Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Prestonburg Health Care Facility
(CCN: 18-5304),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-09-473

Decision No. CR2206

Date: August 10, 2010

DECISION

This matter is before me on the Centers for Medicare & Medicaid Services' (CMS's) Motion for Summary Judgment. I have determined that Prestonburg Health Care Facility (Petitioner) does not have a right to a hearing under the applicable regulations. Accordingly, I grant CMS's Motion for Summary Judgment and, consequently, I dismiss Petitioner's request for hearing.

I. Background

Petitioner is a long-term care facility located in Prestonsburg, Kentucky, that participates in the Medicare program as a skilled nursing facility (SNF)[1], and in the Kentucky Medicaid program as a nursing facility (NF). On March 20, 2009, a standard survey (March 20 survey) was completed at Petitioner's facility by the Kentucky State Survey Agency (survey agency) to determine if Petitioner was in compliance with Medicare

[1] Petitioner is a nursing home facility both under the federal Medicare program (as an SNF) and the state Medicaid program (as an NF) and is referred to as a "dually participating facility." *See* 42 C.F.R. § 488.301. SNFs are governed by section 1819 of the Social Security Act (Act) and NFs are subject to section 1919 of the Act.

participation requirements. By letter dated March 26, 2009,[2] CMS notified Petitioner that based on the March 20 survey findings, it was determined that Petitioner was not in substantial compliance with program requirements and that the conditions at Petitioner's facility constituted immediate jeopardy and substandard quality of care to residents' health and safety. Petitioner was advised that the immediate jeopardy was considered ongoing since March 10, 2009, and that its noncompliance with deficiency tag F309 (Quality of Care) constituted substandard quality of care. The notice also advised Petitioner that CMS was imposing remedies which included a denial of payment for new admissions (DPNA) effective March 28, 2009; a discretionary termination of Petitioner's provider agreement effective April 12, 2009; and as a result of the extended survey of its facility, Petitioner was subject to a two-year decertification of its nurse aide training program (NACTEP). CMS included with its March 26 notice letter a copy of the revised survey findings identified as CMS Form 2567L (also commonly referred to as a Statement of Deficiencies). Petitioner was provided with the opportunity to submit a credible allegation of compliance within 10 days from receipt of the CMS Form 2567L. Petitioner was also advised of its right to file an appeal before an administrative law judge (ALJ) of the Departmental Appeals Board. CMS Exhibit (Ex.) 2, at 2-3.

A revisit survey was conducted at Petitioner's facility on April 8, 2009 (April 8 survey). By notice letter dated April 17, 2009, CMS notified Petitioner that based on the April 8 survey findings Petitioner had not achieved substantial compliance. The letter advised Petitioner that the remedies that were previously imposed would continue in effect until Petitioner either achieved substantial compliance or its provider agreement was terminated. CMS Ex. 3. On April 23, 2009, a Federal Life Safety Code survey (April 23 survey) was completed at Petitioner's facility. Based on the surveyors' findings, CMS determined that Petitioner was not in substantial compliance with program requirements, and that the conditions at Petitioner's facility constituted no actual harm with the potential for more than minimum harm that was not immediate jeopardy. CMS advised Petitioner by notice letter dated May 8, 2009, that the previously imposed remedies would continue if Petitioner did not achieve substantial compliance within 6 months after the last day of the March 20 survey. CMS Ex. 4.

[2] Attached to its request for hearing Petitioner included a copy of the March 26, 2009 CMS notice letter. Petitioner states in its request for hearing that prior to CMS's March 26, 2009 notice, Petitioner had received several notices from the state survey agency as well as a copy of the initial CMS Form 2567L on March 24, 2009 from the state agency. However, since Petitioner's appeal before me is in response to the March 26, 2009 notice letter it received from CMS and the referenced letters Petitioner discusses are not part of the record in this case, I do not find it necessary to discuss the correspondence Petitioner received from the state survey agency.

Petitioner underwent a Life Safety Code review on May 26 (May 26 survey), and based on the results of that survey CMS notified Petitioner by notice letter dated June 3, 2009, that substantial compliance had been achieved by Petitioner as of May 26, 2009. The letter further advised Petitioner that the DPNA penalty would run from March 28 through May 26, 2009, and the discretionary termination remedy would not be effectuated. CMS Ex. 5.

Petitioner, represented by counsel in this matter, filed its request for hearing before an ALJ on May 26, 2009, challenging five of the 10 deficiencies cited in the March 20 survey.[3] In its request for hearing Petitioner specified that it was limiting its appeal to the five immediate jeopardy deficiencies, and that it was not disputing the five non-immediate jeopardy deficiencies cited during the March 20 survey of its facility.[4] Request for Hearing at 2, n.2; 3; 4-9.

The request for hearing was assigned to me on May 29, 2009 for hearing and a decision. An Order was issued to the parties at my direction the same day. Petitioner requested and was granted a 60-day extension to the filing deadlines outlined in my Order. On September 28, 2009, CMS filed a notice of its intent to move for summary judgment (CMS Notice) asserting that Petitioner failed to preserve issues for which it had a right to a hearing. CMS Notice at 1. On November 5, 2009, CMS filed its Motion for Summary Judgment (CMS Motion) with five documents in support of its motion which were identified as CMS Ex. 1 though CMS Ex. 5. Petitioner filed it opposition brief (P. Brief) on December 7, 2009 with two attachments marked as P. Ex. 1 and P. Ex. 2.

A prehearing conference was convened by telephone on December 14, 2009, to discuss CMS's motion for summary judgment. The substance of the discussion held during the conference is memorialized in my *Summary of Prehearing Conference and Order*, issued December 30, 2009. During the conference Petitioner confirmed that it was not disputing the five non-immediate jeopardy deficiencies cited during the March 20 survey, and that it was exclusively challenging the five immediate jeopardy deficiencies also cited during the same survey. Petitioner stated that it was concerned about the impact the immediate

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[3] Petitioner is appealing the following five deficiency tags, all identified at an immediate-jeopardy level and listed at a scope and severity (s/s) of "K": F272 (Comprehensive Assessments); F279 (Comprehensive Care Plans); F309 (Quality of Care); F490 (Administration); and F498 (Proficiency of Nurse Aides). Request for Hearing at 4-5; CMS Ex. 1.

[4] Petitioner is not challenging the following non-immediate jeopardy deficiency tags, all listed at an s/s of "D": F282 (Comprehensive Care Plans); F315 (Urinary Incontinence); F364 (Food); F365 (Food); and F367 (Therapeutic Diet). Request for Hearing at 2, n.1; CMS Ex. 1.

jeopardy deficiencies would have on CMS's "Five Star" quality rating of its facility. I advised Petitioner that its rating with CMS's "Five Star" quality rating system was not an initial determination under the regulations and, therefore, not subject to my review.[5] When I asked if Petitioner operated an approved NATCP, Petitioner advised me that it had been approved to operate a NATCEP but had not yet started the program at the time of the March 20 survey. The parties also agreed that the five non-immediate jeopardy deficiencies which Petitioner had chosen not to appeal were not substandard quality of care citations. *See* Order of December 30, 2009.

CMS advised me at the conference of its intent to file a reply brief that day. A briefing schedule was then developed affording Petitioner opportunity to file a sur-reply to CMS's reply brief. CMS filed a reply brief (CMS Reply) on December 14, 2009. Petitioner filed a sur-reply (P. Reply) on January 15, 2010.

II. Issues

The sole issue before me is whether Petitioner has a right to a hearing on the five immediate jeopardy level deficiencies it has appealed, when the five non-appealed deficiencies arising from the same survey are sufficient to support the remedies imposed by CMS.

III. Applicable Law

The Social Security Act (Act) sets forth requirements for long-term care facilities, including SNFs and NFs, participating in the Medicare and Medicaid programs, and authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations implementing the statutory provisions. Act §§ 1819 and 1919 (42 U.S.C. §§ 1395i-3; 1396r). The Secretary's regulations governing SNFs' and NFs' participation in the Medicare program are found at 42 C.F.R. Part 483. Survey, certification and enforcement procedures for all long-term care facilities, including SNFs and NFs, are contained in 42 C.F.R. Part 488.

A SNF and/or NF must maintain substantial compliance with program requirements as set forth at 42 C.F.R. Part 483 to participate in the Medicare and Medicaid programs. The state agency or CMS conduct surveys of nursing facilities to determine whether they are in compliance with the requirements of Part 483. No deficiency must be found by surveyors that present a greater risk to resident health or safety than the "potential for causing minimal harm" or the facility will be found not in substantial compliance and a certificate of noncompliance will issue. 42 C.F.R. §§ 488.301; 488.330. If a facility is

[5] For reasons discussed in further detail later, Petitioner's challenge to CMS's "Five Star" quality rating system is duly noted and preserved for appeal in another forum. *See also* Order of December 30, 2009.

found to be not in substantial compliance then CMS has the authority to impose one or more of the enforcement remedies listed in section 1819(h) of the Act (42 U.S.C. § 1395i-3(h)) and 42 C.F.R. § 488.406, including a DPNA and loss of NATCEP such as that imposed in this case. Remedies are applied on the basis of the scope and severity of the noncompliance found during surveys. 42 C.F.R. § 488.402(b). The factors to be considered by CMS when selecting remedies are set forth at 42 C.F.R. § 488.404.

Regulations which govern the participation in Medicare of SNFs and NFs provide that a SNF and a NF is entitled to a hearing from a determination by CMS which results in the imposition of a remedy against the SNF or NF by CMS. However, a SNF or a NF is not entitled to a hearing where CMS has imposed no remedy against it. 42 C.F.R. §§ 498.3; 498.5; 488.408(g)(1).

A single deficiency is sufficient for CMS to impose a remedy of DPNA. Act § 1819(h)(2)(B)(i); 42 C.F.R. § 488.417(a) and (b); *Northern Montana Care Ctr.*, DAB No. 1930 (2004), *aff'd Montana v. Leavitt*, No. 04-00097-GF-SEH (D.Mont. Sept. 18, 2006).

IV. Burden of Proof

When a penalty is imposed and appealed, CMS must establish a *prima facie* case that the facility was not in substantial compliance with federal participation requirements. To prevail, the facility must overcome CMS's showing by a preponderance of evidence. *Emerald Oaks*, DAB No. 1800, at 4 (2001); *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998), applying *Hillman Rehabilitation Ctr.*, DAB No. 1611 (1997), *aff'd Hillman Rehabilitation Ctr. v. HHS*, No. 98-3789 (GEB), slip op. at 25 (D.N.J. May 13, 1999). I adopt the burden as set forth in the Board's decision in the *Hillman* case, and as stated and discussed in detail in the *Batavia Nursing and Convalescent Center* and *Batavia Nursing and Convalescent Inn* cases. *See Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x 181 (6th Cir. 2005); and *Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004), *aff'd Batavia Nursing & Convalescent Ctr. v. Thompson*, 143 F. App'x 664 (6th Cir. 2005). The parties have urged no different allocation in this case.

V. Discussion

A. Summary judgment is appropriate.

Appellate panels of the Departmental Appeals Board (Board) have, on multiple occasions, discussed the well-settled principles governing summary judgment. Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail as a matter of law even if

all disputed facts are resolved in favor of the party against whom the motion is made. *See White Lake Family Medicine, P.C.*, DAB No. 1951 (2004); *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004). A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 n.11 (1986); *see, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows that there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992).

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *Brightview Care Ctr.*, DAB No. 2132, at 2, 9 (2007); *Livingston Care Ctr.*, 388 F.3 at 172 (2003); *Guardian Health Care Ctr.*, DAB No. 1943, at 8 (2004); *but see Brightview*, DAB No. 2132, at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). Moreover, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cf. Guardian Health Care Ctr.*, DAB No. 1943, at 11 ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.").

This case presents no disputed issues of material fact and the only questions that require a decision involved the application of the law to the undisputed facts. Accordingly, there being no genuine issues of material fact, summary judgment is appropriate.

B. Petitioner did not challenge CMS's determination of its noncompliance with five non-immediate jeopardy deficiency citations (F282, F315, F364, F365, and F367). By operation of law, these findings of noncompliance are administratively final.

It is CMS's position that: (1) all the non-appealed deficiencies (five deficiency tags) from the March 20 survey provide a fully adequate basis for all the remedies imposed; (2) that a hearing on the five immediate jeopardy deficiencies which Petitioner appeals would not result in any change in the remedies imposed; and (3) Petitioner has no right to a hearing on CMS's "Five Star" quality rating of its facility. CMS Motion at 5, 6-7.

As discussed above, with the exception of CMS's determination that Petitioner's facility was not in substantial compliance with five immediate jeopardy level deficiencies, Petitioner does not appeal any of the non-immediate jeopardy deficiencies cited; specifically, tags F282, F315, F364, F365, and F367. CMS's determination that Petitioner was not in substantial compliance with those non-appealed program

participation requirements is therefore final and binding.[6] 42 C.F.R. § 498.20(b). An initial determination is final and binding unless reversed or modified by a hearing decision, or under other circumstances not applicable here. 42 C.F.R. § 498.20(b).

1. Petitioner did not reserve jurisdiction for the non-immediate jeopardy deficiency tags F282, F315, F364, F365, and F367.

A facility affected by an initial determination and seeking review of the determination on appeal must invoke jurisdiction in its request for hearing. If not, the determinations and the findings on which they are based become final, non-reviewable, and binding on the affected facility by operation of law. 42 C.F.R. §§ 498.20(b); 498.70(a).

In reviewing the contents of Petitioner's request for hearing in order to determine whether the right to a hearing has accrued with respect to all, some, or none of the issues stated in the request I find that Petitioner timely filed its request for hearing on May 26, 2009, but appealed only five deficiency tags, all at an immediate jeopardy scope and severity. Petitioner's request for hearing did not seek review or challenge any of the other five reported deficiency tags and, as noted above, they have now become final. Request for Hearing at 4-5; 42 C.F.R. § 498.20(b). Thus, Petitioner's limitation of its appeal to the five immediate jeopardy deficiencies enumerated above has in effect left in place and beyond the reach of the appeal before me the five non-appealed deficiency citations and remedies CMS imposed.

2. CMS had a basis to impose a DPNA against Petitioner.

The administratively final five deficiencies all have a D scope and severity level. According to the scope and severity matrix published in the State Operations Manual, a scope and severity of level D indicates a deficiency that presents no actual harm but has the potential for more than minimal harm that does not amount to immediate jeopardy. The matrix, which is based on 42 C.F.R. § 488.408, specifies which remedies are required and optional at each level based upon the frequency of the deficiency. *See* SOM § 7400E. D-level deficiencies are classified as "isolated." For deficiencies at the D scope and severity level, the matrix specifies that Category 1 remedies are required to be imposed, and Category 2 remedies are optional.

A DPNA is a Category 2 remedy. 42 C.F.R. § 488.408(d). The regulations at 42 C.F.R. § 488.408(d)(3) provide that CMS may apply one or more of the remedies in Category 2 to any deficiency except when the facility is in substantial compliance or when the deficiency constitutes immediate jeopardy. In the case before me, Petitioner's

[6] These now-final deficiencies are relevant to my analysis of the imposed remedies and I therefore discuss them in this decision where it is appropriate to do so.

administratively final deficiencies include five deficiencies at the D level, which establish that Petitioner was not in substantial compliance. Moreover, the non-appealed deficiencies are, in and of themselves, sufficient to justify the DPNA.[7] Even if Petitioner were to prove that it was in substantial compliance with the appealed immediate jeopardy citation the remedies imposed by CMS would not be nullified or in any other way affected. The basis for a Category 2 DPNA lies in the now administratively final deficiencies, which are binding on Petitioner.

Accordingly, I find that CMS was authorized under the regulations to impose a Category 2 DPNA remedy against Petitioner. 42 C.F.R. § 488.408(d)(1)(i).

3. Petitioner chose to limit its appeal before me.

The regulation at 42 C.F.R. § 498.40(c) provides that an ALJ may extend the time for filing a request for hearing for good cause shown. Here, Petitioner made a thoughtful and deliberate choice to limit its appeal to the five immediate jeopardy deficiency tags specifically addressed in its request for hearing and as confirmed by its counsel during the December 14, 2009 pre-hearing conference. Request for Hearing at 2 n.2; Order of December 30, 2009. Petitioner has not requested and there is no reason to invoke my discretionary authority to allow Petitioner to amend its hearing request, or to add new issues to those already before me in this case. 42 C.F.R. §§ 498.40(c)(2); 498.56(a).

4. The State agency must withdraw Petitioner's authority to conduct NATCEP based upon the imposition against Petitioner of a DPNA.

State agencies are required to withdraw a facility's authority to conduct NATCEP for a period of two years when CMS imposes a DPNA. Act § 1819(f)(2)(B)(iii)(I)(c); 42 C.F.R. §§ 483.151(b)(2)(v), (e)(1). Here, CMS imposed a DPNA based on Petitioner's noncompliance with five non-immediate jeopardy deficiencies which, for the reasons previously discussed, are now final. Thus, withdrawal of Petitioner's authority to conduct a NATCEP is required, even if Petitioner were to prevail on the merits in its challenge of the five immediate jeopardy deficiency tags.

Accordingly, I find that the remedies imposed on Petitioner by CMS, the DPNA and the loss of NATCEP approval for two years, are fully supported by the five non-appealed and now-final deficiencies, without reliance on the five deficiency tags that Petitioner did appeal. 42 C.F.R. §§ 408.408(d)(1)(i); 483.151(b)(2)(v), (e)(1).

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[7] *See* Act § 1819(h)(2)(B)(i); 42 C.F.R. § 488.417(a) and (b); *Northern Montana Care Ctr.*, DAB No. 1930 (a single deficiency is sufficient for CMS to impose a remedy of DPNA).

C. A substandard quality of care citation provides a long-term care facility with an independent basis to appeal the remedy of withdrawal of approval of its NATCEP.

In July 1999, the Secretary corrected a perceived regulatory inequity by issuing an interim final regulation permitting providers opportunity to appeal the loss of NATCEP on an extended or partial extended survey triggered by findings of substandard quality of care. The Secretary explained that experience had shown that the loss of NATCEP could have a serious impact on some facilities, given existing constraints in availability of nurse aides and training programs, and that 42 C.F.R. § 498.3(b) should be revised to provide full hearing to review the underlying factual basis of the substandard quality of care findings, even where no other remedy was being imposed. 64 Fed. Reg. 39,934, 39,935 (July 23, 1999). The revision was effectuated through a new regulatory provision set out at 42 C.F.R. § 498.3(b)(16) which states that CMS makes initial determinations with respect to "[t]he finding of substandard quality of care that *leads to the loss* by a SNF or NF of the approval of its nurse aide training program." (emphasis added). The plain language of the regulation makes it clear that a substandard quality of care finding is an initial determination and thus subject to appeal by a facility when it results in a facility's loss of a NATCEP that is currently in existence.

In the case before me, CMS's notice letter of March 26, 2009 informed Petitioner that the deficiency tag at F309 was identified as substandard quality of care. Petitioner was then advised that its NATCEP was subject to withdrawal of approval. CMS Ex. 2 at 3.

1. Whether Petitioner had an NATCEP is unclear.

At the December 14, 2009 pre-hearing conference, Petitioner advised me that it had been approved to operate a NATCEP but had not yet started the program at the time of the March 20 survey. *See* Order of December 30, 2009. However, it is not clear from the record before me if Petitioner had started a NATCEP program, or if Petitioner was approved and had only sought applications for prospective trainees in a yet-to-be-instituted NATCEP. The distinction is important since the preamble to the regulation adopting section 498.3(b)(16) clearly states that review is not available to a facility that is neither operating a nurse aide training program nor seeking approval to operate one. *See generally* 64 Fed. Reg. 39,934; *see, e.g., Briarcliff Nursing & Rehab. Ctr.*, DAB CR1228 (2004); *St. Charles Health Care*, DAB CR1182 (2004).

For purposes of my decision, I shall draw all reasonable inferences in a light most favorable to Petitioner, the nonmoving party in the case before me, and accept as true the alleged fact that Petitioner had a NATCEP in operation that met the requirements of the drafter's intent at the time material to this case.

2. The State agency is mandated to withdraw Petitioner's NATCEP approval as a result of imposition of the DPNA.

Both the statute and the regulation are clear as to the prohibition of approval for facilities who have been subjected to a DPNA. With the establishment of the DPNA as discussed above, the statute at section 1819(f)(2)(B)(iii)(I)(c) makes clear that the Secretary "shall prohibit approval of such a [NATCEP] program . . . (1) offered by or in a skilled nursing facility which, within the previous 2 years . . . (b) has been subject to an extended survey (or partial extended survey) under subsection (g)(2)(B)(i) . . . ." Moreover, pursuant to 42 C.F.R. §§ 483.151(b)(2)(v) and (e)(1), a state may not approve and **must** withdraw any prior approval of a NATCEP offered by a facility that has been subject to a DPNA.

Therefore, even if Petitioner had an operating NATCEP, the mandatory DPNA imposed by CMS for the non-appealed five non-immediate jeopardy tags which are administratively final automatically results in the state-mandate to withdraw Petitioner's NATCEP approval. Act § 1819(f)(2)(B)(iii)(I)(c); 42 C.F.R. §§ 483.151(b)(2)(v), (e)(1). It is important to note that the imposition of the DPNA triggered the mandatory, non-discretionary obligation of the Secretary to deny approval of Petitioner's NATCEP program. No ruling that I could make in this case that is within my jurisdiction could otherwise change the operation of the Secretary's mandatory obligation.

D. CMS's "Five Star" quality rating of Petitioner's facility is neither an enforcement remedy nor an initial determination subject to my review.

Petitioner claims it is entitled to challenge the immediate jeopardy deficiencies identified during the March 20 survey because those deficiencies resulted in CMS imposing an "alternative remedy" of a negative "Five Star" rating of its facility. Petitioner avers that this rating will severely prejudice Petitioner in its ability to market, admit, and retain residents; and will result in an adverse impact on the facility's reputation, financial and operational status. Petitioner argues that in adopting the "Five Star" program, CMS made it clear that facilities whose rating is adversely affected will have a full and fair opportunity to challenge those survey findings in order to secure a more favorable rating. P. Brief at 5; Request for Hearing at 2.

Petitioner is mistaken in its claim that CMS's "Five Star" quality rating program is an "alternative remedy." The regulations are very specific as to what constitutes an "alternative remedy" and CMS's "Five Star" quality rating program is not included in that list. The word "remedy" is defined in 42 C.F.R. § 488.406. An action take by CMS is a "remedy" if the action is one which falls within the definition of a remedy. Remedies are defined to include: termination of participation; appointment of temporary management; denial of payment; denial of payment for new admissions; imposition of a civil money penalty; imposition of State monitoring of performance; directed transfer of

residents; directed closure of a facility and transfer of the facility's residents; imposition of a directed plan of correction; directed in-service training; and alternative or additional State remedies that are approved by CMS. 42 C.F.R. § 488.406(a). If an action taken by CMS is not one of these remedies, then there is no right to a hearing from the action. Consequently, the "Five Star" quality rating program is neither a remedy imposed by state government agencies, nor it is a remedy imposed by CMS on facilities. *See* 42 C.F.R. § 488.406 (b)-(c).

Petitioner's reliance on 42 C.F.R. § 431.153(h) to support its argument that the "Five Star" rating is subject to my review is also misplaced. As mentioned earlier, Petitioner is a "dually participating facility" and the statutory and regulatory requirements for Petitioner's participation are found at sections 1819 and 1919 of the Act and at 42 C.F.R. Part 483, and enforcement and hearing rights are found at 42 C.F.R. §§ 488 and 498. The regulation Petitioner cites to grants ALJs and appellate panels of the Board jurisdiction to review cases where CMS has either terminated the provider agreement or has imposed an alternative remedy against a NF who participates in the Medicaid program and, is therefore, inapplicable to the case before me. Here, based on Petitioner's participation in the Medicare program, CMS has determined to directly impose remedies against Petitioner.

Petitioner's right to review and my authority to conduct the review are delineated at 42 C.F.R. Part 498. My jurisdiction is limited to review of "initial determinations" listed at 42 C.F.R. § 498.3(b). CMS's "Five Star" quality rating program is used by CMS to provide public awareness of the survey results of facilities. *See* CMS Motion at 7; P. Ex. 1 at 3; P. Ex. 2, at 2. As such, CMS's "Five Star" quality rating system is not listed as an initial determination in 42 C.F.R. § 498.3(b). Consequently, the rating system is not an initial determination over which I have jurisdiction and authority to review, and which Petitioner has a right to a hearing before me.

Finally, Petitioner claims that it has been subjected to harm to its "reputation, financial status, and operational abilities" and based on this harm and the 8th circuit's decision in *Grace Healthcare of Benton*, I should exercise jurisdictional authority over Petitioner's appeal. *Grace Healthcare of Benton v. U.S. Dep't of Health & Human Servs.*, 589 F.3d 926 (8th Cir. 2009), amended at 603 F.3d 412 (2009). The Court in *Grace* commented that if Grace's assertion that "unreviewed CMS findings of immediate jeopardy remain accessible to the public and can be used to support damage claims against the provider in private litigation" are true, then "that is a material adverse impact, in which case all findings of immediate jeopardy that are appealed should *either* be upheld or reversed by the ALJ or the DAB or be expunged from the agency's public records." 589 F.3d at 935 (emphasis added).

I first note that appellate panels of the Board have consistently held that such claims as the one Petitioner here advances do not invoke hearing rights when the regulations are

clear that a petitioner is not entitled to a hearing. *See Florida Health Sciences Ctr., Inc. d/b/a Tampa General Hosp.*, DAB No. 2263 (2009); *Lakewood Plaza Nursing Ctr.*, DAB No. 1767, at 8-10 (2001).

Second, the Board has addressed the recent 8th Circuit Court of Appeals' dicta in *Grace*. In a Ruling issued on February 22, 2010, the Board declined a request to reopened and reconsider its decision in *Golden Living Center - Frankfort*, DAB No. 2296 (2009). Petitioner in *Golden Living* requested the reopening based, in part, on the 8th Circuit Court of Appeals' dicta in its decision in *Grace*. However, in addressing Petitioner's request and reliance on the dicta in the Court's decision, the Board stated that "the *Grace* dicta . . . does not mandate that the ALJ or the Board must resolve noncompliance findings that are not material to the outcome of an appeal before it. Nor does it opine that either the ALJ or the Board, as opposed to CMS or the Secretary, is empowered to order expungement of CMS's public records or to . . . order removal of such findings 'from the administrative record for all purposes. '" *See Golden Living Ctr. - Frankfort*, DAB No. 2296 (2009), *reopening denied*, DAB Ruling No. 2010-2 (Feb. 22, 2010).

In applying the Board's analysis in *Golden Living Center - Frankfort*, as confirmed by the Board's February 22, 2010 Ruling in that case, I find no reason to provide Petitioner with a hearing to address the five appealed immediate jeopardy deficiencies as these deficiency citations are not material to the outcome of this appeal. As has been established, the deficiencies which Petitioner did not appeal suffice to support the remedies CMS has imposed. *See Golden Living Ctr. - Frankfort*, DAB Ruling No. 2010-2, at 3; *Western Care Management Corp. d/b/a/ Rehab Specialties*, DAB No. 1921, at 19 (2004).

I find that the five non-appealed and administratively final deficiencies from the March 20 survey are sufficient to support the DPNA and the resulting withdrawal of Petitioner's NATCEP. Accordingly, I conclude that Petitioner has no right to a hearing, and its request for hearing must be dismissed pursuant to 42 C.F.R. § 498.70(b).

VI. Conclusion

For the reasons stated and discussed in this decision, Petitioner has no right to a hearing and its request for hearing must be dismissed. 42 C.F.R. §§ 498.3; 498.5. Accordingly, I grant CMS's Motion for Summary Judgment and I dismiss Petitioner's request for hearing.

/s/
Alfonso Montaño
Administrative Law Judge