**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Tinley Park Mental Health Center,
(Provider No.: ILH0497),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-557

Decision No. CR2149

Date: June 9, 2010

# DECISION AND ORDER DISMISSING CASE

THIS MATTER IS BEFORE ME on the Motion to Dismiss filed by the Centers for Medicare & Medicaid Services (CMS) on April 13, 2010. By its Motion CMS seeks the dismissal of the Request for Hearing filed by Petitioner Tinley Park Mental Health Center (TPMHC), which Request for Hearing is the basis of this appeal. The parties have briefed the issue raised in the Motion, and have proffered exhibits in documentary form to support their briefing.

Having considered the parties' briefs and having admitted and reviewed their exhibits, I GRANT the Motion to Dismiss. My reasons for doing so, and my findings and conclusions, are set out below.

## I. Procedural Background

TPMHC is a psychiatric hospital located in Tinley Park, Illinois, a community near Chicago. Until February 2007 TPMHC participated in the Medicare program in that capacity. However, compliance surveys of TPMHC were conducted in August and October 2006 and in January 2007, and the results of those surveys led CMS to terminate TPMHC's Medicare participation agreement effective February 23, 2007. TPMHC did not appeal CMS's 2007 termination action.

In time TPMHC sought to regain its Medicare certification, and on March 16, 2009 the facility requested a "reasonable assurance" survey (RAS) in the expectation that it could demonstrate substantial compliance with conditions of participation in the Medicare program. The RAS was completed on September 16, 2009.

The RAS did not find TPMHC in substantial compliance with all participation requirements. The facility was found to be not in substantial compliance with two conditions of participation related to its special status as a psychiatric hospital: the conditions set out at 42 C.F.R. § 482.61, relating to special medical record-keeping requirements for psychiatric hospitals, and at 42 C.F.R. § 482.62, relating to special staff requirements for psychiatric hospitals. TPMHC's substantial non-compliance with 42 C.F.R. § 482.61 had been the basis of CMS's termination action in 2007.

CMS wrote to TPMHC on October 21, 2009 and informed the facility that it had been found to be not in substantial compliance with those two conditions. CMS informed TPMHC that it might within 60 days request that CMS reconsider its decision. Although its request that CMS reconsider does not appear in the record before me, TPMHC apparently did so, but without success. On January 21, 2010, CMS wrote to TPMHC and announced that it was affirming its decision of October 21, 2009 and denying TPMHC's certification to participate in Medicare.

TPMHC filed its Request for Hearing on March 17, 2010, making reference to the CMS letter of January 21, 2010. My Acknowledgment and Initial Docketing Order followed on March 25, 2010.

The CMS letter of January 21, 2010 is the source of some procedural confusion, for it contained language purporting to explain that TPMHS had the right to appeal CMS's action. CMS now asserts that the language was included erroneously, and claims to have corrected its error and cancelled any effect it might have had by writing to TPMHC on April 7, 2010, "re-opening" its January 21, 2010 letter, restating and amplifying its reasons for denying the facility's Medicare certification, and asserting that "[T]he action we are taking in this letter is an administrative action that is not an initial determination, and it is therefore not subject to appeal pursuant to 42 C.F.R. 498.3(d)(4)." Obviously, the CMS letter of April 7, 2010 was written after my Acknowledgment and Initial Docketing Order had been issued.[1]

[1] In its opening pleading, CMS suggests that its "April 7 reopening of this matter renders Petitioner's appeal in this case moot, since the April 7 re-opening letter supercedes CMS' January 21, 2010 reconsidered determination, and no appeal rights were accorded by CMS in its April 7 letter." CMS Motion at 2. This interesting argument was neither answered by TPMHC nor pursued further by CMS, and I do not consider it further in this Decision.

The CMS Motion now before me adopts the position CMS took in its April 7, 2010 letter to TPMHC. CMS now argues that its decision to deny the facility certification is an "administrative action" as contemplated by 42 C.F.R. § 489.57 and 42 C.F.R. § 498.3(d)(4), not an "initial determination" as contemplated by 42 C.F.R. § 498.3(b), and therefore not subject to appeal pursuant to 42 C.F.R. § 498.5.

## II. Issue

The sole issue before me is whether TPMHC has a right to a hearing in order to challenge CMS's January 21, 2010 decision to deny TPMHC certification in the Medicare program. The resolution of this issue depends on whether the CMS decision is an administrative action as defined in 42 C.F.R. § 498.3(d)(4) – in which case it is not appealable – or whether it is an initial determination, subject to appeal under the terms of 42 C.F.R. § 498.5.

## III. Controlling Statutes and Regulations

In order to participate as a provider in the Medicare program, a psychiatric hospital must, among other things, comply with the requirements set out at length in 42 C.F.R. §§ 482.60, 482.61, and 482.62. Many of the general requirements applicable to all hospitals are made applicable to psychiatric hospitals by 42 C.F.R. § 482.60(b). A special condition of participation concerning clinical records is imposed by 42 C.F.R. § 482.60(c) and its component standards are detailed in 42 C.F.R. § 482.61. A special condition of participation concerning staffing requirements is imposed by 42 C.F.R. § 482.60(d) and its component standards are detailed in 42 C.F.R. § 482.62.

The special condition concerning clinical records has five component standards. They are set out at 42 C.F.R. § 482.61(a), development of assessment and diagnostic data; 42 C.F.R. § 482.61(b), psychiatric evaluation; 42 C.F.R. § 482.61(c), treatment plan; 42 C.F.R. § 482.61(d), recording progress; and 42 C.F.R. § 482.61(e), discharge planning and discharge summary. The first three standards are subdivided into additional specific requirements, and all five standards contain detailed descriptions of what the required records must reflect.

In similar manner, the special condition concerning staffing requirements has seven component standards set out at 42 C.F.R. § 482.62(a), personnel; 42 C.F.R. § 482.62(b), director of inpatient psychiatric services and medical staff; 42 C.F.R. § 482.62(c), availability of medical personnel; 42 C.F.R. § 482.62(d), nursing services; 42 C.F.R. § 482.61(e), psychological services; 42 C.F.R. § 482.62(f), social services; and 42 C.F.R. § 482.62(g), therapeutic activities. All but the standards for availability of medical personnel and psychological services are subdivided into additional specific requirements, and all seven standards include detailed descriptions of what is required by each.

In relevant part, 42 C.F.R. § 489.57 provides:

> When a provider agreement has been terminated by CMS . . . a new agreement with that provider will not be accepted unless CMS . . . finds –
>
> (a) That the reason for termination of the previous agreement has been removed and there is reasonable assurance that it will not recur; and
>
> (b) That the provider has fulfilled, or has made satisfactory arrangement to fulfill, all of the statutory and regulatory responsibilities of its previous agreement.

The appeal provisions relevant to this case are set out in 42 C.F.R. Part 498, and 42 C.F.R. § 498.5(b) establishes the appeal rights of providers such as psychiatric hospitals. The regulation requires that the action the provider seeks to appeal must be an "initial determination."

The term "initial determinations" is defined at 42 C.F.R. § 498.3(b) in a lengthy catalogue of potential actions by CMS. The regulation goes on, however, to identify a number of actions, presumably by CMS, that are "administrative actions," and explicitly are not initial determinations. In relevant part, 42 C.F.R. § 498.3(d) reads:

> (d) *Administrative actions that are not initial determinations*. Administrative actions that are not initial determinations (and therefore not subject to appeal under this part) include but are not limited to the following:
>
> * * * *
>
> (4) The finding that an entity that had its provider agreement terminated may not file another agreement because the reasons for terminating the previous agreement have not been removed or there is insufficient assurance that the reasons for the exclusion will not recur.

The terms of 42 C.F.R. § 498.70(b) authorize the dismissal of a hearing request in situations where:

> (b) *No right to a hearing*. The party requesting a hearing is not a proper party or does not otherwise have a right to a hearing.

## IV. Findings and Conclusions

I find and conclude as follows:

1. The CMS decision announced in its letter of January 21, 2010 is not an initial determination within the meaning of 42 C.F.R. § 498.3(b).

2. The CMS decision announced in its letter of January 21, 2010 is an administrative action within the meaning of 42 C.F.R. § 489.57 and 42 C.F.R. § 498.3(d)(4).

3. Because the CMS decision announced in its letter of January 21, 2010 is an administrative action within the meaning of 42 C.F.R. § 489.57 and 42 C.F.R. § 498.3(d)(4), it is not subject to appeal pursuant to 42 C.F.R. § 498.5.

4. TPMHC has no right to right to a hearing in order to challenge CMS's January 21, 2010 decision.

5. TPMHC's Request for Hearing must be dismissed pursuant to the terms of 42 C.F.R. § 498.70(b).

## V. Discussion

Although they differ sharply on the interpretation it should be given, both TPMHC and CMS agree that the language of 42 C.F.R. § 498.3(d)(4) is central to the resolution of the CMS Motion. The parties' briefing does not argue whether TPMHC's effort to regain certification is subject to 42 C.F.R. § 489.57; both sides accept that the regulation applies to TPMHC because its agreement had been terminated in 2007. Instead, the debate has concentrated on the fact that the regulation identifies a precisely-described CMS action as not subject to appeal, and more particularly on whether the facts of the instant CMS action place it within that precise description. In essence, the parties have agreed on the narrow and tightly-focused point of debate I have noted above: whether the CMS decision is an administrative action as defined in 42 C.F.R. § 498.3(d)(4) – in which case it is not appealable – or whether it is an initial determination, subject to appeal under the terms of 42 C.F.R. § 498.57.

CMS urges that 42 C.F.R. § 498.3(d)(4) applies to its January 21, 2010 decision, and maintains that the RAS cycle completed in September 2009 revealed TPMHC to be non-compliant with requirements that formed the reasons for CMS's termination of the facility's agreement in 2007. It will be recalled that the 2007 action was based on TPMHC's non-compliance with the condition relating to special medical record-keeping requirements established at 42 C.F.R. § 482.61. The RAS cycle found TPMHC non-complaint with that condition and the additional condition established at 42 C.F.R. § 482.62 relating to special staff requirements.

It is CMS's position here that because the deficiencies noted in the RAS cycle fall within the broad reach of the record-keeping condition, they are for regulatory purposes *the same* as the noncompliance that was the basis of the termination of TPMHC's agreement in 2007. Put broadly, CMS appears to argue that, within the meaning of 42 C.F.R. § 498.3(d)(4), any deficiency in the RAS appropriate for citation under 42 C.F.R. § 482.61 is to be understood as equivalent to the "reasons for terminating" TPMHC's agreement in 2007: "The repeat occurrence of this particular problem even under different factual contexts suggests that CMS' interpretation of its responsibility to obtain 'reasonable assurance' of continued compliance . . . is sound." CMS Reply Br. at 5.

TPMHC takes a much more restrictive view of the operation of 42 C.F.R. § 498.3(d)(4). While appearing to concede that some of the alleged deficiencies observed in the RAS were appropriately cited as non-compliance with 42 C.F.R. § 482.61 rather than some other regulation, the facility quite correctly points out that the specific facts of those alleged deficiencies are different from the specific facts that led to its 2007 termination. P. Exs.1, 2. TPMHC argues that there is no real equivalence between CMS's "reasons for terminating" the facility's agreement in 2007 and the deficiencies revealed by the RAS.

TPMHC attempts to bolster its argument by suggesting that because of its status as a psychiatric hospital, the RAS was obliged to classify any observed deficiencies into one or the other of the two special conditions applicable to such facilities: "Not surprisingly, when a Psychiatric Hospital is surveyed, the surveyors must relate any number of specific deficiencies to one of these two broad conditions of participation. Otherwise, the alleged deficiency is not relevant to Medicare provider status." P. Br. at 2. That suggestion is incorrect: the terms of 42 C.F.R. § 482.60(b) impose an array of other standards "relevant to Medicare provider status." But this suggestion fails to acknowledge that some of the RAS citations were cited as failures to comply with the specific standards set out as subsections of 42 C.F.R. § 482.61, and that one of the implicated standards – 42 C.F.R. § 482.61(c)(2), requiring that the treatment received by a patient be documented in such a way as to assure that all active therapeutic efforts are included – was the same as one relied on in the 2007 CMS termination. Moreover, the suggestion also fails to acknowledge that the primary purpose of the RAS was to assess TPMHC's correction of the non-compliance on which its 2007 termination was predicated, which of course was non-compliance with 42 C.F.R. § 482.61. If CMS's assertion (CMS Reply Brief at 4, n.1) is correct, a much broader survey inquiry would have followed the RAS, had the RAS shown TPMHC substantially compliant with 42 C.F.R. § 482.61.

There is another difficulty with TPMHC's "non-equivalence" argument, however, and although it borders on the abstract, it is real enough to demonstrate the argument's fundamental weakness. That weakness lies in TPMHC's insistence that because the deficiencies noted in the RAS are "factually distinct and qualitatively distinct" (P. Br. at 4) from those noted in the 2006-2007 surveys, they cannot be treated as "the reasons for terminating" its agreement in 2007.

Quite apart from the staffing, management, and population changes that the chronological gap of thirty-three months between the last survey in 2007 and the September 2009 RAS would invariably generate, there are countless other variables that would make an absolute factual correlation between the deficiencies found in the two surveys impossible. On the continuum from an absolute factual correlation to a much broader one – as in this case, where the correlation CMS identifies is at the level of a specific standard – it is very difficult to see how a reasonable observer would choose a point to say "close enough." The regulations provide no metric for choosing such a point, and TPMHC has been careful in its brief to avoid proposing one.

Another proposal TPMHC has avoided is any specification of exactly where in 42 C.F.R. § 498.3(b) it finds support for its claimed right to appeal this CMS action. The catalogue of initial determinations set out in that regulation includes seventeen categories of appealable CMS actions, but nowhere in its briefing or its Request for Hearing has TPMHC pointed out a provision in that lengthy array on which it relies. While arguing that 42 C.F.R. § 498.3(d)(4) does not apply, TPMHC fails to propose any regulation that does apply and confer its claimed right to appeal.

Thus, TPMHC has not explained why it has the right to appeal in these circumstances, and seeks to avoid the explicit bar to its appeal presented in 42 C.F.R. § 498.3(d)(4) by challenging CMS's authority to apply that regulation on these facts. But that challenge is based on questioning the factual sufficiency of the link between the 2007 termination and the RAS, and it is at exactly that point that CMS's unreviewable discretion comes into play. The nature of that discretion, and the reasons why the Departmental Appeals Board (Board) has endorsed an expansive reading of the regulation, are discussed at length in *Heartland Manor at Carriage House*, DAB No. 1664 (1998).

*Heartland Manor* arose from somewhat different facts: one of the threshold questions was whether that facility sought certification as a prospective provider that not been terminated before, or as a once-terminated provider seeking recertification. But the way in which the Board framed that issue reflected its overall view that once the facility's status as a once-terminated provider was established, CMS's discretion to rely on 42 C.F.R. § 489.57 was plenary:

> The central question presented in this case is whether, for purposes of applying the appeals provisions of section 1866 of the Act and 42 C.F.R. Part 498, [CMS's] May 21, 1997 action was a determination concerning Petitioner as to: 1) "whether a prospective provider qualifies as a provider," under section 498.3(b)(1) of the regulations; or 2) a "finding that an entity that had its provider agreement terminated may not file another agreement because the reasons for terminating the previous agreement have not been removed or there is insufficient assurance that the reasons for the exclusion will not recur," under section 498.3(d)(4) of the regulations. A conclusion that Petitioner was a prospective provider that did not qualify as a provider would render [CMS's] May 21, 1997 action an initial determination subject to reconsideration and an ALJ hearing under the appeals provisions of

> section 1866 of the Act and 42 C.F.R. .. 498.3(b)(1) and 498.5. A conclusion that Petitioner is an entity that had its provider agreement terminated, appealing a finding under 42 C.F.R. . 498.3(d)(4), would render [CMS's] May 21, 1997 decision an administrative action not subject to appeal.

*Heartland Manor*, DAB No. 1664, at 9.

It seems reasonable to read the *Heartland Manor* decision as driven by the Board's desire to give effect to the legislative history behind the present statutory scheme and to advance the expressed goals of the regulations' drafters. It also seems reasonable to point out that, as here, the facility in *Heartland Manor* was not barred from appealing the first termination of its agreement, which first termination was, as here, the predicate for the operation of 42 C.F.R. § 498.3(d)(4). The Board made its appreciation of those issues, and of their implications, very clear:

> Finally, and of particular significance, Petitioner has emphasized that the critical issue in this case is not whether Heartland has in fact met the applicable certification criteria, but whether Petitioner will be afforded the opportunity to contest the May 2, 1997 survey findings. We are mindful of the stakes involved in questions concerning the availability of appeals in Departmental programs. For the reasons detailed above, however, we conclude that Congress and the Secretary specifically exempted the type of determination at issue in this case from appeal. Further, the policy considerations reflected in the legislative history of the nursing home reform legislation, together with [CMS's] expertise in administering the certification and participation requirements, lead us to conclude that it is appropriate to vest in the agency the discretion to make independent decisions with respect to whether, in the case of a previously terminated provider, the reasons for the termination have been removed and there is reasonable assurance that they will not recur.
>
> Moreover, we note that the facility did have an opportunity to appeal the survey findings on which the 1989 termination was based. Thus, it did not become a terminated entity without first having been provided an appeal right. Having been subjected to the most serious remedy for noncompliant providers and given an opportunity to appeal the termination findings, the facility was then accorded a status which Congress and the Secretary determined should be accompanied by different procedural protections than those accorded to prospective providers. For the reasons detailed above, we conclude that the rationale for subjecting terminated providers to more exacting scrutiny to reenter the Medicare program and diminished procedural protections is not diminished by a change of ownership following termination.

*Heartland Manor*, DAB No. 1664, at 23.

Like the Board in *Heartland Manor*, I do not lightly conclude that TPMHC has no right to a hearing. But concern for a provider does not justify a ruling inconsistent with the statutory and regulatory scheme as a whole, for such a ruling could undermine Congress' intent in committing to agency discretion the evaluation of whether there is reasonable assurance that Medicare beneficiaries will be protected if placed in a facility where noncompliance problems have previously arisen. To adopt TPMHC's contention that providers in its position should have an opportunity for appeal would seriously undermine the effectiveness of the termination remedy and its consequences. Under the circumstances before me in this case, it is clear that the terms of 42 C.F.R. § 498.3(d)(4) apply: CMS's January 21, 2010 action is an administrative action, and from it TPMHC has no right to appeal.

## VI. Conclusion

For all of the reasons set forth above, CMS's Motion to Dismiss is GRANTED. Petitioner Tinley Park Mental Health Center's Request for Hearing must be, and it is, DISMISSED pursuant to the terms of 42 C.F.R. § 498.70(b).

/s/
Richard J. Smith
Administrative Law Judge