Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Florida Health Sciences Center, Inc., d/b/a Tampa General Hospital,
(CCN: 10-0128),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-159

Decision No. CR2584

Date: August 8, 2012

DECISION DISMISSING HEARING REQUEST

This matter is before me on the Motion to Dismiss that the Centers for Medicare and Medicaid Services (CMS) filed on February 29, 2012. Petitioner opposes the motion. I conclude Petitioner is not entitled to a hearing, and I grant the Motion to Dismiss.

I. Background

Petitioner is a hospital, doing business in Tampa, Florida, that participates in the Medicare program and is accredited by the Joint Commission on Accreditation of Hospitals (JCAHO). The Florida Agency for Health Care Administration (state agency) completed a complaint survey of Petitioner's hospital on September 16, 2011. Based on the survey findings, CMS determined Petitioner no longer met the requirements for Medicare participation. CMS notified Petitioner on September 22, 2011, that its deficiencies posed "an immediate and serious threat to the health and safety of patients," and its Medicare provider agreement would be terminated effective October 9, 2011 if the immediate jeopardy was not removed by that date. CMS Ex. 2. The state agency conducted a revisit survey on October 6, 2011. CMS notified Petitioner on October 24, 2011 that, based on the revisit findings, the immediate jeopardy had been removed. CMS

Ex. 3. As a result, the termination remedy never went into effect. CMS imposed no other remedy. CMS Motion at 2.

CMS forwarded Petitioner's November 18, 2011 request for hearing to the Civil Remedies Division on November 28, 2011, and it was assigned to me on December 1, 2011 for hearing and decision.

CMS later moved to dismiss Petitioner's hearing request on the grounds that Petitioner does not have a right to a hearing. In addition to its motion to dismiss, CMS filed three exhibits (CMS Exs. 1-3). Petitioner filed a response opposing CMS's motion (P. Br.).

II. Issue

I consider whether Petitioner has a right to a hearing on CMS's determination that it was not in substantial compliance with Medicare conditions of participation where CMS ultimately declined to terminate its Medicare provider agreement.

III. Discussion

A. Petitioner is not entitled to a hearing because CMS did not terminate its Medicare provider agreement.

With respect to CMS determinations that affect a hospital's participation in the Medicare program, a provider is entitled to an administrative law judge (ALJ) hearing where CMS has made an adverse "initial determination" of a kind specified in 42 C.F.R. § 498.3(b). 42 C.F.R. § 498.3(a)(1). Administrative actions that do not constitute an initial determination, and are therefore not subject to appeal, are specified at 42 C.F.R. § 498.3(d). Section 498.3(d)(9) specifically excludes an appeal for:

> The finding that a hospital accredited by the Joint Commission on Accreditation of Hospitals or the American Osteopathic Association is not in compliance with a condition of participation, and a finding that that hospital is no longer deemed to meet the condition of participation.

A CMS determination to terminate a provider agreement is an initial determination reviewable by an administrative hearing. 42 C.F.R. § 498.3(d)(8). Nonetheless, CMS ultimately did not terminate Petitioner's provider agreement.

This is not a novel situation for Petitioner. Petitioner appealed a similar administrative action by CMS based on findings from a 2008 survey where CMS proposed to terminate Petitioner's provider agreement and later rescinded that proposed action. *See Florida Health Science Ctr., Inc., d/b/a/ Tampa General Hospital*, DAB No. 2263 (2009). In that case, Petitioner also came into compliance prior to the termination date, and the

termination did not go into effect. The ALJ granted CMS's motion to dismiss, and on appeal the Board sustained the ALJ's order to dismiss Petitioner's request for hearing and his ruling to deny reconsideration to vacate the dismissal. *See Florida Health Science Ctr., Inc.,* DAB No. 2263, at 5 ("A JCAHO-accredited hospital . . . has no right to an ALJ hearing solely to contest findings of noncompliance with the Medicare conditions of participation . . . when a proposed termination has been rescinded.")

B. Petitioner's inability to participate in the Hospital Value-Based Purchasing program is not an enforcement remedy subject to review in this forum.

Petitioner argues that this request for hearing should not be dismissed because Petitioner will "suffer pecuniary loss" as a consequence of CMS's administrative actions. Petitioner claims that these actions preclude its eligibility for the Hospital Value-Based Purchasing (HVBP) credits for fiscal year 2013. Petitioner states that this "significant monetary penalty" is a direct consequence of CMS's findings of noncompliance. P. Request for Hearing at 2; P. Br. at 1-3.

Petitioner explains that the HVBP program awards hospitals that meet certain performance standards. Petitioner further explains that if a hospital has been cited for deficiencies that pose immediate jeopardy to patient health or safety, the hospital is excluded from participating in the program. P. Br. at 2, *citing* 42 U.S.C. § 1395ww(o)(C)(ii)(II).

Petitioner now claims this harm is different from the argument it presented to the Board in DAB No. 2263. Petitioner distinguishes the two cases by stating that the HVBP program did not yet exist during its prior appeal in 2008, and the Board in DAB No. 2263 held that the alleged harms Petitioner was advancing were "merely speculative." Petitioner now states that CMS imposed a severe remedy by depriving Petitioner of its eligibility for the HVBP program and that this harm is more than speculative. P. Br. at 2-4.

Even if I were to agree that this future exclusion was not speculative, CMS's administrative actions still do not create a right to a hearing where a provider would not otherwise have a right to a hearing under the regulations. *See Golden Living Ctr. – Grand Island Lakeview*, DAB No. 2364, at 5-6 (2010) (holding the impact of noncompliance findings on a future designation as a Special Focus Facility does not give a facility an appeal right); *see also Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316, at 5-8 (2012) (holding that the negative impact of noncompliance findings on the facility's Five-Star Quality Rating does not create an appeal right).

Petitioner also argues that denying it a hearing infringes upon its due process rights. Petitioner raised this Constitutional issue during its appeal in DAB No. 2263. The Board

made clear then that neither the Board nor ALJs can ignore unambiguous statutes or regulations on the basis that they are unconstitutional. DAB No. 2263, at 6.

I find that there is no initial determination over which I have jurisdiction, and Petitioner has no right to a hearing to contest CMS's administrative actions resulting from the September 16 and October 6, 2011 surveys of its hospital. An ALJ may dismiss a hearing request where a party has no right to a hearing, and I therefore grant CMS's motion to dismiss pursuant to 42 C.F.R. § 498.70(b).

IV. Conclusion

I have no jurisdiction over Petitioner's hearing request and therefore order it dismissed. 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