

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Baylor County Hospital District d/b/a Seymour Hospital,  
(CCN: 45-0586),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-801

Decision No. CR3301

Date: July 18, 2014

**DECISION**

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) affirming its determination to deny the application of Petitioner, Baylor County Hospital District d/b/a Seymour Hospital, to participate in the Medicare program as a Critical Access Facility (CAH). Petitioner is located less than 35 miles from another hospital on a highway that is not a secondary road.

**I. Background**

Petitioner requested a hearing to contest CMS's determination to deny it participating status as a CAH and the case was assigned to me. CMS filed a motion for summary judgment along with nine exhibits that it identified as CMS Ex. 1 – CMS Ex. 9.

Petitioner opposed the motion and filed exhibits that it identified as P. Ex. 1 – P. Ex. 4.<sup>1</sup> I receive the parties' exhibits into the record for the purpose of deciding CMS's motion.

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<sup>1</sup> Petitioner also filed a prehearing exchange.

## II. Issue, Findings of Fact and Conclusions of Law

### A. Issue

The issue is whether the undisputed facts establish that Petitioner fails to satisfy the regulatory criteria to serve as a CAH.

### B. Findings of Fact and Conclusions of Law

These facts are undisputed. The driving distance between Petitioner and another hospital, Throckmorton County Memorial Hospital, is 31.8 miles. Petitioner’s brief at 2. The road that connects the two hospitals is designated U.S. Highway 183/U.S. Highway 283. *Id.* It is a concurrent section of two federally designated highways. One of these highways, U.S. Highway 183, spans 1261 miles from Vivian, South Dakota to Refugio, Texas. CMS Ex. 8 at 2 - 3. The other, U.S. Highway 283, spans 730 miles between Lexington, Nebraska and Brady, Texas. *Id.* at 4 - 5. The Texas Department of Transportation has designated U.S. Highway 183/U.S. Highway 283 as a “Primary Highway.” CMS Ex. 4; CMS Ex. 5. The National Atlas Map of the United States, Map of Texas, generated with U.S. Geological Survey data, has designated U.S. Highway 183/U.S. Highway 283 as a “Principal Highway.” CMS Ex. 2; CMS Ex. 3. Both U.S. Highway 183 and U.S. Highway 283 are listed as “Major Roads” in the U.S. Geological Survey database of major roads for 2012. CMS Ex. 6; CMS Ex. 7; <http://nationalatlas.gov/atlasftp.html>.

Section 1820(c)(2)(B)(i)(I) of the Social Security Act (Act) states that in order for a hospital to qualify as a CAH, it must be:

[L]ocated more than a 35-mile drive (or in the case of mountainous terrain or in areas with only secondary roads available, a 15-mile drive) from a hospital, or another [CAH]

. . . . .

Implementing regulations at 42 C.F.R. § 485.610(c), repeat the statutory language. Neither the Act nor the regulation defines the term “secondary road.”

However, CMS, acting on behalf of the Secretary of the United States Department of Health and Human Services, has established interpretive guidelines to differentiate “secondary roads” from other roads, including roads that are primary. This interpretation is set forth in the State Operations Manual (SOM) Chapter 2, § 2256A (effective 8-30-13). In pertinent part, it states:

**Application of the more than 15-mile drive standard,  
based on secondary roads**

To be eligible for the lesser distance standard due to the secondary road criteria under § 485.610(c) the CAH must document that there are more than 15 miles between the CAH and any hospital or other CAH where there are no primary roads. A primary road is:

- A numbered federal highway, including interstates, intrastates, expressways or any other numbered federal highway; or
- A numbered State highway with 2 or more lanes each way; or
- A road shown on a map prepared in accordance with the U.S. Geological Survey's Federal Geographic Data Committee (FGDC) Digital Cartographic Standard for Geologic Map Symbolization as a "primary highway, divided by a median strip." . . . .

The entire stretch of highway between Petitioner and Throckmorton County Regional Hospital is a "numbered federal highway," consisting of U.S. Highway 183/U.S. Highway 283. The entire route between the two hospitals is "primary road." Thus, Petitioner cannot qualify for the "secondary road" interpretation of the SOM and, it cannot meet the statutory and regulatory criteria as a CAH inasmuch as it is separated from another hospital by less than 35 miles of primary road.

Petitioner argues that the SOM's definition of "primary" and "secondary" roads should not be given deference and that I should, in effect, disregard the Secretary's interpretation in favor of what it contends are the facts that reveal the true conditions on U.S. Highway 183/U.S. Highway 283. It contends that this stretch of road is, in fact, rural in character and is "secondary" when examined realistically rather than by what it contends are arbitrary policy criteria.

The SOM does not have the force of regulation and it is not absolutely binding if it conflicts with regulatory or statutory language. But, I see no conflict here. The Secretary's interpretation as embodied in the SOM is entitled to considerable deference as a general rule. But, even more so, it is justified in this case by practical considerations.

It is incumbent on the Secretary to make reasoned judgments as to what constitute “primary” and “secondary” roads when there is no defining language in the Act. That is the responsibility that she is vested with as the executive in charge of applying the law. The policy determination that a “primary” road will constitute a numbered federal highway is a reasonable one as a general principal. It is also reasonable within the undisputed facts of this case inasmuch as the United States Geological Survey and the State Agency responsible for designating roads in Texas have determined independently that the stretch of highway in question is primary in character.

As CMS points out, the Secretary and CMS lack the resources and capacity for making case-by-case judgments about the driving characteristics of every stretch of highway in the United States. Those judgments, in any event, are likely to be subjective. For example, a very crowded stretch of interstate highway may at times produce slower traffic than a nearby county road or urban street. Given that, making a policy determination that a numbered United States Highway is a “primary road” not only makes sense, but it may be the only reasonably objective way, along with the other criteria listed in the SOM, of determining what is “primary” and what is “secondary.” CMS’s determination in this case is entirely consistent with a reasonable policy determination.

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Steven T. Kessel  
Administrative Law Judge