Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
University Behavioral Health of El Paso, LLC, (CCN: 45-4109),	)	Date: January 6, 2009
	)	
Petitioner,	)	Docket No. C-08-627
	)	Decision No. CR1880
- v. -	)	
	)	
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I enter summary judgement in favor of the Centers for Medicare & Medicaid Services (CMS) and against University Behavioral Health of El Paso, LLC. (Petitioner). I find that Petitioner's effective date of participation in the Medicare program is March 5, 2008.

I. Background

Petitioner is a hospital located in El Paso, Texas. By letter dated March 26, 2008, CMS advised Petitioner that it was certified to participate in the Medicare program as a psychiatric hospital effective March 5, 2008. By letter dated April 8, 2008 Petitioner contended that the effective date of certification should be February 21, 2008, and asked that CMS reconsider its decision. By letter dated May 23, 2008 CMS advised Petitioner that it could not change the Medicare participation date, and that the effective date would remain the same. By letter dated July 21, 2008, Petitioner requested a hearing challenging CMS's decision to certify it on March 5, 2008.

The case was assigned to me for hearing and decision. By my direction the parties were sent an Acknowledgment and Initial Docketing Order dated July 25, 2008. The Order set forth certain procedures and a schedule for the initial development of the case. In

response to the Order, Petitioner filed a "Report of Readiness" dated August 25, 2008, and CMS filed a motion for summary judgement on August 28, 2008.
By Order dated September 26, 2008, I issued a Notice and Order to Show Cause to Petitioner because Petitioner's "Report of Readiness" had failed to comply with specific requirements for an adequate Report of Readiness set out in paragraph 4(c) of my Order of July 25, 2008, and was not responsive to CMS's motion for summary judgment.[1]

By letter dated October 2, 2008, Petitioner filed a response to my Notice and Order to Show Cause. By letter dated October 14, 2008, Petitioner submitted a response to CMS's motion for summary judgement.

I advised Petitioner by direction letter dated October 16, 2008, that I accepted Petitioner's October 2, 2008 filing as having shown good cause, and its October 14, 2008 submission as properly filed. Additionally, I advised the parties that no further briefings on the merits of the CMS motion for summary judgement or other pleadings related to that motion would be received pending my ruling and decision on it.

CMS submitted five proposed exhibits (CMS Exs. 1-5) along with its motion for summary judgement. Petitioner submitted several unmarked documents along with its July 21, 2008 request for hearing. These documents are: 1) a letter dated May 23, 2008 from CMS denying Petitioner's request for reconsideration; 2) Petitioner's April 8, 2008 request for reconsideration letter; 3) a March 26, 2008 certification letter from CMS; 4) a health insurance benefit agreement (CMS form 1551) between the Department of Health and Human Services and Petitioner; 5) an electronic mail dated March 31, 2008 from Patrick Walden to David Wright; 6) CMS form 1539; and 7) a survey of Petitioner's facility dated February 21, 2008. For the purposes of the record, I have designated these exhibits as Petitioner's Exhibits (P. Exs.) 1-7 respectively. I receive into evidence CMS Exs. 1-5, and P. Exs. 1-7.

II. Applicable Law

In order to be approved for participation in the Medicare program, a provider must meet the applicable statutory definition and be in compliance with conditions or requirements for participation. 42 C.F.R. § 488.3. 42 C.F.R. Part 488 sets forth the survey and certification process by which CMS and its authorized agents determine whether a provider is complying with the applicable conditions for participation.

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[1] Petitioner is represented by the facility's senior vice-president of financial operations, a non-lawyer.

Medicare participation requirements for psychiatric hospitals are found in 42 C.F.R. Part 482. These regulatory requirements establish that psychiatric hospitals must meet all conditions of participation applicable generally to hospitals, as well as special certain conditions. *See* 42 C.F.R. §§ 482.61, 482.62. Conditions of participation are broken down into standards. A provider, or prospective provider, that is found to be deficient with respect to one or more standards in the conditions of participation, may participate in Medicare only if the facility submits an acceptable plan of correction for achieving compliance within a reasonable period of time as required by 42 C.F.R. § 488.28(a).

A Medicare provider agreement is effective on the date the survey is completed, if on that date the provider meets all federal requirements. 42 C.F.R. § 489.13(b). If on the date the survey is completed the provider fails to meet any of the requirements specified in 42 C.F.R. Chapter IV the effective date of certification is the earlier of the following:

> the date on which the provider meets all requirements; or
>
> the date on which a provider is found to meet all conditions of participation or coverage, but has lower level deficiencies, and CMS or the State survey agency receives an acceptable plan of correction for the lower level deficiencies.

As an applicant for certification and as a participant in the Medicare program, Petitioner has the burden of establishing that it satisfies participation requirements. 42 C.F.R. § 489.10(a). Petitioner also has the ultimate burden of rebutting, by a preponderance of the evidence, any *prima facie* case of noncompliance established by CMS. *Hillman Rehabilitation Center*, DAB No. 1611 (1997), *aff'd*, *Hillman Rehabilitation Center v. U.S. Dep't of Health and Human Services*, No. 98-3789 (GEB), at 21-38 (D.N.J., May 13, 1999).

CMS meets its burden to establish a *prima facie* case merely by establishing that Petitioner has not supplied it with sufficient affirmative evidence that it is complying with participation requirements. As an applicant for certification, Petitioner must show affirmatively that it is complying with such requirements.

III. Discussion

A. Issues

The issues in this case are:

> **1**. Whether summary judgment is appropriate; and if so

2. Whether the effective date of Petitioner's participation is March 5, 2008, or an earlier date.

B. Findings and Analysis

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

1. Summary judgment is appropriate in this case because there are no disputed issues of material fact.

An administrative law judge (ALJ) may decide a case on summary judgment, without an evidentiary hearing, if the case presents no genuine issue of material fact. *Crestview Parke Care Center v. Thompson,* 373 F.3d 743, 750 (6th Cir. 2004); *Livingston Care Center v. Dep't. of Health and Human Services,* No. 03-3489, 2004 WL 1922168, at 3 (6th Cir. Aug. 24, 2004). By interpretive rule, this forum has established a summary judgment procedure "akin to the summary judgment standard contained in Federal Rule of Civil Procedure 56." *Crestview Parke Care Center*, 373 F.3d 743, 750. Under that rule, the moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Livingston Care Center,* No. 03-3489, 2004 WL 1922168, at 4, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986). *See also Vandalia Park,* DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

A mere scintilla of supporting evidence is not sufficient. "If the evidence is merely colorable or is not significantly probative summary judgment may be granted." *Livingston Care Center*, No. 03-3489, 2004 WL 1922168, at 4, quoting *Anderson v. Liberty Lobby,* 477 U.S. 242, at 249-250 (1986). In deciding a summary judgment motion an ALJ may not make credibility determinations or weigh conflicting evidence but must instead view the entire record in the light most favorable to the non-moving party, all reasonable inferences drawn from the evidence in that party's favor. *Innsbruck HealthCare Center,* DAB No. 1948 (2004); *Madison Health Care, Inc.,* DAB No. 1927 (2004).

This case is appropriate for summary judgment. CMS has filed a motion for summary judgment, and Petitioner has not disputed any material issues of fact in this case. Thus, the only issues before me are legal, and can be decided based on written submissions, without the need for an in-person hearing. The central legal issue in this case is whether CMS correctly certified Petitioner to participate in Medicare on March 5, 2008. In evaluating the parties submissions, I find that even if I construe the entire record in the light most favorable to Petitioner, I find that CMS correctly certified Petitioner to participate in Medicare on March 5, 2008.

2. The effective date of Petitioner's participation in Medicare is March 5, 2008.

The facts of the case are undisputed. On February 21, 2008, the Texas Department of State Health Services (TDSHS) conducted a certification survey of Petitioner to determine whether it was in compliance with Medicare participation requirements for psychiatric hospitals. CMS Ex. 1. TDSHS determined that Petitioner had several lower level deficiencies. *Id*. Petitioner submitted its plan of correction for the identified deficiencies. *Id*. In the interim, TDSHS determined that Petitioner's plan of correction was acceptable, and on March 5, 2008 CMS certified Petitioner to participate in the Medicare program. CMS Ex. 4. Between the time of the survey (February 21, 2008), and the time of CMS's certification (March 5, 2008), Petitioner began treating Medicare patients believing it would be reimbursed for services rendered based on statements of one of the TDSHS surveyors who conducted the survey. P. Ex. 1; P. Ex. 5. Thus, Petitioner asserts that in good faith, it reasonably relied on the representations of the state surveyor, and should be reimbursed for Medicare services provided beginning February 21, 2008, instead of March 5, 2008. Petitioner's July 21, 2008 letter.

Petitioner is simply not entitled, as a matter of this forum's well-settled law, to the relief it seeks. The regulations at 42 C.F.R. § 498.13(c)(2(ii) specify when a Medicare agreement may be effective:

> If on the date the survey is completed the provider or supplier fails to meet any of the requirements specified in paragraph (b) of this section, the following apply: (2) For an agreement with, or an approval of, any other provider or supplier, (except those specified in paragraph (a)(2) of this section), the effective date is the earlier of the following: (ii) The date on which a provider or supplier is found to meet all conditions of participation or coverage, but has lower level deficiencies, and CMS or the State survey agency receives an acceptable plan of correction for the lower level deficiencies, or an approval waiver request, or both. (The date of receipt is

> the effective date regardless of when CMS approves the plan of correction or the waiver request, or both.)

42 C.F.R. § 498.13(c)(2(ii).

Thus, in this instance the earliest Petitioner could have been certified by CMS to participate as a psychiatric hospital was February 21, 2008, the date of the survey. However, Petitioner was found not to have complied with all participation requirements as of that date. The TDSHS surveyors who completed the February survey found that Petitioner failed to comply with several lower level standard level participation requirements. Petitioner submitted an acceptable plan of correction on March 5, 2008. CMS certified Petitioner to participate as a psychiatric hospital effective March 5, 2008. Under the regulations, this was the earliest date Petitioner was eligible to participate as a psychiatric hospital. *See Puget Sound Behavioral Health*, DAB No. 1944 (2004). Additionally, there is nothing in the regulations or the Act which obligates or enables CMS to certify a facility to participate in Medicare based on the communication of erroneous information given to that facility by an employee of a state survey agency. *Danville HealthCare Surgery Center*, DAB CR892 (2002).

Petitioner also asserts that according to the State Operations Manual (SOM), lower level deficiencies do not require a plan of correction, and therefore, its effective certification date should be February 21, 2008. Petitioner is incorrect. The SOM does not have the force and effect of law, and therefore is not controlling. *Cal Turner Extended Care Pavilion*, DAB No. 2030 (2006); *Aase Haugen Homes, Inc.*, DAB No. 2013, at 15 (2006); *Prime Care Home Health Agency, Inc.*, DAB CR1678, at 7 (2007).

For the limited purposes of this discussion, I accept *arguendo* Petitioner's assertion that it was told — by a state surveyor — at the completion of the February survey that it met the conditions for participation for a psychiatric hospital. But in accepting the assertion *arguendo*, I must observe that the assertion is irrelevant because any such representations cannot bind CMS or estop CMS from following clear statutory and regulatory provisions. *Physicians Medical Center of Santa Fé*, DAB CR1790, at 7-8 (2008); *Oklahoma Heart Hospital*, DAB CR1719, at 10-11 (2008); *Prime Care Home Health Agency, Inc.*, DAB CR1678, at 7; *Danville HealthCare Surgery Center*, DAB CR892. However, Petitioner was also told, by its receipt of the statement of deficiencies, that it had several standard level deficiencies. It is entirely consistent with the regulatory scheme that Petitioner met conditions of participation yet at the same time manifested some lower level deficiencies. The regulations require that, in light of the presence of these lower level deficiencies, Petitioner could not be certified by CMS to participate as a psychiatric hospital until it either corrected them or until it submitted an acceptable plan of correction, which it did on March 5, 2008.

IV. Conclusion

Accordingly, I grant CMS's motion for summary judgment. I affirm CMS's determination that the effective date of Petitioner's Medicare provider agreement is March 5, 2008.

/s/
Richard J. Smith
Administrative Law Judge