Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Benefis Extended Care Center
(CCN: 27-5012),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-505

Decision No. CR2589

Date: August 15, 2012

DECISION

The request for hearing filed by Petitioner, Benefis Extended Care Center, on March 22, 2012, is dismissed pursuant to 42 C.F.R. § 498.70(b), because Petitioner has no right to a hearing.[1]

I. Background

Petitioner is located in Great Falls, Montana, and participates in Medicare as a skilled nursing facility (SNF) and in the state Medicaid program as a nursing facility (NF). On January 5, 2012, the Montana Department of Public Health and Human Services (state agency) completed a survey of the facility and found that it was not in substantial compliance with federal program participation requirements. The Centers for Medicare and Medicaid Services (CMS) notified Petitioner by letter dated January 25, 2012, that it would be imposing a denial of payment for new admissions (DPNA) effective April 5, 2012 and termination of Petitioner's provider agreement and participation in Medicare on

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[1] All references are to the version of the Code of Federal Regulations (C.F.R.) in effect at the time of the survey, unless otherwise indicated.

July 5, 2012, if Petitioner did not return to substantial compliance with participation requirements before those dates. The CMS notice also advised Petitioner that it was ineligible to conduct a nurse aide training and competency evaluation program (NATCEP) for two years. Request for Hearing; CMS Exhibit (CMS Ex.) 1.[2] CMS notified Petitioner by letter dated April 5, 2012, that a revisit survey concluded that Petitioner returned to substantial compliance on February 29, 2012, and that the DPNA and termination were rescinded. CMS Ex. 3.

On March 22, 2012, Petitioner requested a hearing. The case was assigned to me on April 3, 2012 for hearing and decision, and an Acknowledgment and Prehearing Order was issued at my direction. On June 26, 2012, CMS filed a motion (CMS Motion) to dismiss the request for hearing on grounds that no enforcement remedy was imposed and Petitioner had no right to a hearing. CMS also filed a motion for leave to file its motion to dismiss out-of-time[3] and a motion to stay proceedings pending my ruling on the motion to dismiss. On July 18, 2012, Petitioner requested an extension of time to respond to the motion to dismiss and the motion was granted. On July 27, 2012, Petitioner filed a response (P. Response) opposing the CMS motion to dismiss. The CMS motion for a stay was granted on August 9, 2012.

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

My conclusions of law are set forth in bold followed by my findings of fact and analysis.

A. Petitioner has no right to a hearing because CMS imposed no enforcement remedies and Petitioner had no approved NATCEP.

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

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

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[2] CMS submitted seven documents with its motion to dismiss marked as CMS Ex. 1 through CMS Ex. 7. Petitioner has not objected to my consideration of the exhibits and they are admitted as evidence.

[3] There is good cause to grant the CMS motion for leave to file out-of-time.

A provider does not have a right to a hearing to challenge every action by CMS with which it disagrees. Only certain actions by CMS trigger hearing rights. The Social Security Act (Act) and implementing regulations make a hearing before an ALJ available to a long-term care facility against which CMS has determined to impose an enforcement remedy. Act §§ 1128A(c)(2), 1866(h); 42 C.F.R. §§ 488.330(e), 488.408(g)(1), 498.3(b)(13). The choice of remedies, or the factors CMS considered when choosing remedies, are not subject to review. 42 C.F.R. § 488.408(g)(2). The level of noncompliance found by CMS is subject to review, but only if a successful challenge could affect the range of civil money penalties that could be imposed or the finding of substandard quality of care that "results in the loss of approval" of a facility's NATCEP. 42 C.F.R. § 498.3(b)(14). The regulation also provides that the finding of substandard quality of care that results in the loss of approval of a facility's NATCEP is subject to review. 42 C.F.R. § 498.3(b)(16).

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"); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *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, *aff'd*, DAB No. 1607 (1997). The Secretary of Health and Human Services 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 specifically 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. Part 498. When the enforcement remedy is eliminated, so, too, is Petitioner's right to review and my authority to conduct the review. *Golden Living Ctr.*, DAB No. 2364, at 2-3 (2011); *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316 (2010); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985; *Lakewood Plaza Nursing Ctr.*, DAB No. 1767 (2001); *see Eagle Care, Inc. d/b/a/ Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607; s*ee also The Lutheran Home – Caledonia*, DAB No. 1753; *Walker Methodist Health Ctr.*, DAB CR869 (2002); *Charlesgate Nursing Ctr.*, DAB CR868 (2002); *D.C. Assoc. for Retarded Citizens*, DAB CR776 (2001); *Alpine Inn Care, Inc., d/b/a Ansley Pavilion*, DAB CR728 (2001); *Woodland Care Ctr.*, DAB CR659 (2000); *Fort Tryon Nursing Home*, DAB CR425 (1996). In each of these cases, the failure or inability of the petitioner to demonstrate that the survey findings and deficiency determinations resulted in an enforcement remedy was fatal to the right to a hearing and appeal. In each of the cases, the request for hearing was dismissed. The appellate panels of the Board and the ALJs who decided the 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. Part 498.

There is no dispute in this case that the DPNA and termination remedies were rescinded and never effectuated. CMS Ex. 3. Accordingly, I conclude that Petitioner has no right to request a hearing based upon the imposition of an enforcement remedy. Act §§ 1128A(c)(2), 1866(h); 42 C.F.R. §§ 488.330(e), 488.408(g)(1), 498.3(b)(13).

Petitioner was notified in this case that it was ineligible to conduct a NATCEP for two years. Pursuant to sections 1819(b)(5) and 1919(b)(5) of the Act, SNFs and NFs may only use nurse aides who have completed a training and competency evaluation program. Pursuant to sections 1819(f)(2) and 1919(f)(2) of the Act, the Secretary was tasked to develop requirements for approval of NATCEPs and the process for review of those programs. Sections 1819(e) and 1919(e) of the Act impose upon the states the requirement to specify what NATCEPs they will approve that meet the requirements that the Secretary established and a process for reviewing and re-approving those programs using criteria the Secretary set. The Secretary promulgated regulations at 42 C.F.R. Part 483, subpart D. Pursuant to 42 C.F.R. § 483.151(b)(2) and (e)(1), a state may not approve and must withdraw any prior approval of a NATCEP offered by a skilled nursing or nursing facility that has been: (1) subject to an extended or partial extended survey under sections 1819(g)(2)(B)(i) or 1919(g)(2)(B)(i) of the Act; (2) assessed a CMP of not less than $5,000; or (3) subject to termination of its participation agreement, a DPNA, or the appointment of temporary management. Extended and partial extended surveys are triggered by a finding of "substandard quality of care" during a standard or abbreviated standard survey and involve evaluating additional participation requirements. "Substandard quality of care" is identified by the situation where surveyors identify one or more deficiencies related to participation requirements established by 42 C.F.R. § 483.13 (Resident Behavior and Facility Practices), § 483.15 (Quality of Life), or § 483.25 (Quality of Care) that are found to constitute either immediate jeopardy, a pattern of or widespread actual harm that does not amount to immediate jeopardy, or a widespread potential for more than minimal harm that does not amount to immediate jeopardy and there is no actual harm. 42 C.F.R. § 488.301. The ineligibility to be approved to conduct a NATCEP and the requirement for withdrawal of approval to conduct a NATCEP are not enforcement remedies that CMS has discretion to impose. Rather, the ineligibility to be approved or the requirement to withdraw previously granted approval to conduct a NATCEP is a consequence of the operation of the law. Act §§ 1819(f)(2)(B)(iii)(I), 1919(f)(2)(B)(iii)(I), 42 C.F.R. §§ 483.151(b)(2), 483.151(e), 488.301, 488.310; *Yakima Valley School*, DAB No. 2422, at 7 (2011).

The remaining issue is whether or not Petitioner has a right to a hearing based upon the declaration that it was ineligible to conduct a NATCEP. CMS Ex. 1. CMS argues that Petitioner has no right to request a hearing because Petitioner did not have a NATCEP. CMS Motion at 2-6. Petitioner acknowledges the "apparent lack of jurisdiction under the

regulations as construed by current ALJ/Department Appeals Board case law." P. Response at 1. Petitioner does not dispute that it did not have an approved NATCEP at the time of the survey and CMS's initial determination in this case. Pursuant to the plain language of 42 C.F.R. § 498.3(b)(14) and (16), it is the loss of approval to conduct a NATCEP that triggers the right to a hearing, not the ineligibility to be approved by the state to conduct a NATCEP. Accordingly, I conclude that no right to a hearing was triggered by Petitioner's ineligibility to be approved to conduct a NATCEP.

Petitioner urges that I grant Petitioner a hearing on grounds that it has already suffered prejudice due to the fact CMS has published the "Petitioner's alleged violation on its Nursing Home Compare Website." P. Response at 1-2. Petitioner cites no authority for me to grant a hearing and conduct review on that basis and I am aware of none.

I conclude, based upon the Secretary's regulations and the rationale of prior decisions by the Board and ALJs, that Petitioner does not have a right to a hearing in this case and I have no jurisdiction to grant the review Petitioner requests. Accordingly, I conclude that Petitioner's request for hearing should be dismissed.

III. Conclusion

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

/s/
Keith W. Sickendick
Administrative Law Judge