Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Horizon Health Care, Inc.,	)	Date: November 13, 2007
	)	
Petitioner,	)	Docket No. C-06-387
	)	
- v. -	)	Decision No. CR1689
	)	
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION GRANTING MOTION FOR SUMMARY JUDGMENT

This matter is before me on the Motion for Summary Judgment dated July 31, 2006, filed by the Centers for Medicare & Medicaid Services (CMS). CMS seeks summary affirmation of its December 12, 2005 termination of the Medicare provider agreement of Petitioner Horizon Health Care, Inc. (Petitioner or Horizon) effective December 29, 2005. In support of its Motion, CMS proffered five Exhibits (CMS Exs. 1-5). CMS Exs. 3 and 4 each has an Attachment (Att.). All are admitted as designated.

Petitioner filed a "Motion to Deny CMS's [R]equest for Summary Judgment," dated July 31, 2006, and received on August 7, 2006. Petitioner did not proffer exhibits in support of its Motion to Deny. On September 1, 2006, Petitioner filed its "Supplement to July 31, 2006 Motion to Deny CMS's Motion for Summary Judgment," along with five un-numbered and unpaginated documents, which have been marked Petitioner's Exhibits 1-5 (P. Exs. 1-5) and are admitted as designated.

By a September 14, 2006 filing, CMS requested leave to reply to Petitioner's Motion to Deny and filed Proposed Reply and Findings of Fact and Conclusions of Law. By Order issued September 26, 2006, CMS was granted leave to reply and its proposed findings of fact and conclusions of law were received into the record on September 14, 2006.

CMS moves for summary affirmation of its termination of Petitioner's Medicare provider agreement on two bases. First, CMS asserts that Petitioner's failure to furnish ownership information to the State survey agency at the time the survey was conducted is noncompliance with a Condition of Participation (COP) in 42 C.F.R. § 484.12, along with 42 C.F.R. § 489.53(a)(8), which authorizes termination of a provider agreement based on noncompliance with section 484.12(b). Second, CMS argues that Petitioner's failure to make skilled nursing visits (SNVs) to one of its patients (P-8) consistent with P-8's physician-ordered plan of care is tantamount to condition-level noncompliance with the COP in 42 C.F.R. § 484.30. Because there are no material facts in dispute as to the two asserted bases and undisputed facts demonstrate entitlement to favorable judgment as a matter of law, I GRANT CMS's Motion for Summary Judgment.

Material Facts:

Petitioner is a home health agency located in Chino, California. Before the events from which this proceeding arose, it provided services as a Home Health Agency (HHA) under the Medicare program, pursuant to the general plan established at section 1861(o) of the Social Security Act (Act), 42 U.S.C. § 1395x(o), and implementing regulations at 42 C.F.R. Part 484.

On or about May 10, 2005, Nikko Ashton-Cole sold all of her shares of common stock in Horizon to H. Clifton Ross and his wife Travenna J. Ross. CMS Ex. 2 (copy of Assignment of Stock Separate from Share Certificate). The Rosses, as sole owners of all of Horizon's common stock, in turn, sold all of their shares to Ruth Hernandez Guarina on May 18, 2005. Thus, as of May 19, 2005, Ms. Guarina was the sole owner of Horizon, the disclosing entity. CMS Ex. 3 (Declaration of Diane Greif, a CMS employee, executed July 27, 2006), Att. (copy of Mr. Ross's October 7, 2005 correspondence to Diane Grief, describing the May 18, 2005 stock transfer to Ms. Guarina, with copies of documents evidencing the stock sale). According to Mr. Ross, Mr. Sonny Agonias acted on behalf of his principal Ms. Guarina, and he managed, directly or indirectly, all activities of Petitioner as of the sale of the Rosses' entire interest in Horizon to Ms. Guarina. CMS Ex. 3, Att.

On July 21, 2005, the California Department of Health Services, Licensing and Certification, San Bernardino Office (CDHS), initiated a complaint survey of Petitioner. In connection with the survey, CDHS inquired about information on the ownership and control of Horizon. Horizon's staff were provided with a blank Form CMS-1513 (Disclosure of Ownership and Control Interest Statement) to complete. CMS Ex. 4 (Declaration of Donna Gilbreth, R.N.), at 1. Petitioner represented that Mr. Ross (referred to as Owner A in the Statement of Deficiencies and Plan of Correction (Form

CMS-2567, hereinafter, "2567")) owned Horizon. CMS Ex. 4, at 1-2; CMS Ex. 1, at 10-11 (documentation in the 2567 of Petitioner's responses to surveyor request for ownership information). Petitioner's responses, most of which were furnished by Mr. Agonias, the individual who presented himself as Horizon's Chief Financial Officer (CFO), were to the effect that the "owner" of Horizon, referring to Mr. Ross, could not be contacted because he was "very sick in the hospital" (July 21, 2005), or "not available, I [Mr. Agonias] spoke to him [Mr. Ross] a couple of days ago" (July 22, 2005), or that Mr. Ross is "out of the country and we [referring to Horizon staff] don't know where he is" (July 22, 2005). CMS Ex. 1, at 10-11.

Also, as noted in the 2567 (CMS Ex. 1, at 10), CFO Mr. Agonias and another individual acting as Horizon's administrator and director of patient care services (DPCS) both denied that a change in ownership had occurred. Mr. Agonias stated that a transfer of shares had occurred, and that he believed that a transfer of shares was not tantamount to a change in ownership. Mr. Agonias further stated that Horizon had had two owners, each with a 50-percent ownership interest (referring to Mr. Ross and Mrs. Ross, who each held a 50-percent ownership stake), but that on May 18, 2005, Owner B (referring to N. Ashton-Cole) transferred her 50-percent share to Owner A (Mr. Ross). This communication occurred in the morning, on July 21, 2005. CMS Exs. 1, at 10; 4, at 1-2. On July 21, 2005, in the afternoon, Horizon's administrator/DPCS returned the completed Form CMS-1513, indicating "yes" to a change of ownership within the last year. CMS Ex. 4, Att. (completed Form CMS-1513). That form, signed by Ms. E. Fischer, R.N., "as administrator/DPCS," identified only Owner A (Mr. Ross) as the individual with ownership or controlling interest in Horizon. CMS Ex. 4; CMS Ex. 1, at 10. Subsequently, the surveyor conducted an interview with the administrator/DPCS. The administrator/DPCS stated that the person who presented himself as Horizon's CFO (referring to Mr. Agonias) is "currently in the process of buying the agency" and that "the paperwork is being done." CMS Ex. 1, at 10.

On July 26, 2005, the surveyor received a telephone call from a woman who identified herself as "the most recent" administrator/DPCS before the "current administrator" arrived in May 2005. That individual confirmed that a man and his wife (apparently referring to the Rosses) sold their interest in the business to the "current administrator" (presumably referring to Ms. Guarina) when Owner B (N. Ashton-Cole) "left back in May [2005]." The surveyor then interviewed the current administrator/DPCS, and that individual denied ownership, in whole or in part, and stated that a transfer of ownership to the CFO was in progress. CMS Ex. 1, at 11. On July 28, 2005, a telephone interview was conducted with Owner A (Mr. Ross), who denied that he had been abroad, hospitalized, or for whatever reason unavailable for an interview from July 21 through July 26, 2005. Mr. Ross confirmed that, on May 18, 2005, he and his wife became sole owners of

Horizon; that Owner B (N. Ashton-Cole) had transferred her 50-percent ownership to him (with the other 50-percent share to his wife). The following day, on July 29, 2005, Mr. Ross contacted the surveyor by telephone to clarify his prior communication as to ownership, and stated that he had transferred his interest in Horizon to Owner C (presumably referring to R. Guarina). He further stated that he had attended one governing board meeting following the transfer on May 18, 2005, and had signed some "papers," but denied further involvement with Horizon since then. CMS Ex. 1, at 11-12.

In connection with the survey, on July 26, 2005, CMS identified another deficiency deemed a basis for termination: failure to provide proper care to P-8, a home-bound, 68-year-old woman whose diagnoses included uncontrolled diabetes, asthma, elevated cholesterol, and hypertension, by failing to adhere to her care plan. 42 C.F.R. § 484.30. Specifically, P-8's care plan required SNVs once a week for one week, and thereafter, twice a week for eight weeks. P-8 was provided no SNV during a 15-day period, from June 30, 2005 to July 15, 2005, following her enrollment as Horizon's patient on June 28, 2005. CMS Ex. 1, at 6-8. As a result, P-8 had no home care service consistent with her physician's care plan during the period immediately after admission to Horizon. CMS Ex. 1, at 58-60.

Although the 2567 and subsequent CMS correspondence refer to the survey as having been completed on or about July 26, 2005, the survey was terminated on that date, before completion, due to the surveyor's determination that Petitioner had failed to produce the records requisite to a complete survey. CMS Ex. 4, at 3.

By correspondence dated October 19, 2005, CMS notified Petitioner that the survey documented noncompliance with four Medicare COPs, and that CMS had concluded that Petitioner had refused to permit examination of its records. The latter is a separate basis for termination under 42 C.F.R. § 489.53(a)(5). CMS advised Petitioner that, based on these findings, it had initiated a process that would result in termination of Petitioner's Medicare provider agreement unless Petitioner promptly returned to compliance with applicable Medicare requirements. Petitioner was provided an opportunity to submit its credible allegation of compliance evidencing correction of all deficiencies.

On November 2, 2005, Petitioner submitted to CMS documentation alleging correction of deficiencies cited in the 2567. CMS determined that the submitted documentation did not credibly evidence correction of all identified deficiencies. CMS then proceeded with termination of Petitioner's provider agreement. By correspondence dated December 12, 2005, CMS advised Petitioner of termination effective December 29, 2005. By a June 30, 2006 Notice of Issues for Which Summary Judgment Will be Requested and Report of Readiness to Present Evidence for Adjudication of the Case, CMS provided Horizon

supplemental and amended notice that the termination of its provider agreement is based on provisions in 42 C.F.R. § 489.53(a)(8) and on condition-level noncompliance with COPs in sections 484.18 and 484.55, in addition to the bases for termination previously notified.

Petitioner requested administrative review in correspondence dated February 9, 2006, addressed to Deborah Romero, Manager, Hospital and Community Care Operation, Division of Survey & Certification, Centers for Medicare and Medicaid Services, at 75 Hawthorne Street, 4th Floor, San Francisco, California 94105 (CMS's San Francisco, California, Regional Office). Also, on what apparently was a simultaneous filing (it bears a date of February 9, 2005, which appears to have been erroneous as to the year), Petitioner submitted a separate appeal request addressed to the Administrative Law Judge (ALJ), Departmental Appeals Board (DAB), but sent to the aforementioned address in San Francisco. The latter request, addressed to the DAB, but sent to San Francisco, referred to, and included, a document described as "Horizon's position paper," which, in turn, refers to exhibits and attachments thereto.

CMS forwarded the former (February 9, 2006) appeal request to the Civil Remedies Division (CRD) on April 10, 2006, commencing this proceeding. In correspondence dated July 21, 2006, CMS forwarded the latter (February 9, 2005) appeal request, together with Petitioner's position paper, explaining that it "might . . . have inadvertently omitted the request dated February 9, 2005" when it sent the request dated February 9, 2006 on April 10, 2006. In the same July 21, 2006 correspondence, CMS indicated it was in the process of copying attachments and exhibits to which the February 9, 2005 appeal request refers, and would forward them to the CRD under separate correspondence. Then, by correspondence dated August 7, 2006, CMS sent to CRD the attachments and exhibits referred to in Horizon's position paper.

Controlling Law and Regulations:

Under the Medicare program, an HHA is a public agency or private organization that provides skilled nursing and other therapeutic services to individuals primarily on the basis of visits to their homes. Section 1861(m) of the Social Security Act (Act), 42 U.S.C. § 1395x(m), describes the covered services that HHAs provide under the Medicare program. Section 1861(o) of the Act, 42 U.S.C. § 1395x(o), establishes the statutory definitions that govern HHA participation in the Medicare program. Finally, section 1891(a) of the Act, 42 U.S.C. § 1395bbb(a), creates a framework of conditions with which HHAs must comply in order to participate in the Medicare program.

The Secretary of Health and Human Services (Secretary) has issued regulations at 42 C.F.R. Part 484 which further govern the participation of HHAs in the Medicare program. Specifically, the provisions in 42 C.F.R. §§ 484.10-484.55 set forth the Secretary's refinement of the statutory requirements for HHAs' participation in Medicare by establishing fourteen general COPs. The regulations express these COPs as broadly-stated criteria for HHA performance in various fields, such as patient rights, compliance with local, state and federal laws, skilled nursing and therapy services, and patient assessments. They also establish Standards of Participation (SOPs) as subsidiary components of the COPs.

To determine whether an HHA is complying with all COPs, a state survey agency evaluates the provider's satisfaction of various SOPs within the fourteen COPs. 42 C.F.R. § 488.26(b). The state survey agency documents and records its findings on a standardized Statement of Deficiencies Form, referred to as Form 2567 (and referred to as "2567" herein). Failure to comply with a COP occurs where deficiencies, either individually or collectively, are "of such character as to substantially limit the provider's or supplier's capacity to furnish adequate care or which adversely affect the health and safety of patients . . .". 42 C.F.R. § 488.24(b). After examining documented deficiencies, CMS may terminate an HHA's participation in Medicare if it determines, either based on the state survey agency's 2567 or on its own initiative, that the HHA is not complying with one or more COP(s). Section 1866(b)(2)(A) of the Act, 42 U.S.C. § 1395cc(b)(2)(A); 42 C.F.R. §§ 488.20, 488.24, and 488.26.

As applicable to this case, 42 C.F.R. § 489.53(a)(8) requires disclosure of information concerning an HHA's ownership and management consistent with 42 C.F.R. § 420.206, and a violation of section 489.53(a)(8) constitutes noncompliance with COPs in 42 C.F.R. § 484.12 (and SOP in 42 C.F.R. § 484.12(b)) and 42 C.F.R. § 489.53(a)(1). In relevant part, 42 C.F.R. § 420.206 provides as follows:

> (a) *Information that must be disclosed.* A disclosing entity must submit the following information in the manner specified in paragraph (b) of this section:
>
> > (1) The name and address of each person with an ownership or control interest in the entity . . . totaling 5 percent or more. . . .

> (b) *Time and manner of disclosure.*
>
> > (1) Any disclosing entity that is subject to periodic survey and certification of its compliance with Medicare standards must supply the information specified by paragraph (a) of this section to the State survey agency at the time it is surveyed. The survey agency will promptly furnish the information to the Secretary.
>
> (c) *Consequences of failure to disclose.*
>
> > (2) CMS terminates any existing agreement . . . of, any disclosing entity that fails to comply with paragraph (b) of this section.

The SOP in 42 C.F.R. § 484.12(b) provides, in pertinent part:

> The HHA must comply with the requirements of Part 420, Subpart C of this chapter. The HHA also must disclose the following information to the State survey agency at the time of the HHA's initial request for certification, for each survey, and at the time of any change in ownership or management:
>
> > (1) The name and address of all persons with an ownership or control interest in the HHA as defined in §§ 420.201, 420.202, and 420.206 of this chapter.

As relevant here, section 420.201 defines "person with an ownership or control interest" as "a person or corporation that . . . [h]as an ownership interest totaling 5 percent or more in a disclosing entity." "Disclosing entity" would include a "[a] provider of services." Because the SOP imposes Part 420, Subpart C requirements on HHAs, a violation of the standard would necessarily invoke section 420.206(c)(2), which, as noted above, permits CMS to "terminate[] any existing agreement" with a disclosing entity for failure to furnish required information. As asserted by CMS, the language of this provision mandates termination for failure to furnish ownership information at the time of the survey, and that the SOP in section 484.12(b), which incorporates and applies section 420.206(c)(2) by reference, essentially defines a violation thereof as a condition-level noncompliance.

Additionally, the COP set forth in 42 C.F.R. § 484.30 is relevant here. That COP contains SOPs (section 484.30(a) and (b)) governing provision of skilled nursing services to certain patients as required by their specific plans of care.

A decision by CMS to terminate an HHA's provider agreement is an "initial determination" that the HHA may appeal by requesting a hearing before an ALJ of this forum. 42 C.F.R. §§ 489.53(d), 498.3(b)(8), 498.5(b). The terms of 42 C.F.R. Part 498 govern the litigation of any such appeal.

CMS has moved for summary judgment in its favor. Although FED. R. CIV. P. 56 is not directly applicable to proceedings under 42 C.F.R. Part 498, it provides guidance on the standard of review for motions seeking summary disposition in this forum. Summary judgment is appropriate where the record presents no genuine dispute as to any material fact and the undisputed facts clearly demonstrate that one party is entitled to judgment as a matter of law. *White Lake Family Medicine, P.C.,* DAB No. 1951 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). The movant, or party seeking summary judgment, bears the initial burden of showing the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of genuine factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v, Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 249 (1968).

Discussion:

CMS has made a *prima facie* showing that there are no material facts in dispute as to termination of its provider agreement with Petitioner based on noncompliance with 42 C.F.R. § 489.53(a)(8) associated with requisite disclosure of information on ownership or control of Horizon during the July 2005 CDHS survey. I note that although Petitioner has responded to CMS's Motion and has proffered exhibits to support its opposition, those filings do not provide a basis upon which I can conclude that Petitioner has shown an existence of a genuine issue of material fact that precludes or defeats summary disposition in CMS's favor. DAB has clarified that summary judgment may be upheld "if the affected party either had conceded all of the material facts of proffered testimonial evidence only on facts which, even if proved, clearly would not make any substantive difference in the result." *Lebanon*, at 2, *citing Big Bend Hospital Corp.*, DAB No. 1814 (2002), *aff'd Big Bend Hospital Corp. v. Thompson*, No. P-02-CA-030 (W.D. Tex. Jan. 2, 2003). Thus, Petitioner's termination based on noncompliance with ownership disclosure requirements is subject to summary affirmation if CMS has demonstrated entitlement to judgment as a matter of law. As I explain below, I believe that the undisputed facts do support CMS's position. CMS is therefore entitled to prevail as a matter of law on its Motion for Summary Judgment.

Petitioner did not furnish accurate ownership information – *i.e.*, that Ms. Guarina owned more than 5 percent of Horizon stock following the May 18, 2005 stock transfer – to CDHS when asked to do so in connection with the July 2005 survey. As stated by the surveyor, "the name and address of Ruth H. Guarina were never mentioned in response to any of the questions I asked in order to obtain the ownership information the HHA was required to furnish at the time of the survey." CMS Ex. 4, at 2. Rather, Petitioner's response identified only Mr. Ross as the owner of Horizon even after Mr. Ross and his wife had transferred their entire interest in Horizon to Ms. Guarina on May 18, 2005, some two months before the date of the survey. Mr. Agonias, who represented himself as Horizon's CFO and was the primary source of communication from Horizon to CDHS in connection with the survey, did not convey information about the May 18, 2005 transaction between the Rosses and Ms. Guarina. CMS Exs. 4, at 1-2; 1, at 10. At no time during the survey did any individual associated with Horizon communicate information to the effect that Ms. Guarina had any ownership interest in Horizon totaling a minimum 5 percent. CMS Ex. 4, at 2.

Further, it is evident that Petitioner's responses were intended to convince CDHS that Mr. Ross owned Horizon during the survey period. As noted, Form CMS-1513 (Disclosure of Ownership and Control Interest Statement) supplied by Horizon at the request of the surveyor, clearly lists a single owner named "Clifton Ross." CMS Ex. 4, Att. (copy of CMS-1513 executed by Horizon's administrator/DPCS on July 22, 2005).

I have carefully considered Petitioner's responses to survey findings and arguments against summary disposition and find them ultimately unpersuasive to defeat summary disposition in CMS's favor. First, Petitioner contends that, although the stock transfer from the Rosses to Ms. Guarina occurred on May 18, 2005, the transfer did not actually become "effective" until some three months later, on August 26, 2005. The latter date apparently was the date on which the required change in information associated with the stock sale was provided to United Government Services, LLC, Petitioner's Medicare fiscal intermediary (FI). CMS Ex. 1, at 9. According to Form CMS-855A (CMS Ex. 5), such changes are to be reported within 90 days of the effective date of the change. Thus, Petitioner's argument is that the "effective" date of the stock sale was in August 2005, well after the survey from which the instant proceeding arose, and therefore, there was no violation of ownership information disclosure requirements as of the survey date. The reporting provision in Form CMS-855A, however, is separate and distinct from the requirement to furnish ownership information to a State survey agency as the survey is being conducted and is clearly established by aforementioned regulations. Those regulations do not permit an HHA to delay or withhold provision of ownership

information as requested by a State survey agency pending notice to an FI pursuant to Form CMS-855A provisions, or otherwise provide for exceptions to the reporting requirement based on any alternative reporting date consistent with Form CMS-855A or some other document.

Petitioner also contends that it was not required to furnish ownership information to CDHS at the time of the survey because there was no "actual" change in ownership, arguing, in essence, that the corporate entity of Horizon Health Care, Inc., even after the May 18, 2005 stock transfer, was the legal "owner." *See* Petitioner's position paper, at 3 ("[A] disclosure of the names and addresses of new persons with an ownership or control interest in the agency except with regard to Mr. Ross was not disclosed as there was nothing else to disclose."). As noted, 42 C.F.R. § 489.53(a)(8) incorporates by reference 42 C.F.R. § 420.406, which provides that ownership information must be supplied to the State survey agency *when the survey is being conducted*. And, the SOP in section 484.12(b) explicitly requires an HHA to disclose information concerning ownership or management, in relevant part, for each survey, and as well, at the time of any change in ownership or management. Notwithstanding the continued existence of Horizon Health Care, Inc. as a corporate "person" and a distinct legal entity, before and after May 18, 2005, it is abundantly clear that, as of May 18, 2005, the Rosses had transferred their entire shareholder interest in Horizon to Ms. Guarina. That, in my opinion, is change in ownership or control that had occurred some two months before the date of the survey, and therefore, Petitioner was required to disclose information about the May 18, 2005 transaction when asked to do so in July 2005.

I am aware of the definition of "change of ownership" of a "corporation" as found in 42 C.F.R. § 489.18(a)(3), which, in pertinent part, provides: "Transfer of corporate stock . . . does not constitute change of ownership." However, clear and distinct regulatory provisions elsewhere, as aforementioned, require disclosure of information on ownership or control of an HHA responsive to a surveyor's request for such information coincident to a survey. Petitioner has not complied with those provisions. Also worth noting is the definition of "ownership interest" (42 C.F.R. § 420.201): "the possession of equity in the capital, the stock, or the profits of the disclosing entity." Under that definition, Ms. Guarina, as of May 19, 2005, clearly had an "ownership interest" in Horizon, the disclosing entity.

Further on this issue, I have considered Petitioner's vague assertions to the effect that, due to factors like alleged buyer failure to deliver stock certificates or make payment in connection with the stock transfer on May 18, 2005, or failure of seller's attorney to record the transfer, or Mr. Ross's alleged failure to resign as president and director of the corporation, or a breach-of-contract dispute between buyers and seller, "change of

ownership" did not occur, or should not be deemed to have occurred, as of May 18, 2005. Petitioner still has not proffered any evidence that Ms. Guarina did not have any ownership interest in Horizon in July 2005. The evidence before me is overwhelmingly to the contrary. On this point, Section 4 of the Stock Purchase Agreement Ms. Guarina executed as Buyer, and the Rosses as Seller, provides that "[t]he transaction contemplated by this Stock Purchase Agreement shall close on May 18, 2005 unless that date is modified or changed by mutual written agreement of the parties." CMS Ex. 3, Att. at 3. Section 17(f) of the Stock Purchase Agreement provides that "this . . . Agreement is subject to amendment only by subsequent written, executed agreement by and between the parties hereto." CMS Ex. 3, Att. at 9. There is no proffer of evidence, or even an assertion by Petitioner, that the parties mutually exercised the option to delay or modify the closing date of the May 18, 2005 transaction as scheduled, such that Ms. Guarina did not acquire any ownership or controlling interest in Horizon until after the July 2005 survey. Further on this point, I am aware that Petitioner has proffered evidence purportedly associated with the May 18, 2005 stock transfer bearing various dates before and after then. P. Exs. 2-5. None of those items explicitly identifies the parties to the May 18, 2005 transaction. P. Exs. 4 and 5 are duplicate items. The third and last page of P. Exs. 4 and 5 is a copy of a facsimile transmission cover sheet from Mr. Ross to "Ruth" (presumably Ruth H. Guarina) dated January 16, 2006, asking "Ruth" to send certain tax records "from 5-18-05 thru 12-31-05 for filing the 2005 tax return" to an identified accounting firm. That item, in my view, actually supports CMS's position. It indicates Mr. Ross's and Ms. Guarina's mutual understanding of the transfer of the former's, and his wife's, collective controlling interest in Horizon to Ms. Guarina before July 2005.

Moreover, it is not only evident that Mr. Agonias, representing himself as Horizon's CFO and Ms. Guarina's agent, played a major role in connection with communication to CMS and CRD in connection with the survey and the instant proceeding, but that he also played such a role in the negotiation and consummation of the May 18, 2005 stock transfer from the Rosses to Ms. Guarina. More specifically, the Indemnity Agreement executed by and between the Rosses and Mr. Agonias (CMS Ex. 3, Att. at 13) indicates that Mr. Agonias held himself out to the Rosses as the prospective buyer until "the eve of the execution of" the Stock Purchase Agreement, when he "elected to nominate Ruth H. Guarina as the Buyer therein." Such evidence, the authenticity of which is not disputed and where the evidence before me shows no subsequent revocation or revision of the Indemnity Agreement, is highly probative evidence indicative of Mr. Agonias's awareness of his and Ms. Guarina's respective roles in the transaction and who would "own" Horizon after the transaction was completed. In the face of such evidence, I am not persuaded by after-the-fact arguments concerning what Mr. Agonias deems is the true "effective" date of the transfer of ownership.

Furthermore, what I see as a theme in both arguments - that is, first, the stock transfer was not "effective" until after the CDHS survey, and second, that there was no "actual" change in ownership as of May 18, 2005 - is Petitioner's apparent plea of ignorance or mistake as to regulatory mandates. I agree with CMS that neither ignorance, nor mistake, without more, is adequate to defeat summary judgment. Horizon, as an HHA, is held to a standard of responsibility for complying with Medicare program requirements and is presumed to understand what is required of it to remain a program participant. *See generally Cary Health and Rehabilitation Center*, DAB No. 1771 (2001).

CMS is authorized to terminate a Medicare provider's agreement based on condition-level noncompliance. As stated, the COP at 42 C.F.R. § 484.12 is controlling on the issue of failure to disclose ownership information at the time of the survey. Section 484.12(b) sets forth an SOP, which incorporates by reference the provisions of section 420.206, and section 420.206 authorizes CMS to terminate a provider agreement based on failure to furnish ownership information. The facts of this case support a conclusion that noncompliance with section 484.12(b) is tantamount to a condition-level noncompliance. I agree with CMS on this point.

Based on the foregoing, I conclude that CMS has established a *prima facie* case that there is no genuine issue of material fact and that it is entitled to summary judgment affirming the termination of Petitioner's Medicare provider agreement based on noncompliance with ownership information disclosure requirements. It is clear to me that evidence of such noncompliance in and of itself supports affirmation of CMS's decision to terminate.

I also address, however, CMS's second ground for its Motion: failure to furnish P-8 skilled nursing visits consistent with her plan of care. On this issue, Petitioner offers no evidence specifically responsive to CMS's determination as to noncompliance with section 484.30. Rather, its responses seem to concede noncompliance, as it said in its position paper, at 3, that, "to some extent" P-8 was not provided with physician-ordered care. However, Petitioner did state that, once P-8 said that she did not receive a SNV, a nurse visited her "immediately" and that the agency "constantly communicated with the patient to ensure that she is comfortable and receiving adequate care." *Id.* Petitioner also addressed corrective action taken, as it reported (CMS Ex. 1, at 39, 55) that the nurses who provided service to a number of patients, including P-8, were counseled and terminated. Be that as it may, the evidence is uncontradicted as to noncompliance with section 484.30 with respect to P-8 during the time period in question. Action taken after the fact to remedy a violation, or designed to ensure higher quality of services to patients not limited to the patient whose care is the subject of a noncompliance determination,

does not mitigate the section 484.30 violation noted at the time of the survey. Petitioner's vague assertion to the effect that CMS "ignored" documented corrective actions and that such dismissive CMS action is unfair and tantamount to abuse of CMS's authority cannot defeat summary judgment.

Also in connection with the second basis for CMS's motion, I have considered, in particular, P. Ex.1, which consists of six pages, each of which is a copy of Horizon's "Patient Satisfaction Survey Form" completed by patients, and all of which were signed between July 28, 2005 and August 24, 2005, after the CDHS survey was ceased (with the exception of one survey form, which is not dated), and in which the patients evaluated Horizon's nursing or physical therapy services as having been "excellent" or "good." Perhaps Petitioner's intention, at least in part, was to convey its position that Horizon is providing, and had provided during the time period contemporaneous to the survey date, high-quality nursing care to its patients. (Note Petitioner's statement, in its position paper, at 3: "[P-8] mailed back to the agency a patient satisfaction survey indicating her positive responses to the agency's services.") Assuming that was the intention, P. Ex. 1 does not refute undisputed facts specific to the failure to adhere to SNV requirements consistent with P-8's plan of care between June 30, 2005 and July 15, 2005. Evidence to the effect that certain Horizon patients responded favorably to a patient care satisfaction survey near the time of the July 2005 CDHS survey, under certain circumstances, could be supporting evidence on corrective actions taken, but that, as with counseling and termination of nurses who were found to have failed to provide required care to P-8 and other patients, is not the issue here. The narrow issue before me is noncompliance with specific care requirements to be met within a specific time period consistent with a specific patient's plan of care. I see no evidence contrary to CMS's conclusion that Petitioner did not comply with those requirements.

Findings and Conclusions:

I therefore find and conclude as follows:

1. Petitioner Horizon Health Care, Inc. failed to disclose information on ownership and control of Horizon Health Care, Inc. consistent with 42 C.F.R. § 489.53(a)(8) at the time of the survey in July 2005.

2. Petitioner Horizon Health Care, Inc. failed to comply with the conditions of participation in 42 C.F.R. § 484.12(b) and termination of its Medicare provider agreement is proper pursuant to 42 C.F.R. § 489.53(a)(1).

3. Petitioner Horizon Health Care, Inc. failed to comply with 42 C.F.R. § 484.30.

Conclusion:

Based on the foregoing reasons, CMS's Motion for Summary Judgment should be, and is, GRANTED. CMS's decision to terminate Petitioner Horizon Health Care, Inc.'s participation in the Medicare program as a home health agency effective December 29, 2005, is in all respects

AFFIRMED.

/s/
Richard J. Smith
Administrative Law Judge