Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Regence Health Network, Inc., d/b/a South Plains Health Provider Organization, (CCN: 67-1931),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-586

Decision No. CR2244

Date: September 17, 2010

DECISION

By a hearing request (HR) dated March 30, 2010, Petitioner Regence Health Network, Inc., d/b/a South Plains Health Provider Organization (Petitioner) timely appealed the January 28, 2010, reconsideration decision of the Division of Survey and Certification, Region VI of the Centers for Medicare & Medicaid Services (CMS), which determined that Petitioner's effective date of participation in the Medicare program was December 4, 2009. Petitioner requests that its effective date of enrollment be changed to an earlier date. CMS moved for summary judgment on grounds that Petitioner did not meet the federal requirements for participation in the Medicare program prior to December 4, 2009, pursuant to 42 C.F.R. § 489.13(a). For the reasons explained below, I grant CMS's motion.

I. Background

On October 22, 2009, TrailBlazer Health Enterprises, LLC (TrailBlazer) received a CMS-855A Medicare application for enrollment as a Federally Qualified Health Center

(FQHC) from Petitioner.[1] Respondent's Motion for Summary Judgment (CMS Br.) at 3; CMS Ex. 3. TrailBlazer faxed a request for additional documentation to Petitioner on October 29, 2009. CMS Ex. 2, at 2-7. TrailBlazer received the requested information on November 13, 2009. CMS Ex. 2, at 8-11. Subsequently, on November 16, 2009, TrailBlazer determined that the National Provider Identification Number in use by the Petitioner was already used by an existing FQHC, and TrailBlazer notified Petitioner that this issue must be resolved before TrailBlazer could complete its review of Petitioner's enrollment application. CMS Ex. 2, at 1. TrailBlazer also requested additional information from Petitioner on December 2, 2009 and received this information on December 4, 2009. CMS Ex. 2, at 12.

On December 4, 2009, TrailBlazer notified CMS that it was recommending that Petitioner be approved as an FQHC in the Medicare program. CMS Ex. 1, at 6-8. CMS subsequently accepted the application and notified Petitioner that it met the requirements for participation in the Medicare program as an FQHC effective December 4, 2009. CMS Ex. 1, at 4-5.

Petitioner argues that it first submitted a CMS-855A application on April 15, 2009 to National Government Services (NGS). Petitioner's Response to Respondent's Motion for Summary Judgment (P. Br.) at 1; P. Ex. 1. Petitioner claims that it was in compliance with Medicare requirements for an FQHC at that time and should have been granted an earlier effective date of enrollment based on that application. P. Br. at 1. Petitioner requested reconsideration on January 6, 2010 seeking an effective enrollment date of May 1, 2009. CMS Ex. 1, at 3.

On January 28, 2010, CMS notified Petitioner that its request to change the enrollment date to May 1, 2009 was denied. CMS Ex. 1, at 1-2. This appeal followed. The case was assigned to me pursuant to 42 C.F.R. § 498.44, which permits designation of a member of the Departmental Appeals Board (Board) to hear appeals taken under part 498.

I issued an Acknowledgment and Pre-Hearing Order on April 5, 2010. On May 6, 2010, CMS filed a Motion for Summary Judgment and five exhibits, marked as CMS Exhibits 1-5. On June 7, 2010, Petitioner filed a Response to CMS's Motion and three supporting exhibits marked as Petitioner's Exhibits 1-3. Neither party objected to the admission of any exhibit, and I admit all exhibits into the record in this case.

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[1] CMS's brief actually states that TrailBlazer received the enrollment application on October 22, 2010. However, this is obviously a typographical error since the date stamp of the CMS-855A application (CMS Exhibit 3) indicates that it was received on October 22, 2009.

II. Issue

The sole issue in this case is whether CMS is entitled to summary judgment on the grounds that it properly determined that Petitioner was eligible for participation in the Medicare program on December 4, 2009.

III. Applicable Standard and Legal Authority

The Board explained the applicable standard for summary judgment as follows:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame,* DAB No. 2291, at 4-5 (2009).

Pursuant to 42 C.F.R. § 489.13(a), the effective date of enrollment for an FQHC is the date on which CMS accepts a signed agreement which assures that the FQHC meets all federal requirements. The Medicare State Operations Manual (SOM), Chapter 2, § 2826F (2010) provides that the CMS Regional Office (RO) (not the contractor) signs the FQHC agreement after determining that all Medicare requirements, including enrollment requirements, are met.

The SOM also provides, however, that, if the enrollment application is complete and all the requirements have been met when the RO reviews the application, the RO shall use the date on the contractor's recommendation letter to the RO as the effective date. SOM, Ch. 2, § 2826F.

IV. Findings of Fact, Conclusions of Law, and Analysis

I make findings of fact and conclusions of law in bold and italics below, followed by my supporting analysis

1. No material facts are in dispute.

2. CMS appropriately determined Petitioner's effective date of enrollment in the Medicare program to be December 4, 2009 as an FQHC may not be enrolled in the Medicare program until CMS determines that all enrollment requirements are met, after receipt of a recommendation letter from the CMS contractor.

3. CMS is entitled to summary judgment in its favor.

Petitioner argues for an effective date of enrollment prior to the date of TrailBlazer's recommendation that Petitioner be approved as an FQHC in the Medicare program based on its mailing an enrollment application to NGS on April 15, 2009. Petitioner explains that the application was sent to NGS because, at that time, NGS was responsible for processing FQHC claims and new enrollment applications. On March 27, 2009, CMS issued Change Request 6207, Transmittal #R1707CP (CR 6207) requiring FQHCs seeking to enroll in the Medicare program to file their applications with the Medicare Administrative Contractor that covered the state where the FQHC is located, in this case TrailBlazer. P. Ex. 2, at 1. Thus, TrailBlazer became responsible for processing all FQHC enrollment applications after the Change Request was implemented effective April 27, 2009.

Petitioner contends that NGS should have processed the April 2009 CMS-855A application to completion. Petitioner argues that, from April to October of 2009, it attempted to verify Medicare's receipt of the application by contacting both NGS and CMS. P. Br. at 2; P. Ex. 3. Petitioner asserts that, due to confusion associated with enrolling FQHCs in the Medicare program, its application was delayed many months and that NGS violated Medicare policy by not processing the original application and/or forwarding it to TrailBlazer. Petitioner cites section 1.3 of chapter 10 of the Medicare Program Integrity Manual which states that "[t]he contractor shall provide training…to ensure that each employee processes enrollment applications in a timely, consistent, and accurate manner." P. Br. at 3. Also, Petitioner cites CR 6207 which states that, if a contractor receives a CMS-855A application from an FQHC that should have been sent to a different contractor, the contractor shall mail the CMS-855A application to the appropriate contractor and notify the provider that its application has been sent to the new contractor. P. Br. at 3; P. Ex. 2, at 4. Petitioner argues that NGS had a duty to follow these instructions and that "at the very least, NGS should have forwarded the application to TrailBlazer." P. Br. at 3.

The copy of the application Petitioner submitted as having been sent to NGS on April 15, 2009 is undated, however, and lacks any indication it was ever received by NGS. P. Ex. 1. Petitioner submitted no proof of receipt by NGS or TrailBlazer of any application from Petitioner prior to October 22, 2009. On the contrary, the timeline submitted by Petitioner indicates that NGS staff repeatedly advised Petitioner that no application showed up in their tracking and cross-walk systems. P. Ex. 3. The record indicates that neither NGS nor TrailBlazer have any record of receiving the application Petitioner claims to have submitted in April of 2009. P. Ex. 3, at 1. Petitioner also reported being told in September that the address to which it had mailed the application was incorrect, which may explain why it was not received. *Id.* at 2. I accept for purposes of summary judgment that Petitioner mailed an application to NGS in April 2009 but find that fact immaterial to the issues before me.

Petitioner did not identify, and I am not aware of, any legal authority that bases the effective date of Medicare enrollment on the date of mailing of an application that was never received by a contractor. Certain suppliers receive an effective date of enrollment based on when their application is received by the contractor. *See, e.g.*, 42 C.F.R. § 424.520(d). FQHCs, however, are subject to specific provisions on determining effective date, as set out above, which set the earliest effective date as the date of the contractor's recommendation of approval to CMS assuming CMS ultimately signs the FQHC agreement after finding in its review that all applicable requirements are met. 42 C.F.R. § 489.13(a); SOM, ch. 2, § 2826F.

Petitioner alleges that, because TrailBlazer was able to process the application submitted on October 20, 2009 to the point of recommending approval within 44 days, the April 2009 application could presumably "have been processed and approved on May 30, 2009." P. Br. at 3. Petitioner also alleges that it was in compliance with Medicare requirements as of April 2009. *Id*. at 1. Even assuming both allegations to be true,[2] I could not base an earlier effective date on either point. The prerequisite for determining

[2] Furthermore, Petitioner does not dispute that the application Petitioner submitted on October 22, 2009 did not meet all the enrollment requirements. It is undisputed that TrailBlazer faxed a request for additional documentation to Petitioner on October 29, 2009. CMS Ex. 2, at 2-7. On November 16, 2009, TrailBlazer determined that the National Provider Identification Number used by the Petitioner was already in use by an existing FQHC and notified Petitioner that this issue must be resolved before TrailBlazer could finalize its review of Petitioner's enrollment application. CMS Ex. 2, at 1. TrailBlazer then requested additional information from Petitioner on December 2, 2009. CMS Ex. 2, at 12. Not until December 4, 2009, after receiving all the required information from Petitioner, did TrailBlazer conclude that Petitioner met all the enrollment requirements and notify CMS that it was recommending Petitioner to be approved as an FQHC in the Medicare program.

the effective date of enrollment for an FQHC is an approval recommendation by a contractor to CMS which, it is not disputed, did not take place until December 4, 2009. CMS Ex. 1.

In essence, Petitioner is arguing that I should take equitable considerations into account and grant Petitioner an earlier effective date. Petitioner argues for an effective date of enrollment based upon the date when it claims to have submitted an earlier application that was lost due to errors on the part of the CMS contractor, and wants me to calculate this earlier effective date according to the amount of time it took Petitioner to meet all the enrollment requirements when it submitted a "second" application. Thus, Petitioner is asking me in effect to estop the government from applying federal law and regulations based on Petitioner's good intentions or on the financial effect on it. Estoppel against the federal government, if available at all, is presumably unavailable absent "affirmative misconduct," such as fraud. *See, e.g.*, *Pacific Islander Council of Leaders*, DAB No. 2091, at 12 (2007); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990). None of the circumstances Petitioner describes fit that standard or permit me to ignore the unmistakable requirements of the regulations governing Petitioner's enrollment in Medicare, by which I am bound.

The regulations are clear. Pursuant to 42 C.F.R. § 489.13(a) and Medicare SOM, ch. 2, § 2826A-F (2010), the very earliest effective date of enrollment for an FQHC is the date of the contractor's recommendation letter. The regulation allows no exceptions in determining the effective enrollment date for an FQHC. In TrailBlazer's letter to CMS, it recommended approval of Petitioner as an FQHC and confirmed that Petitioner met all federal requirements for participation as an FQHC on December 4, 2009. CMS Ex. 1.

Petitioner has offered no evidence to suggest that it met the federal requirements for participation in the Medicare program prior to December 4, 2009. In order to satisfy all federal requirements Petitioner must have completed an enrollment application and supplied *all* of the required information pursuant to 42 C.F.R. § 424.510(d)(2). Also, CMS must have accepted a signed agreement from Petitioner assuring that all federal participation requirements are met after receiving the intermediary's recommendation letter. 42 C.F.R. § 489.13(a); SOM, ch. 2, § 2826A-F. The Board has repeatedly affirmed that an FQHC's effective date cannot be set prior to completion of these steps. *See, e.g., Waianae Coast Comprehensive Health Center*, DAB No. 2270 (2009); *Family Health Servs. of Darke County*, DAB No. 2269 (2009).

Contrary to Petitioner's suggestion, the mere completion or mailing of an application for enrollment does not guarantee that the FQHC will be accepted by CMS and enrolled in the Medicare program. Enrollment cannot occur until CMS receives a recommendation letter from the contractor and reviews the enrollment application and determines all the requirements have been met. An ALJ explained the implications of the FQHC approval process clearly in a recent case:

> The regulations contemplate that CMS or an entity . . . that it designates to act on its behalf will review for completeness and accuracy any application before accepting it. Nothing in the regulations mandates that CMS accept an application on the date that it is filed even if that application is subsequently determined to be complete on that date. Thus, the regulations contemplate that there may be a time lag between the date when an applicant files for enrollment and the date when review of the application is completed.

InterCare Cmty. Health Network Inc, DAB CR1947, at 2-3 (2009).

In this case, I must conclude that the effective date determination is correct. CMS has come forward with undisputed evidence establishing that TrailBlazer recommended approval of Petitioner as an FQHC and confirmed that Petitioner met all federal requirements for participation as an FQHC on December 4, 2009, and that the RO thereafter signed the FQHC agreement with Petitioner. Those events establish the correct effective date as a matter of law as December 4, 2009.

Petitioner has not responded with any evidence establishing that a dispute exists as to any material facts. The only dispute of material fact which Petitioner identifies in its brief is whether "NGS was in violation of Medicare policy by not processing Regence's original 855A and/or forwarding it to TrailBlazers, thereby delaying the effective date . . . ." P. Br. at 2. This argument is similar to the position taken by the FQHC in *Family Health* which argued that various interactions it had with contractor staff should have entitled it to an earlier effective date and that it was actually in compliance at the earlier time. The Board rejected that approach, stating as follows:

> To the extent Family Health is raising an estoppel defense, it has no merit since the ALJ and the Board are bound by the effective date provisions of 42 C.F.R. § 489.13 and have no authority to waive them. ALJ Remand Decision [DAB CR1862,] at 9, *see also Regency on the Lake*, DAB No. 2205 (2008).
>
> In any event, estoppel against the federal government, if available at all, is presumably unavailable absent "affirmative misconduct" by the federal government. *Office of Personnel Management v. Richmond*, 496 U.S. 414, at 421 (1990). Certainly estoppel is unavailable where the party fails to show even the traditional elements of estoppel, such as reasonable reliance. *Heckler* [*v. Community Health Services of Crawford County*], 467 U.S. [51,] at 60 (fiscal intermediary gave provider incorrect advice but provider failed to show reasonable reliance).

DAB No. 2269, at 19. Similarly, here, Petitioner has not shown any affirmative misconduct by any government agent, nor has it shown even that it reasonably relied on any incorrect information. Petitioner has not provided any evidence that NGS ever received the application mailed in April 2009 and hence has not provided a factual basis for its assertion that failing to process or forward it violated Medicare policy.

Furthermore, Petitioner premises its claim of procedural violation on the guidelines in a CMS Manual requiring contractors to provide adequate staffing and training to ensure employees process applications properly. P. Br. at 3. The citation provided by Petitioner is not to any currently applicable provision but in any case Petitioner fails to show that any lapse in training or staffing played any role in determining the applicable effective date. Even had the contractor fallen short of its contractual responsibilities to CMS, Petitioner has not shown any source of authority for me to remedy such a failure by altering the legally-required effective date for Petitioner's certification.

V. Conclusion

I grant CMS's Motion for Summary Judgment and sustain CMS's determination as to the effective date of Petitioner's Medicare enrollment.

/s/
Leslie A. Sussan
Board Member