Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Shelby Memorial Hospital,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1914

Decision No. CR3647

Date: February 11, 2015

DECISION

The Centers for Medicare & Medicaid Services (CMS) denied the request of Petitioner, Shelby Memorial Hospital, to participate in the Medicare program as a critical access hospital (CAH). Petitioner requested a hearing to dispute CMS's determination. CMS moved for summary disposition, which Petitioner opposed. For the reasons set forth below, I grant summary judgment to CMS and affirm CMS's determination.

I. Background and Procedural History

Petitioner is a hospital located in Shelbyville, Illinois. On October 22, 2013, Petitioner filed a CMS-855A enrollment application to change its status from a Prospective Payment Provider to a CAH. *See* Petitioner Exhibit (P. Ex.) 14. Following a survey, Det Norske Veritas Healthcare, Inc. (DNV) deemed Petitioner to be in compliance with the Medicare CAH conditions of participation and recommended that CMS approve Petitioner for deemed status as a CAH in the Medicare program; however, DNV noted that "CMS makes the final determination regarding your Medicare certification . . . ." P. Ex. 15.

On May 19, 2014, CMS denied Petitioner's request to participate as a CAH in the Medicare program because Petitioner did not satisfy the condition of participation found in 42 C.F.R. § 485.610(c). P. Ex. 2. CMS's determination stated:

> Based upon our review of the information provided to CMS by DNV and the Illinois Department of Public Health (IDPH), your hospital is located 16.2 miles from the nearest hospital or CAH. However, of the total distance of 16.2 miles, 2.7 of those miles are traversed via primary roadways, in this case, US Highway 51. For purposes of determining compliance with the distance requirements found at 42 CFR § 485.610(c), CMS's guidance issued at State Operations Manual (SOM) Section 2256A requires that any facility seeking certification as a CAH that cannot meet the 35 mile distance requirement, may participate if the facility is greater than 15 miles from the nearest hospital or CAH if only secondary roads are available. Our review of your information revealed that there is only 13.5 miles of secondary roadway between your hospital and the nearest hospital or CAH. Therefore, CMS cannot approve your facility to participate as a CAH in the Medicare program.

P. Ex. 2 at 1.

Petitioner timely requested reconsideration. P. Ex. 16. On July 18, 2014, CMS issued an unfavorable reconsidered determination. P. Ex. 17.

Petitioner timely requested a hearing before an administrative law judge (ALJ). With its request for hearing (RFH), Petitioner submitted 13 exhibits, labeled "A" through "M." CMS moved for summary disposition and filed a supporting brief (CMS Br.) with three exhibits (CMS Exs. 1-3). Petitioner filed a brief opposing summary disposition with 20 exhibits (P. Exs. 1-20).

II. Issue

The general issue in this case is whether the undisputed facts establish that Petitioner fails to satisfy the regulatory criteria to be designated as a CAH in the Medicare program. The specific issue is whether Petitioner's hospital is located more than a 15-mile drive on secondary roads from another hospital or CAH.

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

The Social Security Act (Act) permits states to establish a Medicare Rural Hospital Flexibility Program. 42 U.S.C. § 1395i-4. States establishing such a program must develop at least one rural health network and have at least one facility in the state designated as a CAH. *Id*. § 1395i-4(c)(1). A facility enrolled in Medicare as a CAH generally receives higher payments from Medicare than it would if enrolled as a hospital. *Id*. §§ 1395f, 1395m, 1395x; *see also* 72 Fed. Reg. 42,628, 42,806 (2007) (stating that the "intent of the CAH program is to maintain hospital-level services in rural communities while ensuring access to care").

In order for CMS to designate a facility as a CAH, the facility must be:

> located 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 facility [CAH] . . . .

42 U.S.C. § 1395i-4(c)(2)(B)(i)(I). This standard also appears in the regulations as a condition of participation for CAHs. 42 C.F.R. § 485.610(c).

1. Summary judgment is appropriate.

When appropriate, ALJs may decide a case arising under 42 C.F.R. part 498 by summary judgment. *See* Civil Remedies Division Procedures § 19(a); *Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F.3d 168, 172 (6th Cir. 2004) (citing *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743 (6th Cir. 2004). Summary judgment is appropriate if "the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id*. If the moving party meets its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab*., DAB No. 2300, at 3. To determine whether there are genuine issues of material fact for hearing, an ALJ must view the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in that party's favor. *Id*. When

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

ruling on a motion for summary judgment, an ALJ may not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

Here, CMS has moved for summary disposition. The parties do not dispute the facts material to this case and there is no genuine dispute as to any material fact that requires an evidentiary hearing. The only issue to be resolved in this case is a matter of law, which, as discussed below, must be decided in CMS's favor. Accordingly, summary judgment is appropriate.

2. CMS is entitled to summary judgment because the undisputed facts establish that Petitioner is located less than a 15-mile drive via secondary roads from the nearest hospital and, therefore, does not satisfy the distance requirement for designation as a CAH in the Medicare program. 42 U.S.C. § 1395i-4(c)(2)(B)(i)(I); 42 C.F.R. § 485.610(c).

CMS denied Petitioner CAH status on the grounds that Petitioner did not satisfy the distance requirement established by the statute and regulations because Petitioner was located less than a 15-mile drive via secondary roads from the nearest hospital. Specifically, CMS found that Petitioner was located 16.2 miles from the nearest hospital or CAH. CMS determined that of this total distance of 16.2 miles, the distance traveled via a primary road, in this case, U.S. Highway 51 (U.S. 51), was 2.7 miles, and the distance traveled via a secondary road was only 13.5 miles. P. Exs. 2, 17.

The following facts are not disputed. The closest hospital to Petitioner is Pana Community Hospital (PCH) in Pana, Illinois. Although the parties differ slightly as to the total distance, they are in agreement that the distance between Petitioner and PCH is a little more than 16 miles. P. Br. at 4; CMS Br. at 1.[2] The route between the two hospitals runs primarily along Illinois State Highway 16 (IL 16). RFH at 1. For a portion of the route, which is at least 2.1 miles, the stretch of highway is co-designated as IL 16 and U.S. 51.[3] The entire route between Petitioner and PCH is a two lane road (one lane in each direction with the exception of short turn lanes at certain intersections). P. Br. at 9.

[2] According to CMS, the distance between Petitioner and PCH is between 16.2 and 16.4 miles. CMS Br. at 1. Petitioner claims that the distance between it and PCH is 16.33 miles. RFH; P. Br. at 4.

[3] CMS states that the stretch of highway co-designated as IL 16 and U.S. 51 is 2.7 miles. CMS Br. at 3, 6; P. Exs. 2, 17. Petitioner gives the distance as 2.1 miles. RFH at 2; P. Br. at 5.

In denying Petitioner's request for CAH status, CMS relied on the interpretive guidance published in the State Operations Manual (SOM), § 2256A, which sets out criteria to differentiate between primary and secondary roads. In pertinent part, the SOM 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."
>
> A CAH may qualify for application of the "secondary roads" criterion if there is a combination of primary and secondary roads between it and any hospital or other CAH, so long as more than 15 of the total miles from the hospital or other CAH consists of areas in which only secondary roads are available. To apply the secondary roads criterion, measure the total driving distance between the CAH and each hospital or CAH located within a 35 mile drive and subtract the portion of that drive in which primary roads are available. If the result is more than 15 miles for each drive to a hospital or CAH facility, the 15-mile criterion is met . . . .

SOM Ch. 2, § 2256A (emphasis in original); P. Ex. 3 at 4-5. According to the SOM, a road that does not meet the definition of a "primary road" would constitute a secondary road. Therefore, a secondary road is a road that is not a numbered federal highway or a numbered State highway with two or more lanes each way.

Petitioner argues that I should disregard the SOM criteria regarding what constitutes "primary" and "secondary" roads. Petitioner argues that the SOM provisions are "arbitrary and capricious" and fail to take into account a road's physical characteristics. Petitioner contends that CMS is "woodenly" applying the SOM definitions to label the stretch of road co-designated as IL 16 and U.S. 51 a "primary road" despite the fact it is an undivided two lane road. In Petitioner's view, CMS's position leads to an illogical result in this case and thwarts the congressional objective behind the creation of the CAH provisions, which was to ensure that Medicare beneficiaries located in rural communities have reasonable access to hospital care.[4] P. Br. at 6-9.

Petitioner is located a little over 16 miles from the nearest hospital, PCH. Thus, Petitioner clearly does not qualify for CAH status based on the 35-mile distance requirement, but would be able to qualify as a CAH if more than 15 miles of the road between it and PCH are considered a secondary road. In denying Petitioner status as a CAH, CMS applied the SOM criteria and determined that, out of the total distance between Petitioner and PCH, the distance on secondary roads was less than 15 miles due to the fact that a 2.7-mile portion of the route constituted a primary road based on its co-designation as a numbered federal highway (US 51).

Neither the Act nor the regulation defines the term "secondary road." However, CMS has provided guidance as to the meaning of the term in the SOM. It is well-settled that the SOM, as CMS's interpretative guidance, is instructive, but is not controlling authority. *Baylor Cnty. Hosp. Dist. d/b/a Seymour Hosp.*, DAB No. 2617, at 4 (2015); *Green Oaks Health & Rehab. Ctr.*, DAB No. 2567, at 11 (2014); *Agape Rehab. of Rock*

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[4] In examining the legislative history pertaining to the creation of the CAH program, Petitioner notes that the mileage standard contained in the statute was a "compromise." P. Br. at 3 n.4. Petitioner cites to the House of Representative Report which stated that such facilities had to be:

> located a distance that corresponds to a travel time of greater than 30 minutes (using the guidelines specified [in the] . . . Code of Federal Regulations . . .), from [another] hospital . . . .

H.R. Rep. No. 105-149, at 392 (1997); P. Ex. 5, at 12. The Senate, in the Conference Report, offered an alternative provision based on mileage, stating that a facility would receive CAH status if it is "located more than a 35-mile drive from another hospital or other health care facility." H.R. Rep. No. 105-217, at 706 (1997); P. Ex. 6 at 5. The Conference agreement adopted the Senate's mileage standard, but with a modification which stated "[t]he distance requirement for facilities includes a 15-mile drive in the case of mountainous terrain or in areas with only secondary roads available." *Id*.

Hill, DAB No. 2411, at 19 (2011). An agency's interpretation of ambiguous statutory or regulatory language is entitled to deference so long as the interpretation is reasonable and the party against whom the agency interpretation is applied had adequate notice. *Baylor Cnty. Hosp.*, DAB No. 2617; *Cibola Gen. Hosp.*, DAB No. 2387, at 7-8 (2011). Here, Petitioner does not dispute that it had adequate notice of CMS's interpretation of what constitutes a primary road and secondary road. Instead, Petitioner argues that CMS's interpretation is arbitrary and leads to an illogical result when applied to the facts of this case.

Subsequent to the filings in this case, an appellate panel of the Departmental Appeals Board (DAB) issued its decision in the *Baylor County Hospital District* case, DAB No. 2617.[5] In its decision, the DAB upheld the ALJ decision, concluding that CMS's interpretation in the SOM of what constitutes a "secondary road" was entitled to deference and that, based on the SOM criteria, the petitioner did not meet the distance requirements of the Act and 42 C.F.R. § 485.610(c), and thus did not qualify as a CAH.

Like Petitioner in this case, the petitioner in the *Baylor County Hospital District* case argued that the SOM criteria regarding what constitutes "primary" and "secondary" roads should not be given deference since they do not take a road's actual physical characteristics into account. In *Baylor County Hospital District*, at issue was an approximately 28-mile stretch of road between the petitioner and the nearest hospital that was designated as U.S. Highway 183/U.S. Highway 283. According to the petitioner, this road had one lane in each direction, did not have a median strip, and would be considered a secondary road but for its federal highway designation. The ALJ, in his decision, concluded that although the SOM did not have the force of regulation, it did not conflict with either the regulatory or statutory language and was entitled to deference. Applying the SOM criteria, the ALJ concluded that the entire route at issue was a "primary road" because it was a "numbered federal highway," and, thus, the petitioner did not satisfy the statutory distance requirements to qualify as a CAH. *Baylor Cnty. Hosp.*, DAB CR3301, at 3 (2014). The ALJ commented further that, in the absence of any defining language in the Act, and given the lack of resources to make case-by-case judgments about every highway in the United States, the SOM provisions constituted reasonable policy determinations. *Id*. at 4.

The DAB was not persuaded by the petitioner's argument on appeal that CMS's interpretation was unreasonable because it failed to take into consideration the specific characteristics of individual roads and concluded that "CMS's interpretation is not unreasonable or inconsistent with the intent of the CAH statute." *Baylor Cnty. Hosp.*, DAB No. 2617, at 4. Significantly, the DAB held:

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[5] On January 26, 2015, CMS filed a Statement of Additional Authority, to which it attached the DAB's *Baylor County Hospital District* decision.

> We are not persuaded by Seymour's argument that CMS should have adopted a bright-line rule that treated only those parts of federal highways with two or more lanes in each direction or median strips as primary. Pet. R. Br. at 8. The fact that CMS could have constructed other bright-line rules, using different approaches, does not mean that the rule it chose to adopt is unreasonable.

Id. at 5. The DAB thus concluded that it was appropriate to defer to CMS's interpretation of the term "secondary road." *Id*. at 6.

Although I understand and am sympathetic to Petitioner's arguments in this case, based on *Baylor County Hospital District*, I will apply the SOM criteria to determine whether Petitioner satisfies the statutory distance requirements required for CAH status. In this case, Petitioner asserts the disputed section of road between Petitioner and PCH is 2.1 miles and is co-designated as IL 16 and U.S. 51. RFH at 2; P. Br. at 5. Under the SOM criteria, the disputed section is a "primary" road and not a "secondary" road because the section is co-designated as a numbered federal highway. The statute requires that the "secondary roads" distance from a prospective CAH to another hospital be more than 15 miles. Here, when one subtracts the 2.1-mile primary road portion of the route from the total distance between Petitioner and PCH, which is between 16.2 and 16.4 miles, the minimum total amount of secondary road between Petitioner and PCH is 14.3 miles. Accordingly, under the SOM, Petitioner is located less than a 15-mile drive via secondary roads from the nearest hospital and, therefore, is too close to another hospital to be designated as a CAH under 42 U.S.C. § 1395i-4(c)(2)(B)(i)(I).

Petitioner makes the additional argument that a U.S. 51 bypass will be constructed in the future and, when this occurs, there will no longer be a portion of IL 16 that is co-designated as U.S. 51, which means that the segment in dispute will no longer be considered a primary road. RFH; P. Br. at 10. Unfortunately, the possible removal of the U.S. 51 designation from the disputed section of road in this case is not relevant.

IV. Conclusion

This case presents no genuine dispute of material fact and CMS is entitled to judgment as a matter of law. Therefore, I grant CMS's motion for summary disposition.

/s/
Scott Anderson
Administrative Law Judge