

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	
)	
Green Hills Enterprises, LLC,)	
)	DATE: September 18, 2008
Petitioner,)	
)	App. Div. Docket No. A-08-78
- v. -)	
)	Decision No. 2199
Centers for Medicare &)	
Medicaid Services.)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Green Hills Enterprises, LLC (Green Hills) appeals the February 6, 2008 decision of Administrative Law Judge (ALJ) Alfonso J. Montano, Green Hills Enterprises, LLC, DAB CR1731 (2008) (ALJ Decision). In that decision, the ALJ upheld the denial by the Centers for Medicare & Medicaid Services (CMS) of Green Hills' application for enrollment in the Medicare program as a community mental health center. We conclude that Green Hills' objections to the ALJ Decision are without merit. We thus affirm the ALJ Decision.

Legal Background

Title XVIII of the Social Security Act (Act) establishes the Medicare program, which reimburses health care organizations and practitioners for the medical items and services they provide to Medicare beneficiaries. Act §§ 1811-12, 1831-32.¹

In order to participate in and receive payment from the Medicare

¹ Title XVIII of the Social Security Act can be found at http://www.ssa.gov/OP_Home/ssact/title18/1800.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

program, a medical organization or practitioner must be approved by CMS for enrollment in the program as a "provider" or "supplier." See Act § 1866; 71 Fed. Reg. 20,754 (Apr. 21, 2006). The term "provider" is defined in program regulations to include organizations such as hospitals, skilled nursing facilities, and community mental health centers. 42 C.F.R. § 400.202. Approval of provider enrollment is memorialized in a "provider agreement." 42 C.F.R. § 489.11.

In 1990, Congress amended the Medicare statute to permit a community mental health center (CMHC) to enter into a Medicare provider agreement but only for the purpose of providing "partial hospitalization" services.² Act § 1866(e)(2); Pub. L. 101-508, § 4162(b)(2). Partial hospitalization is an intensive outpatient program of psychiatric services provided to mentally ill patients as an alternative to inpatient psychiatric care. See 42 C.F.R. §§ 410.2, 410.43; 72 Fed. Reg. 66,580, 66,670 (Nov. 27, 2007).

For Medicare program purposes, section 1861(ff)(3)(B) of the Act defines a CMHC as an entity that –

- (i) (I) provides the ***mental health services described in section 1913(c)(1) of the Public Health Service Act [PHSA];*** or
 - (II) ***in the case of an entity operating in a State that by law precludes the entity from providing itself the service described in subparagraph (E) of [section 1913(c)(1) of the PHSA], provides for such service by contract with an approved organization or entity (as determined by the Secretary);***
- (ii) meets applicable licensing or certification requirements for community mental health centers in the State in which it is located; and
- (iii) meets such additional conditions as the Secretary [of Health and Human Services] shall specify

(italics and emphasis added). The Public Health Service Act

² Medicare covers partial hospitalization when it is provided by a CMHC or a hospital outpatient department. 42 C.F.R. §§ 410.27, 410.172.

(PHSA), which is referenced in Medicare's definition of a CMHC, authorizes federal block grants to states to provide community mental health services. 42 U.S.C. § 300x et seq. Under this grant program, providers of mental health services, including CMHCs, must provide certain core services. Id. § 300x-2(b)(2), (c). Section 1913(c)(1) of the PHSA requires CMHCs to provide mental health services that include "day treatment or other partial hospitalization services" and "[s]creening for patients being considered for admission to State mental health facilities to determine the appropriateness of such admission." Id. § 300x-2(c)(1)(A), (E). The service described in subparagraph (E) of the PHSA – and referenced in section 1861(ff)(3)(B)(i)(II) – is "[s]creening for patients being considered for admission to State mental health facilities" Id. § 300x-2(c)(1)(E).

Thus, under section 1861(ff)(3)(B) of the Act, an organization that is precluded under state law from itself providing the screening services described in section 1913(c)(1)(E) of the PHSA may nonetheless be eligible to participate in Medicare as a CMHC that provides partial hospitalization if it: (1) provides those screening services through a contract with another organization or entity approved by the Secretary; (2) provides the other mental health services described in section 1913(c)(1) of the PHSA; (3) "meets applicable licensing or certification requirements for [CMHCs] in the State in which it is located"; and (4) meets other federal participation requirements specified by the Secretary of Health and Human Services.³

³ The regulations that implement section 1861(ff)(3)(B) provide that a CMHC is an entity that –

(1) Provides outpatient services, including specialized outpatient services for children, the elderly, individuals who are chronically mentally ill, and residents of its mental health service area who have been discharged from inpatient treatment at a mental health facility;

(2) Provides 24-hour-a-day emergency care services;

(3) Provides day treatment or other partial hospitalization services, or psychosocial rehabilitation services;

(4) Provides screening for patients being considered for admission to State mental health facilities to

(continued...)

Section 1861(ff)(3)(B)(i)(II), the provision that permits a CMHC to contract with another entity or organization for screening services, was enacted in section 431 of the Medicare, Medicaid, and State Children's Health Insurance Program Benefits Improvement and Protection Act of 2000 (BIPA), Pub. L. No. 106-554 (2001), 114 Stat. 2763A-525. On February 16, 2001, CMS issued a Survey & Certification (S&C) memorandum to inform CMS regional administrators and state survey agency directors about the changes in section 431 of BIPA. P. Ex. 19. In part the February 16, 2001 memorandum states:

[A]s a result of BIPA amendments to the Act, a CMHC that is precluded by State law from providing the core service related to screening described in section 1913(c)(1)(E) of the Public Health Service Act (PHSA) may provide the screening under a contract with an approved organization or entity that is determined to be acceptable by [CMS] on behalf of the Secretary. . . .

* * *

The BIPA amendments allow a CMHC to provide screening by "contract" in the limited circumstance when the CMHC has not been given the authority to provide the service itself under State law. . . .

The [CMS] regional office, on behalf of the Secretary, may approve an entity or organization as a contractor for the purpose of the BIPA screening provision if the organization's or entity's contract with the CMHC meets all of the terms of the contract as described in this memorandum. [CMS] will not grant a "blanket approval" for an entity or organization to conduct screening under contract with a CMHC, but instead, must review each contract to ensure that it meets the prescribed contract terms.

Id. at 2.

³(...continued)
determine the appropriateness of this admission; and

(5) Meets applicable licensing or certification requirements for CMHCs in the State in which it is located.

Case Background

The following undisputed facts are drawn from the ALJ Decision and the evidence of record.

"[Green Hills'] owner, Dr. Wisdom, a licensed psychiatrist, was the Medical Director of a hospital community psychiatric rehabilitation program, which included a partial hospital[ization] program that was to be closed. In response to the closure, in 1992, Dr. Wisdom established a CMHC called Solutions Mental Health Center (Solutions) which, in 1993, was granted the Medicare provider number 26-4623 to participate in Medicare as a CMHC providing partial hospitalization services. Solutions' Medicare agreement was terminated in 1994 when the [Missouri Department of Mental Health (DMH)] determined that [Solutions] did not meet all requirements of a CMHC because it could not screen patients being considered for admission to State mental health facilities to determine the appropriateness of such admission. Solutions did not appeal this decision." ALJ Decision at 5.

"Prior to 1994, the DMH established a system of 25 CMHCs, as designated agents by contract with the DMH, which CMHCs were responsible for screening patients within their geographic areas for entry into Missouri's system of psychiatric services. In 1994, Solutions entered into a contract with North Central Community Mental Health Center (North Central) to provide screening services as required by the DMH. North Central was the administrative agent for a certain area and responsible for screening patients within that area." ALJ Decision at 5.

In 2004, Dr. Wisdom filed an application with CMS to reactivate the Medicare enrollment of Solutions or, in the alternative, to enroll Green Hills in Medicare as a CMHC providing partial hospitalization services. ALJ Decision at 5. CMS sent the application to the Missouri Department of Mental Health (MDMH) for review.⁴ See CMS Ex. 1, at 61.

⁴ When Green Hills' Medicare enrollment application was processed, CMS's program instructions described the state's role in the enrollment application process as follows:

CMS looks to the [state agency] to evaluate whether the applicant CMHC meets applicable licensing or certification requirements for CMHCs in the State in which it is located, develop any provider-based issues,
(continued...)

In a letter dated January 31, 2005, MDMH advised Green Hills that it had completed its review of the enrollment application and determined that Green Hills was "not eligible to become a CMHC" because it was not one of the 25 CMHCs designated by the state of Missouri to screen patients for admission to its mental health facilities. CMS Ex. 1, at 61. MDMH stated that it had implemented its statutory authority to designate the "entry and exit points into or from the state mental health delivery system," and that the 25 designated CMHCs were "the only ones in Missouri that meet the federal screening requirement." Id.

On February 25, 2005, Green Hills was advised by a CMS contractor that its application for Medicare enrollment as a CMHC could not be approved for the following reason:

The applicant does not have license(s) or is not authorized by the Federal/State/local government to perform the services . . . which it intends to render.

CMS Ex. 1, at 41.

In a March 15, 2005 letter to the Departmental Appeals Board's Civil Remedies Division, Green Hills requested a hearing before an administrative law judge to contest the denial of its enrollment application. P. Ex. 14.

The ALJ rendered a decision based on the parties' documentary

⁴(...continued)
and comment on the CMHC's plan to operate an alternative site The [state agency] should also comment on any reason it has to believe or disbelieve that the CMHC applicant is providing the core services [in section 1913(c)(1) of the PHSA] For example, if the [state agency] knows that State law precludes the CMHC from performing the core service requirement related to screening, it should make the [CMS regional office] aware of this. In fact, if the [state agency] knows that the CMHC does not meet State licensure or certification requirements, it should forward all application materials . . . to the RO for a denial of the request to participate in Medicare.

State Operations Manual (CMS Pub. 100-07), Ch. 2 ¶ 2252E (Rev. 1, 05-21-04), available at <http://www.cms.hhs.gov/manuals/downloads/som107c02.pdf>.

evidence and legal argument.⁵ After rejecting a due process claim that Green Hills received inadequate notice of the reasons for CMS's determination, the ALJ considered whether Green Hills met the statutory requirements in section 1861(ff)(3)(B) for Medicare enrollment as a CMHC providing partial hospitalization services. ALJ Decision at 6-7. The ALJ concluded that Green Hills did not meet the statutory requirements in section 1861(ff)(3)(B) because the state of Missouri had not "licensed, certified or authorized [Green Hills] to act as a CMHC providing partial hospitalization services." *Id.* at 7. Although the ALJ acknowledged that Green Hills "may have an arrangement [with North Central] to provide screening services (and thus may meet the first requirement under section 1861(ff)(3)(B) of the Act . . . that it provide screening services)," the ALJ determined that the lack of state licensure or certification was a sufficient and permissible basis to deny Green Hills's enrollment application. *Id.* at 8. The ALJ also found that he lacked the authority to decide whether the state's refusal to license or certify Green Hills as a CMHC was improper (under state law). *Id.*

Standard of Review

The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. The bases for modifying, reversing or remanding an ALJ decision include the following: a finding of material fact necessary to the outcome of the decision is not supported by substantial evidence; a legal conclusion necessary to the outcome of the decision is erroneous; the decision is contrary to law or applicable regulations; a prejudicial error of procedure (including an abuse of discretion under the law or applicable regulations) was committed. *See Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program.*

⁵ The ALJ instructed the parties to advise him if an in-person hearing was necessary to resolve factual issues. *See* Order dated December 23, 2005. The ALJ subsequently found that no party had indicated a need for an in-person hearing and that such a hearing was not required in any event. ALJ Decision at 2. Neither party contends in this appeal that the ALJ should have conducted an in-person hearing.

Discussion

In its appeal brief, Green Hills alleges four "points of error," which we address in the following two sections.

1. *Green Hills' procedural due process rights were not violated.*

In its first point of error, Green Hills contends that the ALJ incorrectly rejected its due process claim. Green Hills (GH) Br. at 7-9. Green Hills asserts that it received notice in February 2005 that its Medicare enrollment application had been denied on the following grounds: (1) not being "licensed" by the state of Missouri; and (2) not being one of the 25 designated facilities selected by MDMH to screen patients for entry into the state mental health system. *Id.* at 7. Green Hills further asserts that CMS provided additional reasons for the denial – namely, lack of "certification" and failure to undergo a "site visit" – in its November 2, 2006 brief to the ALJ. *Id.* Green Hills asserts that its procedural due process rights were violated because CMS failed to identify those additional reasons in February 2005, before the ALJ proceeding commenced. *Id.* at 7, 9.

The Board has consistently held that after an administrative appeal has commenced, a federal agency may assert and rely on new or alternative grounds for the challenged action or determination as long as the non-federal party has notice of and a reasonable opportunity to respond to the asserted new grounds during the administrative proceeding. *See United Medical Home Care, Inc.*, DAB No. 2194, at 13 (2008); *Texas Health and Human Services Commission*, DAB No. 2187, at 5 n.3 (2008). The Board has also held that, even assuming inadequate notice, it will not find a due process violation absent a showing of resulting prejudice. *Livingston Care Center*, DAB No. 1871, at 20 (2002), *aff'd*, *Livingston Care Ctr. v. U.S. Dep't of Health and Human Servs.*, 388 F.3d 168 (6th Cir. 2004).⁶

⁶ See also *Abercrombie v. Clark*, 920 F.2d 1351, 1360 (7th Cir. 1990), *cert. denied*, 520 U.S. 809 (1991) (holding that defects in formal notice may be cured during the course of an administrative proceeding, and that as long as the party is reasonably apprised of the issues in controversy during the proceeding and is given an opportunity to address those issues, the due process requirement is satisfied); *St. Anthony Hospital v. Secretary, Dep't of Health and Human Services*, 309 F.3d 680, 708 (10th Cir. 2002) ("To establish a due process violation [in
(continued...)

In its brief to the ALJ, which Green Hills filed *after* CMS filed its November 2, 2006 brief, Green Hills had an opportunity to respond to CMS's additional reasons for the enrollment denial.⁷ Green Hills does not allege that this opportunity was inadequate, nor does it allege or seek to establish that its presentation on the merits was hampered or disadvantaged by the fact that CMS waited until November 2, 2006 to clarify or fully state its position. For these reasons, we reject Green Hills' due process claim.

2. *The ALJ properly determined that Green Hills had failed to establish that it was qualified for enrollment in the Medicare program as a CMHC.*

In its second point of error, Green Hills contends that the ALJ failed to "properly analyze and consider the significance" of section 1861(ff)(3)(B)(i)(II) of the Act, which provides that an entity or organization precluded under state law from providing the screening services required by section 1913(c)(1) of the PHSA may provide these services through a contract with another organization or entity approved by the Secretary. GH Br. at 9-10. Green Hills asserts that since 1994, it has been a party to a contract with North Central Community Mental Health Center (North Central), one of the 25 CMHCs designated by the MDMH to screen patients for admission to the state's mental health facilities. *Id.* at 10. Green Hills further contends:

The ALJ . . . failed to acknowledge that DMH, by refusing to authorize Green Hills' application based on the fact that it is not one of the 25 designated agents for screening patients, is frustrating an important federal program contrary to the express intent of Congress. Failing to do the above, the ALJ ignored the mandate from Congress to operate as a CMHC even though

⁶(...continued)
an administrative proceeding], an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice").

⁷ Green Hills' brief to the ALJ is undated, and there is no cover or transmittal letter which indicates when it was filed. We infer that it was filed after CMS filed its brief because the briefing schedule ordered by the ALJ called on CMS and Green Hills to file their briefs sequentially. *See* December 23, 2005 Order (requiring CMS to file on or before February 17, 2006, and Green Hills to file on or before April 24, 2006).

State law prevented it from having authority to screen patients.

Id. at 11-12.

We are not persuaded that the ALJ erred in not giving weight or significance to the North Central screening services contract. In the first place, the contract's existence does not change the outcome here because the ALJ did not uphold the enrollment denial on the ground that Green Hills lacked state authorization to provide screening services. Instead, the ALJ upheld the denial based on a finding that Green Hills did not meet applicable state licensing or certification requirements. ALJ Decision at 8. We see no basis to disturb that finding.

Missouri licensing requirements for partial hospitalization and other day programs are contained in title IX of the Missouri Code of State Regulations. See Mo. Code Regs. tit. 9, § 40-10.015 et seq. Green Hills does not contend that it met those requirements or explain how we could, on this record, find them to have been met. Instead, Green Hills contends (in its third point of error) that it is "exempt" from state licensing requirements, pointing to section 630.705.3 of the Missouri Revised Statutes. GH Br. at 12. That provision provides that certain types of residential facilities and day programs "shall not be licensed by the department" (of Mental Health). Paragraph (7) of section 630.705.3 identifies one such type of facility or program as "[a]ny facility or program caring for less than four persons whose care is not funded by [MDMH]." Mo. Rev. Stat. § 630.705.3(7). Characterizing section 630.705.3(7) as an "exception" to otherwise applicable licensing requirements, Green Hills asserts that it does not have to obtain a state license to operate a partial hospitalization program in Missouri because it satisfies the criteria in section 630.705.3(7) – namely, that it is (or will be) a "facility or program caring for less than four persons whose care is not funded by the department." GH Br. at 13.

This argument does not persuade us that Green Hills meets applicable state licensing requirements. We have no basis to find that Green Hills qualified for what it calls the "exception" in section 630.705.3(7) because it presented no evidence to back up its assertion that it intends to operate a partial hospitalization program caring for fewer than four persons whose care is not funded by MDNR. Even assuming that Green Hills actually intends to operate such a program, there is no evidence that the state of Missouri would, in fact, agree that Green Hills could operate a partial hospitalization program in the state

without a license (from MDMH or from some other state agency).

Indeed, it is unclear whether section 630.705.3(7) does, in fact, exempt Green Hills from state licensing requirements. The statement that a facility or program caring for fewer than four persons whose care is not funded by MDNR "shall not be licensed" by MDNR can reasonably be interpreted as a legislative directive or finding that such a facility or program does not meet, and cannot be found to meet, the licensing requirements established by MDNR for mental health residential and day programs. In other words, section 630.705.3(7) may be read as a legal prohibition on licensure, rather than as an exemption from otherwise applicable licensing requirements.

Furthermore, Green Hills' reading of section 630.705.3(7) seems to conflict with section 630.735.2 of the Missouri Revised Statutes. Section 630.735.2 provides that "[a]fter October 1, 1983, **no person** . . . shall establish, conduct or maintain **any** resident facility or day program in this state for care, treatment, habilitation or rehabilitation of persons diagnosed as mentally disordered or mentally ill . . . **unless the facilities or programs are licensed** by the [MDMH]." As the ALJ suggested, ALJ Decision at 8, it is unclear whether section 630.735.2's requirement that all residential or day programs for the treatment of the mentally ill trumps the alleged exemption in section 630.705.3(7).

In addition to claiming exemption from state licensing requirements, Green Hills suggests, in its fourth point of error, that there are no applicable state "certification" requirements. It points to another state statute – section 630.655.1 – which states:

The [MDMH] shall promulgate rules which set forth reasonable standards for residential facilities, day programs or specialized services such that each program's level of service, treatment, habilitation or rehabilitation may be certified and funded accordingly by the department for its placement of program clients or as necessary for the facilities or programs, to meet conditions of third-party reimbursement.

Mo. Rev. Stat. § 630.655.1. It appears that MDMH has implemented section 630.655 in regulations at Mo. Code Regs. tit. 9, §§ 10-7.010 et seq. and 30-4.010 et seq. These regulations specify the quality and other standards that an outpatient mental health facility or program (such as partial hospitalization) must meet in order to obtain and maintain "certification" from the state of

Missouri.⁸

Green Hills quotes the following provision from these regulations:

Under sections 630.655, 630.010, and 376.779.3 and 4 [of the Missouri Revised Statutes], the department [MDMH] is mandated to develop certification standards and to certify an organization's level of service, treatment or rehabilitation as necessary for the organization to operate, receive funds from the department, or participate in a service network authorized by the department and eligible for Medicaid reimbursement. However, certification in itself does not constitute an assurance or guarantee that the department will fund designated services or programs.

MO. Code Regs. tit. 9, § 10-7.130(1). Green Hills contends that "one can see [from this quotation of state law] that there is no requirement that an organization be certified to receive Medicare reimbursement." GH Br. at 15. This contention overlooks the fact that *federal* law, not state law, governs Medicare enrollment and reimbursement. Federal law – in particular, section 1861(ff)(3)(B)(ii) of the Act – plainly requires that an entity or organization meet *state* certification requirements in order to be enrolled in Medicare as a CMHC. The standards and procedures in MO. Code Regs. tit. 9, §§ 10-7.010 et seq. and 30-4.010 et seq. appear to be at least part of the state of Missouri's certification requirements applicable to a CMHC or other provider of partial hospitalization services. As an applicant for Medicare enrollment as a CMHC, Green Hills must demonstrate that it meets (or is exempt from meeting) those requirements and any other regulations applicable to CMHCs that may exist elsewhere in Missouri's laws. Green Hills has not done so in this proceeding.

On the record before us, it appears that MDMH may regard Green Hills as ineligible *under state law* to operate a CMHC because it is not one of the facilities designated by the state of Missouri to provide screening services, even though lack of such

⁸ According to the state's regulations, "[t]he primary function of the certification process is assessment of an organization's compliance with standards of care. A further function is to identify and encourage developmental steps toward improved program operations, client satisfaction and positive outcomes." Mo. Code Regs. tit. 9, § 10-7.130(1)(B).

authorization would not, in itself, necessarily preclude Medicare enrollment in view of section 1866(ff)(3)(B)(i)(II). Green Hills complains that MDMH's refusal to allow it to operate is "arbitrary and capricious and serves no legitimate interest." GH Br. at 10-11. We agree with the ALJ that any dispute concerning the merits of MDMH's refusal to confer state licensure, certification, or authorization upon Green Hills to operate a CHMC in the state of Missouri is a matter for the MDMH and Green Hills to resolve based on state law. The only issue properly before us is whether the federal requirements for Medicare program participation have been satisfied.

In sum, although Green Hills may have a screening services contract that CMS might arguably find satisfies the requirement in section 1861(ff)(3)(B)(i)(II), the existence of a CMS-approved screening contract is not sufficient to qualify Green Hills for Medicare enrollment. Green Hills must also show that, among other things, it "meets applicable licensing or certification requirements for [CMHCs] in the State in which it is located." Because the record does not show that Green Hills met applicable state licensing and certification requirements, the ALJ committed no error in upholding CMS's denial of Green Hills' 2004 Medicare enrollment application.

Conclusion

The ALJ's conclusion that CMS was authorized to deny Green Hills' 2004 application for Medicare enrollment as a CMHC is AFFIRMED.

_____/s/
Leslie A. Sussan

_____/s/
Stephen M. Godek

_____/s/
Sheila Ann Hegy
Presiding Board Member