Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Pineview 102, LLC d/b/a Crossview Care Center,
(CCN: 11-5541),

Petitioner,

v.

Centers for Medicare & Medicaid Services,

Respondent.

Docket No. C-15-4175

ALJ Ruling No. 2017-13

Date: March 9, 2017

DISMISSAL

For the reasons set forth below, I conclude that Petitioner, Pineview 102, LLC d/b/a Crossview Care Center, is not entitled to Administrative Law Judge (ALJ) review. I therefore dismiss its hearing request pursuant to 42 C.F.R. § 498.70(b).

Discussion

Petitioner has no right to a hearing because the Centers for Medicare & Medicaid Services (CMS) did not impose a remedy.

Petitioner is a skilled nursing facility located in Pineview, Georgia, that participates in the Medicare program as a provider of services. On May 22, 2015, the Georgia Department of Community Health (State Agency) completed a health recertification survey of the facility and found that it was not in substantial compliance with federal requirements. By letter dated June 22, 2015, the State Agency advised Petitioner that, based on the survey findings, it would recommend to CMS that the following be imposed: a civil money

penalty of $3,550 per day from January 22, 2015, to May 21, 2015; a civil money penalty of $150 per day from May 22, 2015, lasting until the facility achieved substantial compliance; a denial of payment for new admissions effective immediately; and termination of the facility's provider agreement if it did not achieve substantial compliance by November 22, 2015. Attachments to Request for Hearing, DAB E-file item #1b, at (unnumbered) 4-5.

On July 28, 2015, CMS notified Petitioner that it had reviewed the State Agency's recommended remedies and decided to impose only two of them: mandatory termination of the facility's provider agreement if it did not return to substantial compliance by November 22, 2015; and a denial of payment for new admissions effective August 22, 2015, and continuing until the facility returned to substantial compliance. CMS Ex. 1 at 2. CMS also notified Petitioner that it may impose an additional remedy, loss of approval for Petitioner's Nurse Aide Training Program (it if had one), and that the State Agency would notify the facility if CMS decided to impose that remedy.[1] CMS Ex. 1 at 3.

Petitioner requested a hearing on September 16, 2015, to contest the deficiencies cited during the May 22, 2015 survey. The case was assigned to me and I issued an Acknowledgment and Prehearing Order on November 30, 2015, in which I directed the parties to file prehearing exchanges by certain dates.

CMS moved to dismiss Petitioner's request for hearing on March 14, 2016. In support of its motion, CMS submitted a notice letter dated February 2, 2016, in which CMS informed Petitioner that it was rescinding all remedies referenced in the July 28, 2015 notice letter. CMS Ex. 2. Therefore, CMS argues, Petitioner has no right to ALJ review.

Petitioner filed a response (P. Response) in opposition to CMS's motion on March 15, 2016. Petitioner acknowledges that CMS has rescinded all remedies it imposed on the facility. P. Response at 1. It argues, however, that CMS's fiscal intermediary continues to dispute a Medicare claim as a result of an invalid NPI number, which creates a *constructive* denial of payment for new admissions, and that "CMS must be compelled to intervene and take control of this issue forthwith to effectuate a full and complete resolution . . . ." P. Response at 2-3. CMS filed a reply (CMS Reply) in which it clarified that the dispute over the facility's claim did not arise from a denial of payment for new admissions. CMS Reply at 2.

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 an initial determination is entitled to further review, but administrative actions that are not initial determinations are not subject to appeal. 42 C.F.R. § 498.3(a), (d). The regulations specify which actions are "initial

[1] The record does not show that CMS ultimately removed approval of Petitioner's Nurse Aide Training Program, if it had one.

determinations" and set forth examples of actions that are not. With an exception not applicable here, 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 an ALJ hearing. 42 C.F.R. § 498.3(b)(13). But a facility has no right to a hearing unless CMS imposes one of the specified remedies. *Lutheran Home - Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997). The remedy, not the citation of a deficiency, triggers the right to a hearing. *Schowalter Villa*, DAB No. 1688 at 3; *Arcadia Acres, Inc.*, DAB No. 1607 at 3. Where CMS withdraws the remedies or otherwise declines to impose one, Petitioner has no hearing right. *See, e.g.*, *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 at 5-6 (2005).

Whatever dispute Petitioner has with CMS's fiscal intermediary (assuming such dispute even persists) is neither a remedy that CMS has imposed nor an initial determination subject to appeal. 42 C.F.R. §§ 488.406, 498.3. Because CMS has imposed no remedies, Petitioner has no right to an ALJ hearing, and this matter must be dismissed. 42 C.F.R. § 498.70(b). I therefore grant CMS's motion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge