

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Catalina Post-Acute Rehabilitation,
(CCN: 03-5190),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-2006

Decision No. CR3498

Date: December 5, 2014

DECISION

The request for hearing filed by Petitioner, Catalina Post-Acute Rehabilitation, on September 27, 2014, is dismissed pursuant to 42 C.F.R. § 498.70(b), because Petitioner has no right to a hearing.*

I. Background and Facts.

Petitioner is located in Tucson, Arizona, and participates in Medicare as a skilled nursing facility (SNF). On July 17, 2014, the Arizona Department of Health Services (state agency) completed a survey of the facility and found that it was not in substantial compliance with federal program participation requirements. The state agency notified Petitioner by letter dated July 31, 2014, that if Petitioner did not return to substantial compliance within three months a denial of payment for new admissions (DPNA) would be imposed and, after six months, Petitioner's participation in Medicare would be

* All references are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless otherwise indicated.

terminated. The state agency also advised Petitioner that it recommended that CMS impose a civil money penalty (CMP) of \$500 per day effective July 17, 2014. On September 27, 2014, Petitioner requested a hearing. The case was assigned to me for hearing and decision on October 14, 2014, and an Acknowledgment and Prehearing Order was issued at my direction. On November 12, 2014, CMS filed a motion (CMS Motion) to dismiss the request for hearing with CMS exhibits (CMS Exs.) 1 through 4. On December 2, 2014, Petitioner filed a response (P. Response) opposing the CMS motion to dismiss with Petitioner's exhibits (P. Exs.) 1 and 2.

CMS Ex. 3 shows that a revisit survey on September 18, 2014, determined that Petitioner returned to substantial compliance with program participation requirements on that date. CMS asserts in its motion to dismiss that the DPNA did not go into effect and CMS never imposed a CMP or other enforcement remedy based on the July 17, 2014 survey. CMS moved to dismiss on grounds that no enforcement remedy was imposed and Petitioner has no right to a hearing. CMS Motion at 1-2.

II. Conclusions of Law and Analysis

My conclusions of law are set forth in bold followed by my analysis.

A. Petitioner has no right to a hearing because CMS imposed no enforcement remedies.

B. I have no jurisdiction or authority to review alleged deficiencies from a survey absent enforcement remedies based upon those deficiencies.

C. Dismissal of Petitioner's request for hearing pursuant to 42 C.F.R. § 498.70(b) is appropriate because Petitioner has no right to a hearing.

A provider does not have a right to a hearing to challenge every action by CMS with which it disagrees. Only certain actions by CMS trigger hearing rights. The Social Security Act (Act) and implementing regulations make a hearing before an ALJ available to a long-term care facility against which CMS has determined to impose an enforcement remedy. Act §§ 1128A(c)(2), 1866(h); 42 C.F.R. §§ 488.330(e), 488.408(g)(1), 498.3(b)(13). The choice of remedies, or the factors CMS considered when choosing remedies, are not subject to review. 42 C.F.R. § 488.408(g)(2). The level of noncompliance found by CMS is subject to review, but only if a successful challenge could affect the range of CMPs that could be imposed or the finding of substandard quality of care that "results in the loss of approval" of a facility's nurse aide training and competency evaluation program (NATCEP). 42 C.F.R. § 498.3(b)(14). The regulation also provides that the finding of substandard quality of care that results in the loss of approval of a facility's NATCEP is subject to review. 42 C.F.R. § 498.3(b)(16).

The possible remedies that CMS may impose against a facility are specified at 42 C.F.R. § 488.406(a). No right to a hearing exists pursuant to 42 C.F.R. § 498.3(b)(13) unless CMS determines to impose - and actually imposes - one of the specified remedies. 42 C.F.R. § 488.408(g) (“facility may appeal a certification of noncompliance leading to an enforcement remedy”); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985 (2005); *The Lutheran Home – Caledonia*, DAB CR674, *aff’d*, DAB No. 1753 (2000); *Schowalter Villa*, DAB CR568, *aff’d*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB CR424 (1996), *aff’d*, DAB No. 1607 (1997). The Secretary of Health and Human Services (the Secretary) specifically rejected a proposal to grant hearing rights for deficiency findings that were made without the imposition of remedies. 59 Fed. Reg. 56,116, 56,158 (Nov. 10, 1994) (“if no remedy is imposed, the provider has suffered no injury calling for an appeal”).

It is specifically the imposition or proposed imposition of an enforcement remedy, and not the citation of a deficiency, that triggers the right to a hearing under 42 C.F.R. pt. 498. When the enforcement remedy is eliminated, so, too, is Petitioner’s right to review and my authority to conduct the review. *Golden Living Ctr.*, DAB No. 2364, at 2-3 (2011); *Columbus Park Nursing and Rehab. Ctr.*, DAB No. 2316 (2010); *Fountain Lake Health & Rehab., Inc.*, DAB No. 1985; *Lakewood Plaza Nursing Ctr.*, DAB No. 1767 (2001); *see Eagle Care, Inc. d/b/a/ Beech Grove Meadows*, DAB CR923 (2002); *Schowalter Villa*, DAB No. 1688; *Arcadia Acres, Inc.*, DAB No. 1607; *see also The Lutheran Home – Caledonia*, DAB No. 1753; *Walker Methodist Health Ctr.*, DAB CR869 (2002); *Charlesgate Nursing Ctr.*, DAB CR868 (2002); *D.C. Assoc. for Retarded Citizens*, DAB CR776 (2001); *Alpine Inn Care, Inc., d/b/a Ansley Pavilion*, DAB CR728 (2001); *Woodland Care Ctr.*, DAB CR659 (2000); *Fort Tryon Nursing Home*, DAB CR425 (1996). In each of these cases, the failure or inability of the petitioner to demonstrate that the survey findings and deficiency determinations resulted in an enforcement remedy was fatal to the right to a hearing and appeal. In each of the cases, the request for hearing was dismissed. The appellate panels of the Board and the ALJs who decided the cases have uniformly concluded that a citation of deficiency that is not the basis for an enforcement remedy, or that results in the imposition of a remedy that is later rescinded or reduced to zero, does not trigger the right to a hearing under 42 C.F.R. pt. 498.

There is no dispute in this case that the DPNA and termination remedies were not effectuated. There is no evidence that CMS issued a notice of an initial determination to impose an enforcement remedy as required by 42 C.F.R. §§ 488.434(a) and 498.20(a). Accordingly, I conclude that Petitioner has no right at this time to request a hearing based upon the imposition of an enforcement remedy and I have no jurisdiction to grant the review Petitioner requests. Act §§ 1128A(c)(2), 1866(h); 42 C.F.R. §§ 488.330(e), 488.408(g)(1), 498.3(b)(13). If CMS subsequently issues an initial determination to impose enforcement remedies, Petitioner’s right to request review is preserved by the Act and regulations.

Petitioner urges me to follow the rationale articulated in two federal court decisions and conclude that, even in the absence of enforcement remedies, there is stigma and infringement on Petitioner's property interest that entitle Petitioner to a hearing and decision. Petitioner also argues that I have discretion under 42 C.F.R. § 498.70(b) not to dismiss a request for hearing, even in the absence of enforcement remedies. Petitioner's arguments are without merit. I have no authority to find invalid provisions of the Act or the Secretary's regulations. I have no authority to choose not to follow the Act and the Secretary's regulations. Sections 1128A(c)(2) and 1866(h) of the Act are clear that Petitioner is entitled to a hearing only when the Secretary, or in this case her delegate CMS, imposes a CMP or takes other adverse action affecting Petitioner's participation in Medicare. In this case, there is no evidence of the adverse action that is required to trigger Petitioner's right to review under the Act or the regulations.

III. Conclusion

For the foregoing reasons, Petitioner's request for hearing is dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge