Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Elant at Fishkill,
(CCN: 33-5750),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-488

Decision No. CR2465

Date: November 17, 2011

DECISION

THIS MATTER IS BEFORE ME on Petitioner's Motion for Summary Judgment of July 8, 2011, and the Centers for Medicare and Medicaid Services (CMS)'s Motion to Dismiss and/or for Summary Disposition of July 11, 2011. Those essentially-competing motions were filed by the parties in response to my Acknowledgment and Initial Docketing Order of June 9, 2011. The parties have submitted additional briefing in support of their Motions pursuant to my Order of July 26, 2011: CMS filed its Response to Petitioner's Motion for Summary Judgment on July 29, 2011, and Petitioner filed its Response to Respondent's Motion for Summary Judgment and or Dismissal on August 15, 2011. Each side has supported its position with a detailed proffer of documents, and I have considered all of them, specifically Petitioner's Exhibits 1-13 (P. Exs. 1-13) and CMS's Exhibits (CMS Exs. 1-7), in resolving the issues presented by the motions. It may be helpful to note at the outset of this discussion that while the Motions may be seen as essentially competing for the ultimate result in this case, they do not disagree that Petitioner was not in substantial compliance with the terms of 42 C.F.R. §§ 498.25(h) and 498.75 between January 4, 2011 and January 11, 2011. The competing Motions differ sharply, however, on the significance and consequence of events after that latter date.

Petitioner asserts that its May 27, 2011 request for hearing timely perfected an appeal in which there is no genuine issue as to any material fact, and that it is entitled as a matter of law to judgment that it had returned to compliance with Medicare and Medicaid program requirements on January 12, 2011. Petitioner asserts that CMS is wrong as a matter of law in establishing the return-to-compliance date as February 18, 2011, and that there is no genuine issue of material fact before me as to the correctness of January 12, 2011 and the incorrectness of February 18, 2011 as the return-to-compliance date.

On the other hand, CMS takes the position that I need not and should not reach the question of which date might be correct. CMS asserts that Petitioner did not perfect its appeal in a timely manner, that no good cause exists for extending the deadline for Petitioner's request for hearing, and that Petitioner's appeal should be dismissed. CMS argues that the action Petitioner seeks to appeal is not an "initial determination" and thus beyond the jurisdiction of this forum. CMS bolsters its jurisdictional argument with a second position directed more to the substance of Petitioner's Motion, and maintains that if Petitioner's appeal is to be decided on its merits, then CMS is entitled as a matter of law to judgment that February 18, 2011 is the correct return-to-compliance date.

As the discussion below will explain, I have attempted to resolve these issues in what may be an unorthodox fashion. That is, while fully recognizing that the timeliness of Petitioner's hearing request is a jurisdictional question normally to be addressed and resolved as a threshold issue, I have discussed it without explicitly ruling on the CMS Motion to Dismiss, and have taken that approach because of the uncertainty with which I view the application of an important recent appellate decision. Instead, I have considered the parties' competing efforts to win summary disposition, and have ruled in CMS's favor in that context. Prudence and a concern for judicial economy support this approach, since even if Petitioner's appeal could overcome CMS's jurisdictional challenge, it would ultimately succumb to the CMS effort to win summary disposition.

I.

Petitioner's facility is a skilled nursing facility located in Beacon, New York. It participates in both the Medicare and the Medicaid programs, and its compliance with the participation requirements of both programs is monitored by surveys conducted by the New York State Department of Health (NYSDOH).

On the evening of Thursday, December 30, 2010, one of the facility's residents eloped. The resident's elopement was not discovered by the facility. At approximately 8:45 that evening, the local police were alerted to the fact that an elderly person — who turned out to be the resident who had eloped — was sitting in the snow along a highway approximately a quarter-mile from the facility. The police responded and returned the resident to the facility, which is how and when the facility first became aware that

something was amiss. The facility notified NYSDOH of the incident the next day, Friday, December 31, 2010.

NYSDOH surveyors arrived at the facility on Monday, January 3, 2011, and began a survey completed on Monday, January 10, 2011. On that date, NYSDOH told Petitioner that effective January 4, 2011 its facility was not in compliance with two program requirements, 42 C.F.R. § 483.25(h), cited as F-Tag F-323, and 42 C.F.R. § 483.75, cited as F-Tag F-490. Both citations constituted immediate jeopardy and were assessed at a scope-and-severity level of "K." These findings were communicated to CMS by NYSDOH.

On Tuesday, January 11, 2011, CMS wrote to Petitioner and announced that it was adopting the NYSDOH findings. Thus CMS determined that the facility was non-compliant with the two cited F-Tags at a scope-and-severity level of "K," that the noncompliance constituted immediate jeopardy and a substandard quality of care, and that the noncompliance was subject to sanctions of a civil money penalty of $5550 per day beginning January 4, 2011, a denial of payment for new admissions (DPNA) effective January 13, 2011, and termination of the facility's participation in the programs if compliance were not achieved by February 1, 2011. This letter closed with CMS's standard notification of the appeal provisions of 42 C.F.R. § 498.40 *et seq*.

NYSDOH returned to the facility on Tuesday, January 11, 2011 to review the steps taken there to correct the deficiencies and bring the facility back into compliance. This revisit survey led surveyors to conclude that the problems had been mitigated but not completely resolved: NYSDOH found that the violations of F-323 and F-490 continued, but that as of January 11, 2011 their scope-and-severity level had been reduced to "H" and immediate jeopardy no longer existed. NYSDOH announced that it would recommend to CMS that the DPNA continue, that the deadline for termination be extended, and that the CMP be reduced.

CMS accepted these recommendations, and so notified the facility on January 18, 2011. CMS's letter announced the reduction of the per-day CMP from $5550 to $200 beginning January 11, 2011 and continuing until substantial compliance could be achieved. The letter reaffirmed the imposition of the DPNA on January 13, 2011 and reaffirmed that it would remain in effect until substantial compliance could be achieved. The termination date was extended until July 10, 2011. Like the CMS letter of January 11, 2011, this letter closed with CMS's standard notification of the appeal rights available to Petitioner, and of the provisions of 42 C.F.R. § 498.40 *et seq*. Like the earlier letter, this CMS letter of January 18, 2011 specifically made Petitioner aware of the 60-day deadline for filing a request for hearing. According to CMS's present position in its Motion and its briefing, it is this January 18, 2011 letter, and the five-day period allowed for mailing provided by 42 C.F.R. § 498.22(b)(3), that marks the beginning of the 60-day deadline established at 42 C.F.R. § 498.40(b) for the filing of Petitioner's request for hearing.

Petitioner did not file its request for hearing until May 27, 2011, obviously well outside the 60-day deadline. Instead, during the time between the CMS letter of January 18, 2011 and February 18, 2011, Petitioner and NYSDOH engaged themselves in exchanging documents setting out the detailed observations made by the NYSDOH surveyors in support of the two citations and the detailed steps Petitioner had taken, or proposed to take, in order to correct the deficiencies. These steps were set out in two versions of Petitioner's plan of correction (POC).

Petitioner's first POC was submitted to NYSDOH in written form on February 10, 2011, and it claimed January 12, 2011 as the effective completion date for all required corrective actions. It is this date Petitioner now asserts marks its return to substantial compliance with program requirements and the end of the $200 per-day CMP and the DPNA.

That first version of Petitioner's POC was rejected by NYSDOH on February 16, 2011 because the POC did not satisfactorily assure the safety of other facility residents in situations of potential elopement. Petitioner amended its POC on February 17, 2011, and on February 18, 2011 NYSDOH notified Petitioner that the amended POC had been accepted. CMS asserts that if its jurisdictional arguments related to the timing of Petitioner's hearing request fail, then it is entitled as a matter of law to a ruling that February 18, 2011 is the date on which Petitioner returned to substantial compliance.

A good deal of the controversy over the timeliness of Petitioner's hearing request arises from the events that followed NYSDOH's acceptance of Petitioner's amended POC. It will suffice for present purposes to note that when NYSDOH conducted a re-visit survey of the facility two weeks later on March 4, 2011 — the purpose of which survey was to verify that the amended POC had been fully implemented — its letter of that date to Petitioner confirming the successful survey contained an obvious error when NYSDOH stated that "This office will also recommend that any remedies currently enforced will be lifted on 01/12/2011." The error was obvious, for Petitioner knew that NYSDOH had already rejected Petitioner's claim that it had achieved substantial compliance on January 12, 2011, and Petitioner had submitted its amended POC precisely because of that rejection.

This record does not reveal how or when NYSDOH became aware of the obvious error in its March 4 letter, but it is certain that NYSDOH was aware of it not later than April 5, 2011, when it sent its "AMENDED LETTER" to Petitioner. Except for the prominent notation "AMENDED LETTER," the only change in NYSDOH's April 5, 2011 letter was the change in the date it would recommend the enforcement of remedies end. This time, the critical sentence read: "This office will also recommend that any remedies currently enforced will be lifted on 02/18/2011." It is impossible to see the error in the March 4 letter from NYSDOH as anything other than typographical or clerical, and it is

equally impossible to see it as having any substantive effect on Petitioner's return-to-compliance date. As will be seen, NYSDOH addressed the error three weeks later in a letter dated April 29, 2011.

Petitioner, although aware that its first POC had been rejected and that its amended POC had been accepted effective only February 18, 2011, chose to react immediately to NYSDOH's "AMENDED LETTER" as if it had effected some substantive change in the status of its rejected first POC. By letter of April 7, 2011, Petitioner challenged "the determination of the compliance date of February 18, 2011." It explicitly relied on the NYSDOH letter of March 4, 2011 — and the obvious error in Petitioner's favor it contained — in making its argument, and went on to suggest that the changes in its rejected POC demanded by NYSDOH and incorporated in the amended POC were trivial: "The revision of the POC on 2/16/11 was not substantive in nature and did not enhance the safety of the residents or the security of the facility." In essence, the theory Petitioner relied on in its April 7 letter to NYSDOH is identical to the theory it urges here in support of its Motion for Summary Judgment.

One week after the NYSDOH had written its "AMENDED LETTER," CMS wrote to Petitioner on April 11, 2011 repeating the return-to-compliance date of February 18, 2011. The CMS letter also removed the DPNA effective February 18, 2011 and calculated the total CMP to be imposed based on seven days of immediate jeopardy — from January 4 through January 10, 2011 — at $5550 per day, and 38 days of non-immediate jeopardy — from January 11 through February 17, 2011 — at $200 per day, for a total CMP of $46,450. Since only the period after January 11 is at issue here, the effective amount of CMP at issue is approximately $7600, and the extension of the DPNA is similarly at issue. CMS's letter neither contained nor made reference to CMS's standard notification of the appeal provisions of 42 C.F.R. § 498.40 *et seq*. It is this April 11, 2011 CMS letter on which Petitioner bases its May 27, 2011 request for hearing.

Only two more letters are relevant to this history. The first is NYSDOH's letter to Petitioner of April 29, 2011, in which NYSDOH reiterated its position that the facility was able to reduce considerably the scope and severity of the cited deficiencies by January 12, 2011, but had not substantially corrected those deficiencies until the amended POC was accepted effective February 18, 2011. NYSDOH explained the sequence of events on which it based its position, and pointed out explicitly what had been implicit in the "AMENDED LETTER": the reference to January 12, 2011 in its March 4, 2011 letter was "mistakenly entered" and was therefore "not feasible."

The second letter is Petitioner's request for hearing dated May 27, 2011. In it, Petitioner categorically relies on the erroneous date in the NYSDOH letter of March 4, 2011 as establishing the date of its return to substantial compliance, dismisses NYSDOH's rejection of its first POC as based on concerns "insubstantial and not related to the core

issues of compliance under review," and asserts that the CMS letter of April 11, 2011 marks the CMS action from which it seeks to appeal.

II.

The procedural posture of this case presents an obvious jurisdictional issue, and like most — perhaps all — jurisdictional issues, it is a threshold question: is Petitioner's May 27, 2011 request for hearing timely within the terms of 42 C.F.R. § 498.40(a)(2)? That question may depend in large measure on whether the CMS letter of April 11, 2011 represents one of the "initial determinations" for which appeal rights are provided by 42 C.F.R. § 498.3. If it does, then the hearing request is timely. If it does not, then the request for hearing is on its face an untimely appeal from the CMS notice of noncompliance of January 18, 2011 and is subject to dismissal, although that defect can be overcome by the discretionary granting of an extension of time, for good cause shown, for the filing of an amended hearing request based on what CMS maintains is the properly appealable "initial determination" set out in its letter of January 18, 2011. 42 C.F.R. §§ 498.3, 498.40(c)(2).

Petitioner and CMS have both vigorously debated the question, and much of that debate has centered on the parties' different understandings of two crucial Departmental Appeals Board (Board) decisions: *Taos Living Center*, DAB No. 2293 (2009); and *Mimiya Hospital*, DAB No. 1833 (2002). Petitioner relies particularly on *Taos Living Center* because, at least in Petitioner's view, the Board's holding in that case would bring CMS's April 11, 2011 letter within 42 C.F.R. § 498.3's definition of appealable "initial determinations." CMS takes a far different view of *Taos Living Center*, and suggests that the majority opinion is fundamentally wrong and in conflict with regulations and DAB precedent. CMS asserts that the dissent in *Taos Living Center* is the correct view and urges that I follow it. CMS also argues that because the CMS letter from which the petitioner in *Mimiya Hospital* sought to appeal contained the standard recitation of appeal rights, that fact distinguishes *Mimiya* from this situation, in which, it will be remembered only the January CMS letters — and not the CMS letter of April 11, 2011 — contained the standard language.

There is much to consider in CMS's analysis of *Taos Living Center*, and the force of its argument is not easily resisted. But the majority opinion in *Taos* is the law of this forum, and must control this question to the extent that the facts before me now are congruent with those before the divided Board in *Taos*. And to a significant extent, they are not.

First, the majority in *Taos Living Center* was troubled by the delay of approximately four months between that facility's submission of its POC and the state agency's re-visit to verify that the POC had actually been implemented. In this case, NYSDOH conducted the re-visit survey within two weeks of Petitioner's submission of the accepted POC. Since the return-to-compliance date here is the same date as NYSDOH's acceptance of

the POC, no extended delay in re-visiting created an artificially-extended period of non-compliance, one of the factors explicitly pointed out by the majority in *Taos*. And while it may not be an essential observation in distinguishing this case from *Taos*, it is worth noting that the entire process by which NYSDOH and CMS surveyed, evaluated, and sanctioned Petitioner was marked by promptness and expedition in the agencies' actions.

Next, as CMS points out in its briefing, the DPNA in this case was not initiated or announced by its letter of April 11, 2011. The DPNA had been in effect since January 13, and had been announced in the CMS letters of January 11 and January 18. It had been announced, as well, by NYSDOH on January 14. The majority in *Taos* relied on the effect of the CMS letter in that case as having some substantive effect on the imposition of the DPNA: "[B]ecause the DPNA could not go into effect unless CMS determined that [*Taos*] had continued to be in noncompliance . . . the August 5 [CMS] letter notifying [*Taos*] that the DPNA had gone into effect . . . constituted an initial determination of noncompliance." *Taos Living Center,* DAB No. 2293, at 15. There is nothing in the CMS letter of April 11 that can be so understood.

Third, the overall nature of the CMS letter of April 11 distinguishes it from the situation in *Taos*. It cannot be characterized as a rejection of a POC or a rejection of a claim of substantial compliance. It announces no new or enhanced penalty based on prior noncompliance. It contains no recitation of appeal rights. There is patently nothing in the CMS letter of April 11 that marks a change in the sanctions imposed on Petitioner or the period over which those sanctions were in effect. The last time CMS wrote such a letter — and thus the last time CMS announced an initial determination of noncompliance or sanctions — was in its letter of January 18, 2011.

The majority decision in *Taos* depends on facts unique to that case. Those facts are not congruent with the facts before me, and so the reasoning and result in *Taos* are not persuasive now. No "initial determination" within the meaning of 42 C.F.R. § 498.3 can be read into the CMS letter of April 11, 2011. The CMS letter of January 18, 2011 is the last "initial determination" by CMS in the sequence of events that began at Petitioner's facility on December 30, 2010, and Petitioner's right to appeal that determination expired in late March 2011. Petitioner's request for hearing was filed May 27, 2011. Accordingly, and for purposes of this immediate discussion I assume *arguendo*, Petitioner's hearing request is untimely.

III.

Assuming for the moment that Petitioner's choice not to appeal the January 18, 2011 CMS letter has placed its appeal in jeopardy of dismissal, should the discretionary remedy of an extension of time in which to file an amended hearing request be applied on this record? That is, would the record before me allow a finding of "good cause shown" for extending to Petitioner the time and opportunity to amend its hearing request and

challenge the January 18, 2011 CMS notice of noncompliance? It is very difficult to see good cause "under any reasonable definition of that term" (*Brookside Rehabilitation and Care Center*, DAB No. 2094, at 7, n.7 (2007)) in Petitioner's apparently-deliberate disregard of the clear warnings about the 60-day deadline in the CMS letters of January 11 and January 18, 2011. Petitioner took no measures toward perfecting its appeal after the erroneous NYSDOH letter of March 4, 2011, nor after the "AMENDED LETTER" of April 5, 2011 except to tell NYSDOH that it insisted that the erroneously-typed date was actually correct. Even after NYSDOH explained the error and reiterated the correct date on April 29, 2011, Petitioner did nothing for another four weeks.

By the time Petitioner filed its May 27, 2011 request for hearing, the only CMS letter or notice on which the 60-days-plus mailing deadline had not expired by a margin of months was the CMS letter of April 11. The sequence of these facts reflects at the very least Petitioner's determination to "act by choosing from many tactical and strategic options," about which options "it will be expected to have informed itself . . . before it chooses." *Brookside Rehabilitation and Care Center*, DAB CR1541 (2006). Providers such as Petitioner are charged with knowledge of the regulations governing program participation, and are assumed to understand both the importance of the notice of appeal rights set out in the CMS letter and of the necessity for careful compliance with it in filing a hearing request. Both CMS's January letters offered a telephone number and a name to which Petitioner could have addressed any questions or requests for clarification of the need for timely action if an appeal were to be pursued. That Petitioner is now bound by its informed choices to delay the filing of its hearing request, and that no good cause for relieving it of the consequences of its choices appears in this record is amply supported by substantial authority. *Brookside Rehabilitation and Care Center*, DAB No. 2094; *Concourse Nursing Home*, DAB No. 1856 (2002); *Nursing Inn of Menlo Park*, DAB No. 1812 (2002); *Cary Health and Rehabilitation Center*, DAB No. 1771 (2001). If Petitioner's hearing request is untimely, there is no "good cause" in this record for extending the filing deadline to permit the filing of an amended hearing request.

IV.

But, as I have said above, a ruling on the question of this appeal's timeliness is not the vehicle by which I intend to resolve the contending positions. Each side has argued that if the merits of the case are to be reached, its own side of the controversy is supported by uncontested facts and is entitled to summary affirmation. What follows is an effort to examine the competing arguments, and to reach a disposition of this case at a point less clouded by the debate over *Taos*. For the immediate purpose of reaching the parties' opposing motions for summary disposition, I will now assume *arguendo* that CMS's Motion to Dismiss is not persuasive, and that the merits of the case are before me in those motions.

Petitioner began the exchange of motions seeking summary disposition by asserting that there is no genuine issue of fact concerning the date it returned to compliance. Petitioner claims January 12, 2011 as that date, and relies on the uncontested fact that it submitted its first POC to NYSDOH on that date. Now, there is no serious debate as to those limited facts, but even if they remain unchallenged, they do not entitle Petitioner to a summary ruling that its substantial compliance was established on that date by those facts. What Petitioner attempts to show, in bridging the gap between those facts and the conclusion it desires, is that the corrections and additions to its first POC demanded by NYSDOH were so trivial — or, as Petitioner describes them, "neither significant nor material to the health and safety of the residents" — as to represent NYSDOH's *de facto* acceptance of the first POC. CMS vigorously disagrees with Petitioner's characterization of the shortcomings in the first POC and the significance of the changes required by NYSDOH: CMS describes them as "fundamental and essential changes given the seriousness of the deficiencies cited and the risk they posed to the facility's residents." Now, the exhibits proffered by both sides offer some insight into the importance of the changes NYSDOH required, but it is plainly a question of fact whether those changes were trivial or significant, and thus a question to be resolved only through the evaluation of evidence and the assessing of weight and credibility where that evidence conflicts. Since that central question of fact remains, Petitioner's Motion for Summary Judgment must be, and it is, DENIED.

But the facts relied on by CMS in its effort to win summary disposition are rather different. While Petitioner seeks to characterize and thus minimize the rejection of its first POC, CMS is content merely to point out the fact that the first POC *was rejected* and the related fact that an amended POC *was required* before NYSDOH could conduct the re-visit survey and verify that the amended POC had actually been implemented. Petitioner must concede these two facts, even if it quarrels with the interpretation to be given them.

There is no genuine doubt that Petitioner submitted its first POC to NYSDOH on February 10, 2011, and in it claimed — on the basis of the steps set out in that first POC — that it had returned to substantial compliance almost a month earlier, on January 12, 2011. Nor is there genuine doubt that this first POC was rejected by NBYSDOH as inadequate to assure the protection of the facility's residents. Thus, *unless the decision of NYSDOH and CMS to reject the first POC is subject to Petitioner's challenge here*, there is simply no genuine doubt that Petitioner was not in substantial compliance on the basis of the measures it claimed to have taken in its first POC. And so, *unless the decision of NYSDOH and CMS to accept only the amended POC of February 17, 2011 is subject to Petitioner's challenge here*, there is simply no genuine doubt that Petitioner's progress toward returning to substantial compliance was incomplete and unsuccessful until its amended POC had been accepted, thus clearing the way for NYSDOH to re-visit the facility as it did two weeks later on March 4, 2011.

On this critical question, there seems little doubt of the answer: the acceptance or rejection of Petitioner's POC is not a matter subject to appeal or to my review. It lies entirely within the discretion of NYSDOH and CMS. *Hermina Traeye Memorial Nursing Home*, DAB No. 1810 (2002). The Administrative Law Judges of this forum have applied that rule in cases involving nursing homes, clinical laboratories, and home health agencies, all of which are regulated under statutory schemes similar to the one at work here. *Therapy Management Services*, DAB CR1892 (2009); *HRT Laboratory, Inc.*, DAB No. 2118 (2007); *Rosewood Living Center*, DAB CR1293 (2005); *On-Call Nursing of Alaska*, DAB CR1142 (2004). Given that the re-visit survey took place promptly after approval of the amended POC, and given that Petitioner was found to have returned to substantial compliance as of the date of the amended POC, there remains no genuine issue of material fact suggesting an earlier compliance date. CMS's Motion for Summary Disposition should be, and it is, GRANTED.

CONCLUSION

On the basis of the discussion and authorities set out above, I find and conclude: (1) there are no genuine issues of material fact as to the date Petitioner returned to substantial compliance with program requirements; (2) CMS is entitled as a matter of law to judgment in its favor on that issue; and (3) Petitioner returned to substantial compliance with the requirements set out at 42 C.F.R. §§ 483.25(h) and 482.75 on February 18, 2011, but not sooner.

/s/

Richard J. Smith
Administrative Law Judge