Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
North Oakland ASC, L.L.C.,	)	Date: April 08, 2008
	)	
Petitioner,	)	
	)	Docket No. C-06-599
- v. -	)	Decision No. CR1767
	)	
Centers for Medicare & Medicaid Services.	)	

DECISION

The sole issue in this case is whether there is a legal basis to affirm the decision of the Centers for Medicare & Medicaid Services (CMS) that certified Petitioner, North Oakland Ambulatory Surgical Center, L.L.C. (NOASC), for participation in the Medicare program as an ambulatory surgical center (ASC) effective October 18, 2005, over Petitioner's assertion that an earlier certification date of August 11, 2005 is warranted. Petitioner and CMS have filed cross-motions for summary judgment on this matter. I grant CMS's motion for summary judgment, deny Petitioner's motion for summary judgment, and affirm CMS's decision to certify NOASC as an ASC participating in the Medicare program effective October 18, 2005.

I. Background and Procedural Matters

Petitioner, NOASC, is an ASC located in Waterford, Michigan. By letter dated October 31, 2005, CMS notified Petitioner that it was authorized to provide ambulatory surgical services pursuant Title XVIII (Medicare program) of the Social Security Act (Act) effective October 18, 2005, under Medicare supplier identification number 23C0001063. By letter dated December 21, 2005, Petitioner sought CMS's reconsideration of its decision, requesting an earlier Medicare provider certification date of August 11, 2005, the date on which the Michigan Department of Community Health, Bureau of Health Systems, Division of Health Facility Licensing & Certification (MDCH), granted the facility its operating license. CMS denied the request for reconsideration by letter dated

January 19, 2006. Petitioner then filed a request for hearing before an administrative law judge (ALJ) by letter dated March 24, 2006,[1] asserting that the certification should be effective August 11, 2005. On August 9, 2006, the matter was assigned to me for hearing and decision. On that day, I issued an initial Order directing, among other things, the filing of any potentially dispositive motions within 60 days.[2]

By filings dated October 4, 2006 (Petitioner) and October 10, 2006 (CMS), the parties informed me each would seek summary judgment on specific issues, all of which ultimately would be on whether or not Petitioner is entitled to certification earlier than October 18, 2005. The parties agreed to a briefing schedule for cross-motions for summary judgment: cross-motions, supporting briefs, and exhibits due November 7, 2006; response briefs due December 5, 2006; and reply briefs due January 2, 2007.

The parties filed cross-motions for summary judgment (CMS Motion; P. Motion) on November 7, 2006.[3] CMS offered exhibits (CMS Exs.) 1 through 14. Petitioner offered Exs. (P. Exs.) 1 through 3. On December 5, 2006, each party filed its response brief (CMS Response; P. Response). On January 2, 2007, Petitioner filed its reply brief (P. Reply), along with P. Exs. 4 and 5. On January 3, 2007, CMS filed its reply brief (CMS Reply) with CMS Ex. 15. Without objections to any exhibit as offered, I admit into evidence P. Exs. 1-5 and CMS Exs. 1-15. Also, Petitioner raised no objection to CMS's filing of its Reply on January 3, 2007, and I consider it in deciding this case.

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[1] Pursuant to 42 C.F.R. §§ 498.40(a)(2) and 498.22(b)(3), the date of receipt of a notice is presumed to be 5 days after the date on the notice unless there is a showing that it was, in fact, received earlier or later. Petitioner represents it received the January 19, 2006 denial of reconsideration on January 25, 2006. I conclude that the March 24, 2006 hearing request was timely filed.

[2] The August 9, 2006 letter from the Civil Remedies Division (CRD) to the parties acknowledging CRD's receipt of the request for hearing indicates that CMS received the request for hearing on March 27, 2006, and forwarded it to CRD on August 4, 2006.

[3] CMS did not file a "motion for summary judgment" styled as such, but instead filed a Brief in Support of Summary Affirmance. There is no objection from Petitioner on this issue. The parties were aware that I would decide this case on cross-motions for summary judgment and agreed to a briefing schedule for the motions. Neither party is prejudiced by my construing CMS's Brief as a motion for summary judgment.

II. Material Facts

On May 11, 2005, NOASC submitted an application to MDCH seeking licensing by the State of Michigan to operate as a freestanding surgical outpatient facility. CMS Ex. 6. That application apparently was sent in anticipation of impending business reorganization that would create a new legal entity named NOASC effective July 1, 2005. Prior to July 1, 2005, North Oakland Medical Center (NOMC), a Medicare-certified hospital (formerly known as Pontiac General Hospital) located in Waterford, Michigan (mailing address in Pontiac, Michigan), wholly owned and operated Waterford Ambulatory Surgi-Center (Waterford). Waterford did not have its own health insurance benefits agreement with CMS or its own Medicare supplier number as it was wholly owned and operated by NOMC. Rather, the services Waterford provided to Medicare beneficiaries were billed through NOMC's provider number 23-0013. CMS Exs. 1-4, 12, 13, at 2. On July 1, 2005, NOMC reorganized, or "spun off," certain surgical services into a legal entity named NOASC, in which NOMC holds a controlling ownership interest (51 percent) and several physicians each hold minority ownership shares totaling 49 percent. P. Motion at 1; CMS Ex. 6, at 6. As Petitioner asserts, the reorganization resulted in no change in the physical location of the ambulatory surgical services facility; before and after July 1, 2005, such services were provided at the same site. P. Motion at 1.

On June 24, 2005, one week before the reorganization, the surgical services site that was to become NOASC upon reorganization was subject to a fire marshal survey, which Petitioner contends was a full, on-site Life Safety Code (LSC)[4] survey. CMS Ex. 13, at 2; P. Ex. 1; P. Motion at 2. On August 10-11, 2005, MDCH conducted a licensing and certification survey of NOASC, which CMS states was a health survey as opposed to an LSC survey. CMS Motion at 8; P. Motion at 2; CMS Ex. 13, at 2. Then, on October 6, 2005, NOASC underwent another survey, which both parties agree was an LSC survey. The October 2005 LSC survey resulted in a determination that NOASC was not in compliance with LSC 9.6.4(d), cited as Tag K051, based on failure to maintain a fire alarm system with approved component devices or equipment to automatically transmit the fire alarm to the fire department or monitoring company. CMS Motion at 8; P. Motion at 4; CMS Ex. 10, at 1, 6, 10-11. On October 18, 2005, Petitioner submitted a plan of correction which it alleged in its Motion (at 4) resulted in return to substantial compliance as of October 18, 2005. *See* CMS Ex. 10, at 10-11 (pertinent portion of Form CMS-2567). By a September 27, 2005 letter, NOASC was provided its State of Michigan operating license in NOASC's name with an effective date of August 11, 2005. CMS Ex. 9, at 1 (letter) and 2 (license). The September 27, 2005 letter advised NOASC that CMS will notify the facility of the decision regarding the application for Medicare certification.

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[4] The LSC of the National Fire Protection Association (NFPA) contains procedural safeguards to prevent and respond to fires and other types of accidents.

CMS Ex. 9, at 1. Pursuant to 42 C.F.R. § 489.13(c), CMS determined that NOASC (Medicare supplier number 23C0001063) qualified for admission into the Medicare program as an ASC effective October 18, 2005, and notified NOASC of that determination by letter dated October 31, 2005. P. Ex. 3; CMS Ex. 13, at 8-10.

III. Controlling Law and Regulations

Section 1866 (42 U.S.C. § 1395cc) of the Act authorizes the Secretary of Health and Human Services to enter into agreements with providers of services that seek to participate in the Medicare program. Regulations in 42 C.F.R. Part 489 and corresponding guidelines in the State Operations Manual (SOM)[5] provide the requirements for participation in the Medicare program.

Under 42 C.F.R. § 489.1(d), "[a]lthough section 1866 of the Act speaks only to providers and provider agreements, the effective date rules in this part are made applicable also to the approval of suppliers that meet the requirements specified in § 489.13." The definitions in 42 C.F.R. § 400.202 state that hospitals are included in the category of "providers"; "suppliers" include an entity other than a "provider." Hospitals are subject to certain conditions of participation and standards in 42 C.F.R. Part 482 to participate in the Medicare program. ASCs are subject to the conditions and standards in 42 C.F.R. Part 416. Unless CMS finds an applicant seeking certification as an ASC compliant with participation requirements, a state survey agency, on CMS's behalf, or accrediting body, must so conclude such that CMS has reasonable assurance that requisite conditions are met. 42 C.F.R. § 416.26(a) and (b). Among the requirements is compliance with the applicable provisions of the 2000 edition of the LSC of NPFA. 42 C.F.R. § 416.44(b); *see also* 42 C.F.R. § 489.13(b). Where a state survey agency determined compliance with ASC requirements, CMS reviews the agency's findings and recommendations, as well as any other evidence related to the ASC's qualifications. 42 C.F.R. § 416.26(c). If, based on this review, CMS determines that the facility satisfies the requirements for

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[5] The SOM does not have the force and effect of law, but the provisions of the Act and the regulations that interpret the Act do have such force and effect. *State of Indiana by the Indiana Department of Public Welfare v. Sullivan*, 934 F.2d 853 (7th Cir. 1991); *Northwest Tissue Center v. Shalala*, 1 F.3d 522 (7th Cir. 1993). Thus, while the Secretary of Health and Human Services may not seek to enforce SOM provisions as law, he may seek to enforce the provisions of the Act or regulations as interpreted by the SOM.

participation in the Medicare program, then CMS notifies the facility of the effective date of the Medicare certification, and enters into a Health Insurance Benefits Agreement with the ASC. 42 C.F.R. § 416.26(c), (d), and (e). A state survey agency may recommend certification, but CMS has the authority to decide whether or not an applicant should be certified to participate in the Medicare program as an ASC. 42 C.F.R. § 416.26(c).

With respect to the effective date of ASC certification for participation in the Medicare program, the Health Insurance Benefits Agreement or approval is "effective on the date the survey (including the Life Safety Code survey, if applicable) is completed, if on that date the provider or supplier meets all applicable Federal requirements as set forth in this chapter." 42 C.F.R. § 489.13(b). If not all of the applicable requirements are met on the date of the survey, then section 489.13(c) mandates how the effective date of the Agreement is determined. It provides, in pertinent part:

> 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 rules apply: . . .
>
> (2) For an agreement with, or an approval of, any other provider or supplier . . . the effective date is the date earlier of the following:
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> (i) The date on which the provider or supplier meets all requirements.
>
> (ii) The date on which the 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 approvable 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. § 489.13(c)(2)(i) and (ii).

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 a 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).

IV. Discussion

A. Petitioner's Assertions; Issues on Which Summary Judgment is Sought

Petitioner asserts that it is entitled to an earlier Medicare ASC certification date of August 11, 2005, which was the effective date of its Michigan state operating license, and not October 18, 2005, for the following reasons.

Petitioner asserts that the July 1, 2005 reorganization resulted only in the creation of a new legal entity named NOASC for which ASC certification was sought; it did not involve any change in the nature of the services provided, or the physical location of the site at which the services were provided. As Petitioner argues, it matters not that before the reorganization, NOMC was the legal entity authorized as a Medicare provider. That is so, according to Petitioner, because NOMC was deemed compliant with Medicare certification requirements, and in particular, LSC fire safety requirements, based on a survey performed on June 24, 2005, merely a week before the effective date of reorganization. Therefore, Petitioner argues, its predecessor entity, NOMC, was eligible for certification before the second survey (August 2005) was performed merely 48 days after the June 24, 2005 survey. Petitioner asserts that MDCH informed it that the August 2005 survey did not include a new, full-scale survey of the physical plant precisely because creation of the new entity of NOASC did not involve a change in the locus where surgical services are provided. CMS Ex. 13, at 2; P. Motion at 2.

Petitioner does not dispute that the October 6, 2005 survey resulted in a citation of K051 based on noncompliance with LSC 9.6.4.(d). P. Motion at 4; CMS Ex. 10, at 6, 10-11. Instead it argues that even if that deficiency had been detected on June 24, 2005, which it was not, the deficiency was an "isolated, easily abatable" one that "in an otherwise clean survey" (referring to the June 24, 2005 survey) would not have adversely affected patient health and safety. As such, the deficiency would have likely been a candidate for a CMS waiver under 42 C.F.R. § 416.44(b)(2). P. Motion at 7 (Petitioner appears to have erroneously cited 42 C.F.R. § 316.44(b)(2).). Moreover, Petitioner argues that it had corrected the deficiency on October 18, 2005, merely 12 days after the citation was received on October 6, 2005, and that is indicative of how promptly the facility would have implemented corrective action had the deficiency been identified on June 24, 2005, to ensure full compliance by August 11, 2005. P. Motion at 7-8.

Petitioner also argues that the "clean" June 24, 2005 survey is sufficient basis to deem Petitioner compliant with 42 C.F.R. § 416.44, warranting certification effective August 11, 2005. CMS purportedly "elevated form over substance" and took an "overly formalistic course of action" (P. Motion at 7) when it required yet another survey in August 2005, merely 48 days after the "clean" June 2005 survey.

In addition, Petitioner asserts that section 2472E of the SOM contemplates gaps of up to three years between full on-site LSC surveys where there is no change in building characteristics, as was the case with NOASC, and, therefore, the "clean" June 24, 2005 survey that resulted in no deficiency findings, performed only 48 days before the August 11, 2005 survey, is sufficient evidence of ongoing LSC compliance to justify an earlier certification date. P. Motion at 8.

Finally, Petitioner contends that it was reasonable for it to rely upon MDCH's representation or assurances that there were no impediments to Medicare certification. It claims that its detrimental reliance thereon resulted in deprivation of approximately $112,500 for surgical services NOASC provided to Medicare beneficiaries from August 11, 2005 to October 18, 2005. P. Motion at 9-10.

Petitioner seeks summary judgment in its favor on three issues, as specified in P. Motion at 5: (1) whether compliance with LSC on June 24, 2005, only 7 days before the reorganization of the surgical services as an ASC and only 48 days before the ASC licensing and certification survey, provides sufficient evidence of compliance with 42 C.F.R. § 416.44 to permit ASC certification on August 11, 2005; (2) whether section 2472E of the SOM, which recognizes that gaps can exist between on-site LSC surveys longer than the period in this matter, means that evidence of compliance with LSC requirements only 48 days before the licensing/certification survey should be deemed sufficient evidence of ongoing compliance and support certification as of August 11, 2005; and (3) whether Petitioner reasonably relied on statements of MDCH personnel following the licensing/certification survey that Petitioner was in compliance with all CMS requirements as of August 11, 2005, and should therefore be reimbursed for services it provided from August 11, 2005 to October 18, 2005.

B. CMS's Assertions; Issue on Which Summary Judgment is Sought

CMS moved for summary judgment on a single issue: whether, under applicable statutes and regulations, Petitioner can establish by a preponderance of the evidence that the effective date of its Medicare certification should be August 11, 2005.

In sum, CMS argues that NOASC has been assigned the earliest possible certification date the law allows. CMS maintains that Medicare program participation is controlled by requirements that are separate from state inspection and licensing requirements. Moreover, CMS asserts that this tribunal cannot address issues of detrimental reliance and equitable estoppel, and is without authority to grant equitable relief to which Petitioner claims entitlement.

C. Analysis

For the reasons and bases set forth below, I agree with CMS that the law does not allow NOASC certification as an ASC in the Medicare program earlier than October 18, 2005.

Petitioner's argument that the "clean" June 24, 2005 survey results suffice to show compliance with participation requirements such that an earlier certification date of August 11, 2005 is warranted is grounded in what it seems to believe is common sense. But it is not supported by applicable law. Indeed, Petitioner cites no law or regulation to buttress its position. Moreover, Petitioner's argument seems to assume certain "facts" that are inconsistent with the exhibits that have been admitted into evidence in this case.

I note, first, that Petitioner asserts the June 24, 2005 survey was a full-scale on-site LSC survey. Yet its own exhibit (P. Ex. 1; Inspection Report) indicates that the June 24, 2005 survey concerned an annual "Fire Safety Inspection Recheck" and was a follow-up survey to determine whether noncompliance noted in the "last" inspection report was corrected. Petitioner did not proffer the Inspection Report for what apparently was the "last" inspection, conducted April 20, 2005, but CMS offered that item as CMS Ex. 5, at 2 (identifying a violation of LSC 5-2.1.8). Petitioner points out that the Inspection Reports for the June 24, 2005 survey and October 6, 2005 survey (latter is found in CMS Ex. 10, at 1) bear "Health Care - 01" in the box marked "Rules/Codes," presumably in an effort to bolster an inference that both applied the same criteria. P. Motion at 4; P. Reply at 3. However, as noted, the June 24, 2005 Inspection Report, read carefully, indicates that it was in fact a follow-up survey to determine whether a previously identified fire safety violation was corrected.

Second, the October 6, 2005 Inspection Report clearly indicates that the "Inspection Type" is "Initial," and that the facility inspected was "North Oakland ASC, LLC." In contrast, the June 24, 2005 Inspection Report indicates "Re-Check Annual" as the "Inspection Type" and that the facility inspected was "Waterford Ambulatory Surgi-Cent[er]." There is no dispute that NOASC did not exist as a legal entity before the reorganization of NOMC. Therefore, Petitioner could not have been the facility subject to a certification survey on June 24, 2005, despite Petitioner's assertion that because there was no change in the physical site or location, no new survey was even warranted.

Third, Petitioner points out that with respect to citation K051, it had "alleged [return to substantial] compliance as of October 18, 2005." P. Motion at 4. But it fails to specify that its plan of correction (CMS Ex. 10, at 10-11) indicates that Petitioner reported it would have a third-party install an automatic dialer to the existing fire alarm system by November 15, 2005, and that the system would be monitored by a different company located in Allenwood, New Jersey.

The uncontested facts, as demonstrated by exhibits as discussed herein, show that October 18, 2005 is the earliest permissible certification date. As set forth above, the regulations require that a supplier cannot be certified as a Medicare program participant before it is found to be in compliance with all program requirements, or it has submitted an acceptable plan of correction. 42 C.F.R. § 489.13(b)-(c); *see also Oak Lawn Endoscopy*, DAB No. 1952, at 10 (2004). An ASC must meet the provisions applicable to Ambulatory Health Care Centers of the 2000 edition of the LSC of NFPA. 42 C.F.R. § 416.44(b). Here, that a LSC violation was identified on October 6, 2005 is undisputed and is plainly evident in the exhibits of record. Therefore, NOASC cannot be deemed to have been compliant with all Medicare program requirements before that date. As for an acceptable date of correction, the date on which such a plan was submitted was October 18, 2005, the date CMS assigned as the effective date of certification. Furthermore, as I noted, although the plan of correction was submitted on October 18, 2005, the date of actual return to substantial compliance was projected to be November 15, 2005, approximately a month after the certification date assigned. *See SRA, Inc., d/b/a St. Mary Parish Dialysis Center*, DAB CR341, at 13 (1994) (interpreting 42 C.F.R. § 489.13 to mean that a supplier cannot be assigned an earlier certification date based on a plan of correction unless the plan establishes that deficiencies were cured on a date earlier than the plan). CMS therefore correctly assigned October 18, 2005 as the effective date of NOASC's certification.

I also agree with CMS that Petitioner cannot be assigned an earlier certification date based on so-called "clean" June 24, 2005 survey results. As addressed earlier, that survey pre-dated Petitioner's existence as a legal entity separate from Waterford or the controlling entity of NOMC. That survey was conducted on Waterford, which, prior to the reorganization, functioned as a hospital-based surgical center and was reimbursed for its services through its owner NOMC. The June 24, 2005 survey was not a survey of NOASC, as part of the process for certification as a freestanding ASC. Petitioner did not exist at the time of the June 24, 2005 survey. Moreover, Waterford, the entity surveyed, was subject to requirements governing a hospital's participation in the Medicare program, and not the requirements governing ASCs. *Compare* 42 C.F.R. Parts 482 and 416. Petitioner's enrollment application form to participate in Medicare as an ASC, submitted on April 25, 2005 (CMS Ex. 15), indicates that the application is for "initial enrollment." Further, the June 2005 survey was a fire safety inspection associated with state licensing (CMS Ex. 5, at 3), and was not specifically conducted by a state entity for CMS, to

determine compliance with federal Medicare program requirements for the purposes of ASC certification. Petitioner agrees that a state must apply the 2000 edition of LSC of NFPA for ASC survey purposes. P. Motion at 6; P. Reply at 2; *see* 42 C.F.R. § 416.44(b)(1). CMS need not accept state certification as sufficient bases for certification for Medicare program purposes. *See Community Hospital of Long Beach*, DAB CR1118, at 4, *aff'd*, DAB No. 1938 (2004). A state survey agency may conduct certification surveys on CMS's behalf, but CMS is ultimately the arbiter of whether an applicant for ASC certification is compliant with federal participation requirements.[6] *See* 42 C.F.R. § 416.26(c). Petitioner attempts to circumvent these hurdles by arguing that same, and therefore, appropriate, criteria were applied in the June 24, 2005 survey. Petitioner further attempts to confuse the issue by emphasizing the relatively brief time period between the June 2005 survey and the October 2005 survey and by asserting that the August 11, 2005 survey revealed no deficiencies. I am not convinced by its arguments. Applicable law and the undisputed facts material to my decision here are not on Petitioner's side.

I also find problematic Petitioner reliance on the SOM to argue that full-scale, on-site LSC surveys need not be performed annually if the facility's physical characteristics are not altered. The SOM could hardly be relied upon to conclude that an applicant is eligible for certification where there is evidence of noncompliance with program requirements. The SOM serves only as guidance in interpreting regulations implementing the Act. CMS counters Petitioner's argument by citing section 2476C of the SOM, which specifies that where, as here, CMS has before it an initial application for ASC certification, a full-scale LSC survey must be performed. *See* 42 C.F.R. § 489.13(b). Such a survey was not performed before October 6, 2005, for NOASC.

Furthermore, Petitioner's arguments to the effect that if LSC 9.6.4(d) had been identified earlier, that is, in June 2005, that the deficiency, being an "isolated" and "easily abatable" one, would have been subject to a CMS waiver for the purposes of certification on August 11, 2005, is speculation. Petitioner's argument on this point, as with its other arguments addressed above, needlessly confuses the narrow issue before me. The issue before me is whether or not NOASC itself, and not any predecessor entity of Waterford, underwent surveys and demonstrated compliance with federal ASC certification requirements before

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[6] In fact, Petitioner acknowledged, in P. Motion at 3, that on September 28, 2005, Mr. R. Benson of MDCH informed Petitioner that MDCH "would have to seek approval from CMS Regional Office in Chicago to use the June 24, 2005 LSC survey report for Medicare certification purposes." And, in a September 27, 2005 letter, MDCH notified NOASC that CMS will contact NOASC about CMS's decision on NOASC's application for Medicare certification. CMS Ex. 9, at 1.

the October 2005 survey. The answer is no. That is what ultimately defeats Petitioner's case. It is for CMS, and not an applicant, to decide whether and when applicable Medicare program requirements were met.

In its reply brief Petitioner takes issue with CMS's apparent position that the June 24, 2005 survey was conducted consistent with the 1997, and not the requisite 2000, edition of the LSC. CMS points out (CMS Response at 3) that under the Michigan Administrative Code, health care facilities, which include hospitals and freestanding outpatient surgical facilities, are subject to the 1997 edition of the LSC of NFPA, citing Mich. Admin. Code R29.1802. CMS correctly maintains that to be Medicare-certified, hospitals and ASCs must comply with the 2000 edition.

Petitioner also argues that the June 24, 2005 survey is controlling because the facility that later became NOASC was accredited by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) in August 2004, before the reorganization. Petitioner asserts that the JCAHO accreditation was predicated on a finding that NOMC and "its various facilities" (P. Reply at 2) all complied with the 2000 edition of the LSC.

Both arguments fail. In the end whether or not the June 2005 survey was in fact based on the 2000 edition of LSC, or whether pertinent sections of the 1997 and 2000 editions of the LSC are nearly identical (P. Reply at 4-5) is not in issue. Likewise, whether the 2004 JCAHO accreditation supports a conclusion that NOMC and its facilities complied with the 2000 edition of the LSC is not really at issue, nor is it relevant or dispositive in this case. The undisputed facts are that NOASC - the entity that sought its own Medicare supplier number as an ASC - did not even exist before July 2005. As of the October 6, 2005 survey, NOASC was found to be in violation of a LSC fire safety requirement and its plan of correction specific to that noncompliance was not submitted until October 18, 2005.

Finally, I address Petitioner's argument that it reasonably, and detrimentally, relied upon certain statements, representations, or assurances, whether verbal or written, that Petitioner states MDCH made with respect to the status of NOASC's Medicare certification application or compliance with LSC requirements. Petitioner's briefings and its Request for Hearing exhaustively discuss what purportedly transpired between Petitioner and various MDCH personnel concerning the status of Petitioner's Medicare certification application, and I will not repeat the discussion in detail here. I do find Petitioner's arguments as to reasonable reliance specious. Generally speaking, applicants are held to a standard of responsibility for understanding what is required of them to be program participants. *See generally Cary Health and Rehabilitation Center*, DAB No. 1771 (2001). Despite Petitioner's position that it reasonably relied upon MDCH's assurances as to the status of its Medicare certification application through September 2005, as early as in May 2005, MDCH informed NOASC that state licensing and

Medicare certification are not one and the same, and that Medicare certification requires compliance with federal ASC certification requirements. CMS Ex. 7. *See also supra* note 6. In the end, regardless of whether I find Petitioner's argument incredible, I must agree with CMS that this tribunal lacks authority to consider issues of detrimental reliance or to grant a party equitable relief. *See Community Hospital of Long Beach*, DAB CR 1118 (2003). Petitioner has identified issues of detrimental reliance and equitable relief with sufficient clarity to preserve them for review by an appellate body with jurisdiction over them should Petitioner decide to seek further review of this decision.

For the reasons and bases discussed above, I find and conclude that CMS has demonstrated that there are no material facts in dispute as to the assignment of October 18, 2005 as the effective date of Petitioner's certification as an ASC in the Medicare program. For the reasons and bases above, I also find and conclude that Petitioner has not demonstrated a genuine dispute of material fact that would preclude a decision sustaining CMS's decision to certify NOASC effective October 18, 2005. The Departmental Appeals Board 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 Nursing and Rehabilitation Center*, DAB No. 1918, 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).

V. Conclusion

I GRANT CMS's motion for summary judgment and DENY Petitioner's motion for summary judgment. CMS's decision that assigned an effective date of October 18, 2005 for Petitioner NOASC's certification as an ASC in the Medicare program is, in all respects, AFFIRMED.

IT IS SO ORDERED.

/s/ Alfonso J. Montaño
Administrative Law Judge