Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Douglas Care Center,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-693

ALJ Ruling No. 2013-22

Date: September 11, 2013

ORDER OF DISMISSAL

The Centers for Medicare & Medicaid Services (CMS) determined that Petitioner, Douglas Care Center (CCN: 535040), provided substandard quality of care and imposed a remedy on Petitioner. Shortly thereafter, Petitioner achieved substantial compliance with Medicare participation requirements and CMS rescinded the remedy imposed on Petitioner. However, based on the substandard quality of care finding, Petitioner is statutorily precluded from obtaining approval for a facility-based nurse aid training and competency evaluations program (NATCEP) or a nurse aide competency evaluations program (NACEP). Petitioner filed a request for hearing (RFH) before an administrative law judge. However, because CMS rescinded the remedy it imposed on Petitioner and Petitioner did not suffer the loss of an existing approved NATCEP or NACEP, Petitioner does not have a right to a hearing. Therefore, I dismiss Respondent's RFH.

I. Procedural History and Background

Petitioner is a skilled nursing facility (SNF) participating in the Medicare program. In a February 20, 2013 letter, CMS informed Petitioner of its initial determination to impose a remedy on Petitioner based on a finding of substandard quality of care. Specifically, CMS stated that the Wyoming Department of Health (WDOH) conducted a survey of

Petitioner on January 18, 2013, and found that Petitioner had deficiencies that included immediate jeopardy and substandard quality of care. The letter indicated that the immediate jeopardy situation was removed by February 17, 2013. However, CMS decided to impose the remedy of the Denial of Payment for New Admissions (DPNA). Further, if Petitioner did not achieve substantial compliance by July 18, 2013, CMS would terminate Petitioner's Medicare provider agreement. Finally, CMS advised Petitioner that the Social Security Act required the denial or withdrawal of approval of facility-based NATCEP/NACEP for Petitioner. CMS Exhibit (Ex.) 1.

In a March 27, 2013 letter, CMS advised Petitioner that WDOH conducted a follow-up survey and verified that Petitioner achieved substantial compliance with Medicare program requirements by February 25, 2013. Therefore, CMS rescinded the remedy imposed on Petitioner and stated that CMS would not take any action to terminate Petitioner's Medicare provider agreement. CMS Ex. 2.

On April 18, 2013, Petitioner, through counsel, filed an RFH with the Departmental Appeals Board, Civil Remedies Division (CRD), disputing CMS's February 20, 2013 determination that Petitioner had not been in substantial compliance. The CRD Director assigned this case to me and on May 6, 2013, I issued an Acknowledgment and Initial Pre-hearing Order in which I established a schedule for the submission of pre-hearing exchanges. On June 6, 2013, CMS filed motions to stay the pre-hearing submission schedule and for dismissal of the RFH. CMS also filed a brief (CMS Br.) and eight exhibits (CMS Exs. 1-8). CMS included Attachments A and B with CMS Ex. 7. Petitioner filed a timely response to the motions (P. Br.) along with one exhibit (P. Ex. 1), which included an attachment marked as Ex. A. CMS filed a reply brief (CMS Reply Br.) along with two exhibits (CMS Exs. 9, 10). I accepted CMS's reply brief and afforded Petitioner the opportunity to file a surreply. I also stayed the pre-hearing submission schedule pending a ruling on CMS's motion to dismiss. Petitioner timely filed a surreply (P. Surreply Br.) along with two exhibits (P. Exs. 2, 3). Petitioner included four attachments to P. Ex. 2 marked as Exs. B-E, and one attachment to P. Ex. 3 marked as Ex. F.

The motion to dismiss is now ripe to adjudicate. In the absence of objection, I enter all of the parties' proposed exhibits into the record.

II. Issue

Whether Petitioner has a right to a hearing before an administrative law judge when Petitioner is prohibited from obtaining approval for a facility-based NATCEP/NACEP due to CMS's finding that Petitioner provided substandard quality of care.

III. Discussion[1]

Before adjudicating this case, I must determine whether I have jurisdiction to review CMS's determination that Petitioner provided substandard quality of care. Generally, an administrative law judge has "no more jurisdiction or authority to hear and decide a case than the Secretary [of Health and Human Services] has under [her] enabling statutes and my jurisdiction is further subject to limits imposed by the Secretary's regulations and the delegations of authority specified therein." *Marion Citrus Mental Health Ctr.*, DAB CR864 (2002). This means "there is no general right to appeal CMS's administrative actions." *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316, at 6 (2010). Therefore, a party that files a RFH must have a right to a hearing or the administrative law judge may dismiss the request for hearing. 42 C.F.R. § 498.70(b).

In order for Petitioner to have a right to a hearing before an administrative law judge, CMS must have "made an adverse 'initial determination' of a kind specified in 42 C.F.R. § 498.3(b)."[2] *Columbus Park*, DAB No. 2316, at 6; *see also* 42 C.F.R. § 498.3(a)(1). Petitioner contends that it has a right to a hearing because it can no longer operate its NATCEP/NACEP program after the substandard quality of care finding. *See* 42 C.F.R. § 498.3(b)(14)(ii), (16). CMS denies that Petitioner had an approved NATCEP/NACEP. Therefore, the parties' primary dispute is whether CMS's substandard quality of care finding resulted in the loss of a state approved facility-based NATCEP/NACEP or simply

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[1] My findings of fact and conclusions of law are set forth in italics and bold font.

[2] Although CMS initially imposed the remedy of DPNA on Petitioner and warned that CMS would terminate Petitioner's provider agreement if Petitioner did not achieve substantial compliance with program participation requirements, CMS later rescinded the DPNA and stated it would not terminate the provider agreement. CMS Exs. 1; 2. When CMS makes a finding that a SNF is noncompliant and CMS imposes a remedy under 42 C.F.R. § 488.406, the SNF has received an initial determination that is subject to further review. 42 C.F.R. § 498.3(b)(13); *see also* 42 C.F.R. §§ 488.330(e)(3), 488.408(g)(1), 498.3(a)(3)(ii). Further, if CMS terminates a provider agreement with a SNF based on a failure to meet program requirements, the SNF has also received an initial determination that is subject to further review. 42 C.F.R. § 498.3(b)(8); *see also* 42 C.F.R. §§ 489.53(a)(3), (e); 498.5(b). Consistent with this, a SNF "has no right to an [administrative law judge] hearing to contest survey deficiency findings where CMS has not imposed any of the remedies specified in section 488.406 based on those findings, or where CMS imposed, but subsequently rescinded such remedies." *Columbus Park*, DAB No. 2316, at 7. In the present matter, CMS rescinded the remedy it imposed and never terminated the provider agreement. Therefore, Petitioner does not have hearing rights based on the remedy originally imposed by CMS.

prohibited Petitioner from obtaining state approval of a new NATCEP/NACEP. If the answer is the former, then Petitioner would have a right to a hearing. If the latter, Petitioner has no such right.

A. Petitioner did not have a NATCEP or NACEP approved by WDOH on or after January 18, 2013.

In an August 7, 2007 letter, CMS informed Petitioner that the results of a WDOH survey of Petitioner revealed that Petitioner was not in substantial compliance with Medicare program participation requirements. CMS Ex. 3. CMS informed Petitioner that it was imposing the remedy of a DPNA effective August 22, 2007, and termination of Petitioner's Medicare provider agreement if substantial compliance was not achieved by January 2008. CMS Ex. 3, at 1-2. CMS also informed Petitioner that due to the extended/partial extended survey, effective July 19, 2007, Petitioner's facility-based NATCEP/NACEP was subject to denial or withdrawal of approval. CMS Ex. 3, at 2. WDOH withdrew approval of Petitioner's facility-based NATCEP/NACEP. CMS Ex. 7, at 2. Ultimately, Petitioner became eligible to seek approval of a facility-based NATCEP/NACEP on July 23, 2011. CMS Exs. 6, at 3; 7, at 2.

In 2009, Joyce L. Stapleton, RN, owner of Stapleton Consultants, received state approval from WDOH to provide NATCEPs/NACEPs for SNFs. CMS Ex. 9. In the October 29, 2009 application, Ms. Stapleton indicated that her first class will be taught at Petitioner's facility. CMS Ex. 9, at 9. However, Ms. Stapleton was an independent contractor (P. Ex. 2, at 2) who did not exclusively teach classes at Petitioner's facility. *See* CMS Ex. 10. Ms. Stapleton appears to have taught "several classes" at Petitioner's facility from 2010 through 2012. P. Ex. 2, Exs. B, C, D.

In 2012, Ms. Stapleton retired and stopped serving as a contracted instructor. The documents in the record are not consistent as to exactly when Ms. Stapleton completed her last class with Petitioner. However, a report of a telephone contact between Ms. Stapleton and a WDOH employee indicates that Ms. Stapleton stated the programs she taught at "Douglas" "were terminated in February 2012." CMS Ex. 10. Based on Petitioner's submission, it appears that Ms. Stapleton's last class at Petitioner's facility was in March 2012. P. Ex. 2, at 2; P. Ex. 2, Ex. D. A letter dated July 10, 2013, that purports to be from Ms. Stapleton does not state when she stopped teaching classes at Petitioner's facility. P. Ex. 2, Ex. B. However, a declaration of one of Petitioner's counsel's employees states that Ms. Stapleton told the employee that "the last time she taught a class at [Petitioner's facility] was sometime in 2012, but she could not remember the exact date." P. Ex. 3, at 2. In any event, by July 9, 2012, Petitioner indicated on a Long Term Care Facility Application for Medicare and Medicaid (Form CMS-671) that

Petitioner did not currently have an approved NATCEP/NACEP. CMS Ex. 7, Attachment A, at 1.

In declarations submitted in this case, Petitioner's Administrator asserts that it was not until late 2012 that Ms. Stapleton informed them that she was planning on retiring. P. Ex. 1, at 2. Although the Administrator acknowledges that Ms. Stapleton was a contractor, she avers that the NATCEP/NACEP program was Petitioner's facility-based program and not Ms. Stapleton's program. She also stated that before the end of 2012, Petitioner decided to have one of Petitioner's employees replace Ms. Stapleton as the new instructor for Petitioner's NATCEP/NACEP. P. Ex. 1, at 2. Finally, Petitioner's Administrator asserted that by January 2013, Petitioner had begun preparing an application to have a NATCEP/NACEP "re-approved"; however, because of the WDOH survey performed in January 2013, Petitioner "held off on submitting [Petitioner's] completed application to have our program re-approved with a different instructor." P. Ex. 1, at 2-3. Ultimately, Petitioner filed its application with WDOH for the approval of a facility-based NATCEP/NACEP on or about May 29, 2013.

Despite Petitioner's Administrator's perception that the NATCEP/NACEP provided by Stapleton Consulting was actually Petitioner's program, it is clear that the records of WDOH, the entity tasked with approving NATCEPs/NACEPs, show that Petitioner: has not had an approved NATCEP/NACEP since approval was withdrawn from its program on July 19, 2007; did not have an approved NATCEP/NACEP on the day of the survey on January 18, 2013; is not listed on the list of state approved programs as of February 26, 2013; and does not currently have an approved NATCEP/NACEP. CMS Ex. 7, at 1-2; CMS Ex. 7, Attachment B. The WDOH's records are consistent with the fact that Petitioner began hiring Stapleton Consulting in 2009 or 2010 while Petitioner was still unable to obtain approval for a facility-based NATCEP/NACEP. *See* CMS Ex. 4, at 2; 6, at 3. Petitioner provides no evidence to contravene WDOH records that show Petitioner did not have an approved NATCEP/NACEP since 2007. Petitioner also provides no evidence to show how Stapleton Consultants' NATCEP/NACEP was transformed to Petitioner's NATCEP/NACEP after the statutory preclusion from having a facility-based NATCEP/NACEP ended in 2011. Finally, it is clear from the Form CMS-671 that Petitioner signed on July 9, 2012, that Petitioner did not believe it had a facility-based NATCEP/NACEP on that date. CMS Ex. 7, Attachment A, at 1.

Therefore, I find that the record as a whole substantiates that Petitioner last had a WDOH approved facility-based NATCEP/NACEP in 2007, and that on and after January 18, 2013, Petitioner did not have a WDOH approved facility-based NATCEP/NACEP.

B. An SNF that does not have an approved facility-based NATCEP or NACEP at the time CMS determines it has provided substandard quality of care does not gain hearing rights even though such a finding precludes the SNF from later obtaining approval to conduct facility-based NATCEPs or NACEPs.

In its motion to dismiss, CMS argues that Petitioner does not have a right to a hearing before an administrative law judge because hearing rights only attach when CMS imposes a remedy on a SNF. CMS Br. at 4. CMS asserts that it withdrew the DPNA and did not terminate Petitioner's provider agreement. CMS Br. at 2, 4. Although CMS concedes that CMS's finding that Petitioner provided substandard quality of care means that Petitioner's "loss of approval of NATCEP/CEP . . . remained," CMS argues Petitioner did not operate either program. CMS Br. 5. CMS's position is that Petitioner only has appeal rights if it had a pre-existing approved NATCEP or NACEP and the finding of substandard quality of care led to the withdrawal of approval of that program. CMS Br. at 5. However, CMS argues, merely losing the right to seek approval of a new NATCEP or NACEP does not confer appeal rights on Petitioner. CMS Br. at 5-6.

Petitioner argues that it had an approved NATCEP/NACEP and that Ms. Stapleton, as a contract employee, taught it. P. Br. at 5. Petitioner asserts that it meets "the required harm element and thus is entitled to a hearing" because CMS's determination of substandard quality of care stopped Petitioner from being able to conduct its NATCEP/NACEP. P. Br. at 5; P. Surreply Br. at 5-6. Petitioner also argues that an administrative law judge has discretion not to dismiss a request for a hearing and urges me to use this authority so that Petitioner may dispute CMS's findings. P. Br. at 6.

SNFs may not employ individuals as nurse aides unless they have completed a state approved NATCEP or NACEP, and SNFs "must provide such regular performance review and regular in-service education as assures that individuals used as nurse aides are competent to perform services as nurse aides. . . ." 42 U.S.C. § 1395i-3(b)(5)(A), (E). Congress made each state responsible for approving NATCEPs and NACEPs. *Id*. § 1395i-3(e)(1). States may approve NATCEPs and NACEPs offered by SNFs. *Id*. § 1395i-3(f)(2)(B). However, the state must prohibit or withdraw approval of an NATCEP and NACEP offered by or in a SNF if the SNF is subject to extended surveys. *Id*. § 1395i-3(f)(2)(B)(iii); 42 C.F.R. § 483.151(b)(2)(iii), (f)(1). A SNF is subject to extended surveys if it has been found to have provided substandard quality of care. 42 U.S.C. § 1395i-3(g)(2)(B). If a finding of substandard quality of care results in or leads to "the loss of approval for the SNF . . . of its nurse aide training program," then the SNF is subject to an initial determination that is reviewable. 42 C.F.R. § 498.3(b)(14)(ii), (16). If a finding of substandard care merely prohibits a SNF from obtaining approval for a NATCEP or NACEP that was not already approved when CMS found the SNF to have provided substandard care, then there is no initial determination that is subject to further

review. *St. Charles Health Care*, DAB CR1182 (2004) ("The plain language of the regulations makes it clear that a substandard quality of care finding is appealable when it results in a facility's loss of a NATCEP/CEP currently in existence"); *see also Benefits Extended Care Ctr*., DAB CR2589, at 5 (2012) ("[I]t 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."); *Briarcliff Nursing & Rehab. Ctr.*, DAB CR1228 (2004); 64 Fed. Reg. 39,934, 39,935 (July 23, 1999) (explaining that appeal rights were given to SNFs that lose their NATCEP/NACEP because of the hardship this causes on the SNF and that the NATCEP/NACEP still must cease to operate its NATCEP pending an appeal; however, no mention is made of granting appeal rights to SNFs that did not operate a NATCEP/NACEP at the time of the substandard quality of care finding).

As I found above, in the present case, Petitioner did not have a WDOH approved NATCEP/NACEP at the time WDOH conducted its January 18, 2013 survey. The survey resulted in a finding of substandard quality of care and CMS informed Petitioner that effective January 18, 2013, it was subject to denial or withdrawal of approval of any facility-based NATCEP/NACEP for a two-year period. CMS Ex. 1, at 2. Therefore, I conclude that under the regulations, Petitioner's preclusion from obtaining approval for a new NATCEP/NACEP is not an initial determination that creates appeal rights. Therefore, Petitioner has no right to a hearing before an administrative law judge.

Finally, Petitioner requests that I deny CMS's motion to dismiss because 42 C.F.R. § 498.70(b) does not require me to dismiss Petitioner's RFH. Although the dismissal regulation states that I "may" dismiss a RFH when the party who filed it has no right to a hearing, it would be an abuse of discretion for me to adjudicate a matter over which I do not have jurisdiction.

IV. Conclusion

Because Petitioner does not have a right to a hearing, CMS's motion to dismiss is GRANTED and Petitioner's RFH is DISMISSED. 42 C.F.R. § 498.70(b).

Within 60 days of receiving of this Order, either party may request that I vacate this Order. 42 C.F.R. § 498.72.

It is so ordered.

/s/
Scott Anderson
Administrative Law Judge