

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Regency Rehabilitation Center,  
(CCN: 14-5237),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-313

Decision No. CR4635

Date: June 17, 2016

**DECISION**

The request for hearing of Petitioner, Regency Rehabilitation Center, is dismissed pursuant to 42 C.F.R. § 498.70(b), as Petitioner has no right to a hearing.

**I. Background**

On December 23, 2015, the Illinois Department of Public Health (the state agency) notified Petitioner that a December 16, 2015 survey found that Petitioner was not in substantial compliance with federal participation requirements. The state agency required that a plan of correction be filed within ten days. The state agency advised Petitioner that, if Petitioner did not correct all alleged deficiencies, it would impose or propose to CMS certain enforcement remedies. The state agency also advised Petitioner that a mandatory denial of payments would be triggered if Petitioner did not achieve substantial compliance within three months and Petitioner's participation in Medicare and Medicaid would be terminated if Petitioner did not achieve substantial compliance within six months. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1.

On February 12, 2016, Petitioner filed a request for hearing before an administrative law judge (ALJ) based on the December 23, 2015 state agency notice. The case was assigned to me for hearing and decision and an Acknowledgement and Prehearing Order (Prehearing Order) was issued on February 19, 2016.

CMS notified Petitioner by letter dated February 18, 2016, that the state agency had conducted a revisit survey and found that Petitioner returned to substantial compliance on December 29, 2015. CMS advised Petitioner that no enforcement remedies would be imposed because Petitioner returned to substantial compliance. CMS Ex. 2.

On March 18, 2016, CMS filed a motion to dismiss (CMS Motion) the request for hearing with CMS exhibits 1 through 3 and a motion to stay further proceedings pending my ruling. On March 21, 2016, I ordered a stay pending my ruling on the motion to dismiss. Petitioner responded to the motion to dismiss on April 7, 2016 (P. Opp.) and filed Petitioner exhibits (P. Exs.) 1 through 3. CMS Exs. 1 and 2 reflect the procedural history of this case and are admitted and considered for that purpose. CMS Ex. 3 and P. Exs. 1 through 3 are not admitted as evidence as they are not relevant to the issue of whether or not Petitioner has a right to a hearing, which is the dispositive issue.

## **II. Findings of Fact, Conclusions of Law, and Discussion**

My conclusions of law are set forth in bold followed by my findings of fact and discussion.

**A. No enforcement remedies were imposed in this case and, therefore, Petitioner has no right to a hearing before an ALJ.**

**B. I have no jurisdiction or authority to review alleged deficiencies from a survey absent enforcement remedies based upon those deficiencies.**

**C. Dismissal of Petitioner's request for hearing pursuant to 42 C.F.R. § 498.70(b) is required because Petitioner has no right to a hearing.**

### *1. Pertinent Fact*

Petitioner was subject to a survey by the state agency on December 16, 2015. The survey found Petitioner was not in substantial compliance with program participation requirements. The state agency notified Petitioner of the survey findings on December 23, 2015, and threatened imposition of enforcement remedies if Petitioner did not return to substantial compliance. CMS Ex. 1. CMS notified Petitioner on February 18, 2016, that a revisit survey determined that Petitioner returned to substantial compliance on

December 29, 2015, and that no enforcement remedies would be imposed. CMS Ex. 2. Neither CMS nor the state agency imposed any of the available enforcement remedies listed in 42 C.F.R. § 488.406. Although the state agency requested that Petitioner file a plan of correction, the state agency did not impose a “directed plan of correction” under 42 C.F.R. § 488.406(a)(7) as such a plan is described by 42 C.F.R. § 488.424.

## 2. Analysis

CMS argues in its motion to dismiss that no remedy was imposed; that Petitioner has no right to a hearing; and that dismissal of the request for hearing is required. CMS cites *Columbus Park Nursing & Rehabilitation Center*, DAB CR2037 (2009), *aff'd*, DAB No. 2316 (2010) in support of its position. Petitioner does not deny that no enforcement remedies specifically listed in 42 C.F.R. § 488.406 were imposed. Petitioner argues it should be granted a hearing even though no enforcement remedy was imposed because: (1) the citation of deficiency was based on “the improper conclusion that the facility provided substandard care” and Petitioner has no opportunity to challenge that conclusion; (2) citing the deficiency at a scope and severity level of “G,” which represents actual harm, is effectively an alternative remedy that “amounts to an adverse action and significant interference with a property right” due to the impact upon Petitioner’s rating under the CMS Five-Star Quality Rating System (Five-Star Rating) and the impact of that rating upon future business; (3) citation of a deficiency without granting Petitioner a hearing deprives Petitioner of its Constitutional right of due process and is inconsistent with notions of fundamental fairness; and (4) permitting the state agency or CMS to cite a deficiency without granting Petitioner the opportunity to challenge the citation encourages error and abuse of the survey process. P. Opp.

I conclude that neither the Act nor the regulations grant Petitioner a right to a hearing before an ALJ when no enforcement remedy is imposed. A long-term care facility, such as Petitioner, does not have a right to a hearing to challenge every action by CMS with which it disagrees. Only certain actions by CMS or its delegates, such as the state agency in this case, trigger hearing rights. In general, a participating long-term care facility will have a right to a hearing if CMS makes an initial determination to impose an enforcement remedy against that facility. 42 C.F.R. § 498.3(b)(13). The possible remedies that CMS might impose against a facility are specified at 42 C.F.R. § 488.406(a). No right to a hearing exists pursuant to 42 C.F.R. § 498.3(b)(13), unless CMS determines to impose – and actually imposes – one of the specified remedies. 42 C.F.R. § 488.408(g) (“facility may appeal a certification of noncompliance leading to an enforcement remedy”); *Columbus Park*, DAB No. 2316 at 6; *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *The Lutheran Home – Caledonia*, DAB CR674, *aff'd*, DAB No. 1753 (2000); *Schowalter Villa*, DAB CR568, *aff'd*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB CR424, *aff'd*, DAB No. 1607 (1997); *Twin Pines Nursing & Rehab. Ctr.*, DAB CR1601 (2007). The Secretary of Health and Human Services (Secretary)

specifically rejected a proposal to grant hearing rights for deficiency findings that were made without the imposition of remedies. 59 Fed. Reg. 56,116, 56,158 (Nov. 10, 1994) (“if no remedy is imposed, the provider has suffered no injury calling for an appeal”).

It is the imposition or proposed imposition of an enforcement remedy and not the citation of a deficiency that triggers the right to a hearing under 42 C.F.R. pt. 498. When the enforcement remedy is eliminated, so is Petitioner’s right to review and my authority to conduct the review. *Columbus Park*, DAB No. 2316 at 7; *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985; *Twin Pines Nursing & Rehab. Ctr.*, DAB CR1601; *see EagleCare, Inc. d/b/a/ Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607; *see also The Lutheran Home – Caledonia*, DAB No. 1753; *Walker Methodist Health Ctr.*, DAB CR869 (2002); *Charlesgate Nursing Ctr.*, DAB CR868 (2002); *D.C. Assoc. for Retarded Citizens*, DAB CR776 (2001); *Alpine Inn Care, Inc., d/b/a Ansley Pavilion*, DAB CR728 (2001); *Woodland Care Ctr.*, DAB CR659 (2000); *Fort Tryon Nursing Home*, DAB CR425 (1996). In each of these cases, the failure or inability of the petitioner to demonstrate that the appealed survey findings and deficiency determinations resulted in an enforcement remedy was fatal to its request for hearing. In each of the cases, the appeal was dismissed. Appellate panels of the Departmental Appeals Board (Board) and the ALJs who decided the cases have uniformly concluded that a citation of deficiency that is not the basis for an enforcement remedy, or that results in the imposition of a remedy that is later rescinded or reduced to zero, does not trigger the right to a hearing under 42 C.F.R. pt. 498.

Petitioner raises several arguments, all of which were addressed by the Board in *Columbus Park*, DAB No. 2316 at 10. Petitioner argues that it should be granted the opportunity to challenge the conclusions of the survey as incorrect and against the weight of the evidence. P. Opp. at 2-3. But, Petitioner’s argument, which goes to the merits of the alleged regulatory violation, is not subject to my review because, under the controlling regulation, Petitioner simply has no right to ALJ review of the survey allegations. Petitioner argues that the citation of a violation that allegedly resulted in actual harm to a resident has adverse and significant consequences to the facility. Petitioner argues that such a deficiency citation is easily accessible by the public on the internet without any indication that the violation is subject to dispute; the alleged violation negatively impacts Petitioner’s Five-Star Rating and its reputation, which will likely deter resident admissions and referrals; and the alleged deficiency will likely negatively impact future surveys and any resulting enforcement remedies and may jeopardize Petitioner’s license. P. Opp. at 3-4. The adverse consequences foreseen by Petitioner are speculative. However, even if I accept that the alleged adverse consequences are possible, the regulations nevertheless limit my authority to reviewing those cases where an enforcement remedy authorized by the regulations is actually imposed. None of the adverse consequences foreseen by Petitioner are enforcement remedies listed in the regulations. Petitioner argues that denying it a hearing results in a

violation of its right to due process and undermines principles of fundamental fairness. P. Opp. at 4-7. Petitioner cites cases where the courts have recognized that a party is entitled to a hearing when government action deprives the party of a protected property or liberty interest. However, it is not within my authority to address Petitioner's Constitutional challenges to either the Secretary's regulations or the Social Security Act. Finally, Petitioner argues that depriving it of a hearing facilitates and encourages error and abuse of the survey process. P. Opp. at 7. This argument challenges the policy underlying the Secretary's regulations, and is also not within my authority to review.

I conclude, based upon the Secretary's regulations, that Petitioner has no right to a hearing in this case and I have no jurisdiction to grant the review requested.

### **III. Conclusion**

For the foregoing reasons, Petitioner's request for hearing is dismissed.

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/s/  
Keith W. Sickendick  
Administrative Law Judge