

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Lakeside Hospital of Bastrop,)	Date: May 10, 2007
(CCN 67-0011))	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-06-677
)	Decision No. CR1594
Centers for Medicare & Medicaid)	
Services.)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to certify Petitioner, Lakeside Hospital of Bastrop, as a participating provider in the Medicare program, effective March 29, 2006.

I. Background

Petitioner is a hospital located in Bastrop, Texas. CMS certified Petitioner to participate in the Medicare program effective March 29, 2006. Petitioner filed a request for a hearing, asserting that the effective certification date is incorrect and that CMS should have certified it to participate effective February 17, 2006.¹ The case was assigned to me for a hearing and a decision. The parties then agreed that the case could be heard based on their written submissions. CMS submitted a brief along with 10 proposed exhibits (Exs.) consisting of CMS Exs. 1 - CMS Exs. 10, and a reply brief. Petitioner submitted a

¹ In its request for hearing Petitioner stated that it requested that its certification be made "effective as of February 20, 2006." However, in its other submissions including its brief Petitioner asserted that the certification date should be February 17, 2006. I accept February 17, 2006 as the date that Petitioner contends should have been its certification date.

brief along with three proposed exhibits consisting of P. Exs. 1 - P. Exs. 3, and a reply brief. Petitioner also submitted an excerpt from the Federal Register as an attachment to its brief. I receive into evidence CMS Exs. 1 - CMS Exs. 10 and P. Exs. 1 - P. Exs. 3.

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether Petitioner is entitled to a Medicare certification date that is earlier than March 29, 2006, the date when CMS determined to certify it as a participating Medicare provider.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading and I discuss each Finding in detail.

1. Petitioner did not prove that it qualified to participate in Medicare on a date that is earlier than March 29, 2006.

The effective date of participation by a provider in the Medicare program is governed by federal regulations at 42 C.F.R. § 489.13. Generally, a provider applying to participate in Medicare will be certified as of the date of a survey in which the provider is found to satisfy all applicable federal requirements. 42 C.F.R. § 489.13(b). Alternatively, a provider that is accredited by a national accrediting organization whose program had CMS approval at the time of the decision to accredit it may be deemed by CMS to satisfy participation requirements based on that accreditation. 42 C.F.R. § 489.13(d)(1). In that instance, and assuming that the provider is not subject to additional participation requirements, the provider will be certified to participate on the date of that provider's initial request for participation. 42 C.F.R. § 489.13(d)(1)(ii).

In practice the regulation imposes three duties on a provider seeking to be certified based on an accreditation by an approved organization. First, the provider must establish that it is accredited. Second, the provider must prove that it either meets or is not subject to other certification requirements. Third, the provider must submit an acceptable application for participation.

Petitioner sought certification based on its accreditation as a hospital by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). I find that it attained the necessary accreditation effective February 17, 2006. There was some confusion about this date because JCAHO issued two letters concerning Petitioner's accreditation, each establishing a different accreditation date. On March 29, 2006, JCAHO sent a letter to Petitioner telling it that it was accredited as of that date. CMS Ex. 1, at 1. However, on June 23, 2006, JCAHO sent a second letter to Petitioner telling it that its effective accreditation date was February 17, 2006. CMS Ex. 9, at 1. It appears from the correspondence that the actual date of the JCAHO accreditation was February 17, 2006 because that was the date of the JCAHO survey at which Petitioner was found to satisfy accreditation requirements.

However, and as I discuss above, accreditation is not the *only* criterion for certification. Certification depends on three criteria, including a successful survey outcome or accreditation, satisfying CMS that other requirements are satisfied to the extent that they apply, and filing an acceptable application for certification. Here, Petitioner satisfied the first criterion – accreditation – effective February 17, 2006. CMS does not contend that there were additional requirements that Petitioner, a general hospital, needed to satisfy.² That leaves only the question as to when Petitioner filed an acceptable application for certification.

I conclude that Petitioner filed its application in April 2006, after the date that CMS determined to certify it. Petitioner argues that, in fact, it filed its application “a week or so after the . . . [JCAHO] survey.” Petitioner's brief at 2. According to Petitioner, it had the application hand-delivered to a fiscal intermediary that was charged with processing and approving provider enrollment applications for hospitals in Texas. “Unfortunately,” contends Petitioner, “the application did not reach the proper department at . . . [the fiscal intermediary] and was never logged in as received.” Petitioner contends that it filed a second application in April only after it learned that the first one had been lost. *Id.*

However, Petitioner produced no persuasive evidence to support its contention that it filed an application in February. It did not produce, for example, a copy of the alleged February application nor did it produce any document verifying that the fiscal intermediary received it. Absent such proof I am unpersuaded that Petitioner filed an application in or about February 2006 as it contends.

² There are, for example, distinct certification requirements for a psychiatric hospital as opposed to a general hospital.

Furthermore, the contents of the allegedly lost application are unknown inasmuch as Petitioner did not produce a copy of it. Consequently, it is impossible to say whether the application was complete and contained the information CMS needed in order to process Petitioner's application.³

Thus, Petitioner did not satisfy *all* of the regulatory criteria for certification at any time prior to April 2006 when it filed its second application. CMS's determination to certify Petitioner effective March 29, 2006, gave Petitioner the earliest certification date that it was entitled to consistent with the requirements of 42 C.F.R. § 489.13.

2. I do not have the authority to order CMS to certify Petitioner retroactively to participate in Medicare as of February 17, 2006.

There are circumstances where CMS may certify a provider retroactively to participate in Medicare. Pursuant to 42 C.F.R. § 489.13(d)(2):

If a provider . . . meets . . . [all regulatory requirements for certification] the effective date may be retroactive for up to one year to encompass dates on which the provider . . . furnished, to a Medicare beneficiary, covered services for which it has not been paid.

The regulation confers discretion on CMS. CMS "may," not "must," certify a provider retroactively under defined circumstances. No provider is *entitled* to retroactive certification. And, I am without authority to order CMS to take an action that is entirely within its discretion to take or not to take.

³ CMS argues that it is not obligated to certify a provider for participation until the date when it completes its review of a provider's application. In other words, a provider is not entitled to participate, assuming it meets regulatory criteria for participation, as of the date that it files its application but only as of the date that CMS finishes its processing of the application. It is unnecessary that I decide this argument because ultimately CMS determined to certify Petitioner on a date that was prior to the date that it filed its completed application. As I discuss below, at Finding 2, CMS has discretion, in certain circumstances, to certify a provider retroactively to a date that is earlier than the date when the provider files its application for participation.

Petitioner contends that CMS should have certified it retroactively to February 17, 2006, the date when it was accredited by JCAHO. Essentially, its premise is that it satisfied all certification criteria as of that date. Therefore, according to Petitioner, it would be unfair not to certify it retroactively. I am without authority to order CMS to do what Petitioner demands because certifying Petitioner retroactively is an act of discretion that is entirely within CMS's province.

Moreover, as I discuss above, at Finding 1 Petitioner did not in fact satisfy all certification criteria as of February 17, because it did not prove that it submitted an acceptable application on that date. CMS was under no legal obligation to certify Petitioner prior to April 2006 when Petitioner submitted an acceptable application. The fact that CMS exercised its discretion to certify Petitioner effective March 29, 2006, confers no additional rights on Petitioner.

/s/

Steven T. Kessel
Administrative Law Judge