

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Emmanuel Ridge Hospice Ministry,)	Date: July 14, 2009
(CCN: 25-1588))	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-324
)	Decision No. CR1974
Centers for Medicare & Medicaid)	
Services.)	
)	
_____)	

DECISION

THIS MATTER IS BEFORE ME on the Motion for Summary Disposition filed by the Centers for Medicare & Medicaid Services (CMS) on April 9, 2009. By its Motion, CMS seeks affirmation of its December 19, 2008 determination to terminate the Medicare participation agreement of Petitioner Emmanuel Ridge Hospice Ministry (ERHM). Because no genuine issues of material fact appear in dispute in the record before me, and because settled law supports CMS's position, I GRANT the CMS Motion and affirm its termination of ERHM's Medicare agreement.

I. Procedural Background

Until June 30, 2008, ERHM operated a hospice in Florence, Mississippi under a license granted to it by the Mississippi State Department of Health (MSDH). ERHM allowed its license to expire on that date, and did not submit an application to renew its license until mid-July, 2008. MSDH determined that it would not renew ERHM's license, and, on December 4, 2008 notified CMS that ERHM was then unlicensed as a hospice and recommended that CMS terminate ERHM's Medicare agreement.

CMS acted on the MSDH notification: on December 19, 2008, CMS notified ERHM that its Medicare provider agreement was terminated effective December 4, 2008, giving as its reason for the termination ERHM's failure to be licensed as a hospice by the State of Mississippi. CMS relied on the terms of 42 C.F.R. § 418.116.

On February 23, 2009, ERHM mailed a three-page letter with attachments to the CMS regional office in Atlanta, Georgia. That office forwarded the letter and attachments to the Civil Remedies Division, since the letter's content made it clear that ERHM requested a hearing on its termination of its participation in the Medicare program. My Orders of March 19, 2009, and May 6, 2009, a telephonic conference held on May 6, 2009, and my letter of June 15, 2009, established the procedural outline by which this case has progressed.

ERHM's hearing request included 25 pages of attached documents marked Exhibits A, B-1, B-2, and C-F, and the June 3, 2009 "Informal Brief of Petitioner" included an additional 64 pages of attached documents marked Exhibits A, B, C-1, C-2, and D-H. Although much of the latter submission is duplicative of the material submitted with ERHM's hearing request, and although most of both submissions consists of material irrelevant to the issue before me, I have admitted it all as marked and have reviewed it all. I have also admitted the two exhibits proffered by CMS, CMS Exs. 1 and 2.

II. Issue

The sole legal issue before me is whether CMS was authorized to terminate ERHM's Medicare agreement because ERHM was no longer licensed to operate a hospice by the State of Mississippi.

III. Controlling Statutes and Regulations

In order to participate in the Medicare program, a hospice must have an approved provider agreement with CMS. The statutory requirements for hospices providing Medicare services are established at section 1861(dd) *et seq.* of the Social Security Act (Act), 42 U.S.C. § 1395x(dd) *et seq.*

42 C.F.R. § 418.116 provides that, as a condition of participation in the Medicare program as a provider of hospice services, a "[h]ospice and its staff must operate and furnish services in compliance with all applicable Federal, State, and local laws and regulations related to the health and safety of patients. If State or local law provides for licensing of hospices, the hospice must be licensed."

42 C.F.R. § 489.53(a)(3) grants CMS the discretionary authority to terminate any Medicare provider agreement if it “no longer meets the appropriate conditions for participation . . .” in the Medicare program.

IV. Findings of Fact and Conclusions of Law

I find and conclude as follows:

1. ERHM’s license to operate as a hospice expired on June 30, 2008, and was not renewed or extended beyond that date by MSDH.
2. Because ERHM was not licensed to operate as a hospice beyond June 30, 2008, its hospice operation was after that date not in compliance with the condition for participation in the Medicare program set out at 42 C.F.R. § 418.116.
3. By the terms of 42 C.F.R. § 489.53(a)(3), CMS was authorized to terminate ERHM’s Medicare provider agreement because it no longer met the condition for participation in the Medicare program set out at 42 C.F.R. § 418.116.
4. There are no genuine issues of material fact in dispute in this record and CMS is entitled to summary disposition in its favor. I have viewed the facts and inferences reasonably to be drawn from the undisputed facts in the light most favorable to ERHM, the non-moving party. *Brightview Care Center*, DAB No. 2132 (2007).

V. Discussion

The State of Mississippi forbids the unlicensed operation of a hospice facility, and extends its prohibition broadly to include the use of the title “hospice” in a facility’s name or the general providing of hospice-like care without a license. MISS. CODE ANN. § 41-85-5(1). Until June 30, 2008, ERHM acknowledged the application of that statute to its hospice operation by seeking and being granted Hospice Operator License Number 096. On or about July 14, 2008, ERHM again acknowledged the application of the statute by seeking the renewal of its hospice license.

It appears from the documents attached to ERHM’s request for hearing that during the period immediately prior to the expiration of its hospice license on June 30, 2008, ERHM had become involved in a somewhat contentious inspection process conducted by representatives of MSDH. The details of the inspection process are not relevant here, but what is relevant is the undisputed fact that ERHM’s license expired on June 30, 2008, and was not renewed thereafter.

The condition of participation here at issue is set out at 42 C.F.R. § 418.116. The language in which the condition is framed is unambiguous: “If State or local law provides for licensing of hospices, the hospice must be licensed.” The terms of 42 C.F.R. § 418.116 became effective December 2, 2008. 73 Fed. Reg. 32,204 (June 5, 2008). It should be noted that the regulation’s publication date in the Federal Register was prior to the expiration date of ERHM’s license, and that CMS did not effectuate the termination of ERHM’s Medicare eligibility until December 4, 2008, two days after the effective date of the new regulation.

In the language of 42 C.F.R. § 489.53(a)(3), “CMS may terminate the agreement with any provider if CMS finds that . . . [i]t no longer meets the appropriate conditions of participation” The choice to terminate lies in CMS’s discretion. See *United Medical Home Care, Inc.*, DAB No. 2194 (2008).

ERHM appears here through its non-attorney president and chief executive officer. I have for that reason treated this matter as if ERHM appears *pro se*, and have accordingly remained mindful of the Departmental Appeals Board’s admonition that *pro se* litigants be afforded “some extra measure of consideration” in developing their cases. *Louis Mathews*, DAB No. 1574 (1996); *Edward J. Petrus, Jr., M.D., et al.*, DAB No. 1264 (1991). My Order of May 6, 2009, and my by direction letter of June 15, 2009, demonstrate that extra measure of consideration. I have searched ERHM’s pleadings for any arguments or contentions that might amount to a colorable defense to the termination. I have found nothing that could be so construed: ERHM argues vigorously that MSDH improperly denied it a hospice license, and complains stridently about certain aspects of the Medicare program, but ERHM has never asserted that it actually had an MSDH-issued hospice license after June 30, 2008, and that is the material question. Once that question is resolved against ERHM — as it is here by every element of the record before me, which record is uncontradicted by any claim or assertion by ERHM — summary disposition in favor of the CMS Motion is required as a matter of law.

Conclusion

For all of the reasons discussed above, CMS’s Motion for Summary Disposition should be, and it is, GRANTED. I affirm CMS’s determination to terminate Petitioner ERHM’s participation in the Medicare program effective December 4, 2008.

/s/

Richard J. Smith
Administrative Law Judge