Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

San Fernando Post Acute Hospital,
(CCN: 05-6053),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-668

Decision No. CR2577

Date: July 27, 2012

DECISION DISMISSING REQUESTS FOR HEARING

This matter is before me on the Motion to Dismiss filed May 4, 2012, by the Centers for Medicare & Medicaid Services (CMS). Citing a long line of decisions by the Departmental Appeals Board (Board) and the Administrative Law Judges (ALJs) of the Civil Remedies Division, CMS argues that a provider has no right to a hearing to contest citations of noncompliance with program requirements if CMS declines to impose a sanction or remedy against the provider based on those citations. Petitioner candidly acknowledges those decisions, but points to recent rulings in the United States District Court for the District of Nebraska as casting doubt on the validity of that long line of authority. Thus, this Decision is issued in a unique procedural context and in full awareness of the apparent conflict of authorities on the central question: whether a long-term care facility that participates in the Medicare and Medicaid programs may appeal citations of deficiencies if those citations do not result in the imposition of remedies, or if remedies imposed as a result of those citations are later rescinded, or reduced to zero. As I shall explain below, I conclude that I am obliged to follow the long and unvarying line of decisions announced by the Board and applied by the ALJs. Accordingly, I GRANT the CMS Motion to Dismiss.

Although both sides in this appeal agree that the enforcement history that led to Petitioner's appeal is somewhat convoluted, its material aspects are rather more straightforward. Petitioner is a skilled nursing facility located in Los Angeles County, California. It participates in the Medicare and Medicaid programs, and because it does, it is subject to the inspection-and-compliance mechanism established by the Social Security Act. In December 2011, the Los Angeles County Department of Public Health (LACDPH) conducted a recertification survey of Petitioner's facility and noted certain deficiencies, including a violation of 42 C.F.R. § 483.25(h) —Tag F-314 — at a scope-and-severity level of G. LACDPH notified Petitioner of the deficiencies in January 2012, informed Petitioner that it would recommend that CMS impose a denial of payment for new admissions (DPNA), and informed Petitioner that it was entitled to challenge the LACDPH's findings through a state informal dispute resolution proceeding (IDR).

At this point, CMS did not act as LACDPH had recommended. On March 2, 2012, CMS notified Petitioner that it would impose a per-instance civil money penalty (PICMP) based on the F-314 citation. On March 16, 2012, Petitioner filed its Request for Hearing in this forum and the matter was docketed as C-12-487. But while CMS was considering the LACDPH recommendation, the IDR proceeding began on February 21, 2012, and Petitioner won a substantial revision of the citations it challenged there. In particular, Petitioner won the reduction of the scope-and-severity level of the F-314 citation from G to D, and a recommendation from LACDPH to CMS that the PICMP be rescinded. This result was communicated to Petitioner by LACDPH on March 22, 1012.

CMS this time concurred in LACDPH's recommendation. On April 16, 2012, CMS notified Petitioner that it would not impose the PICMP or the DPNA. Petitioner filed its Request for Hearing in response to the CMS notice on May 1, 2012, and that appeal was docketed as C-12-668. By Order of May 9, 2012, I consolidated the two appeals into this case and this docket number; the earlier docket number, C-12-487, was dismissed; and I directed that motion practice would proceed on the basis of the Motion to Dismiss filed by CMS in C-12-487 on May 4, 2012.

CMS asserts that all enforcement remedies it once sought to impose against Petitioner have been rescinded. The PICMP was withdrawn and the DPNA proposed by LACDPH never took effect. Thus, the issue before me is whether Petitioner has a right to a hearing when CMS has withdrawn the enforcement remedies provided for in 42 C.F.R. § 488.406. As I noted above, this issue has been addressed many times by the ALJs of this forum and by the Board, and without exception, each time the issue has been considered, it has come to the same resolution that I announce here. The parties have briefed the issue immediately before me with candor, and in the acknowledged awareness that a substantial body of authority leaves little room for speculation as to the outcome of the present debate at least as far as my review in this forum. I find and conclude that San Fernando Post Acute Hospital is not entitled to a hearing, and on the basis of 42 C.F.R. § 498.70(b), I grant CMS's Motion to Dismiss.

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 is an initial determination for which a facility may request a 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). Where, as here, CMS rescinds all proposed remedies, a facility has no hearing right because no determination properly subject to a hearing exists. It is the final imposition of an enforcement remedy or sanction and not the citation of a deficiency that triggers a facility's right to a hearing pursuant to 42 C.F.R. Part 498. *Golden Living Center-Grand Island Lakeview*, DAB No. 2364 (2011); *Columbus Park Nursing and Rehabilitation Center*, DAB No. 2316 (2010); *Fountain Lake Health and Rehabilitation, Inc.*, DAB No. 1985 (2005); *Lakewood Plaza Nursing Center*, 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).

Petitioner resists the CMS Motion, vigorously maintaining that not permitting it to appeal the underlying survey findings or the scope and severity of the deficiencies as cited have the potential to make it subject to inclusion in CMS's Special Focus Facility program, or to damage its standings in various public rating media, a result that Petitioner argues must adversely affect its reputation and limit its ability to compete in the marketplace. A great deal of Petitioner's argument is based on its success in winning endorsement of its position in *Golden Living Center-Grand Island Lakeview v. Sebelius*, No. 8:11CV119, (D. Neb. 2012). While acknowledging that the United States District Court's resolution of that case represents a direct contradiction of the Board's decision in *Golden Living Center-Grand Island Lakeview*, DAB No. 2364 — and implicitly of mine in that appeal when it was before me — I note that the instant case arises in neither the District of Nebraska nor the Eighth Circuit, and that of the Board decisions on which I rely above, three — *Fountain Lake*, *Lakewood Plaza*, and *Lutheran-Caledonia* — are longstanding Board precedents that did arise in the Eighth Circuit. I believe that I am bound to follow them, and that I simply cannot provide the form of relief Petitioner seeks on these facts. The potential for Petitioner to be included in the Special Focus Facility program list is neither an enforcement remedy nor an initial determination subject to my review. 42 C.F.R. §§ 488.406, 498.3(b).

Petitioner also asserts, partly in reliance on language in the United States District Court's Orders of July 6, 2012 and December 16, 2011, that I must consider its claim that it would be denied its constitutional rights to due process of law if not allowed to appeal the deficiencies and scope and severity ratings determined by CMS. However, similar arguments have not found success when they have been raised before the Board. Neither

the ALJs of this forum nor the Board may consider such challenges to CMS actions. *Carrington Place of Muscatine*, DAB No. 2321, at 24 (2010); *Columbus Park Nursing and Rehabilitation Center*, DAB No. 2316, at 10. The regulations and prior decisions in this forum and before the Board uniformly adhere to the doctrine that there is no right to a hearing where deficiencies are identified, but where CMS had thereafter rescinded the initial determination to impose enforcement sanctions or remedies. Here, the PICMP and the DPNA were both completely rescinded, and after the CMS letter of April 16, 2012, Petitioner faced no sanctions or remedies whatsoever. The authority delegated to me by the Secretary of this Department in cases involving CMS is specified at 42 C.F.R. §§ 498.3 and 498.5. The regulations limit my authority to hear and decide only cases involving specified initial determinations by CMS, and since April 16, 2012, none have been present in this case.

Section 498.70(b) of 42 C.F.R. authorizes me to dismiss a hearing request when a petitioner does not have a right to a hearing, and for that reason I do so now in this matter. Petitioner's March 16, 2012 and May 1, 2012 Requests for Hearing. consolidated into this proceeding by Order of May 9, 2012, must be, and they are, **DISMISSED**.

The parties may request that an order dismissing a case be vacated pursuant to 42 C.F.R. § 498.72.

/s/
Richard J. Smith
Administrative Law Judge