Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cedar Crest Nursing and Rehabilitation Center
(CCN: 555790),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-305

Ruling No. 2013-21

Date: August 29, 2013

ORDER OF DISMISSAL

This matter is before me on a motion to dismiss that the Centers for Medicare & Medicaid Services (CMS) filed on February 22, 2013. Petitioner did not respond to the motion. I conclude that Petitioner is not entitled to a hearing, and I grant the motion.

Petitioner is a skilled nursing facility in Sunnyvale, California, that participates in the Medicare program. On November 16, 2012, the California Department of Public Health (state survey 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 survey agency alleged that six deficiencies were found, all at the scope and severity level of "D." In a notice letter dated November 27, 2012, the state survey agency informed Petitioner that it would impose a denial of payment for new admissions (DPNA) effective February 16, 2013, unless Petitioner submitted an acceptable plan of correction and demonstrated its substantial compliance at a subsequent revisit survey. The state survey agency also stated that it would recommend directed in-service training effective January 5, 2013, if substantial compliance was not achieved by December 16, 2012. CMS Ex. 2.

Petitioner pursued a state informal dispute resolution (IDR) process and disputed five of the six deficiency findings. Following the IDR process, the state survey agency notified Petitioner on December 27, 2012, that it upheld Tag F226 (42 C.F.R. § 483.13(c)) at the scope and severity level of "D," and dismissed and deleted Tag F253 (42 C.F.R. § 483.15(h)(2)), Tag F281 (42 C.F.R. § 483.20(k)(3)(i)), Tag F441 (42 C.F.R. § 483.65), and Tag F465 (42 C.F.R. § 483.70(h)). CMS Exhibit (Ex.) 3. Petitioner did not contest the deficiency citation at Tag F328 (42 C.F.R. § 483.25(k)), so that Tag remained unchanged at the scope and severity level of "D." The state survey agency sent Petitioner a revised statement of deficiencies that reflected the results of the IDR decision. CMS Ex. 4.

Petitioner submitted a plan of correction and a credible allegation of compliance, stating that it had corrected the deficiencies at Tag F226 and Tag F328 as of December 5, 2012. CMS Ex. 4. On December 6, 2012, the state survey agency conducted a revisit and determined that Petitioner had returned to substantial compliance as of December 6, 2012. CMS Ex. 5.

On January 4, 2013, Petitioner requested a hearing. In its hearing request, Petitioner requested review of Tag F226 only. The case was assigned to me for hearing and decision. I issued an Acknowledgment and Initial Pre-Hearing Order on January 23, 2013.

On February 22, 2013, 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. On March 26, 2013, via e-mail, Petitioner's representative confirmed that Petitioner did not file a response to CMS's motion. Petitioner has not objected to my consideration of CMS's exhibits, and I admit them as evidence.

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). Remedies specified at 42 C.F.R. § 488.406 include termination of a provider agreement, a DPNA, civil money penalties, and directed in-service training.

Here, CMS effectuated no remedies based on the November 16, 2012 survey. Therefore, Petitioner no longer has a hearing right because the determination that is subject to a hearing no longer 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. *See, e.g., Golden Living Ctr.-Grand Island Lakeview,* DAB No. 2364 (2011).

In this case, although CMS originally imposed the remedies of a DPNA and directed in-service training against Petitioner based on the deficiencies found at the November 16, 2012 survey, these remedies were never effectuated because Petitioner returned to substantial compliance with program requirements as of December 6, 2012. According to the Post-Certification Revisit Report, the previously cited deficiencies at Tag F226 and Tag F328 from the November 16, 2012 survey were corrected on December 6, 2012, the date of the revisit survey. CMS Ex. 5. As a result, there were no deficiencies, and Petitioner faced no remedies. I find that there is no remedy determination that Petitioner may challenge and Petitioner has no right to a hearing under 42 C.F.R. Part 498. Inasmuch as Petitioner did not file a response to CMS's motion, it appears that Petitioner does not dispute the administrative case law as described by CMS in its motion.

Because CMS did not impose any enforcement remedies, Petitioner has no right to a hearing. An administrative law judge 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