Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Appellate Division

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| In the Case of: | DATE: October 30, 2008 |
| Regency on the Lake, | |
| Petitioner, | Civil Remedies CR1760<br>App. Div. Docket No. A-08-98 |
| | Decision No. 2205 |
| - v. - | |
| Centers for Medicare & Medicaid Services. | |

## FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Regency on the Lake (Regency, Petitioner) requested review of the decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes in Regency on the Lake, DAB CR1760 (2008) (ALJ Decision). The ALJ found that CMS correctly certified Regency for Medicare participation effective January 18, 2007, the date its federal Life Safety Code (LSC) survey was completed. Before the ALJ, Regency contended that it should have been certified effective December 15, 2006, the date the initial survey to certify its eligibility to participate in the Medicare program was completed. The ALJ granted CMS's motion for summary affirmance, which Regency opposed, on the ground that "as a matter of law, the facility could not be certified any earlier than the date it passed the federal LSC survey." ALJ Decision at 2. Regency takes the position that summary affirmance is not appropriate because there are genuine issues of material fact in dispute. Regency's primary allegation is that a state fire safety inspection conducted on October 24, 2006 established that Regency was in compliance with the federal LSC requirements. Regency argues that it therefore met all requirements for Medicare

participation when the initial Medicare certification survey was completed on December 15, 2006.

For the reasons discussed below, we uphold the ALJ Decision granting CMS's motion for summary affirmance.

Applicable Legal Authority

The applicable legal authority is set out in the ALJ Decision at pages 2-3 and in the analysis section of our decision.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address *de novo.* Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). Summary judgment is appropriate if there are no genuine disputes of fact material to the result. Everett Rehabilitation and Medical Center, DAB No. 1628, at 3 (1997). In reviewing a disputed finding of fact, we view proffered evidence in the light most favorable to the non-moving party. See Crestview Parke Care Center, DAB No. 1836 (2002), rev'd on other grounds, Crestview Parke Care Center v. Thompson, 373 F.3d 743 (6th Cir. 2004). The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Departmental Appeals Board, *Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs* (DAB Guidelines), http://www.hhs.gov/dab/ guidelines/prov.html.

Analysis

Regency does not dispute that, as a matter of law, the effective date of its certification could not be earlier than the date a survey was completed finding it in compliance with all Medicare participation requirements, including the LSC requirements. According to Regency, however, there are genuine disputes of material fact regarding the date of the survey finding it in compliance with the LSC requirements. Regency identifies these disputes as: 1) whether the October 24, 2006 state fire safety inspection covered the same areas as the January 18, 2007 federal LSC survey, and 2) whether oral and written communications from the state survey agency led Regency to believe that passing the state fire safety inspection established its compliance with the LSC requirements. P. Br. at 10-13; P. Reply Br. at 5-7, 14-16. For the reasons discussed below, we conclude that neither of these disputes is material and that summary judgment was appropriate.

As Regency recognizes, the regulations provide that a Medicare provider agreement "is effective on the date the survey (including Life Safety Code survey, if applicable) is completed if on that date the provider . . . meets all applicable federal requirements." 42 C.F.R. §489.13(b) (emphasis added); see also 42 C.F.R. § 483.70(a)(requiring compliance with the "applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association.") The only exception relevant here is that the LSC "does not apply in a State where CMS finds, in accordance with applicable provisions of sections 1819(d)(2)(B)(ii) and 1919(d)(2)(B)(ii) of the [Social Security] Act, that a fire and safety code imposed by State law adequately protects patients, residents and personnel in long term care facilities." 42 C.F.R. §483.70(a)(3).[1] In adopting this exception, CMS specifically indicated that its approval was required for the use of any state fire and safety code in place of the LSC, rejecting the suggestion that the proposed rule be revised to allow health care facilities to unilaterally choose to follow other codes with requirements that are equivalent to or more stringent than the LSC. 68 Fed. Reg. 1374, 1378-1379 (Jan. 10, 1993) (preamble to final regulation adopting 2000 edition of LSC). Regency acknowledges that the State of Michigan has not obtained CMS's approval to substitute its fire safety code for the LSC. P. Reply Br. at 6, citing CMS Ex. 20 (Connell Declaration) at 3, ¶ 13 (stating that CMS has not taken any action on the State's application for an exception). Thus, the exception does not apply, and, as a matter of law, Regency's Medicare certification was not effective until an LSC survey finding Regency in compliance with the LSC was completed. Accordingly, it is immaterial whether the October 24, 2006 state fire safety inspection covered the same areas as the January 18, 2007 LSC survey or whether communications from the state survey agency led Regency to believe that passing the state fire safety inspection established its compliance with the LSC requirements. We therefore conclude that summary judgment for CMS was appropriate.

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[1] Section 483.70(a)(2) provides that "[a]fter consideration of State agency survey findings, CMS may waive specific provisions of the Life Safety Code which, if rigidly applied, would result in unreasonable hardship upon the facility, but only if the waiver does not adversely affect the health and safety of the patients." Since the January 18, 2007 LSC survey found Regency in compliance with all LSC requirements, the waiver provision is not relevant.

Even if the law allowed a finding of compliance with an identical state code to be treated as a finding of compliance with the LSC, which it does not absent CMS approval under 42 C.F.R. § 483.70(a)(3), Regency has not shown that there is a genuine dispute of material fact in this regard. Regency does not contend that the requirements of the state fire safety code are identical to those of the LSC, much less proffer any evidence to show the codes are identical. Instead, Regency merely disputes the fire safety inspector's allegation in his declaration that he performed additional duties during the January 18, 2007 LSC survey that he did not perform during the October 24, 2006 fire safety inspection. P. Br. at 10-11; P. Reply Br. at 5-6.[2] Regency further argues that the fire safety inspector "effectively conducted both surveys at the same time, on October 24, 2006." P. Reply Br. at 5. The argument is illogical on its face since there is no dispute that the inspector conducted a separate LSC survey on January 18, 2007. There would have been no reason for the January 18, 2007 survey if that survey had "effectively" been conducted on October 24, 2006.[3]

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[2] We need not determine whether the evidence, viewed in the light most favorable to Regency, supports its position. We nevertheless note that the ALJ found that, as part of the January 18, 2007 LSC survey, the fire safety inspector "reviewed the adequacy of . . . the actual fire drills conducted" and implied that this review could not have occurred at the time of the state fire safety inspection since that inspection "predated the admission of any residents." ALJ Decision at 6. Regency asserts that the fire safety inspector "would have been **required** by state rules and regulations during the October 24, 2006 survey to . . . review . . . the fire drills that [the facility] had conducted," but points to no evidence that might arguably show that such a review occurred. P. Br. at 8 (emphasis in original); see also P. Reply Br. at 6-7. Regency's additional argument that the ALJ erred by "holding" that under State Operations Manual §2008A a facility must be "fully operational" before an LSC survey can be conducted, even if correct, would not undercut the ALJ's finding.

[3] In addition, although an LSC survey may be conducted by the state survey agency, it must be on the federal form designed for this purpose. See 42 C.F.R. § 488.26(c)(5) ("Federal forms are used by all surveyors to ensure proper recording of findings and to document

(continued...)

Moreover, even if it were material whether communications from the state survey agency led Regency to believe that the October 24, 2006 state fire safety inspection established its compliance with the LSC requirements, we agree with the ALJ that Regency could not reasonably rely on such communications. Regency's argument rests on the mistaken premise that the state survey agency determines whether a provider meets the Medicare participation requirements.[4] As the ALJ correctly concluded, "Petitioner's reliance on the statements of state employees seems particularly unreasonable because the facility knew, or should have known, that neither a state agency nor its employees are empowered to find a facility eligible to participate in the Medicare program. Only the Secretary (for whom CMS acts) has the final authority to make that determination." ALJ Decision at 5, citing 42 C.F.R. § 488.18(c)("If, on the basis of the State certification, the Secretary determines that the provider ... is eligible to participate ... ."). The regulations clearly provide that certifications by state survey agencies that providers are in compliance merely "represent recommendations to CMS," based on which "CMS will determine whether ... a provider ... is eligible to participate in or be covered under the Medicare program ... ." 42 C.F.R. § 488.12(a)(1). Similarly, section 1864 of the Act (42 U.S.C. § 1395aa) provides, in pertinent part, that the Secretary--

> shall make an agreement with any State . . . under which the services of the . . . appropriate State agency . . . will be utilized by him for the purpose of determining whether an institution therein is a . . . skilled nursing facility[.] To the extent that the Secretary finds it appropriate, an institution or agency which

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[3] (...continued)
the basis for the findings."); 68 Fed. Reg. 41,816 (July 15, 2003) (Notice of request for emergency clearance by the Office of Management and Budget (OMB) of Fire Safety Survey Report Forms in order to implement regulations adopting 2000 edition of LSC). The only form in the record dated October 24, 2006 is a state inspection form, not an OMB-approved form. Compare CMS Exs. 13 and 14.

[4] Regency states in its reply brief that it "has never argued that CMS is not the 'approving official' for purposes of determining whether it satisfies participation requirements." P. Reply Br. at 13. While Regency may not have expressly made such an argument, however, it is implicit in Regency's other arguments.

> such a State . . . agency certifies is a . . . skilled nursing facility . . . may be treated as such by the Secretary.

Act, § 1864(a) (emphasis added); see also the implementing regulations at 42 C.F.R. §§ 488.10, 488.11 (specifying that functions of state survey agencies having agreements under section 1864(a) include the responsibility to "[S]urvey and make recommendations" regarding ... issues ... such as whether "[p]roviders or prospective providers meet the Medicare conditions of participation or requirements (for SNFs [skilled nursing facilities] and NFs) ... [and] to [m]ake recommendations regarding the effective date of provider agreements ... in accordance with § 489.13 ... .")

In light of the foregoing statutory and regulatory provisions, of which Regency had constructive notice, Regency could not reasonably conclude that it was in compliance with the federal LSC requirements based on communications from the state survey agency since CMS had not approved a recommendation from the state survey agency to that effect. See also Heckler v. Cmty. Health Servs. Of Crawford County, 467 U.S. 51, 63 (1984) (quoted in ALJ Decision at 5). But even assuming Regency did reasonably rely on these communications, neither the ALJ nor this Board could waive, under a theory of estoppel, the statutory and regulatory requirements that make January 18, 2007 the earliest possible effective date of Regency's Medicare certification.[5] Everett Rehabilitation and Medical Center, DAB No. 1628, at 3 (1997) (cited in ALJ Decision at 5).

Conclusion

For the reasons discussed above, we affirm the ALJ's decision that CMS correctly certified Regency for participation in the

[5] The ALJ stated, "I do not see anything particularly misleading about any of these communications." ALJ Decision at 5. We need not determine, however, whether the evidence, viewed in the light most favorable to Regency, would support a finding that the communications were, in fact, misleading.

Medicare program effective January 18, 2007, the date its federal LSC survey was completed.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member