Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

A.M. Home Health Services, Inc.
(CCN: 05-8369),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-476

Decision No. CR2225

Date: August 20, 2010

DECISION

I grant summary judgment in favor of the Centers for Medicare and Medicaid Services (CMS) terminating the participation in the Medicare program of Petitioner, A.M. Home Health Services, Inc.

I. Background

Petitioner participated in the Medicare program as a home health agency. Sections 1861(o) and 1866 of the Social Security Act (Act), and implementing regulations at 42 C.F.R. Parts 484 and 489, govern Petitioner's participation in Medicare. Regulations at 42 C.F.R. Part 498 govern Petitioner's right to hearing in this case.

CMS determined to terminate Petitioner's participation in the Medicare program, and Petitioner requested a hearing to challenge that determination. The case was assigned to me for a hearing and a decision. I ordered the parties to exchange proposed exhibits and briefs. CMS timely filed a brief plus seven proposed exhibits, which it identified as CMS Ex. 1 – CMS Ex. 7. Petitioner then filed a brief plus several assorted documents, which, evidently, it intended that I receive as exhibits. These documents were neither properly marked as exhibits nor paginated pursuant to the instructions that I had given to the

parties. Furthermore, Petitioner failed to supply CMS counsel with a copy of its exchange. I returned the documents to Petitioner and ordered that it re-file them consistent with what I had ordered. Petitioner re-filed the exhibits, which it identified as P. Ex. 1 – P. Ex. 9 on its exhibit list, but, again, it failed to mark and paginate them consistent with my pre-hearing order. Once again, Petitioner failed to send a copy of its filing to CMS counsel. Therefore, I mailed a copy of Petitioner's exhibits to CMS counsel.

II. Issues, Findings of Fact, and Conclusions of Law

A. Issues

The issues in this case are whether:

1. Petitioner failed to comply with Medicare participation requirements.

2. CMS is authorized to terminate Petitioner's participation in Medicare.

B. Findings of Fact and Conclusions of Law

This case is before me on CMS's motion for summary judgment. In deciding whether summary judgment is appropriate, I apply the principles of Rule 56 of the Federal Rules of Civil Procedure. I grant summary judgment only where a party is entitled to it as a matter of law based on the undisputed material facts of the case. A "material fact" is a fact that potentially affects the outcome of a case. I may not issue summary judgment where a material fact is in dispute.

I make the following findings of fact and conclusions of law (Findings) based on the undisputed material facts of this case.

1. Petitioner failed to comply with Medicare participation requirements.

Section 1861(o)(1) of the Act defines a home health agency as follows:

> The term "home health agency" means a public agency or private organization, or a subdivision of such an agency or organization, which –
>
> (1) is primarily engaged in providing skilled nursing services and other therapeutic services; . . . .

A home health agency must comply with statutory requirements to be eligible to participate in Medicare. 42 C.F.R. § 484.1(a)(1). To be a home health agency, an entity must be "engaged in" providing services. The plain meaning of the statute is that an

entity must be functional – that is, it must actively provide skilled nursing and other therapeutic services – to meet the statutory definition of a home health agency. An entity that is dormant, or that fails to provide services for an extended period, does not meet the statutory definition and is, therefore, not a home health agency within the meaning of the Act.

CMS offered facts to show that Petitioner was not engaged in providing services and had not done so for many months. These facts, if not disputed by Petitioner, establish that Petitioner failed to meet the statutory definition of a home health agency.

CMS asserts the following. On November 4, 2009 a surveyor went to Petitioner's office at 12626 Riverside Drive, Valley Village, California, to conduct a compliance survey of Petitioner's operations (November 4 Survey). CMS Ex. 1 at 1; CMS Ex. 3 at 1. No one was present at this location, and the door to the facility was locked with the type of lock that real estate agencies put on vacant facilities that are for sale or for lease. *Id*.; CMS Ex. 4 at 1. The manager of the premises told the surveyor that Petitioner had moved from the premises about six months previously. CMS Ex. 1 at 1; CMS Ex. 4 at 1.

On that same morning, another surveyor went to 1420 N. Claremont Blvd., Suite 110A, Claremont, California. This location is the address that Petitioner had on the check that it used to pay for its license renewal. CMS Ex. 1 at 1; CMS Ex. 5 at 1. The surveyor spoke with Janet Marcelin, Petitioner's administrator. CMS Ex. 1 at 1; CMS Ex. 5 at 2. Ms. Marcelin told the surveyor that Petitioner had not provided services to patients since December 2008, or for about 10 months. CMS Ex. 1 at 1; CMS Ex. 5 at 2. According to Ms. Marcelin, Petitioner was in the process of recruiting professional staff. Ms. Marcelin stated that, as of the survey date, Petitioner had no registered nurses, or other professional personnel on its staff, who could provide patient care. CMS Ex. 1 at 2; CMS Ex. 5 at 2.

CMS offered corroboration for the surveyors' findings, consisting of information from the California Outcome & Assessment Information Set system, which shows that Petitioner had not submitted any data concerning patient care since December 10, 2008. CM Ex. 7 at ¶¶ 3, 5.

Petitioner offers a variety of arguments and contentions to challenge CMS's determination that Petitioner was not engaged in providing services. None of these arguments and contentions calls into dispute the core facts on which CMS relies. At bottom, Petitioner has produced nothing to show that it was actually engaged in providing services to patients during the months preceding the November 4 Survey.

Petitioner asserts that:

- The surveyors' findings, including the statements that the building manager at the 12626 Riverside Drive address reportedly made, are hearsay and, therefore, are of no probative value.

- As of October 1, 2009, Petitioner had moved its business address to 1420 N. Claremont Drive in Claremont, California.

- Petitioner's provider agreement was "under a 6-month suspension, than [sic] extended to another 6-month suspension, from January 09, 2009 through January 9, 2010." Petitioner's Brief at 7.

- The fact that Petitioner moved its offices a total distance of more than 43 miles made it "expedient" for Petitioner to discharge its patients. In fact, Petitioner could no longer provide services to its patients because of the distance between Petitioner's old and new office locations. Petitioner's Brief at 7-8.

- Petitioner was "primarily engaged in operating the agency" as is attested to by documents including: an office lease; telecommunication documents; utility bills; a business license; a home health license; a CLIA waiver/registration document; personnel documents; and other business records. Petitioner's Brief at 8-9.

Petitioner's objection to CMS's facts on the ground that some of them may be based on hearsay is without merit, because Petitioner has not actually challenged those facts. It has offered nothing to show that the surveyors' findings are, or may be, incorrect.

More significantly, Petitioner has offered no facts to dispute CMS's assertions that Petitioner was not engaged in providing patient care as of November 4, 2009, and had not done so for many months. That Petitioner had a business license, was renting offices, or had satisfied CLIA and other requirements, does not constitute any challenge to CMS's facts showing that Petitioner was not engaging in patient care. Those facts could only be challenged by facts showing that Petitioner was providing actual care to patients through licensed professional staff. Petitioner has provided nothing that would show that to have been the case. Indeed, Petitioner admits that it was not actively providing such care in that it avers that its operations were under some sort of official suspension beginning in January 2009.

Thus, the core of CMS's contentions – that Petitioner was not actively engaged in providing services to patients and that it had not done so for about 10 months as of November 2009 – is simply not challenged by Petitioner. Those facts are undisputed and, therefore, provide ample support for CMS's assertion that Petitioner did not meet the statutory definition of a home health agency. I enter summary judgment as to this issue.

CMS also contends that, as of the November 4 Survey, Petitioner failed to comply with regulatory requirements mandating that a home health agency allow the inspection and copying of its records in response to a surveyor's request. 42 C.F.R. § 489.53(a)(5), (13). CMS contends that, on November 4, 2009, Ms. Marcelin responded to a surveyor's request to see the treatment record of the last patient that Petitioner had cared for by stating that she did not have access to the record and could not provide it. Nor, according to CMS, was Ms. Marcelin able to provide employee records as of that date. CMS Ex. 1 at 1-2; CMS Ex. 5 at 2.

In response, Petitioner asserts that Ms. Marcelin told the surveyor only that the relevant records were in storage and that they could be produced by noon on November 4, 2009. I conclude that this assertion by Petitioner does raise a fact dispute as to whether Petitioner complied with the requirements of 42 C.F.R. § 489.53, because the ability to produce requested records after a short delay would, on its face, appear to satisfy regulatory requirements. Therefore, I do not enter summary judgment as to this issue.

2. CMS is authorized to terminate Petitioner's participation in Medicare, because Petitioner did not meet the statutory definition of a home health agency.

CMS may terminate a Medicare provider agreement where the provider fails substantially to meet the applicable provisions of section 1861 of the Act. Act Section 1866(b)(2)(B); 42 C.F.R. § 489.53(a)(1).

The undisputed facts of this case plainly establish that Petitioner failed to comply with the requirements of section 1861(o)(1) of the Act in that it was not engaged in providing skilled nursing services and other therapeutic services to patients as of November 4, 2009, or during the 10 months preceding that date. Consequently, CMS is authorized to terminate Petitioner's participation in Medicare.

/s/
Steven T. Kessel
Administrative Law Judge