

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dynamic Visions Home Health Services
(CCN: 22-7502),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-727

Decision No. CR2414

Date: August 12, 2011

DECISION

Petitioner, Dynamic Visions Home Health Services, is a home health agency (HHA) located in Boston, Massachusetts, that, until termination of its provider agreement on May 21, 2010, participated in the Medicare program. Following a survey completed April 13, 2010, the Centers for Medicare and Medicaid Services (CMS) terminated the HHA's program participation because Petitioner failed to maintain substantial compliance with Medicare conditions of participation and did not correct its deficiencies by the time of a May 6, 2010 revisit.

Petitioner here does not challenge its termination but complains that CMS has withheld reimbursement for nursing and other services provided prior to its termination.

CMS has moved to dismiss Petitioner's hearing request, arguing that reimbursement issues are not reviewable in this forum. I agree and dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 498.70(b).

Petitioner's appeal must be dismissed because it raises no issues reviewable in this forum.¹

An HHA is a public agency or private organization that “is primarily engaged in providing skilled nursing services and other therapeutic services” to patients in their homes. Social Security Act (Act) § 1861(o). It may participate in the Medicare program as a provider of services, if it meets that statutory definition and complies with certain requirements called conditions of participation. Act §§ 1861(o), 1891; 42 C.F.R. §§ 484, 488.3. But if the provider fails to comply with the provisions of section 1861 of the Act, or the relevant regulations, CMS, acting on behalf of the Secretary of Health and Human Services, may terminate its provider agreement. Act § 1866(b)(2); 42 C.F.R. § 489.53(a)(1).

A “condition of participation” represents a broad category of home health services. Each condition is contained in a single regulation, which is divided into subparts called standards. 42 C.F.R. § 484. Compliance with a condition of participation is determined by the manner and degree to which the provider satisfies the standards within the condition. 42 C.F.R. § 488.26(b). If deficiencies are of such character as to “substantially limit the provider’s . . . capacity to furnish adequate care or which adversely affect the health and safety of patients,” the provider is not in compliance with conditions of participation. 42 C.F.R. § 488.24(b). CMS may terminate program participation, if the HHA fails to meet even one condition of participation. Act §§ 1866(b)(2)(B), 1861(o)(6); 42 C.F.R. § 489.53(a)(3); *Cnty. Home Health*, DAB No. 2134 at 4 (2007).

To monitor compliance, CMS contracts with state agencies that periodically survey the HHAs. 42 C.F.R. § 488.10.

Here, the Massachusetts Department of Public Health (State Agency) completed Petitioner’s recertification survey on April 13, 2010. CMS Exhibit (Ex.) 1. Based on the survey findings, CMS determined that Petitioner was not in substantial compliance with three conditions of participation and that its deficiencies posed immediate jeopardy to resident health and safety. CMS Ex. 3. CMS thereafter authorized a follow-up survey, which the State Agency completed on May 6, 2010. CMS Ex. 2. Based on those survey findings, CMS determined that Petitioner remained out of substantial compliance and had not corrected the immediate jeopardy. CMS Ex. 4.

In notice letters dated April 22, 2010 and May 14, 2010, CMS advised Petitioner of these determinations and the HHA’s appeal rights. The April letter told Petitioner that its appeal should “identify the specific issues and finding of fact and conclusions of law with

¹ I make this one finding of fact/conclusion of law.

which you disagree” and “should also specify the basis for contending that the findings and conclusions are incorrect.” CMS Ex. 3.

Petitioner filed what it characterized as a “letter of appeal [and] allegation of removal of immediate jeopardy.” However, the letter did not specifically ask for a hearing or other review; rather, Petitioner sought more time in which to achieve compliance. We, nevertheless, have treated the document as a hearing request.

In an order dated July 27, 2010, I directed the parties to file pre-hearing exchanges, which would include proposed exhibits, declarations of proposed witnesses, and pre-hearing briefs. My order specified that a pre-hearing brief “must contain any argument that a party intends to make,” and warned that I “may exclude an argument and evidence that relates to such argument if a party fails to address it in its pre-hearing brief.” Acknowledgment and Initial Pre-Hearing Order at 4, ¶ 7) (July 27, 2010).

In its pre-hearing brief, Petitioner did not challenge its termination; it did not claim that it complied substantially with program requirements. Instead, Petitioner complained that it had not been reimbursed properly by the Medicare program:

Here, all that Dynamic Visions is asking for is the proper and reasonable remuneration of the nurse and nurse’s aide and home health workers[’] pay for the TIME periods when Dynamic Visions was properly licensed, yet which have not been paid to Dynamic Visions as they should be.

P. Br. at 2.

I held a pre-hearing conference on March 22, 2011, during which Petitioner confirmed that its appeal is limited to challenging CMS’s alleged failure to reimburse it for services provided prior to its termination. *See* Order Following Prehearing Conference (Mar. 23, 2011).

CMS now moves to dismiss Petitioner’s hearing request, arguing that Petitioner has no right to a hearing in this forum on this issue.

The limits of my jurisdiction are set forth in regulations that govern these proceedings: 42 C.F.R. Part 498. The regulations limit my review to actions that are “initial determinations.” 42 C.F.R. § 498.3(a). The regulations specify which actions are “initial determinations,” and that list includes the termination of a provider agreement (which Petitioner has not appealed). 42 C.F.R. § 498.3(b); *see* 42 C.F.R. § 489.53(e). Reimbursement complaints, however, are not initial determinations and therefore not reviewable under Part 498.

Because Petitioner has no right to a hearing on the issues it raises, I am authorized to dismiss its hearing request. 42 C.F.R. § 498.70(b).

Petitioner's response to CMS's motion to dismiss lacks coherence, so I am not able to determine the precise nature of Petitioner's complaints. However, in support of its claims for reimbursement, it appears to raise some additional issues: the state survey was defective; and the HHA was given inadequate time to correct its deficiencies. Even if Petitioner had properly preserved these issues (which it did not), it would not be entitled to a hearing.

First, the Departmental Appeals Board has repeatedly rejected, as irrelevant, attacks on survey performance. *Comprehensive Prof'l Home Visits*, DAB No. 1934 at 13 (2004); *Beechwood Sanitarium*, DAB No. 1906 at 44 (2004) (holding that "the appeals process is not intended to review the conduct of the survey, but rather to evaluate the evidence of compliance regardless of the procedures by which the evidence was collected").

Second, with respect to the allegedly inadequate opportunity to correct, Petitioner was not entitled to such an opportunity. Indeed, where, as here, the HHA's deficiencies pose immediate jeopardy to patient health and safety, CMS, acting on behalf of the Secretary of Health and Human Services, must "take immediate action" to remove the immediate jeopardy or to terminate an HHA's provider agreement. Act § 1891(e)(1). CMS may not allow a deficient provider the opportunity to correct where, as here, the deficiencies are condition level, jeopardize patient health and safety, or "are of such character as to seriously limit the provider's capacity to render adequate care." 42 C.F.R. § 488.28.

Petitioner has not raised an issue that I am empowered to review. Therefore, as authorized by 42 C.F.R. § 498.70(b), I dismiss its request for hearing.

/s/

Carolyn Cozad Hughes
Administrative Law Judge