Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Orange Tree Nursing Center,
(CCN: 55-5017),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-869

ALJ Ruling No. C-13-16

Date: July 16, 2013

DISMISSAL

For the reasons set forth below, I conclude that Petitioner, Orange Tree Nursing Center, is not entitled to Administrative Law Judge (ALJ) review of a determination made by the Centers for Medicare & Medicaid Services (CMS) following a March 20, 2013 survey. I therefore dismiss its hearing request pursuant to 42 C.F.R. § 498.70(b).

Discussion

Petitioner is a skilled nursing facility located in Riverside, California that participates in the Medicare program as a provider of services. On January 24, 2013, the California Department of Public Health (State Agency) completed a survey of the facility and found that it was not in substantial compliance with federal requirements. CMS agrees and has imposed a $1500 per instance CMP. The facility timely appealed, and that appeal is pending. Docket No. C-13-613.

In a follow-up survey, completed March 20, 2013, the State Agency determined that the facility's noncompliance continued. CMS agreed that the facility was not in substantial compliance but has imposed no additional penalties. Petitioner appealed and CMS now moves to dismiss Petitioner's hearing request. Petitioner opposes.

Petitioner agrees that the "sole issue in dispute" is the issue presented in the earlier appeal (C-13-613): "a single deficiency cited following a January 24, 2013 survey, and a 'per instance' civil money penalty CMS imposed for that deficiency." P. Response to CMS Motion at 1. Petitioner nonetheless opposes dismissal because, at the time it requested review of the January 20 survey, CMS had not yet established the $1,500 per instance CMP. Although Petitioner complains about a "convoluted" background to the two cases, I see nothing particularly unusual or confusing about CMS's or the state's actions. In situations where the penalty has not been decided when an appeal is filed (which is not uncommon), any challenge to the ultimate amount of the penalty can be (as it usually is) added to the original appeal.

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 an 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(a). The regulations specify which actions are "initial determinations" and set 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 administrative law judge hearing. 42 C.F.R. § 498.3(b)(13). But a facility has no right to a hearing unless CMS imposes one of the specified remedies. *Lutheran Home - Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc*., DAB No. 1607 (1997). The remedy, not the citation of a deficiency, triggers the right to a hearing. *Schowalter Villa*; *Arcadia Acres, Inc.* Where CMS withdraws the remedies or otherwise declines to impose one, a provider has no hearing right. *See, Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005).

Because CMS imposed no remedies based on the March 20 survey, Petitioner has no right to an ALJ hearing, and this matter must be dismissed. 42 C.F.R. § 498.70(b). I therefore grant CMS's motion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge