Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Autumn Healthcare of Zanesville,
(CCN: 365464),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-940

ALJ Ruling No. 2014-26

Date: March 18, 2014

RULING

Here, the Centers for Medicare & Medicaid Services (CMS) has terminated the Medicare participation of Petitioner, Autumn Healthcare of Zanesville, a long-term care facility that has a history of significant noncompliance with Medicare program requirements. Petitioner seeks administrative review. CMS asserts that Petitioner voluntarily waived its appeal rights and asks that I dismiss this appeal or summarily affirm the remedies imposed.

I agree that Petitioner waived its appeal rights. Because Petitioner has no right to a hearing, I dismiss its hearing request pursuant to 42 C.F.R. § 498.70(b).

Background

The Social Security Act (Act) sets forth requirements for nursing facility participation in the Medicare program and authorizes the Secretary of Health and Human Services to promulgate regulations implementing those statutory provisions. Act §1819. The Secretary's regulations are found at 42 C.F.R. pt. 483. To participate in the Medicare program, a nursing facility must maintain substantial compliance with program

requirements. To be in substantial compliance, a facility's deficiencies may pose no greater risk to resident health and safety than "the potential for causing minimal harm." 42 C.F.R. § 488.301.

The Secretary contracts with state survey agencies to conduct periodic surveys to determine whether skilled nursing facilities are in substantial compliance. Act § 1864(a); 42 C.F.R. § 488.20. The regulations require that each facility be surveyed once every twelve months and more often, if necessary, to ensure that identified deficiencies are corrected. Act § 1819(g)(2)(A); 42 C.F.R. §§ 488.20(a); 488.308. If, as here, a facility "has consistently demonstrated failure to maintain compliance," and its practices have harmed residents, it will be designated a "special focus facility," which must be surveyed at least once every six months. Act §1819(f)(8); *see* CMS Ex. 2 (CMS State Survey and Certification Memorandum, S&C-10-32-NH (September 17, 2010)).

CMS's policies with respect to special focus facilities have been relatively lenient. Although it has the authority to terminate facilities that are not in substantial compliance (see discussion below), it apparently has allowed these substandard facilities to continue as special focus facilities, without demonstrating correction, for at least two additional years. To "graduate," i.e. shed the designation, a facility must have two consecutive surveys with no deficiencies cited at scope and severity level "F" or higher. An F-level deficiency is not trivial; although it does not involve actual harm, the facility's noncompliance is widespread and presents the potential for more than minimal harm. CMS Ex. 2 at 5.

In a survey and certification memorandum issued by CMS on April 5, 2013, CMS recognized that the agency spends a disproportionate amount of its scarce resources monitoring these chronically and seriously deficient facilities. The memo describes the steps CMS planned to take in response to a decrease in program funding. For nursing homes, such as Petitioner, "that have exhibited a persistent pattern of poor quality and have been enrolled in the Special Focus Facility initiative" for more than 18 months, but have failed to improve, the state agency would schedule a final "last chance" survey. If that survey did "not reveal appropriate improvement[,] or unless there is a major new development that CMS concludes is very likely to eventuate in timely and enduring improvement in the quality of care or safety[,]" a termination notice might be issued. CMS Ex. 3 at 3 (CMS State Survey and Certification Memorandum, S&C-13-23-ALL (April 5, 2013)).

Petitioner here became a special focus facility in December 2008, and at every survey thereafter it was not in substantial compliance with program requirements. CMS Ex. 7. Although it could not graduate from the special focus facility program, it continued to participate in Medicare.

Finally, on April 27, 2012, the state agency completed standard and complaint investigation surveys at the facility. The state surveyors cited multiple deficiencies, including deficiencies that caused actual harm to resident health and safety (scope and severity level "G") and that presented patterns of substantial noncompliance with the potential for more than minimal harm to resident health and safety (scope and severity level "E"). CMS Ex. 1 at 2 (Lang Decl. ¶ 5). In a notice letter dated May 24, 2012, CMS advised the facility of the survey results and its proposed penalties: denial of payment for new Medicare/Medicaid admissions; a civil money penalty of $900 per day effective April 27, 2012; and termination effective June 27, 2012. CMS Ex. 4.

The facility avoided termination, however, by entering into a written agreement, referred to as a Systems Improvement Agreement or SIA, with CMS and the state agency. By its terms, CMS gave the facility a full year to correct its deficiencies, achieve substantial compliance, and graduate from the special focus facility program. In return, the facility waived its rights to challenge any remedies CMS imposed based on the surveys conducted during that year. CMS Ex. 5. The facility explicitly agreed that its program participation would terminate if an "F" level deficiency – or worse – were cited during a standard health or complaint survey. CMS Ex. 5 at 7 (¶ D.8).

CMS kept its part of the bargain, and the facility continued to participate in the Medicare program and to receive reimbursement. Following a survey completed June 3, 2013, however, CMS determined that the facility was not in substantial compliance with multiple program requirements, including two – accident prevention (42 C.F.R. § 483.25(h)) and nutritional status (42 C.F.R. § 483.25(i)) – that posed actual harm to resident health and safety (scope and severity level "G"); and two – food safety (42 C.F.R. § 483.35(i)) and infection control (42 C.F.R. § 483.65) – that constituted widespread noncompliance with the potential for more than minimal harm to resident health and safety (scope and severity level "F").[1]

In a letter dated June 14, 2013, CMS advised the facility of the most serious survey findings. The letter said that, as a result of those findings, it would deny payment for new

[1] Some of the survey findings were deeply disturbing. Video surveillance footage (instituted as part of an investigation by the state attorney general) showed that staff repeatedly failed to provide ordered care but documented that they had done so. One underweight resident had suffered significant weight loss. He needed eating assistance, because he was unable to take food from his plate to his mouth, and he choked when swallowing. Video surveillance showed that staff not only failed to assist him as ordered, they sometimes did not feed him at all. Then they falsely recorded that they had done so. CMS Ex. 6 at 48, 50-51, 55-68. Not only did the staff's actions jeopardize this individual resident's health and safety, but their willingness to falsify treatment records raises serious questions about the reliability of the facility's other records.

admissions effective June 20, 2013, and terminate the facility's provider agreement effective August 2, 2013. Attachment to hearing request.

Notwithstanding its explicit waiver of all appeal rights, the facility requested a hearing to challenge the June 3 survey findings. While this appeal was pending, the facility filed in federal court a complaint and motion for a temporary injunction to halt the termination. In a decision dated August 6, 2013, the district court for the Southern District of Ohio dismissed the case for lack of jurisdiction, noting, among other findings, that the "risk of an erroneous deprivation [of the facility's provider status] is low." *Autumn Health Care of Zanesville, Inc. v. U.S. Dep't of Health & Human Servs.*, 959 F. Supp. 2d 1044 (S.D. Ohio Aug. 6, 2013).

Discussion[2]

"Unconstitutional conditions." Petitioner argues that the Systems Improvement Agreement it willingly entered into is nevertheless unenforceable based on the doctrine of unconstitutional conditions. According to that doctrine, a state may not condition a party's receipt of a benefit on its waiver of constitutional rights.[3] According to Petitioner, the Systems Improvement Agreement here is unenforceable, because it compels the facility to waive its constitutionally-protected rights to administrative and judicial review in order to participate in the Medicare and Medicaid programs. P. Br. at 4.

As a threshold matter, I note that CMS did not enter into the Systems Improvement Agreement in order to achieve some constitutionally-suspect goal, independent of any legitimate government interest. As CMS points out, the agency did not begin termination proceedings back in 2012 in order to coerce the facility into giving up its appeal rights. It began the termination proceedings because, for years, the facility was unable to maintain anything approaching substantial compliance with program requirements.

Moreover, as the Ohio district court observed, Petitioner's waiver does not fall within the narrow range of agreements made unenforceable by the doctrine. Petitioner acknowledges that the Ohio district court rejected its argument, but points out that the court lacked jurisdiction to make any determinations, so the opinion is not binding. That may be so but does not detract from the court's sound reasoning. As it pointed out,

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[2] With its motion, CMS submitted a brief and seven exhibits (CMS Exs. 1-7). Petitioner submitted a brief and CMS filed a reply.

[3] CMS quotes Judge Posner, who characterized as a misnomer the term, "doctrine of unconstitutional conditions," because it creates the incorrect impression that such waivers are necessarily unconstitutional. Judge Posner suggested that "doctrine of constitutional conditioning" would be a more appropriate term. *Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000); CMS Reply at 2 n.2. I agree.

courts recognize that "many constitutional rights may be knowingly and voluntarily waived as part of the settlement of disputes." *Autumn Health Care* at 1053-1054, *citing Town of Newton v. Rumery*, 480 U.S. 386 (1987) (upholding contract waiving right to bring civil claims for alleged violations of constitutional rights by state actors); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 758 (6th Cir. 1985) (concluding that when a party knowingly, voluntarily, and intentionally signs a jury waiver provision in a civil case, that party has waived its right to a jury trial); *Lake James Cmty. Volunteer Fire Dep't v. Burke County*, 149 F. 3d 277 (4th Cir. 1998) (agreement between a volunteer fire department and the county that prohibited the fire department from suing the county was enforceable, even though it waived the fire department's constitutional right to petition the government). So long as a party knowingly and voluntarily waives his rights, an appeal waiver is enforceable. *United States v. Toth*, 688 F.3d 374, 378 (6th Cir. 2012); *United States v. Wilson*, 438 F.3d 672, 673 (6th Cir. 2006); *West Chelsea Buildings, LLC v. United States*, 109 Fed. Cl. 5, 27 (2013) ("Where, as here, plaintiffs voluntarily waived their constitutional rights as part of a voluntary agreement, the doctrine of unconstitutional conditions does not apply.").

Here, as the district court pointed out, the parties' "ongoing dispute . . . culminated in a lengthy agreement that included a waiver of the right to [administrative and] judicial review." *Id.* The facility, which was represented by counsel throughout these proceedings, knowingly and voluntarily waived its hearing rights, and reaped the benefits of that waiver for more than a year. It therefore has no right to a hearing, and I may dismiss its hearing request entirely. 42 C.F.R. § 498.70(b).

Authority to terminate. Petitioner also challenges the remedy imposed, arguing that CMS may only terminate a facility's program participation if the deficiencies cited pose immediate jeopardy to resident health and safety. Inasmuch as Petitioner waived its appeal rights, I have no authority to decide this, or any other issue Petitioner raises. Even if I had such authority, Petitioner's argument is simply wrong as a matter of law. The Act authorizes CMS (acting on behalf of the Secretary of HHS) to terminate a Medicare provider agreement if the facility is not in substantial compliance with program requirements. Act §§ 1819(h)(2); 1866(b)(2)(A); 42 C.F.R. § 488.412(a); *see also Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 21 (2000); *Blossom South, LLC v. Sebelius*, 2014 WL 204201(WD NY January 17, 2014); *Beverly Health & Rehab. Servs., Inc., v. Thompson*, 223 F. Supp. 2d 73, 111 (D.D.C. 2002) (holding that the agency's authority to terminate is not limited to immediate jeopardy cases, but "may span all noncompliant facility behavior.").

Conclusion

Because Petitioner knowingly and voluntarily agreed to waive its appeal rights and realized the benefits of that waiver, it has no right to a hearing before me.

/s/
Carolyn Cozad Hughes
Administrative Law Judge