Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Parkview Adventist Medical Center,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-3800

Decision No. CR4500

Date: January 7, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS) granted the request of Parkview Adventist Medical Center (Parkview or Petitioner) to voluntarily terminate its Medicare provider agreement. CMS set the effective date of termination based on the date on which Parkview ceased to provide inpatient services. Parkview requested a hearing to challenge CMS's action arguing that the date of termination and CMS's reason for picking that date amounted to an involuntary termination. Because I agree that CMS's action constitutes an involuntary termination, I have jurisdiction to issue a decision in this case. Based on the record in this matter, I affirm CMS's determination to terminate Parkview; however, I modify the effective date of the termination from June 18, 2015, to July 4, 2015.

I. Background

Parkview was a non-profit, 55-bed hospital located in Brunswick, Maine, and was a Medicare provider for decades. Petitioner Exhibit (P. Ex.) 1 ¶¶ 3-5. Due to operating losses attributed to its inpatient unit and emergency department, Parkview decided to petition for bankruptcy protection and sell Parkview's assets to another hospital. P. Ex. 1 ¶ 6.

In a June 15, 2015 letter, Parkview notified CMS that it was voluntarily terminating its participation in the Medicare program under 42 C.F.R. § 489.52. The letter stated that Parkview was going to file in bankruptcy court and would cease operating as a hospital following the issuance of an order by the bankruptcy court. Parkview anticipated that the court would issue such an order within 60 to 90 days. Finally, Parkview stated that on June 18, 2015, it would transition from providing inpatient services to only providing outpatient services. P. Ex. 1 ¶ 10; CMS Ex. 1.

On June 16, 2015, Parkview filed a voluntary petition for Chapter 11 bankruptcy. P. Ex. 1 ¶ 12. On that date, Parkview also filed a motion with the bankruptcy court that stated, among other things, all inpatients at Parkview would be transitioned to other facilities by the close of business on June 18, 2015. CMS Ex. 2 ¶ 16; *see also* CMS Ex. 5 ¶ 14.

By June 18, 2015, Parkview discharged all of its inpatients and closed its inpatient care unit. P. Ex. 1 ¶ 12. On June 19, 2015, the Maine Department of Health and Human Services (Maine DHHS) issued a conditional license for Parkview to operate outpatient services during the pendency of the bankruptcy proceedings. CMS Ex. 6. Maine DHHS did not authorize Parkview to admit inpatients. CMS Ex. 6 at 2.

Also on June 19, 2015, CMS issued a letter in which it accepted Parkview's voluntary termination of its Medicare provider agreement and set June 18, 2015, as the effective date of termination. CMS stated the following:

> Based upon information from your hospital's website, your statements to CMS, and your emergency motion filed in [bankruptcy court], CMS has determined that the date of voluntary termination of your Part A Medicare Provider Agreement is June 18, 2015. *See* 42 C.F.R. §489.52(b)(1).
>
> According to the information reviewed by CMS, the hospital has closed its inpatient services on June 18, 2015, and discharged all inpatients on or about 4:00pm on June 18, 2015. Additionally, the hospital is not accepting new inpatients, and does not plan to accept new inpatients in the future. Therefore, the hospital no longer meets the definition of "hospital," as outlined in [42 U.S.C. § 1395x(e)]. *See also* 42 C.F.R. § 482.1. More specifically, a Medicare-participating hospital must be an institution which is primarily engaged in providing care to inpatients. Additionally, you have also requested voluntary termination of your participation in the Medicare program.

CMS Ex. 3 at 1.

On June 24, 2015, Parkview's counsel emailed CMS and explained that CMS's decision to terminate Parkview's provider agreement on June 18 would have significant negative ramifications for Parkview's bankruptcy transition plan. CMS Ex. 10 at 2-3. Parkview's counsel indicated that Parkview could request that Maine DHHS permit Parkview to admit one or more inpatients if CMS would reinstate Parkview's Medicare provider agreement again. CMS Ex. 10 at 2-3. On June 25, 2015, CMS responded that it was willing to rescind the termination of the provider agreement if Parkview reopened its inpatient admissions. CMS Ex. 10 at 1.

On July 27, 2015, Parkview notified CMS that it viewed CMS's decision to terminate Parkview's provider agreement on June 18 to be an involuntary termination because CMS based the effective date of termination on Parkview's failure to meet a requirement to be a hospital in the Medicare program. Parkview also sought to rescind its June 15 notice of voluntary termination. CMS Ex. 7.

On August 4, 2015, CMS responded to Parkview's counsel that CMS had accepted Parkwood's voluntary termination of its provider agreement and that CMS would have to treat Parkview's request to rescind the termination of the provider agreement as an initial request to participate in the Medicare program. CMS also advised Parkview that it may request a hearing before an Administrative Law Judge (ALJ) if Parkview believed that CMS's actions constituted an involuntary termination. CMS Ex. 8.

On August 17, 2015, Parkview requested a hearing to dispute CMS's decision to terminate Parkview's provider agreement effective June 18, 2015. Parkview argued that CMS involuntarily terminated Parkview's provider agreement, but failed to provide notice of the termination 15 days before it became effective.

I issued an Acknowledgment and Pre-hearing Order (Order) on September 23, 2015. On October 2, 2015, CMS moved for a more definite statement from Parkview. Parkview opposed CMS's motion, but also articulated a detailed basis for the hearing request, thus rendering CMS's motion moot. On October 28, 2015, CMS filed a motion for summary judgment and memorandum in support of that motion (CMS Br.), and 12 exhibits (CMS Exs. 1-12). Petitioner filed a prehearing brief and opposition to the CMS motion for summary judgment (P. Br.) and three exhibits (P. Exs. 1-3). CMS filed a reply brief (CMS Reply) in which CMS requested that I either grant summary judgment or issue a decision on the record.

II. Decision on the Record

I admit all of the parties' proposed exhibits because neither party objected to any of the exhibits. Order ¶ 7; Civil Remedies Division Procedures § 14(e).

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested to cross-examine a witness. Order ¶¶ 8-10; Civil Remedies Division Procedures §§ 16(b), 19(b). Both parties submitted written direct testimony (P. Exs. 1, 2; CMS Ex. 11); however, neither party requested to cross-examine any of the witnesses. Therefore, I issue a decision based on the written record. Order ¶ 13; Civil Remedies Division Procedures § 19(d).

III. Issues

1. Whether CMS had a legitimate basis to terminate Parkview's Medicare provider agreement.

2. If so, whether CMS correctly set June 18, 2015, as the effective date of termination.

IV. Jurisdiction

I have jurisdiction to decide the issues in this case. 42 U.S.C. § 1395cc(h)(1); 42 C.F.R. §§ 489.53(e), 498.3(b)(8).

V. Findings of Fact, Conclusions of Law, and Analysis[1]

A hospital that participates in the Medicare program is considered a provider of services (provider). 42 U.S.C. § 1395x(u); 42 C.F.R. § 400.202 (definition of *Provider*). A provider will only be eligible to receive payments under the Medicare program if it enters into an agreement with the Secretary of Health and Human Services (Secretary). 42 U.S.C. § 1395cc(a); *see also* 42 C.F.R § 489.2(b)(1). In order for a hospital to be a provider in the Medicare program, it must be primarily engaged in providing care to inpatients. 42 U.S.C. § 1395x(e)(1).

A provider may voluntarily terminate its Medicare provider agreement. 42 U.S.C. § 1395cc(b)(1). To do so, the provider must send written notice to CMS and may provide the intended date of termination. 42 C.F.R. § 489.52(a)(1), (3). If the provider's notice does not specify a date for termination or the date requested by the provider is unacceptable to CMS, CMS may set a date for termination that is not more than six months after the date on the provider's termination notice. 42 C.F.R. § 489.52(b)(1). A provider who ceases to be in business is deemed to be terminated as of the date that the provider ceased providing services. 42 C.F.R. § 489.52(b)(3). A provider who is

[1] My findings of fact and conclusions of law are set forth in italics and bold font.

voluntarily terminating its provider agreement must provide public notice of this fact at least 15 days before the termination goes into effect. 42 C.F.R. § 489.52(c)(1).

CMS may involuntarily terminate a provider's Medicare provider agreement for a variety of reasons, including a failure to substantially meet the applicable provisions in 42 U.S.C. § 1395x. 42 U.S.C. § 1395cc(b)(2); 42 C.F.R. § 489.53(a). Generally, CMS must give notice of an involuntary termination of a provider agreement 15 days before the termination takes effect and CMS concurrently gives notice to the public of the termination. 42 C.F.R. § 489.53(d)(1), (5).

1. CMS involuntarily terminated Parkview's Medicare provider agreement.

Parkview asserts that CMS's June 19, 2015 determination is an involuntary termination of Parkview's provider agreement. P. Br. at 12-15; CMS Ex. 7. CMS argues that it merely accepted Parkview's voluntary termination and legitimately set an effective date for termination. CMS Br. 8-13; CMS Ex. 8. There is no dispute that Parkview sent a letter to CMS on June 15, 2015, seeking voluntary termination of its Medicare provider agreement. CMS Ex. 1. There is no dispute that Parkview's letter indicated that it intended for termination to occur on the same day as the bankruptcy court issued its order approving the sale of Parkview's assets, which Parkview expected within 60 to 90 days. CMS Ex. 1 at 2. There is also no dispute in this case that CMS responded to Parkview's letter with a June 19, 2015 letter in which CMS retroactively terminated Parkview's provider agreement on June 18, 2015. CMS Ex. 3. CMS reasoned that Parkview failed to specify a voluntary termination date; therefore, CMS set the termination date based on the date Parkview last provided inpatient services. CMS Ex. 3 at 1; CMS Ex. 11 ¶¶ 5-6.

I am persuaded that CMS's determination to impose a retroactive effective date for a voluntary termination based on Parkview's decision to cease providing inpatient services was an involuntary termination of Parkview. As explained below, a hospital that does not primarily engage in providing inpatient care may be involuntarily terminated. *See* 42 U.S.C. §§ 1395cc(b)(2), 1395x; 42 C.F.R. § 489.53(a). When CMS based its June 19, 2015 determination to retroactively terminate Parkview on Parkview's failure to meet a statutory requirement to be a hospital in the Medicare program, CMS involuntarily terminated Parkview. *United Medical Home Care, Inc.*, DAB No. 2194, at 8-9 (2008).

This conclusion is confirmed by CMS's willingness to rescind the termination if Parkview returned to compliance and started to admit inpatients again. CMS Ex. 10 at 1. Further, although CMS has never conceded that its June 19, 2015 determination was an involuntary termination, CMS informed Parkview on August 4, 2015, that it could request a hearing, within 60 days of the June 19, 2015 letter, if Parkview thought the determination was an involuntary termination. CMS Ex. 8. CMS even indicated that it would "not challenge the timeliness of any appeal if Parkview files it within 60 days of

receipt of this letter." CMS Ex. 8 at 1. Finally, CMS did not move for dismissal of Parkview's hearing request, even though a provider does not have a right to a hearing based on a voluntary termination. *See* 42 C.F.R. §§ 489.52, 498.3, 498.70(b). Therefore, while CMS's position is that it acted within its authority under 42 C.F.R. § 489.52 to set an effective date for a voluntary termination, CMS's actions subsequent to June 19, 2015, betray uncertainty as to the type of action it took.

Although not found in the June 19, 2015 determination, CMS asserts that its retroactive voluntary termination determination was justified because Parkview ceased its business activities and that, as such, June 18, 2015, is the appropriate effective date for the voluntary termination under 42 C.F.R. § 489.52(b)(3). CMS Br. at 10, 12. However, the record is clear that Parkview did not cease its business activity on June 18, 2015, but rather continued to be licensed by Maine DHHS and provided outpatient care during the pendency of the bankruptcy proceeding. P. Ex. 1 ¶ 15; CMS Ex. 1 at 1; CMS Ex. 2 ¶ 10; CMS Ex. 6; CMS Ex. 9; CMS Ex. 10 at 2. Therefore, this argument is unavailing.

2. Parkview ceased to provide inpatient care on June 18, 2015.

Parkview was a 55-bed hospital. P. Ex. 1 ¶¶ 3-5. Although Parkview previously provided care to inpatients, there is no dispute that "[b]y June 18, 2015, all inpatients had been discharged and [Parkview] had closed its inpatient care services . . . ." P. Br. at 6; CMS Br. at 3; *see also* P. Ex. 1 ¶¶ 10, 12; CMS Ex. 1; CMS Ex. 2 at 8; CMS Ex. 4; CMS Ex. 5 ¶ 14; CMS Ex. 6 at 1; CMS Ex. 9; CMS Ex. 10 at 2; CMS Ex. 11 ¶ 6. On June 19, 2015, Maine DHHS issued a conditional license for Parkview to operate outpatient services during the pendency of the bankruptcy proceedings; however, Maine DHHS did not authorize Parkview to admit inpatients. CMS Ex. 6. There is no evidence in the record that Parkview admitted or cared for any inpatients after June 18, 2015.

3. CMS had a legitimate basis for involuntarily terminating Parkview because Parkview permanently ceased to provide inpatient services on June 18, 2015.

The statutory definition for a hospital participating in the Medicare program states that the hospital must be:

> primarily engaged in providing, by or under the supervision of physicians, to **inpatients** (A) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons.

42 U.S.C. § 1395x(e)(1) (emphasis added). The Secretary may terminate a provider agreement for a provider who "fails substantially to meet the applicable provisions of section 1395x of [42 U.S.C.]." 42 U.S.C. § 1395cc(b)(2). Therefore, Parkview is subject to termination if it was not "primarily engaged" in providing care to inpatients on and after June 18, 2015. *See Arizona Surgical Hospital LLC*, DAB No. 1890 (2003); *see also Kearney Regional Medical Ctr., L.L.C.*, DAB No. 2639 (2015). As found above, Parkview permanently ceased to provide any inpatient services as of June 18, 2015. Therefore, CMS was justified in involuntarily terminating Parkview's provider agreement in its June 19, 2015 determination. 42 C.F.R. § 489.53(a)(1).

4. The effective date for the termination of Parkview's Medicare provider agreement is July 4, 2015.

With limited exceptions not applicable here, CMS must give notice of an involuntary termination at least 15 days before the termination goes into effect. 42 C.F.R. § 489.53(d)(1). In the present matter, CMS set the effective date of termination one day before it issued its June 19, 2015 determination. Because this does not comport with the regulatory requirement for involuntary terminations, the effective date of Parkview's termination must be modified to July 4, 2015, which is 15 days after the date that appears on the determination.

Petitioner argues that CMS's June 19, 2015 notice was inadequate because it failed to provide notice of the effective date of the termination 15 days in advance of the termination taking effect. P. Br. at 15. In particular, Parkview indicates that notice of the termination would have given Parkview an opportunity to try to readmit inpatients in order to avoid termination. P. Br. at 16.

I disagree that Parkview was sufficiently prejudiced by CMS's lack of notice. On June 17, 2015, one day before Parkview discharged all inpatients, CMS informally notified Maine DHHS (which was working with Parkview on its bankruptcy plan) that CMS would terminate Parkview's provider agreement if Parkview no longer provided inpatient care. P. Ex. 3. Importantly, in response to a June 24, 2015 email from Parkview, CMS stated that it would rescind the termination if Parkview readmitted inpatients. CMS Ex. 10 at 2-3. However, Parkview did not act to ensure it continued to provide inpatient care. Finally, CMS sent a second notice on August 4, 2015, which provided Parkview with appeal rights. CMS Ex. 8. Parkview has exercised those appeal rights and is receiving some measure of the relief it has requested. While the scenario presented in this case is not ideal, CMS took sufficient action to avoid prejudicing Parkview. *See United Medical Home Care*, DAB No. 2194, at 12-13.

5. I do not have the authority to provide equitable relief to Parkview.

Parkview argues that a CMS official provided incorrect information that Parkview relied upon when determining the transition plan that it would follow during the bankruptcy proceedings. The record reflects that when considering its decision to seek bankruptcy protection and sell its assets, Parkview held discussions with officials from the state of Maine, including the Maine DHHS and the Attorney General's Office, as well as potential purchasers. P. Ex. 1 ¶ 6. Based on these discussions, Parkview decided to file for bankruptcy, maintain outpatient services until a bankruptcy court approved the sale of Parkview's assets, and cease to provide inpatient services following a three-day transition period after filing for bankruptcy. P. Ex. 1 ¶ 7; P. Ex. 2 ¶ 4; CMS Ex. 9. Just before commencing the transition period, an employee of the Maine DHHS contacted CMS and asked if a Medicare provider agreement for a hospital would remain in effect pending a bankruptcy court order if the hospital only provided outpatient services. P. Ex. 1 ¶ 8. The Maine DHHS employee did not identify Parkview during the conversation with CMS. *See* P. Ex. 2 ¶ 5. The CMS employee responded that the provider agreement would remain in effect until the bankruptcy court issued its order. P. Ex. 1 ¶ 9; P. Ex. 2 ¶ 6. Parkview moved forward with its plan, which included ceasing inpatient care. On June 17, 2015, Parkview posted on its website notice of its bankruptcy filing and that inpatient services would cease on June 18, 2015. CMS Ex. 4. Also on June 17, 2015, the CMS employee who had previously advised Maine DHHS that a hospital provider agreement would remain in effect during bankruptcy proceedings, even if the hospital no longer had inpatients, sent an email to Maine DHHS advising that the termination date of a Medicare provider agreement in such a circumstance is the date that the provider discharges the last inpatient. P. Ex. 3 at 2; *see also* P. Ex. 1 ¶ 13; P. Ex. 2 ¶ 7.

Although it appears that CMS provided incorrect information to Maine DHHS, it is well settled that an incorrect statement cannot be used to estop the government. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009); *U.S. Ultrasound*, DAB No. 2302, at 8 (2010). Therefore, to the extent that Parkview seeks equitable estoppel based on misinformation provided by CMS to Maine DHHS, I must reject that argument.

VI. Conclusion

I affirm CMS's involuntary termination of Petitioner's Medicare provider agreement. However, I modify the effective date of termination to July 4, 2015.

/s/
Scott Anderson
Administrative Law Judge