, at the end of the probationary period no additional deficiencies were found. *Id.* It then asserts that, in November 2009 it applied for a full license. However, according to Petitioner, ISDH reneged on the terms of its agreement and proceeded to issue Petitioner an additional probationary license. *Id.* at 3.

Next, according to Petitioner, ISDH conducted a series of surveys of Petitioner's facility, in November and December 2009. On February 1, 2010, Petitioner asserts ISDH issued an emergency order directing that Petitioner's residents be relocated. Petitioner's Brief at 3. That action, according to Petitioner, was not prompted by any noncompliance but,

rather, by the determination of ISDH that Petitioner's probationary license had expired. Petitioner contends that it was this determination by ISDH – and not any finding of noncompliance with participation requirements – that prompted CMS, on February 22, to first advise Petitioner that its participation in Medicare would be terminated. *Id.* at 4.

From these allegations, Petitioner argues that everything flows from ISDH's allegedly improper determinations not to grant Petitioner a full license and to order that its residents be relocated. It asserts that it was these allegedly improper actions by ISDH were the proximate cause of CMS's subsequent determination to terminate Petitioner's participation in Medicare. It urges that I find CMS's determination to be unauthorized, because it is the end result of wrongful State action. Petitioner's Brief at 5-6.

It is not necessary for me to address closely the history of Petitioner's relations with ISDH, or the lawfulness of ISDH's actions, for me to find this argument to be without merit. CMS's determination to terminate Petitioner's participation in Medicare is authorized by the unchallenged findings of noncompliance that were made at the March 26 Survey. The findings of noncompliance at surveys conducted before the March 26 Survey, and all of Petitioner's prior relationship with ISDH, are rendered moot by virtue of those unchallenged March 26 survey findings. The March 26 Survey findings, without reference to anything that may have happened previously, are in and of themselves, all that CMS needs as authority to terminate Petitioner's Medicare participation. Act § 1866(b)(2)(A); 42 C.F.R. § 488.456(b)(1)(i).

Petitioner's argument also overlooks the fact that CMS's determination is a federal action, made pursuant to federal law, and not in any sense dependent on what may have taken place at the State level. It is true that, at one point, CMS relied in part on ISDH's administrative action against Petitioner as a basis for terminating Petitioner's participation in Medicare. But, that basis for termination became unnecessary with subsequent survey findings that gave CMS superseding grounds for terminating Petitioner's participation. Thus, CMS's determination does not in any respect hinge on State action.

Furthermore, even if the March 26 Survey would never had occurred but for some prior action – wrongful or not – by ISDH, that survey nevertheless produced findings of noncompliance that gave CMS authority to act once they became administratively final. There is no "exclusionary rule" in these cases that prohibits CMS from relying on survey findings even assuming that the facility would never have been surveyed but for some error or even wrongful conduct by a State agency. If survey findings are substantiated or become administratively final, as they have in this case, then they provide CMS with sufficient basis to act no matter what motivated the State agency to perform the survey.

Petitioner argues also that the reason it failed to file a hearing request explicitly responding to CMS's April 30, 2010 notice and the March 26 Survey findings is that "CMS's notices are misleading and contradictory." Petitioner's Brief at 7. In essence

Petitioner argues that it was misled by CMS into believing that it did not have to challenge the March 26 Survey findings to preserve its right to a hearing addressing all issues of noncompliance including those deficiencies that were identified at the March 26 Survey. Thus, according to Petitioner, CMS's allegedly misleading and contradictory notices denied it due process of law and are unconstitutional. Petitioner's Brief at 7-11.

As support for this contention Petitioner cites to language in the April 30, 2010 notice, which states:

> We have received a copy of your request for hearing to the Departmental Appeals Board in Washington, D.C., where an Administrative Law Judge will be designated to hear the case. You will be contacted by that office concerning the time and place of hearing. The CMP [civil money penalty] will not be collected until a final administrative decision upholding its imposition has been made. There are no other outstanding appeal issues.

CMS Ex. 10 at 3. Petitioner contends that:

> Any reasonable provider reviewing this section and the Notices as a whole would understand it must have already submitted its objection and hearing request and that no further action would be needed to perfect its appeal. Thus, . . . [Petitioner] did not need to file a new hearing request because CMS indicated it had already received it and was preparing to designate an . . . [administrative law judge] to handle the appeal. Moreover, CMS informed . . . [Petitioner] that there are "no other outstanding appeal issues" in this case, therefore putting . . . [Petitioner] on notice that it had done all it could do to object to the onslaught of evolving sanctions imposed against it.

Petitioner's Brief at 7.

I disagree with Petitioner's contention that the language it relies on in the April 30, 2010 letter is ambiguous and misleading. Perhaps, that language might be misleading if it were read in a vacuum. But, the language relied on by Petitioner follows immediately after the paragraph in which CMS informed Petitioner that it must file a new hearing request if it intended to challenge the findings made at the March 26 Survey. CMS Ex. 10 at 3. The meaning of the language cited by Petitioner is perfectly clear when read in context with the immediately preceding paragraph in the April 30 letter. It refers solely to the hearing requests previously filed by Petitioner and to the issues that were encompassed by those requests but not to issues that were identified by the April 30 letter, including the noncompliance findings that were made at the March 26 Survey.

Furthermore, Petitioner knew, or should have known, that its hearing requests did not challenge the noncompliance findings that were made at the March 26 Survey. Petitioner's hearing requests plainly and explicitly did not challenge the March 26 Survey

noncompliance findings. Petitioner filed its hearing requests prior to April 30, 2010 and before it had ever received notice of the March 26 Survey results.

Moreover, Petitioner never – not even in its response to CMS's motion – challenged the March 26 Survey findings of noncompliance. Petitioner's brief offers no discussion as to the merits of these noncompliance findings, and none of Petitioner's proposed exhibits address those findings. Thus, those noncompliance findings remain unchallenged by Petitioner.

2. Petitioner has no right to a hearing and, therefore, I dismiss its hearing requests.

Petitioner has no right to a hearing. It has failed to exercise its right to challenge the remedies of civil money penalties and denial of payment for new admissions. CMS is thus authorized to impose these remedies. CMS also is authorized to terminate Petitioner's participation in Medicare, because Petitioner failed to challenge the findings of noncompliance that were made at the March 26 Survey.

Petitioner's challenges of noncompliance findings made at the February Survey and previous surveys are moot. CMS would be authorized to impose all of the remedies that it determined to impose, including termination of Petitioner's Medicare participation, even if I were to rule in Petitioner's favor as to deficiency findings made at surveys conducted before the March 26 Survey. There is no relief from CMS's remedy determinations that I may grant Petitioner given its failures to challenge the imposition of civil money penalties, denial of payment for new admissions, and the noncompliance findings that were made at the March 26 Survey.

I may dismiss a hearing request where a party has no right to a hearing. 42 C.F.R. § 498.70(b). Petitioner has no right to a hearing inasmuch as there is no relief that I can grant to it. I therefore dismiss Petitioner's hearing requests.

/s/
Steven T. Kessel
Administrative Law Judge