Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of: Evergreen Commons, Petitioner, - v. - Centers for Medicare & Medicaid Services.	DATE: May 16, 2008 Civil Remedies CR1684 App. Div. Docket No. A-08-44 Decision No. 2175

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Evergreen Commons (Evergreen) requested review of the decision of Administrative Law Judge (ALJ) Keith W. Sickendick in Evergreen Commons, DAB CR1684 (2007) (ALJ Decision). The ALJ Decision dismissed Evergreen's request for a hearing on CMS's determination of immediate jeopardy as to two of several deficiencies found by the State survey agency. The ALJ concluded that Evergreen raised no issue for which it had a right to a hearing. For the reasons discussed below, we affirm the ALJ Decision.

Legal Background

This case turns on the question of what type of civil money penalty (CMP) CMS imposed on Evergreen. If a facility is not in substantial compliance with one or more program requirements, CMS has the authority to terminate the facility and/or to impose alternative enforcement remedies. Among the remedies CMS may impose is a CMP "for either the number of days a facility is not in substantial compliance with one or more participation

requirements or for each instance that a facility is not in substantial compliance[.]" 42 C.F.R. § 488.430(a).[1] In the case of a per-day CMP, the applicable range is $3,050 to $10,000 per day for deficiencies constituting immediate jeopardy or $50 to $3,000 per day where the noncompliance does not constitute immediate jeopardy. 42 C.F.R. § 488.438(a)(1). In the case of a per-instance CMP, there is a single range of $1,000 to $10,000, whether or not the noncompliance constitutes immediate jeopardy. 42 C.F.R. § 488.438(a)(2). Immediate jeopardy is defined as a situation in which the noncompliance "has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident" and represents the highest level of noncompliance. 42 C.F.R. §§ 488.301; State Operations Manual, section 7400E (scope and severity matrix).

The significance of CMS's choice of remedy here derives from the fact that a facility may seek review of "[t]he level of noncompliance found by CMS . . . only if a successful challenge on this issue would affect" either "[t]he range of civil money penalty amounts that CMS could collect" or a "finding of substandard quality of care that results in the loss of approval" of a facility's "nurse aide training program." 42 C.F.R. § 498.3(b)(14).[2] A per-instance CMP has only one range. 42 C.F.R. §§ 488.408(d)(1)(iv), (e)(iv), 488.438(a)(2). Accordingly, a successful challenge to CMS's immediate jeopardy determination would not affect the range of CMP amounts and, therefore, CMS's immediate jeopardy determination may not be challenged when CMS imposes a per-instance CMP. See, e.g., Aase Haugen Homes, DAB No. 2013 at 3 (2006).

Case Background[3]

By letter dated August 2, 2007, Evergreen requested a hearing to contest, in part, the results of a survey completed by the State survey agency on May 21, 2007. CMS determined that four deficiencies found in that survey constituted noncompliance at

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[1] This decision refers to the 2006 Code of Federal Regulations.

[2] Evergreen has not argued that it has appeal rights based on a "finding of substandard quality of care that results in the loss of approval" of a facility's "nurse aide training program."

[3] This background is drawn from the ALJ Decision and record before the ALJ.

the immediate jeopardy level and that three deficiencies found in that survey constituted noncompliance at the non-immediate jeopardy level. Evergreen requested a hearing on CMS's determination of immediate jeopardy as to two deficiencies, cited under tag F-323, Shower Room Heaters, and tag F-324, Steam Tables. Evergreen did not request a hearing on CMS's determination of immediate jeopardy as to two other deficiencies or on CMS's conclusion that Evergreen failed to substantially comply with Medicare participation requirements, as evidenced by either the immediate jeopardy deficiencies or other deficiencies cited by the State survey agency. CMS moved to dismiss Evergreen's hearing request, asserting that Evergreen had no right to a hearing on CMS's immediate jeopardy determination regarding tags F-323 and F-324, because: 1) CMS had imposed a per-instance CMP, for which there is only a single range of amounts; and 2) Evergreen had no nurse aide training program. In response to CMS's motion, Evergreen did not dispute that under 42 C.F.R. § 498.3(b)(14)(i), it would not be entitled to challenge CMS's immediate jeopardy determination if CMS had imposed a per-instance CMP, since a successful challenge to CMS's immediate jeopardy determination would not affect the range of CMP amounts that CMS could collect. Neither did Evergreen dispute that it had no nurse aide training program or that the lack of such a program left it without appeal rights under 42 C.F.R. § 498.3(b)(14)(ii). Evergreen argued only that CMS had, in fact, imposed both a per-instance CMP and a per-day CMP, or, at least, had not made it clear which type of CMP it was imposing. The ALJ found, based on his reading of CMS's notice letter, that CMS never imposed, or indicated any intent to impose, a per-day CMP but, rather, imposed only a per-instance CMP of $9,000.[4] ALJ Decision at 2-3. The ALJ also noted that CMS reiterated in its briefing that no per-day CMP was imposed. Id. at 3. Accordingly, the ALJ dismissed Evergreen's hearing request pursuant to 42 C.F.R. § 498.70(b) (authorizing ALJ to dismiss for cause where "[t]he party requesting a hearing is not a proper party or does not otherwise have a right to a hearing.").

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. Departmental Appeals Board, *Guidelines for Appellate Review of*

[4] CMS gave notice of its intent to impose other remedies in addition to a CMP but they are not at issue here.

Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs (DAB *Guidelines*), http://www.hhs.gov/dab/guidelines/prov.html. 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 High Tech Home Health, Inc., DAB No. 2105, at 7-8 (2007) and cases cited therein.

Discussion

On appeal, Evergreen offers a variant of the argument it made in response to CMS's motion to dismiss. According to Evergreen, CMS's notice letter was "materially deficient" since "the reader cannot tell which type of penalty is involved (in fact, it appears to be both)." Notice of appeal at 4, 5. Evergreen therefore requests that the Board reverse the ALJ Decision and remand the matter to the ALJ with orders to instruct CMS "to clarify" the notice letter and to give Evergreen an opportunity to request a hearing based on a new notice letter. Id. at 5.

We conclude that the ALJ did not err in finding that CMS never imposed a per-day CMP and that CMS instead imposed only a $9,000 per-instance CMP. Section 488.430(a) of 42 C.F.R. refers to the two types of CMPs in the alternative, stating that CMS may impose a CMP for "either" the number of days of noncompliance "or" for each instance of noncompliance. See also 42 C.F.R. § 488.434(a)(2)(iii) (providing that the notice of penalty includes "[t]he amount of penalty per day of noncompliance or the amount of the penalty per instance of noncompliance" (emphasis added)). In addition, the preamble to the final rule authorizing imposition of a per-instance CMP clearly states that the regulation "does not authorize the use of both" a per-day CMP and a per-instance CMP. 64 Fed. Reg. 13,354, 13,356 (March 18, 1999). Thus, as a matter of law, Evergreen could not reasonably read the notice letter as imposing both types of CMPs for the noncompliance at issue.

Moreover, the notice letter clearly indicates that CMS was imposing a per-instance CMP, not a per-day CMP. The notice states in relevant part:

> As a result of the survey findings, you were notified that the DOH (New York State Department of Health] was recommending to [CMS] that your Medicare provider agreement be terminated effective November 21, 2007 unless all deficiencies are corrected by November 21, 2007. The DOH has also recommended that a civil money penalty be imposed.

> The CMS has accepted the DOH's recommendations. This means that your facility's Medicare provider agreement will terminate on November 21, 2007 if substantial compliance is not achieved by that time. In addition, if your facility remains noncompliant with participation requirements three months after the survey exit date, a Mandatory denial of Payment for all New Medicare and Medicaid Admissions . . . will be imposed on your facility effective August 21, 2007 . . . .
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> * * * *
>
> Also, we are imposing a per instance civil money penalty (CMP) in the amount of $9,000.00.

CMS letter dated June 6, 2007, at 1-2 (emphasis added).

The notice letter expressly states that CMS is imposing a per-instance CMP and specifies the amount of that CMP. In contrast, the notice letter does not contain any statement that CMS is imposing a per-day CMP, nor does the notice letter specify the amount or the duration of such a CMP. Evergreen points to a sentence, directly following the sentence stating that CMS is imposing a $9,000 per-instance CMP, which states:

> In determining the amount of the CMP that we are imposing for each day of noncompliance, we have considered your facility's history of noncompliance, including repeated deficiencies; its financial condition; the factors specified in the Federal requirement at 42 CFR 488.404; and the facility's degree of culpability. . . .

Id. at 2.

Evergreen argues that the phrase "for each day of noncompliance" makes it unclear which type of CMP CMS intended to impose. The ALJ concluded that this phrase "is obviously part of a form letter that was not properly edited prior to issuance." ALJ Decision at 3.

Regardless of whether the phrase "for each day of noncompliance" was included in error, the notice letter's use of that phrase is immaterial because the sentence in which the phrase appears does not purport to impose any CMP. The sentence merely addresses the factors set forth at 42 C.F.R. § 488.438(f) that CMS considers when deciding the amount of any CMP, whether per instance or per day. See also 64 Fed. Reg. 13,354, 13,357 (stating that the criteria applied to determine the amount of a per-instance CMP

are "the same as those applied to determining penalty amounts under the current regulation"). Furthermore, CMS has interpreted section 1819(h)(2)(B)(ii) of the Social Security Act, which authorizes the Secretary to "impose a civil money penalty in an amount not to exceed $10,000 for each day of noncompliance," as authorizing the imposition of either per-day or per-instance CMPs. See id. at 13,356. Thus, CMS's use of the phrase "for each day of noncompliance" does not create any ambiguity where, as here, CMS has expressly stated that it is imposing a per-instance CMP.

We note that Evergreen objects both to the ALJ's consideration of CMS's reply to Evergreen's response to CMS's motion to dismiss and to the Board's consideration of any briefs submitted by CMS in the proceedings before the ALJ (including that reply). Evergreen letter dated 3/15/08, at 2; see also Evergreen letter to Civil Remedies Division staff attorney, dated 10/22/07, at 1. These objections have no merit. Evergreen argues that CMS's reply should not be part of the record because the ALJ did not expressly rule that there was good cause for granting CMS's request to file the reply. The ALJ's pre-hearing order permitted the filing of a motion to dismiss and a response but stated that a reply brief "will not be accepted absent a showing of good cause." Order dated 8/24/07, at 2. The ALJ's finding of good cause is implicit in his decision to cite to CMS's reply. See ALJ Decision at 3. In any event, the good cause criterion here was a matter of the ALJ's own discretion under his pre-hearing order, not a statutory or regulatory requirement. Evergreen also points out that CMS did not advise the Board until after the time provided by the Board for CMS to file a response to Evergreen's appeal that CMS was relying on its briefs below rather than filing a separate response. Since those briefs are part of the administrative record for the ALJ Decision, however, the Board may properly consider them regardless of whether CMS advised the Board of its intention to rely on them within the time for filing a response. In any event, even without the benefit of a responsive brief from CMS (which the Board's Guidelines provide for but do not require), we would conclude that CMS imposed only a $9,000 per-instance CMP.

Conclusion

For the foregoing reasons, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member