

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)
Evergreen Commons) Date: November 5, 2007
(CCN: 33-5110),)
Petitioner,) Docket No. C-07-644
) Decision No. CR1684
v.)
Centers for Medicare & Medicaid Services.)

DECISION

Petitioner's request for hearing is dismissed pursuant to 42 C.F.R. § 498.70(b), as Petitioner has raised no issue for which it has a right to a hearing. Pursuant to 42 C.F.R. § 498.72, I may vacate the dismissal of a hearing request upon a showing of good cause filed within 60 days from receipt of this decision, calculated in accordance with 42 C.F.R. § 498.22(b)(3).

I. Background

Petitioner requested a hearing by letter dated August 2, 2007. The case was assigned to me for hearing and decision on August 24, 2007, and a Notice of Case Assignment and Prehearing Development Order (Prehearing Order) was issued at my direction on that date. On September 25, 2007, the Centers for Medicare and Medicaid Services (CMS) filed a motion to dismiss Petitioner's request for hearing with a supporting memorandum (CMS Brief) and one exhibit. Petitioner filed a reply to the motion to dismiss on October 15, 2007 (P. Brief). On October 19, 2007, CMS moved for leave to file a reply to Petitioner's reply. On October 22, 2007, Petitioner responded to CMS's motion for leave.

II. Discussion

By letter dated August 2, 2007, Petitioner requests a hearing to contest the determination of the New York State Department of Health (state agency) based upon a survey completed on May 21, 2007, that deficiencies at Petitioner's facility posed immediate jeopardy to residents. Petitioner states that the state agency and CMS determined that immediate jeopardy was abated before the survey was completed, but Petitioner argues that two of the deficiencies cited by the state agency never posed immediate jeopardy.

CMS asserts in its motion to dismiss that Petitioner does not have a right to hearing on the classification of the severity of the deficiencies cited by the survey completed on May 21, 2007. CMS argues that a skilled nursing facility, such as Petitioner, may only appeal the level of noncompliance, *i.e.*, scope and severity, of an alleged deficiency if a successful challenge would affect either the range of the civil money penalty or the withdrawal of approval of the facility to conduct a nurse aide training competency and evaluation program (NATCEP). CMS argues that Petitioner was assessed a per instance civil money penalty (PICMP) of \$9000 and there is only one range of PICMPs. CMS also argues, based upon the affidavit submitted as CMS Ex. 1, that Petitioner did not have a NATCEP and has no right to a hearing on that basis. CMS Brief at 1-2, 5-7. According to CMS, the survey completed on May 21, 2007, found that Petitioner was not in compliance with four participation requirements that posed immediate jeopardy: 42 C.F.R. §§ 483.25(h)(1) (Tag F323), 483.25(h)(2) (Tag F324), 483.75 (Tag F490), and 483.75(o)(1) (Tag F520). CMS notes that Petitioner was also cited with three other deficiencies of lesser scope and severity. CMS Brief at 4. CMS argues that Petitioner specifically requested a hearing only as to the scope and severity determination for the alleged violations of Tags F323 and F324 at the level of immediate jeopardy. CMS Brief at 4. CMS correctly notes that Petitioner did not request a hearing as to the other deficiencies characterized as posing immediate jeopardy or the other lesser deficiencies and CMS argues it is precluded from doing so now. CMS Brief at 4. CMS asserts that the deficiencies not appealed provide a sufficient basis for the PICMP. CMS Brief at 6-7.

Petitioner does not deny any of the facts asserted by CMS. P. Brief at 1-2. Petitioner also concedes that it may not contest the PICMP. P. Brief at 1. It argues, however, that CMS actually imposed both a PICMP and a per day civil money penalty (CMP) in this case and that it has a right to review as to the per day CMP, which would be in the upper range of CMPs reserved for violations that pose immediate jeopardy. P. Brief at 3. Petitioner did not submit a copy of the CMS notice-letter dated June 6, 2007, with its brief as an exhibit. However, Petitioner did submit that letter with its request for hearing. I have reviewed the CMS letter dated June 6, 2007, attached to the request for hearing and make the single finding of fact based upon my reading of that letter that CMS never imposed, nor indicated, any intent to impose a per day CMP. The only remedies of which Petitioner

was notified are termination of its provider agreement effective November 21, 2007, if substantial compliance is not achieved before that date, a mandatory denial of payment for new Medicare and Medicaid admissions if substantial compliance is not achieved within three months of May 21, 2007, and a PICMP of \$9000.* The notice also advised Petitioner of the loss of authority to conduct a NATCEP, but Petitioner does not dispute it did not have a program at the time of the survey. The language of the letter that Petitioner cites as the basis for its confusion that CMS was also imposing a per day CMP is obviously part of a form letter that was not properly edited prior to issuance. The letter is otherwise clear that the only CMP imposed by CMS was the \$9000 PICMP. I note that the CMS brief makes clear that the \$9000 PICMP was the only CMP imposed and CMS emphasizes that point in its reply to Petitioner's reply.

Petitioner's concession that it cannot seek review of the PICMP demonstrates the clarity of the regulations on the issue presented by the motion. The regulations specify that a CMP imposed against a facility on a per day basis will fall into one of two broad ranges of penalties. 42 C.F.R. §§ 488.408, 488.438. The upper range of CMP, from \$3050 per day to \$10,000 per day, is reserved for deficiencies that constitute immediate jeopardy to a facility's residents and, in some circumstances, for repeated deficiencies. 42 C.F.R. §§ 488.438(a)(1)(i), (d)(2). The lower range of CMP, from \$50 per day to \$3000 per day, is reserved for deficiencies that do not constitute immediate jeopardy, but either cause actual harm to residents, or cause no actual harm, but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). There is only a single range of \$1000 to \$10,000 for a PICMP which applies whether or not immediate jeopardy is present. 42 C.F.R. §§ 488.408(d)(1)(iv); 488.438(a)(2). The regulations also clearly provide that a facility may only challenge the scope and severity level of noncompliance found by the state agency and CMS if a successful challenge would affect the amount of the CMP that could be collected by CMS or would affect the approval status of the facility's nurse aide training program. 42 C.F.R. §§ 498.3(b)(14) and (d)(10)(i). Because the only CMP at issue in this case is the \$9000 PICMP, whether or not any deficiency was cited as posing immediate jeopardy does not affect the range or amount of the CMP authorized by the regulation.

* The parties do not advise me of the status of the termination or the mandatory denial of payments. However, those remedies have not been placed in issue.

III. Conclusion

For the foregoing reasons, Petitioner has no right to a hearing and the request for hearing must be dismissed.

/s/
Keith W. Sickendick
Administrative Law Judge