Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Ridgeview Hospital
Ruling on Motion for Reconsideration of Decision No. 2593
Ruling No. 2015-1
January 12, 2015

Introduction

On November 14, 2014, Ridgeview Hospital (Ridgeview) asked the Board to reconsider the decision in *Ridgeview Hospital*, DAB No. 2593 (2014) which sustained the Administrative Law Judge decision granting summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), *Ridgeview Hospital*, DAB CR3183 (2014). [1] The Board determined that the effective date of Ridgeview's participation in Medicare under 42 C.F.R. § 489.13(c)(2) was September 21, 2012, the date on which the Joint Commission (TJC) received from Ridgeview evidence of compliance that resolved standard-level deficiencies identified during Ridgeview's initial survey and granted Ridgeview accreditation. In reaching this conclusion, the Board determined that CMS's construction of section 489.13(c)(2) was reasonable, consistent with CMS's prior statements and the regulatory history, and properly applied to the undisputed material facts. The Board further determined that Ridgeview's contrary interpretations of the regulation to achieve an earlier effective date violated fundamental principles of regulatory construction.

The Board also found no merit in Ridgeview's alternative argument that summary judgment in favor of CMS should be denied because there remained a material dispute of fact. Ridgeview argued that it had "heard anecdotally that CMS, at least occasionally," had enrolled other similarly situated providers prior to their accreditation dates. P. Br. at 2, 6-7; P. Reply at 4. Ridgeview contended that if its "belief is correct, it could mean that CMS's failure to make" Ridgeview's "initial Medicare enrollment date retroactive to the date that TJC found that it met all Medicare" conditions of participation but had lower-level deficiencies "was arbitrary, capricious, and otherwise not in accordance with law under the Administrative Procedure Act . . . , 5 U.S.C. §§ 551 et seq." P. Br. at 2 (emphasis in original). Consequently, Ridgeview argued that it should be permitted to

[1] Ridgeview also asked for an extension of time to seek judicial review of the Board's decision in this matter until 60 days after the Board ruled on its motion for reconsideration. By ruling dated November 18, 2014, the Board extended the time for Ridgeview to seek judicial review until 60 days after Ridgeview receives the notice of the Board's ruling on the motion for reconsideration.

obtain evidence of such instances through discovery and a Freedom of Information Act (FOIA), 5 U.S.C. 552, request initiated during the pendency of the ALJ proceedings. The Board concluded that under the circumstances presented, Ridgeview had failed to establish a genuine dispute of material fact precluding summary judgment. The Board explained that Ridgeview had "not come forward with any specific facts or support to substantiate its 'belief' that CMS may have" treated Ridgeview differently from similarly situated providers. DAB No. 2593, at 16. Moreover, the Board stated, "CMS's prior statements about the meaning of the effective date regulation show that, contrary to Ridgeview's unsubstantiated allegations, CMS has consistently interpreted the effective date provisions to preclude accredited providers from participation in and billing Medicare prior to their accreditation." *Id.*

Ridgeview's Motion for Reconsideration

Ridgeview asks the Board to reconsider its conclusion that Ridgeview failed to show a material dispute of fact precluding summary judgment in favor of CMS. Ridgeview asserts that the DAB decision "inherently recognizes that the results of the Hospital's FOIA request could determine the outcome of this case if those results were to show that CMS had more than 'occasionally' acted in direct contravention of its alleged interpretation of" section 489.13(c)(2). Motion for Reconsideration (Motion) at 3. Ridgeview argues that by sustaining CMS's determination of its effective date without allowing it to "get even a peek at the information [it] needs," forces Ridgeview "to go to Court without the information necessary to prove its case," and is "deeply offensive to due process and undeniably fair." *Id.* at 2, quoting Ridgeview Reply at 3. Accordingly, Ridgeview requests that the Board "hold this appeal in abeyance pending CMS's response to Ridgeview's FOIA request" and "set a hearing date so that the Hospital can renew its request for expedited processing of its FOIA request." *Id.* at 4.

The Board's Standard for Reopening

The Board may reopen a decision, within 60 days of the date of notice of the decision, on its own motion or the request of either party. 42 C.F.R. § 498.100. The regulations in Part 498 do not specify a standard for granting a request to reopen. Procedures applicable to other types of disputes provide that the Board may reconsider a decision when a party promptly alleges a clear error of fact or law. 45 C.F.R. § 16.13. Previously, the Board has held that this standard is "reasonably applied" to decisions involving participation in the Medicare program. *Experts Are Us, Inc.*, DAB No. 2342 (2010), *reopening denied*, DAB No. 2342 (2010). Reopening a Board decision is not a routine step under the Board's regulations in 42 C.F.R. Part 498. Rather, it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong. *Peter McCambridge, C.F.A.*, Ruling No. 2010-1, at 1 (Feb. 2, 2010).

Discussion

While Ridgeview's motion for reconsideration is timely, we conclude for the reasons explained below that it failed to identify any clear error of fact or law.

Indeed, Ridgeview has failed to put forth *any* evidence that could be construed in the light most favorable to Ridgeview conclude that its effective date of Medicare participation should pre-date its accreditation. A general, unsubstantiated allegation of hearsay cannot reasonably be considered evidence. Speculation by a party that a broad fishing expedition might generate some helpful evidence is not a sufficient basis to indefinitely delay resolution of an administrative appeal.

Ridgeview mischaracterizes the Board's decision in asserting that the Board somehow agreed with Ridgeview's position that its discovery or FOIA requests targeted potentially dispositive evidence. The Board stated:

> In any event, whether CMS may have in some instances assigned an accredited provider an effective date of Medicare participation that was prior to its accreditation date is immaterial to the question whether CMS reasonably interpreted and applied section 489.13(c)(2) here. Even if, for purposes of summary judgment, we accepted that there may have been some instances in which CMS assigned an accredited provider an effective date of participation that predated its accreditation, we find no provision in the regulation that would entitle Ridgeview to an effective date prior to September 21, 2012, for the reasons discussed at length above. Moreover, such occasional instances could not reasonably be viewed as showing that CMS had adopted a routine "practice for the initial enrollment of newly-accredited providers," counter to its longstanding interpretation of the effective date regulation, as Ridgeview suggests. P. Br. at 7.

In this statement, the Board merely noted that, even if it accepted for purposes of summary judgment Ridgeview's own claim (attributed to anecdotal hearsay) that CMS may have "occasionally" assigned an effective date predating an accreditation date, such instances would not undercut the regulatory requirement of accreditation prior to enrollment of new providers. In fact, Ridgeview did not identify even a single instance to support its speculations.

Ridgeview now asserts error because the Board cannot "rule out the possibility" that a FOIA request might disclose more than occasional instances of inconsistent action by CMS. Motion at 3. This assertion upends any reasonable concept of summary judgment. The Board explained at length why it found CMS's interpretation of the regulation at issue to be consistent with the regulatory history and multiple other prior statements made

by CMS, as well as with the structure, wording and purpose of the regulation itself. DAB No. 2593, at 12-16. On summary judgment against it, Ridgeview was entitled to have the evidence viewed in the light most favorable to it and to have reasonable inferences drawn in its favor. *See, e.g., Cmty Hosp. of Long Beach*, DAB No, 1938 (2004). Ridgeview was not entitled to insist that its interpretation of the regulation (which the Board found to be unreasonable) be accepted based on the inability to rule out a purely theoretical possibility. As the Board explained in denying remand, Ridgeview had to do more to oppose summary judgment than "simply show . . . some metaphysical doubt . . . ." DAB No. 2593, at 14-15, *quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, at 586-87 (1986).

The Board also expressly addressed Ridgeview's argument that the ALJ erred in denying its discovery request which sought to obtain documents from every CMS region for a period of nearly four years relating to any case of a provider granted enrollment before the accreditation date. CMS had opposed the request as vague, overbroad, and unduly burdensome, as well as irrelevant; in response, Ridgeview did not narrow the scope of its document request, but rather sought a motion to compel full production, or alternatively production of declarations (or in-person testimony) from ten CMS Regional Administrators attesting that the agency <u>never</u> granted such an effective date. DAB No. 2593, at 15 (citations to record before ALJ omitted). On the face of this motion, the attestations sought would have required even more burdensome record searches than the original discovery request. We found, and continue to see, no error in the ALJ's denial of these motions under the circumstances of this case.

Furthermore, Ridgeview's position seems to be based on a misunderstanding of the administrative process here. The regulations governing these appeals, 42 C.F.R. Part 498, do not provide for the sort of freewheeling discovery mechanisms available in some court proceedings. The regulations merely permit an ALJ to issue subpoenas for witnesses or documents where "reasonably necessary for the full presentation of a case," and require a party requesting such a subpoena to identify and describe the persons or documents "with sufficient particularity to permit them to be found" and to "[s]pecify the pertinent facts" to be established by them and why those facts could not be established in some other manner. 42 C.F.R. § 498.58. Neither in its original appeal to us nor in its reconsideration request has Ridgeview come close to showing that it met this standard in seeking discovery.

As noted in the Board's decision, Ridgeview did not come forward with any support for its "belief" that CMS, "at least occasionally," may have acted inconsistently with its long-standing interpretation of its regulation, not even with any details of the supposed anecdotes on which the belief was premised. DAB No. 2593, at 16. As also explained, the "fact" which Ridgeview claimed might be established by this document search would not be material because occasional deviations by some employees would not undercut the

evidence of a longstanding and reasonable interpretation. *Id*. Ridgeview did not even suggest (to the ALJ or on appeal to the Board) that it could point to particular documents or witnesses who might have information of some widespread inconsistency the possibility of which it now states cannot be ruled out.

Finally, Ridgeview makes clear in its motion for reconsideration that at base its goal is to reopen administrative proceedings in order to use a pending hearing date as a tool to press for expedited processing from the FOIA office. Motion at 3-4. The appeals process under Part 498 is unrelated to the FOIA process which neither the ALJ nor the Board have the authority to enforce. *Experts Are Us, Inc.* (ALJ lacked authority over FOIA request).[2] Ridgeview identifies no applicable authority for its repeated demand that the Board "must hold this appeal pending the completion of the FOIA process (including by setting a hearing date so that the Hospital can renew its request for expedited processing)." *Id.* Hearings are held in Part 498 cases to adjudicate determinations properly on appeal, not to provide a basis for influencing unrelated administrative processing. As fully explained in the Board decision, no hearing may be held here because no material fact is in dispute and summary judgment was properly issued.

Conclusion

Finding no clear error of fact, we reject Ridgeview's motion for reconsideration.

/s/
Stephen M. Godek

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member

[2] Appeals relating to FOIA are handled under a different process set out at 45 C.F.R. § 5.34.