Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Generations at Regency Center
Docket No. A-19-13
Decision No. 2950
July 5, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE ORDER OF DISMISSAL

Generations at Regency Center (Petitioner), an Illinois nursing facility that participates in the Medicare program, has appealed the August 30, 2018 order (Order) of an administrative law judge (ALJ) dismissing Petitioner's December 29, 2017 request for an ALJ hearing. Petitioner filed its hearing request to contest state survey findings that it was not in substantial compliance with Medicare participation requirements. The ALJ concluded that under the applicable regulations and Board precedent there is no right to an ALJ hearing to contest noncompliance citations if, as in this case, the Centers for Medicare and Medicaid Services (CMS) does not impose a remedy.

For the reasons discussed below, we affirm the ALJ's Order.

Legal Background

To participate in the Medicare program, a skilled nursing facility (SNF) must be in "substantial compliance" with program participation requirements. A SNF is not in substantial compliance when it has a "deficiency" – that is, a failure to meet a participation requirement – that creates the potential for more than minimal harm to one or more residents. *See* 42 C.F.R. § 488.301 (defining "substantial compliance"). The term "noncompliance," as used in the applicable regulations, is synonymous with lack of substantial compliance. *Id.* (defining "noncompliance"). The Social Security Act (Act) provides for state health agencies to conduct on-site surveys of SNFs to evaluate their compliance with the participation requirements. Act §§ 1819, 1864(a), 1902(a)(33)(B) and 1919;[1] 42 C.F.R. Parts 483, 488, and 498. A state survey agency reports any "deficiency" it finds in a Statement of Deficiencies (SOD). *Id.* § 488.325(f)(1).

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

CMS may impose enforcement "remedies" on a SNF found to not be in substantial compliance. *Id*. §§ 488.400, 488.402(b), (c), 488.406. The remedies imposed by CMS, if any, are based on the scope and severity of deficiencies, i.e., whether a deficiency has created a "potential for" harm, resulted in "[a]ctual harm," or placed residents in "immediate jeopardy," and whether a deficiency is "isolated," constitutes a "pattern," or is "widespread." *Id*. § 488.404. CMS in its State Operations Manual (SOM) assigns a letter to each level of scope and severity, with (as relevant here) "D" meaning an isolated deficiency that constitutes "[n]o actual harm with a potential for more than minimal harm that is not immediate jeopardy." SOM § 7400.3.1[2] (last visited July 5, 2019), https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS1201984.html?DLPage=1&DLEntries=10&DLSort=0&DLSortDir=ascending.

Section 498.3 sets forth a list of administrative actions that are "initial determinations by CMS" that are subject to review, as well as a list of other types of "administrative actions that are not initial determinations (and therefore not subject to appeal under [Part 498])." *Id*. § 498.3(b), 498.3(d). The "initial determinations" include a "finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 or § 488.820 . . . ." *Id*. § 498.3(b)(13). An ALJ may dismiss a hearing request where the party requesting the hearing "does not . . . have a right to a hearing." *Id*. § 498.70(b).

Factual Background[3]

On October 16, 2017, the Illinois Department of Public Health (state agency) completed a complaint survey of Petitioner. Order at 1 (citing CMS Exhibit (Ex.) 1). In a letter dated November 1, 2017, the state agency notified Petitioner that it was recommending that CMS impose a civil money penalty (CMP) of $2,000 per instance for noncompliance cited under Tag F323. *Id*.; CMS Ex. 1, at 1. The state agency informed Petitioner that, since Petitioner had already corrected the deficiency cited under Tag F323 prior to the survey and established a quality assurance program to ensure that the noncompliance would not happen again, a plan of correction or revisit was not required, and the deficiency was still eligible for informal dispute resolution (IDR). Order at 1-2; CMS Ex. 1, at 1. The state agency further informed Petitioner that a plan of correction was required for a deficiency cited under Tag F279. Order at 2; CMS Ex. 1, at 1-2. The state agency also informed Petitioner that facilities not in substantial compliance "may be

[2] At the time of the state agency survey in this case, October 16, 2017, the scope and severity level definitions were found at SOM § 7400.5.1.

[3] The facts stated in this section are not our findings; rather, they are from the Order and the record. The stated facts are undisputed unless we note otherwise.

subject to remedies," and that facilities that do not achieve substantial compliance following a survey are subject to mandatory denial of payment for all new program admissions and mandatory termination. *Id*. at 2. The state agency did not advise Petitioner of any appeal rights. Order at 2 (citing CMS Ex. 1).

On December 29, 2017, Petitioner filed a request for a hearing before an administrative law judge to challenge the October 16, 2017 survey findings by the State, and attached a copy of the State's letter to the request. Order at 2. The letter noted that CMS had not yet issued a notice letter.[4] *Id*. By letter dated January 4, 2018, CMS notified Petitioner that the state agency survey identified deficiencies under Tags F323 and F279 at scope and severity level "D." *Id*. (citing CMS Ex. 2). CMS informed Petitioner that, "based on the scope and severity of the deficiencies cited, CMS will not impose a CMP against your facility for this survey cycle." CMS Ex. 2, at 1. CMS further informed Petitioner that "no remedies against your facility have gone into effect for this enforcement cycle." *Id*. at 2 (emphasis omitted).

On February 15, 2018, CMS filed a motion to dismiss Petitioner's hearing request on the ground that Petitioner "does not have a right to a hearing on deficiency findings for which no remedies were imposed, and where appeal rights were not provided." CMS's Combined Motion to Dismiss and Supporting Memorandum of Law (citing 42 C.F.R. § 498.70(b)); Order at 2.

On March 7, 2018, Petitioner filed a response in opposition to CMS's motion (Response to Motion to Dismiss). Petitioner argued that "the use of [the cited] deficiencies in calculating" its rating under CMS's 5-Star Rating system (Five-Star Rating), "the effects of the [Five-Star Rating] on [Petitioner]'s business, including but not limited to participation in Federal Programs, Insurance Service Networks, Accountable Care Organizations, Preferred Provider Networks, and Terms and Conditions provided by lenders, . . . as well as each deficiency's consideration during future surveys and determination of subsequent remedies clearly constitute '**other alternative remed[ies]**' for which the facility should be granted the due process right to a hearing." Response to Motion to Dismiss at 2 (citing 42 C.F.R. § 431.151) (emphasis in original). Petitioner asserted that it would suffer "a deprivation of its right to due process" because the deficiencies are "posted to public websites, made part of the public record, and are published for use by potential clients and referral sources," thus resulting "in tangible

[4] Although the ALJ did not specifically address this, Petitioner's appeal was also subject to dismissal because 42 C.F.R. §§ 498.1 and 498.3 provide no right to appeal a State's determination of deficiencies or its recommendations of enforcement actions to CMS. If CMS had notified Petitioner that it made an initial determination to impose an enforcement action specified in section 488.406 (which it did not), Petitioner would have needed to appeal that notice, not the State's.

harm to the facility's reputation and present[ing] a significant opportunity for financial harm to the facility." *Id*. at 4. Petitioner further asserted that a decrease in a facility's Five-Star rating as a result of a deficiency citation "constitute[s] a taking of a protected property right . . . ." *Id*. at 4-9.

ALJ Order

The ALJ issued an Order Dismissing Case on August 30, 2018, concluding that "Petitioner has no right to a hearing because CMS did not impose a remedy." Order at 1 (emphasis removed). The ALJ explained that "administrative actions that are not initial determinations are not subject to appeal." *Id*. at 2-3 (citing 42 C.F.R. § 498.3(a)). The ALJ noted that, relevant here, "a finding of noncompliance leading to the imposition of enforcement remedies specified in [42 C.F.R.] § 488.406" "is an appealable initial determination." *Id*. at 3 (quoting 42 C.F.R. § 498.3(b)(13)) (emphasis omitted).[5] The ALJ stated that the Board has "long held that there is no right to a hearing under 42 C.F.R. Part 498 unless CMS determines to impose – *and actually imposes* – a remedy." *Id*. (emphasis in Order) (citations omitted). The ALJ also stated that "[t]he imposition of a *remedy*, not the citation of a deficiency, triggers the right to a hearing." *Id*. (citing *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc.*, DAB No. 1607 (1997) (emphasis in Order).

The ALJ rejected Petitioner's argument that dismissing its hearing request would deprive Petitioner of its constitutional right of due process. *Id*. at 3-4. The ALJ stated, in relevant part:

> [I]f Petitioner's position is that denying it the opportunity for a hearing is unconstitutional, I have no authority to review such a claim. Neither appellate panels nor administrative law judges of the [Departmental Appeals Board] may ignore unambiguous statutes or regulations on the

[5] Our decision cites to the version of the regulations in effect on October 16, 2017, when the state agency performed the survey. *See Carmel Convalescent Hosp.*, DAB No. 1584, at 2 n.2 (1996) (applying regulations in effect on the date of the survey and resurvey). Section 498.3(b)(13) was revised effective January 1, 2015, to state that initial determinations include "the finding of noncompliance leading to the imposition of enforcement *actions* specified in § 488.406 or § 488.820 of this chapter, but not the determination as to which sanction was imposed." 79 Fed. Reg. 66,032, 66,118 (Nov. 6, 2014) (emphasis added). The revision to "imposition of enforcement actions specified in § 488.406 or 488.820" from "imposition of enforcement remedies specified in 42 C.F.R. § 488.406" merely corresponded to the fact that, as revised, section 498.3(b)(13) applies to the enforcement sanctions specified in section 488.820 that apply to Home Health Agency enforcement actions as well as the enforcement remedies in section 488.406 that apply to long-term care facility enforcement actions. *See* 79 Fed. Reg. 66,032, 66,108 and 66,118.

> basis that they are unconstitutional. *See, e.g., Florida Health Sciences Ctr.*, DAB No. 2263 at 5-6. With regard to Petitioner's claim that CMS's deficiency citations deprive Petitioner of its property without due process, "no right to a hearing survives merely to correct [a] compliance record." *San Fernando Post Acute Hosp.*, DAB No. 2492 at 8, *quoting Fountain Lake*, DAB No. 1985 at 6 (internal quotation marks omitted); *see also Florida Health Sciences Ctr.*, DAB No. 2263 at 5 (a provider "has no right to an [administrative law judge] hearing solely to contest findings of noncompliance . . . when a proposed termination has been rescinded"). Thus, if CMS has not imposed a remedy, Petitioner does not have a right to a hearing to repair any perceived damage to its reputation caused by a deficiency citation.

Id. The ALJ also rejected Petitioner's argument that the negative effects of the deficiency citations on its Five-Star Rating creates an appeal right, concluding that "[t]he possible adverse consequences Petitioner envisions" are "speculative," and that the Board has already "considered and rejected this precise argument" in *Columbus Park Nursing & Rehabilitation Center*, DAB No. 2316, at 5-9 (2010). *Id*. at 4.

Finally, the ALJ rejected Petitioner's argument that any adverse consequences it may suffer as a result of the findings of noncompliance constitute "other alternative remed[ies]" under 42 C.F.R. § 431.151. *Id*. The ALJ concluded that section 431.151 "is inapplicable to this proceeding" because the "proceeding is not before a state administrative agency nor does it involve the imposition of any remedy by a state authority, whether chosen from the list in 42 C.F.R. § 488.406 or from a list of alternative remedies specified in a state Medicaid plan." *Id*.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it is erroneous. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, (last visited July 5, 2019), https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html?language=en. We review an ALJ's exercise of discretion to dismiss a hearing request, where such dismissal is authorized by law, for abuse of discretion. *See, e.g., High Tech Home Health, Inc.*, DAB No. 2105, at 7-8 (2007), *aff'd, High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

Discussion

In its Request for Review (RR) and Reply brief (Reply), Petitioner renews its argument that a deficiency finding "constitute[s] a remedy triggering the right to a hearing." RR at 2. Petitioner argues that a cited deficiency's "publication and use in the calculation of the Five-Star Rating deeply affect the constitutionally protected property rights a [SNF] has in its business." *Id*. Petitioner asserts that a facility's Five-Star Rating affects its ability to conduct business including, among other things, whether consumers will select a facility to place a loved one, lending terms available to a facility, the decision of insurers and other managed care organizations to include a facility in their networks, and referral decisions made by providers and practitioners. Reply at 3-4. Petitioner also notes that a facility's past compliance history is used to determine the scope and severity of future violations, as well as the amount of CMP to be imposed as a remedy for future violations. *Id*. at 4, 5.

The ALJ's decision to dismiss Petitioner's hearing request for lack of jurisdiction is consistent with the governing regulations and Board precedent. The Board and ALJs are bound by all applicable sections of the Act and regulations and do "not have the authority to ignore unambiguous statutes or regulations on the basis that they are unconstitutional." *See, e.g., Florida Health Sciences Ctr., Inc., d/b/a Tampa General Hosp.*, DAB No. 2263, at 6 (2009) (quoting *Sentinel Med. Labs.*, Inc., DAB No. 1762, at 9 (2001), *aff'd, Teitelbaum v. Health Care Fin. Admin.*, 32 F. App'x 865 (9th Cir. 2002)). The regulations unambiguously state that an initial determination under section 498.3(b)(13) only includes those findings of noncompliance "leading to the imposition of enforcement actions specified in [42 C.F.R.] §488.406 or §488.820 . . . ." 42 C.F.R. § 498.3(b)(13). The Board has long held that neither the Act nor the regulations provide a hearing right for a finding of noncompliance absent the imposition of an enforcement remedy specified by the regulations. *See, e.g., San Fernando Post Acute Hosp.*, DAB No. 2492, at 2, 6-8 (2012) (discussing the appeal rights of facilities that receive a determination of noncompliance with Medicare participation requirements); *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316, at 7 (A SNF "has no right to an ALJ hearing to contest survey deficiency findings where CMS has not imposed any of the remedies specified at section 488.406 based on those findings, or where CMS imposed, but subsequently rescinded, any such remedies") (and cases cited therein). Here, CMS expressly stated that it would "not impose a CMP against [Petitioner] for this survey cycle," and that "no remedies against [Petitioner] have gone into effect . . . ." CMS Ex. 2, at 1, 2. Although the language of section 493.3(b)(13) now states that initial determinations include "the finding of noncompliance leading to the imposition of enforcement **actions** specified in §488.406 or §488.820 of this chapter . . ." rather than "imposition of enforcement **remedies** specified in [42 C.F.R.] § 488.406," the change in language, as we discussed in footnote 5, supra, effected no substantive change in appeal rights provided in the long-term care enforcement regulations and, consequently, does not affect the continuing authority of our prior decisions on this issue. Petitioner has not identified an enforcement

action imposed by CMS that is listed in either section 488.406 or section 488.820; thus, Petitioner has not shown that the state agency's deficiency findings are appealable initial determinations under section 498.3(b)(13).

We reject Petitioner's argument that the ALJ's "reliance on *Columbus Park* is misplaced" because, Petitioner asserts, "the use of published deficiencies and the Five-Star Rating System by CMS, insurance companies and others has increased exponentially in the last eight years." RR at 3. Petitioner's argument, even if true, fails to take into account the plain language of the regulations limiting appeals of noncompliance findings to instances where CMS imposes an enforcement action found in sections 488.406 or 488.820. Neither Congress nor CMS has expanded a SNF's hearing rights to include appeals based on the effects a deficiency finding has on a facility's Five-Star Rating or public reputation. *San Fernando* at 8 ("Despite . . . longstanding implementation of the statute and regulations, Congress has not acted to expand formal rights for SNFs . . . although it has provided new hearing rights for other types of determinations and has addressed the informal dispute resolution process for SNFs . . . .") (citing Act §§ 1866(j)(8) and 1819(h)(2)(B)(ii)(IV)(aa)).

Moreover, we reject, generally, Petitioner's argument that it has a right to a hearing based on the "detrimental effect" that the deficiency findings have on its "protected property rights." Reply at 2. In *San Fernando*, the Board rejected similar due process arguments, concluding that "the claimed 'collateral consequences' of the . . . survey noncompliance findings," such as the affect that the citations have on a facility's Five-Star Rating, "do not rise to the level of a constitutionally protected interest." *San Fernando* at 15 (citing *Bryn Mawr Care v. Sebelius*, 898 F. Supp. 2d 1009 (N.D. Ill. Sept. 26, 2012), *aff'd*, *Bryn Mawr Care, Inc. v. Sebelius*, 749 F. 3d 592 (7th Cir. 2014)). In reaching its conclusion, the Board explained that "the potential harm to a facility's reputation or financial status that may flow from the publication of deficiency findings does not trigger appeal rights under the Act or regulation." *Id*. at 13 (citing *Florida*). The Board also observed, among other things, that CMS affords facilities the right to go through the IDR process to challenge deficiency findings regardless of whether enforcement remedies are imposed. *Id*. at 14 (citing 42 C.F.R. § 488.331(a), (c)).[6] Finally, the Board noted that if a facility receives an enhanced penalty, it will be entitled at that point to challenge any previously unreviewable deficiency findings that were used to enhance that penalty. *Id*. at 14-15. Petitioner has presented no argument that compels us to alter our conclusions in *San Fernando*.

[6] The Board correctly noted that CMS is not required to accept State IDR results, but that the IDR process nonetheless "does provide an opportunity for the provider to challenge, and for the State agency to further review, deficiency citations." DAB No. 2492, at 14 (citations omitted).

In sum, CMS did not determine to impose an enforcement action found in 42 C.F.R. § 488.406 or § 488.820 on Petitioner and, therefore, the state agency's findings of noncompliance are not appealable initial decisions under section 498.3(b)(13).

Conclusion

For the reasons stated above, we affirm the ALJ's August 30, 2018 Order Dismissing Case.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member