Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Monterey Care Inc., d/b/a Scottsdale Nursing & Rehabilitation

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-130

Ruling No. 2015-11

Date: March 18, 2015

ORDER OF DISMISSAL

This matter is before me on a motion to dismiss that the Centers for Medicare & Medicaid Services (CMS) filed on December 29, 2014. Petitioner opposes the motion. I conclude that Petitioner is not entitled to a hearing because CMS has not imposed any enforcement remedies, and I must dismiss Petitioner's hearing request.

I. Procedural History and Background

Petitioner is a skilled nursing facility, located in Scottsdale, Arizona, that participates in the Medicare program. On May 9, 2014, the Arizona Department of Health Services, Division of Licensing Services, Bureau of Long Term Care Licensing (state agency) completed a recertification survey of the facility and found that it was not in substantial compliance with federal program participation requirements. Specifically, the state agency alleged that four deficiencies were found, all at the scope and severity level of "G." In a notice letter dated June 5, 2014, the state agency informed Petitioner that, as authorized by CMS, it would impose a denial of payment for new admissions (DPNA) effective August 9, 2014, unless Petitioner submitted an acceptable plan of correction and demonstrated substantial compliance at a subsequent revisit survey. The state agency

also stated that it would recommend that CMS impose a civil money penalty (CMP) of $700 per day, effective May 9, 2014, if substantial compliance was not achieved. CMS Exhibit (Ex.) 1. Further, the state agency informed Petitioner that CMS would terminate its provider agreement if it did not achieve substantial compliance by November 9, 2014. The notice letter also notified Petitioner of its right to request a hearing before an administrative law judge (ALJ) within 60 days of receiving the June 5, 2014 letter. CMS Ex. 1. Finally, it advised Petitioner that "[e]ffective July 1, 2007, facilities requesting an Informal Dispute Resolution must submit separate requests, one for State deficiencies cited and one for Federal deficiencies cited, if applicable." CMS Ex. 1, at 4.

On July 21, 2014, the state agency conducted a revisit survey and determined that Petitioner had returned to substantial compliance as of July 21, 2014. CMS Ex. 2. As a result, CMS did not impose the DPNA. Moreover, the state agency made no recommendations to CMS regarding the imposition of a CMP. The state imposed its own CMP against Petitioner in the total amount of $1500 for violations of Arizona regulations. CMS Ex. 3.

On October 15, 2014, Petitioner filed a letter to request a hearing "to dispute four Federal deficiencies" from its most recent survey.[1] According to Petitioner's Administrator, he spoke to representatives from the state agency and CMS, who informed him that he should initiate informal dispute resolution (IDR) with the state and that he would have appeal rights before an ALJ if he did not agree with the IDR results. Petitioner's Administrator acknowledged that "[a]s there were no Federal Remedies recommended with our survey outcomes I did not receive a letter from CMS in regards to our Appeal rights." Petitioner indicated that the state agency had recently notified it by letter dated October 3, 2014, "that the Federal deficiencies [they] had submitted an IDR for back in June would remain the same with only one resident being removed." Request for Hearing.

In addition to requesting IDR for the federal deficiencies, Petitioner also requested a separate IDR proceeding for the State deficiencies cited, for which it received separate IDR results from the stage agency in a letter dated October 3, 2014. I note that the state IDR process is separate from and in addition to appeal rights provided to a facility under federal regulations. An IDR result from the state agency is not a CMS administrative action that may be appealed to an ALJ. *See* 42 C.F.R. §§ 498.3(b)(13), 498.3(d), 498.40(a); *Capitol House Nursing & Rehab Ctr*., DAB No. 2252, at 4-5 (2009); *High Tech Home Health, Inc*., DAB No. 2105, at 7-8 (2007), *aff'd*, *High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

[1] Although CMS did not raise this as an issue, I note that Petitioner's letter requesting a hearing was filed more than 60 days after receipt of the June 5, 2014 letter.

The case was assigned to me for hearing and decision, and I issued an Acknowledgment and Initial Pre-Hearing Order. CMS filed its motion to dismiss Petitioner's request for hearing on grounds that no enforcement remedy was imposed, and therefore, Petitioner had no right to a hearing. CMS submitted five exhibits with its motion, marked as CMS Ex. 1 through CMS Ex. 5. After receiving an extension, Petitioner filed a response opposing CMS's motion (P. Br.). Petitioner submitted two exhibits with its response.

II. Issue

Whether Petitioner has a right to a hearing before an ALJ where CMS has imposed no enforcement remedies against Petitioner.

III. Discussion

CMS has imposed no enforcement remedies in this case; therefore, Petitioner has no right to a hearing before an ALJ.

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 CMS's initial determination is entitled to further review, but administrative actions that do not constitute initial determinations are not subject to appeal. 42 C.F.R. § 498.3(d). 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 (with the exception of state monitoring) is an initial determination for which a facility may request an ALJ hearing. 42 C.F.R. § 498.3(b)(13). Unless the finding of noncompliance results in the actual imposition of a specified remedy, the finding is not an initial determination. 42 C.F.R. § 498.3(d)(10)(ii). Remedies specified at 42 C.F.R. § 488.406 include termination of a provider agreement, a DPNA, CMPs, and directed in-service training.

Here, CMS effectuated no remedies based on the May 9, 2014 survey. Because Petitioner returned to substantial compliance as of July 21, 2014, the imposition of the DPNA never went into effect. Further, CMS did not impose any other enforcement remedy, such as a CMP, based on the May 9, 2014 survey. In fact, Petitioner's Administrator admitted in the October 15, 2014 hearing request that he had not received any correspondence from CMS containing information regarding "Appeal rights" because no "Federal Remedies [had been] recommended with our survey outcomes." In his October 21, 2014 letter, Petitioner's Administrator again conceded that the facility "did not receive enforcement remedies from CMS and I was informed we would not be."

Where, as here, CMS has imposed no remedies, Petitioner does not have a right to a hearing. *See, e.g., San Fernando Post Acute Hosp.*, DAB No. 2492 (2012); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *Lakewood Plaza Nursing Ctr.*, DAB

No. 1767 (2001); *The Lutheran Home-Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). It is the enforcement remedy, not the citation of a deficiency, that triggers the right to a hearing. *San Fernando Post Acute Hosp.*, DAB No. 2492 at 7 (2012) ("Thus, the regulations do not provide a hearing right for a noncompliance finding alone.").

In its response, Petitioner complains that it received disparate treatment from CMS that is arbitrary and capricious and amounts to unequal treatment under the law. According to Petitioner, the State of Arizona, acting under state regulations which mirror the federal regulations, did not find the deficiencies to be very serious, while the federal government, through CMS, acting on the same information by the same state surveyors, treated the deficiencies much more harshly, citing them at a "G" scope and severity level. In addition, Petitioner argues that it will suffer the "loss of property rights and a loss of due process" if it is not allowed to appeal the deficiency and scope and severity rating. P. Br. at 1-3.

Insofar as Petitioner has raised what may be Constitutional claims, I have no authority to review them. The Departmental Appeals Board has concluded that neither the Board nor ALJs can ignore unambiguous statutes or regulations on the basis that they are unconstitutional. *Florida Health Sciences Ctr., Inc.*, DAB No. 2263, at 5-6 (2009).

Because CMS did not impose any enforcement remedies, Petitioner has no right to a hearing. An ALJ may dismiss a hearing request where a party has no right to a hearing. 42 C.F.R. § 498.70(b). I therefore grant CMS's motion to dismiss and order this case dismissed. The parties may request that an order dismissing a case be vacated pursuant to 42 C.F.R. § 498.72.

/s/
Joseph Grow
Administrative Law Judge