

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Optimus Homecare LLC,
(NPI: 1063897569),

Petitioner,

v.

Centers for Medicare & Medicaid Services,

Respondent.

Docket No. C-16-582

Decision No. CR4682

Date: August 16, 2016

DECISION

I sustain the determination of a Medicare contractor, as affirmed on reconsideration and ratified by the Centers for Medicare & Medicaid Services (CMS), to deny an enrollment application for Medicare participation by Petitioner, Optimus Homecare, LLC.

I. Background

Petitioner, seeking certification from CMS to participate in Medicare as a home health agency, filed a hearing request in order to challenge the denial of its application to participate in Medicare. CMS filed a brief and five proposed exhibits that are identified as CMS Ex. 1-CMS Ex. 5. Petitioner filed a brief plus two unmarked and unidentified exhibits. These consist of a license issued to Petitioner by the State of New Jersey, which I am identifying as P. Ex. 1, and an accreditation services agreement, which I am identifying as P. Ex. 2. I receive all of these exhibits into the record.

CMS moved for summary judgment as part of its pre-hearing exchange. It is unnecessary that I decide whether the criteria for summary judgment are met in this case. Neither party has offered the testimony of a witness and, consequently, no purpose would be served by convening an in-person hearing. I decide the case based on the written record.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether a Medicare contractor appropriately denied Petitioner's application to participate in Medicare as a home health agency.

B. Findings of Fact and Conclusions of Law

A "home health agency" is an agency or organization that is primarily engaged in providing skilled nursing and other therapeutic services subject to applicable state licensing laws and regulations. Social Security Act (Act), § 1861(o) (42 U.S.C. § 1395x(o)). In order to be certified to participate in Medicare, a home health agency must comply with all applicable laws, including applicable State laws and regulations. 42 C.F.R. § 484.12(a). CMS has interpreted this section to require home health agencies to be licensed pursuant to State law. *Home Health Providers*, Centers for Medicare & Medicaid Services, <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/HHAs.html> (last updated 04/09/2013 4:53 PM).

CMS is authorized to deny a provider's application for enrollment in Medicare where a provider is found not to be complying with enrollment requirements. 42 C.F.R. § 424.530(a)(1). In order to qualify for participation a provider must submit all applicable licenses, including State licenses, to CMS. 42 C.F.R. § 424.510(d)(2)(ii), (iii).

The facts of this case are undisputed and uncomplicated. Petitioner, a New Jersey entity, does not have a license to provide health care services in that State as a home health agency. CMS has refused to certify Petitioner as a Medicare participant because it does not have the requisite license. That determination is entirely consistent with the requirements of the Act and governing regulations.

Evidently, the State of New Jersey will not license Petitioner because Petitioner has not obtained a certificate of need to provide home health care services in that State. For Petitioner, the situation is a Catch-22 in that the State is not currently issuing such certificates and apparently, has not done so for many years. *See* Request for Hearing at 1. But, that does not change the outcome of this case. Whatever dispute Petitioner may

have with the State of New Jersey, and whatever may be the merits of that dispute, Petitioner lacks a license to provide care in that State as a home health care agency and that is outcome determinative for purposes of deciding whether Petitioner qualifies to be certified to participate in Medicare.

Petitioner has produced a business license that it obtained from the State of New Jersey, specifically, the Division of Consumer Affairs of the Department of Law and Public Safety. That is a license to operate as a “health care service firm.” P. Ex. 1. The issuance of such a license is governed by New Jersey State regulation. N.J. Admin. Code Subchapter 13. A health care service firm is defined as:

Any person who operates a firm that employs individuals directly or indirectly for the purpose of assigning the employed individuals to provide health care or personal care services either directly in the home or at a care-giving facility

N.J. Admin. Code § 13:45B-13.2.

That definition is distinct from New Jersey’s definition of a home health agency, which is defined as:

a facility that is licensed . . . to provide preventative, rehabilitative, and therapeutic services to patients in the patient’s home or place of residence.

N.J. Admin. Code § 8:33-1.3. It is plain from these regulations that a license as a health care service firm is distinguishable from a license as a home health agency. The former license authorizes an entity to employ persons and to assign them to provide health care services in a patient’s home or care-giving facility. By contrast, a license for a home health agency covers not only the personnel who may be assigned but the services that may be performed by those personnel, and it plainly focuses precisely on those services.

The requirements for a home health agency are quite different from those for a health care service firm. Amongst many distinguishing characteristics, home health agencies: must be licensed by the New Jersey Department of Health (N.J. Admin. Code § 8:42-2.2(a)); must have nursing services available 24 hours a day, seven days a week (N.J. Admin. Code § 8:42-3.1(a)(2)); must undergo surveys by the Department’s Division of Health Facility Survey and Field Operations (N.J. Admin. Code § 8:42-2.3)); must provide continuity of care by retaining the same nursing personnel for each patient whenever possible (N.J. Admin. Code § 8:42-3.1(b)(3)); and must have an established policy and procedure manual available to the public (N.J. Admin. Code § 8:42-3.5(a), (c)). Conversely, a health care service firm has no requirements for minimum services provided and is licensed by the Division of Consumer Affairs of the New Jersey Department of Law and Public Safety (N.J. Admin. Code §§ 13.45B-1.2 (definition of

“Director”), 13.45B-13.1(b)). Broadly speaking, New Jersey law treats a home health agency as it does other health care providers, while it treats a health care service firm as it does an employment agency. As a result, the two entities are not interchangeable.

_____/s/_____
Steven T. Kessel
Administrative Law Judge