Department of Health and Human Service

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	Date: September 16, 2009
Rancho Mesa Care Center (CCN: 55-5521),	)	
Petitioner,	)	Docket Nos. C-09-73 C-09-348
v.	)	Decision No. CR2006
Centers for Medicare & Medicaid Services.	)	

DECISION

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

I. Background

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated November 3, 2008. Petitioner requests review as to deficiencies cited by the survey of its facility completed on August 7, 2008, by the California Department of Public Health (state agency) and related enforcement remedies, including a denial of payment for new admissions (DPNA), civil money penalties (CMP), and withdrawal of Petitioner's authority to conduct a nurse aide training and competency evaluation program (NATCEP). The request for hearing was docketed as C-09-73 and assigned to me for hearing and decision. On February 25, 2009, I notified the parties that the case was set for hearing from July 13 through 17, 2009. On February 23, 2009, Petitioner filed a motion for partial summary judgment that was opposed by the Centers for Medicare and Medicaid Services (CMS). On April 1, 2009, I issued a notice advising the parties that I would defer a ruling on Petitioner's motion until a decision on the merits.

On March 17, 2009, Petitioner filed a second request for hearing challenging the results of a revisit survey concluded at Petitioner's facility by the state agency on October 9, 2008. The second request for hearing was docketed as C-09-348 and assigned to me for hearing and decision on March 27, 2009. On March 31, 2009, Petitioner moved that the cases be consolidated. On April 1, 2009, I ordered that C-09-73 and C-09-348 be consolidated for hearing and decision under the lead case number.

CMS advised me by letter dated June 25, 2009, that it had reopened and revised its initial determination in this case and rescinded all enforcement remedies, and that, as a result, Petitioner's authority to conduct a NATCEP would not be withdrawn. CMS provided a copy of its June 25, 2009 letter advising Petitioner of the reopening and revision. CMS also advised me that a motion to dismiss Petitioner's appeal would be filed. On June 30, 2009, CMS filed a motion to dismiss this case and a motion to stay further proceedings pending a ruling upon its motion. On July 2, 2009, I convened a telephonic prehearing conference to discuss Petitioner's intention regarding the CMS motion to dismiss and the impact upon the scheduled hearing. The substance of the prehearing conference is memorialized in my Ruling and Order dated July 2, 2009, in which I granted the CMS motion to stay; I postponed the hearing indefinitely; and I directed that Petitioner file any opposition to the CMS motion to dismiss or a withdrawal of its request for hearing not later than July 20, 2009. On July 20, 2009, Petitioner filed an opposition to the CMS motion to dismiss (P. Opp.). On July 27, 2009, CMS moved for leave to file a reply to Petitioner's opposition. CMS filed its proposed reply on August 7, 2009. On August 10, 2009, Petitioner filed a request for a telephonic hearing for me to hear oral argument on the CMS motion to dismiss. The CMS motion for leave to file a reply is denied. The CMS reply adds no argument that is pertinent to my decision of its motion that was not discussed in the motion or that should have been discussed in the motion. Petitioner's request for oral argument is also denied. The parties' arguments are clearly articulated in the CMS motion and Petitioner's opposition. There is no factual dispute and the issue for resolution is a matter of law. Oral argument would not be helpful. I note for the benefit of both parties that their characterization of their settlement discussions is simply not relevant to and has no impact upon my resolution of the issue of law that causes me to dismiss Petitioner's case.

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. CMS rescinded the enforcement remedies in this case and thereby eliminated Petitioner's basis for review by an ALJ.

B. I have no jurisdiction or authority to review allegations of 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 appropriate because Petitioner has no right to a hearing.

1. Pertinent Facts

These following facts are undisputed and are based upon the parties' Supplemental Joint Stipulation of Facts filed on June 10, 2009.

> The state agency completed an annual standard survey of Petitioner on August 7, 2008, finding 17 deficiencies, i.e., violations of 17 regulatory participation requirements that posed the risk for more than minimal harm to facility residents. CMS notified Petitioner by letter dated September 5, 2008, that Petitioner was not in substantial compliance with program participation requirements and that CMS was imposing the following enforcement remedies: a DPNA effective September 20, 2008, and two per instance CMPs of $5000 for two separate violations.
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> On October 9, 2008, the state agency conducted a revisit survey and found that Petitioner had not returned to substantial compliance based upon three deficiencies. CMS notified Petitioner by letter dated February 6, 2009, that CMS agreed with the state agency that Petitioner had not returned to substantial compliance and that the DPNA that was effective September 20, 2008, would remain in effect.
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> On February 11, 2009, CMS notified Petitioner that it had reopened and revised its initial determination of September 5, 2008, and CMS reduced its determination for the severity of two alleged deficiencies and reduced the CMP imposed for one from $5000 to $1200.

On June 25, 2009, CMS filed its letter dated June 25, 2009, by which CMS notified Petitioner that it had reopened and revised its initial determination pursuant to 42 C.F.R. § 498.30. CMS advised Petitioner that it determined to reduce the alleged severity of one deficiency; rescind all remedies; and, as a result, Petitioner would not be denied authority to conduct a NATCEP.

2. Analysis

CMS argues in its motion to dismiss that Petitioner is no longer subject to an enforcement remedy; that Petitioner has no right to a hearing; and that dismissal of the request for hearing is required. Petitioner argues that the request for hearing should not be dismissed and that Petitioner should be accorded a hearing. I conclude that Petitioner's request for hearing must be dismissed. CMS has rescinded all enforcement remedies, Petitioner has no right to review, and I have no authority to render a decision that addresses the merits of the alleged deficiencies.

Petitioner advances two theories in its opposition to the CMS motion to dismiss, which I summarize as follows: (1) Petitioner's right to a hearing was triggered by the imposition of an enforcement remedy and the right is not lost simply because CMS decided to rescind the remedies (P. Opp. at 4-5); and (2) if the regulatory scheme permits CMS to deprive Petitioner of the right to a hearing by unilaterally withdrawing enforcement remedies, then the regulatory scheme deprives Petitioner of due process. Petitioner alleges a due process violation because, if enforcement remedies are withdrawn, Petitioner's property interest is nevertheless adversely affected because the deficiencies remain on the record of the facility and may be considered when determining future civil money penalties and also adversely effect Petitioner's "Five Star Nursing Home Quality Rating" (P. Opp. at 5-8). I conclude that the theories Petitioner presents in its opposition to the motion to dismiss are without merit.

Petitioner does not dispute that CMS has rescinded the enforcement remedies imposed in this case. Petitioner does not specifically address the rationale of various ALJs and appellate panels of the Departmental Appeals Board (the Board) in prior cases in which a long-term care facility has been found to lose the right to ALJ review when CMS reopened and revised an initial determination and rescinded all enforcement remedies resulting in dismissal of a pending request for hearing pursuant to 42 C.F.R. § 498.70(b). I find the rationale expressed in the prior Board and ALJ decisions persuasive.

A provider 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 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"); *Fountain Lake Health & Rehabilitation, 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 and Rehabilitation Center*, DAB CR1601 (2007). The Secretary of Health and Human Services 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").

Contrary to Petitioner's argument that CMS improperly relies upon prior administrative decisions and that the regulations do not permit CMS to deprive a facility of the right to pursue its appeal by withdrawing enforcement remedies, there is nothing in the regulations that prohibits CMS from reopening and revising its initial determination pursuant to 42 C.F.R. § 498.30 within 12 months of the date of notice of the initial determination. It is specifically 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. Part 498. When the enforcement remedy is eliminated, so too, is Petitioner's right to review and my authority to conduct the review. *Fountain Lake Health & Rehabilitation, Inc.*, DAB No. 1985; *Twin Pines Nursing and Rehabilitation Center*, 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; s*ee also The Lutheran Home – Caledonia*, DAB No. 1753; *Walker Methodist Health Center*, DAB CR869 (2002); *Charlesgate Nursing Center*, DAB CR868 (2002); *D.C. Association for Retarded Citizens*, DAB CR776 (2001); *Alpine Inn Care, Inc., d/b/a Ansley Pavilion*, DAB CR728 (2001); *Woodland Care Center*, 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 had resulted in a remedy was fatal to its appeal. In each of the cases, the appeal was dismissed. The appellate panels of the 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. Part 498.

Petitioner's argument that the regulatory scheme as interpreted deprives Petitioner of due process is not an issue within my authority to decide.

Petitioner does not have a right to a hearing in this case. The undisputed facts establish that while CMS initially determined to impose enforcement remedies against Petitioner, CMS rescinded the enforcement remedies. Petitioner no longer suffers any injury that I am authorized to redress and Petitioner no longer has a right to hearing pursuant to 42 C.F.R. Part 498.[*]

[*] The relief Petitioner seeks may be addressed through regulatory and legislative reform, such as was done to obtain authority for ALJ and Board review of a facility's loss of authority to conduct nurse aide training and competency evaluation programs. *See, e.g.*, 64 Fed. Reg. 39,934 (Jul. 23, 1999).

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed pursuant to 42 C.F.R. § 498.70(b).

/s/
Keith W. Sickendick
Administrative Law Judge