

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Missouri Baptist Hospital-Sullivan  
(CCN: 26-0015),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-163

Decision No. CR2384

Date: June 17, 2011

**DECISION AND ORDER  
OF REMAND**

I decide that Petitioner, Missouri Baptist Hospital-Sullivan, met the distance criteria for qualifying as a critical access hospital (CAH), effective the date when the Missouri Legislature changed its designation of the 1.33 mile section of Missouri Route 47 in Washington, Missouri, from a State highway to a local street (Franklin Street). I remand this case to CMS so that it may determine the effective date of this change and also so that CMS may determine whether Petitioner satisfies other applicable criteria for CAH certification.

**I. Background**

This is the second iteration of this case. Petitioner initially applied in 2008 to be certified as a Medicare-participating CAH. CMS denied that application, and Petitioner requested a hearing before me. On August 11, 2009 I issued a decision that sustained CMS's determination. *Missouri Baptist Hosp. – Sullivan*, DAB CR1987 (2009). That decision was not appealed. Rather, Petitioner filed a second application for certification, which was again denied by CMS, and Petitioner again requested a hearing. It is this second hearing request, which is before me at this time.

I ordered the parties to file pre-hearing briefs and proposed exhibits. CMS filed a brief and two proposed exhibits that are identified as CMS Ex. 1 and CMS Ex. 2. Petitioner filed a brief and four proposed exhibits that are identified as P. Ex. 1 – P. Ex. 4.

I receive the parties' exhibits into the record. There exists no reason that I convene an in-person hearing in this case. Although the parties have not entered into formal stipulations of fact they have raised no disputed facts in their briefs or in their evidentiary submissions.

## **II. Issues, Findings of Fact, and Conclusions of Law**

### **A. Issue**

The issue in this case is whether Petitioner satisfies the distance test for certification as a CAH.

### **B. Findings of Fact and Conclusions of Law**

I make the following findings of fact (Findings) and conclusions of law.

#### ***1. To qualify as a CAH, a hospital must satisfy the distance standard of section 1820(c)(2)(B)(i)(I) of the Social Security Act.***

Section 1820(c)(2)(B)(i)(I) of the Social Security Act (Act) states that, as a prerequisite for qualifying as a CAH, a hospital must be:

Located more than a 35-mile drive (or, in the case of mountainous terrain or in areas with only secondary roads available, a 15-mile drive) from a hospital or another [CAH] . . . .

An implementing regulation restates this language. 42 C.F.R. § 485.610(c).

Neither the Act nor the regulation defines the term “secondary roads.” CMS has provided guidance as to the meaning of this term in its State Operations Manual (SOM). The SOM defines a “primary road” to be either:

- A numbered federal highway, including interstates, intrastates, expressways or any other numbered federal highway; or
- A numbered State highway with 2 or more lanes each way . . . .

SOM, Chapter 2, § 2256A.<sup>1</sup>

In *Missouri Baptist Hospital*, I discussed the history and intent of this SOM language. I held there that the Secretary, through CMS, had determined to implement a precise and objective criterion for defining what is meant by a secondary road. Using the SOM definition of a “primary road” as a guide, a “secondary” road is a road that is *not* a numbered federal highway or a numbered State highway with two or more lanes each way. Thus, a numbered State highway having only one lane in each direction, or a road that is not designated as a State highway – even if that road has more than one lane in each direction – would satisfy the SOM’s definition of a secondary road.

It is very clear that CMS determined to defer to the States in delineating what is and what is not a secondary road. The SOM rests the distinction between a primary and a secondary road in a critical aspect on a State’s determination of what is, and what is not, a State highway.

As I explained in *Missouri Baptist Hospital*, the determination to rely on State designation establishes an objective bright line for determining whether a facility meets the distance criteria for qualifying as a CAH. There is nothing in the Act or in the implementing regulation that requires CMS to make this distinction. CMS could have, for example, defined a secondary road based on the actual driving conditions encountered on that road. It might have taken into consideration factors such as lane width, grade, curves, elevation, weather conditions, and traffic. However, it elected to rely on a much more simplified test, that being the way in which a State designates its roads. That is a determination that is within CMS’s discretion to make, but it is bound by that determination.

**2. *Petitioner satisfied the distance test for qualifying as a CAH, when the Missouri State legislature changed its designation of the 1.33 mile section of Missouri Route 47 in Washington, Missouri, from a State highway to a local street (Franklin Street).***

I addressed the facts of Petitioner’s location and its proximity to other hospitals or CAHs in *Missouri Baptist Hospital*, and my Finding was not appealed by either party. The nearest hospital to Petitioner is St. John’s Mercy Hospital in Washington, Missouri (St. John’s). That hospital is situated 31.14 miles away from Petitioner. To drive from

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<sup>1</sup> An earlier policy statement defined the term “secondary road” explicitly by stating that a secondary road is “any state or local road, paved or unpaved, that does not meet the definition of ‘primary road’ as herein stated.” State Survey Agency Directors Letter, Location and Relocation of Critical Access Hospitals (CAHs) and Relocation of Necessary Provider CAHs, S&C-06-04 (Nov. 14, 2005). This policy statement was replaced effective September 7, 2007 with the current SOM language.

Petitioner to St. John's, using the shortest possible route, one must travel over portions of Interstate Highway 44 (I-44), Missouri Route (Mo. Rt.) 47, and U.S. Highway 50.

The distance traveled on I-44 is 15.15 miles. I-44 has two or more lanes and meets the SOM's definition of a primary road. To enter and exit I-44, one must drive on an entrance ramp of 0.27 miles and an exit ramp of 0.30 miles. These ramps also meet the SOM's definition of a primary road, because they are part of the Interstate Highway System and consist of two lanes each of one-way travel.

The remaining distance is comprised of what was formerly designated in its entirety as Mo. Rt. 47. That distance exceeds 15 miles. If 15 miles of that stretch of highway is secondary road, then Petitioner satisfies the distance test for a CAH.

A total of 13.92 miles of Mo. Rt. 47 consists of a road that has a single lane in each direction. Although it is designated as a State highway, the 13.92 single-lane stretch of Mo. Rt. 47 does not have two lanes of traffic in each direction. It is, therefore, undisputed that this 13.92 mile stretch is secondary road, because it fails to meet CMS's criteria as a primary road.

What remain to be considered are the .17 miles of dual lane highway and the 1.33 miles that run through the town of Washington, Missouri. The .17 miles clearly satisfy the SOM test for primary road because it is part of a State highway having two or more lanes in each direction. That leaves the 1.33 miles in Washington, Missouri.

At the time of my first decision in this case, those 1.33 miles were designated as being part of Mo. Rt. 47. That designation was critical to my decision because that section met the test for a primary road using the SOM criteria. By virtue of that, the total amount of secondary road between Petitioner and St. John's was less than 15 miles, and Petitioner failed to satisfy the distance test for qualifying as a CAH.

However, at some date in 2009, and presumably after I had decided *Missouri Baptist Hospital*, the Missouri State legislature adopted a law changing the designation of Mo. Rt. 47 in Washington from a State highway to a local street. CMS Ex. 2 at 6. Consequently, and using the criteria of the SOM for determining whether a road is secondary, the total distance between Petitioner and St. John's Hospital that satisfy the test for a secondary road now exceeds 15 miles. Thus, Petitioner now satisfies the distance test for a CAH under the SOM criteria, even though it failed to satisfy those criteria previously. The sole determining factor here that changes the outcome is Missouri legislature's change of designation of the 1.33 mile stretch in Washington, from Mo. Rt. 47, a State highway, to a local street.

CMS does not deny that Petitioner now satisfies the distance test for CAH certification established in the SOM. Rather, it argues that the State legislature's change of

designation of the 1.33 mile stretch in Washington, Missouri is simply a change of name that changes none of the conditions of the road. It characterizes the change as being a sham intended to circumvent Medicare participation criteria to qualify Petitioner for participation.

But, it was CMS that determined to rely on States' designation of their roads as the basis for distinguishing primary from secondary roads. CMS could have developed criteria designed to establish the actual driving conditions on State roads but it did not do so, relying instead on the States' designations of their roads. Given that, CMS cannot really cry foul when the State of Missouri decides to change the designation of a particular stretch of its roads.

CMS never argued that *actual* driving conditions on Mo. Rt. 47, either on the highway taken as a whole, or on that stretch in Washington, Missouri, would serve to qualify the road as primary in character. Throughout, CMS has maintained that the *sole* basis for deciding whether Petitioner met the distance test was application of the SOM criteria to determine the character of the roads between Petitioner and St. John's. Thus, the fact that the actual conditions on the stretch in question in Washington may not have changed, even though the designation of that stretch has changed, is not relevant to deciding whether that stretch is now secondary road. It is now secondary based on the SOM's criteria for distinguishing primary from secondary roads.

Indeed, had the stretch in question originally been designated a local road, there would have been no dispute that Petitioner would satisfy the distance test for a CAH. It was CMS that urged the use of the SOM criteria as the dispositive test for deciding whether Petitioner satisfied the distance criteria.

***3. I remand this case to CMS for further determination.***

Although the parties do not dispute that the Missouri legislature changed the designation of the 1.33 mile stretch in Washington some time in 2009, neither party has supplied me with the effective date of that change. That may be relevant for purposes of determining the effective date of Petitioner's participation in Medicare. I remand the case to CMS so that it may determine the effective date of the change of designation and its impact on Petitioner's participation status. Furthermore, neither party has advised me whether

