Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Prestige Dialysis Clinics, Inc.	)	Date: December 14, 2009
	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-579
	)	Decision No. CR2045
Centers for Medicare & Medicaid Services.	)	
	)	
	)	

DECISION GRANTING MOTION FOR SUMMARY DISPOSITION

I grant the motion of the Centers for Medicare & Medicaid Services (CMS) for summary disposition against Petitioner, Prestige Dialysis Clinic, Inc.

I. Background

Petitioner is a dialysis clinic located in Baltimore, Maryland. CMS certified Petitioner to participate in the Medicare program as a supplier of end stage renal disease (ESRD) services, effective May 4, 2009. Petitioner requested a hearing to challenge the effective date of its participation, asserting that it should have been certified to participate in Medicare on March 25, 2009. The case was assigned to me for a hearing and a decision.

CMS moved for summary disposition. Petitioner did not answer the motion.[1] With its motion CMS filed five proposed exhibits which it identified as CMS Ex. 1 – CMS Ex. 5. I receive these into the record of the case.

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether CMS properly determined Petitioner's effective date of participation in Medicare to be May 4, 2009.

B. Findings of fact and conclusions of law

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.

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[1] CMS sent a copy of its motion to two attorneys, J. Brian Tansley, Esquire, and Robert King, Esquire on the apparent belief that they represented Petitioner. My office had not received a notice of appearance from either of these individuals. After the time to answer the motion had expired and at my direction, a staff attorney in my office called Mr. King to determine why he had not filed a notice of appearance or answered the motion. Mr. King assured the staff attorney that he would be entering an appearance immediately and would respond to the motion. Based on that representation, I sent a letter to Mr. King on October 28, 2009 granting him an extension until November 4, 2009 to enter an appearance and answer the motion. However, Mr. King did not file either a notice of appearance or an answer. In order to be fair to Petitioner (and also because Petitioner, evidently, continued to believe that Mr. King represented it) I extended its deadline to file a reply to the motion until December 2, 2009. On that date Mr. King finally filed a notice of appearance and asked for an additional week, or until December 9, 2009 to file a reply to the motion. I sent a fax to Mr. King on December 3 giving him a final extension until close of business Friday, December 4, 2009 to file a reply. I also sent him notice by regular mail saying the same thing. He filed nothing. On December 9, 2009 Mr. King called my office and asserted that he had not received the fax but had just received the mailed copy of my final extension. However, our office had a fax receipt showing that the fax was received by Mr. King's office on December 3, 2009. I directed the staff attorney to tell Mr. King that at this point he had exceeded his final deadline and I would not accept an argument from him. I note that December 9 was the date that Mr. King had requested as a final extension, and yet, as of his call to the staff attorney on that date, he had still not filed anything.

1. CMS properly determined Petitioner's effective date of participation to be May 4, 2009.

The effective date of participation in Medicare of an ESRD supplier such as Petitioner is governed by regulation. That date will be the *earlier* of the following: the date on which the supplier meets all Medicare participation requirements; or the date on which it is found to meet all conditions of participation or coverage, but has lower level deficiencies, and CMS or a State survey agency receives an acceptable plan of correction for the lower level deficiencies, or an approvable waiver request, or both. 42 C.F.R. § 489.13(c)(2).

The undisputed facts of this case establish that Petitioner was first surveyed for compliance with participation requirements on March 4, 2009 by an agency of the Maryland State government, the State of Maryland Department of Health and Mental Hygiene Office of Health Care Quality (State agency). The State agency found that Petitioner was not in full compliance with Medicare participation requirements and, on March 6, 2009, it sent Petitioner a letter advising it of its findings. CMS Ex. 1, at 1-8.[2] The letter advised Petitioner that it must submit an acceptable plan of correction to the State agency in order to qualify for Medicare certification.

On March 20, 2009 Petitioner submitted a plan of correction. CMS Ex. 1, at 3. However, in the interim, the State agency conducted a second survey of Petitioner on March 16, 2009. It determined that there were additional deficiencies at Petitioner's facility that had not been detected at the March 4 survey. On March 25, 2009, the State agency sent a second letter to Petitioner. This letter specifically refers to the deficiencies that were identified at the March 16 survey and invites Petitioner to submit a plan of correction addressing these deficiencies. CMS Ex. 2, at 1-2. Petitioner submitted a plan of correction addressing these deficiencies on May 4, 2009. CMS Ex. 3, at 1-8.

CMS subsequently determined the effective date of Petitioner's participation to be May 4, 2009 based on its submission of the May 4 plan of correction addressing the March 16 deficiencies and on Petitioner's previous correction of the deficiencies that had been identified on March 4.

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[2] In its hearing request Petitioner did not contend that the deficiencies found on March 4, or subsequently, by the State agency were incorrectly determined. Consequently, there is no issue before me in this case as to whether Petitioner actually was deficient on the dates in question.

In its hearing request Petitioner argues that its effective date of participation should have been March 25, 2009. On that date the State agency conducted a follow up survey to determine whether Petitioner had corrected the deficiencies that were identified at the March 4, 2009 survey. It determined that Petitioner had done so, and on April 2, 2009, the State agency sent Petitioner a letter confirming those findings. CMS Ex. 4. Petitioner construes this letter to be a certification that Petitioner complied with participation requirements as of March 25, 2009. Therefore, it contends, it should have been certified to participate as of that date. But, what Petitioner overlooks is that as of March 25 the State agency had not certified that Petitioner had corrected the deficiencies that were identified at the *March 16, 2009 survey*. The April 2 letter, although it is somewhat ambiguous, is directed only at the deficiencies which were found to be present on March 4. Petitioner was not eligible for certification until it had corrected all outstanding deficiencies and these deficiencies included not only those identified on March 4 but those identified on March 16 as well. The date when Petitioner submitted an acceptable plan of correction to address the deficiencies that were identified on March 16, was May 4, 2009.

The earliest date when CMS could have certified Petitioner to participate in Medicare was May 4, 2009 because that was the date when Petitioner submitted an acceptable plan of correction addressing the deficiencies identified on March 16. 42 C.F.R. § 489.13(c)(2)(ii). CMS properly certified Petitioner to participate on May 4.

2. The State agency's April 2 letter to Petitioner does not exempt Petitioner from the requirements of 42 C.F.R. § 489.13(c)(2).

In its hearing request Petitioner seems to be arguing that it was misled by the April 2 letter and relied on it to assume that it had been certified to participate effective March 25, 2009. As I have discussed above, the April 2 letter is ambiguous in that it states that the March 25 follow up survey "found that . . . [Petitioner's] facility is in compliance with the health component requirements." CMS Ex. 4, at 1. When read in a vacuum that language might cause one to believe that the State agency had concluded that Petitioner was complying with all Medicare participation requirements as of March 25.

But, the letter may not reasonably be read in a vacuum. First, Petitioner knew that, whatever the April 2 letter said, it had been found to be deficient on March 16 and that it had been told in a separate letter from the State agency that it had to correct the March 16 deficiencies in order to be certified. Second, the April 2 letter refers specifically to the March 25 follow up survey – and not to the March 16 survey – which Petitioner knew or should have known was performed to address only the deficiencies that were found on March 4, 2009.

But, Petitioner would not be entitled to an effective date of participation earlier than May 4, 2009 even if it was misled by the April 2 letter into believing that it had attained compliance with all participation requirements as of March 25, 2009. The regulation governing the effective date of certification does not allow for exceptions. 42 C.F.R. § 489.13(c)(2). Consequently, the fact that the State agency may have sent Petitioner a misleading or even an incorrect letter does not serve as any justification for certifying Petitioner earlier than the date on which it submitted its plan of correction for the deficiencies that were identified on March 16, 2009. Moreover, and as a general rule, estoppel does not lie against CMS. Consequently, arguments of estoppel or for its equitable counter part, laches, provide no basis for giving Petitioner an effective date of certification that is earlier than May 4, 2009.

/s/
Steven T. Kessel
Administrative Law Judge