Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Cases of:	)	
	)	Date: March 9, 2009
Sea Mar Community Health Center – Aberdeen (No. 50-1906) and Copalis Beach (No. 50-1907),	)	Docket Nos. C-08-310, C-08-311
Petitioners,	)	Decision No. CR1920
- v. -	)	
Centers for Medicare & Medicaid Services.	)	

DECISION

The effective date of participation in the Medicare program as Federally Qualified Health Centers (FQHC) of Petitioners, Sea Mar Community Health Center – Aberdeen and Sea Mar Community Health Center – Copalis Beach, is September 13, 2007.

I. Background

On February 15, 2008, Petitioners requested hearings by an administrative law judge (ALJ). Petitioners request review of the reconsideration decisions of the Centers for Medicare & Medicaid Services (CMS) denying Petitioners' requests that the effective date of their participation in the Medicare program as FQHCs be changed from September 13, 2007 to November 1, 2006. Their requests for hearing were docketed with docket numbers C-08-310 assigned to the Aberdeen site, and C-08-311 assigned to the Copalis Beach site. Both cases were assigned to me for hearing and decision on March 14, 2008, and a Notice of Case Assignment and Prehearing Case Development Order (Prehearing Order) was issued at my direction in each case. On June 13, 2008, I issued an order consolidating the cases for hearing and decision under docket number C-08-310.

On June 6, 2008, CMS filed a motion for summary disposition and memorandum in support of its motion (CMS Memo.), with exhibits (CMS Exs.) 1 through 29. On July 25, 2008, Petitioners filed their memorandum opposing the CMS motion for summary judgment (P. Opp.) with Petitioners' exhibits (P. Exs.) 1 through 9. No objection has been made to my consideration of the offered exhibits and they are admitted.

II. Discussion

A. Applicable Law

A FQHC is an entity that:

> 1. receives a grant under section 330 of the Public Health Service Act (PHSA) (42 U.S.C. § 254b);
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> 2. meets the requirements to receive a grant under section 330 of the PHSA, but receives the funds under contract of the recipient of such a grant;
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> 3. is determined by the Secretary (the Secretary) of Health and Human Services (HHS) to meet the requirement for receiving a grant under section 330 of the PHSA, including requirements that an entity may not be owned, controlled, or operated by another entity, based on the recommendation of the Health Resources and Services Administration (HRSA) of the Public Health Service (PHS), HHS; or
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> 4. was treated by the Secretary as a "comprehensive Federally funded health center as of January 1, 1990."

Social Security Act (Act) § 1905(l)(2)(B) (42 U.S.C. § 1396d(l)(2)(B)). A FQHC provides physician, nurse practitioner, physician assistant, or clinical psychologist services and supplies incident to such services, on an outpatient basis to patients of the FQHC. Act §§ 1861(aa)(1) (42 U.S.C. § 1395x(aa)(1));1905(l)(2)(A)(42 U.S.C. § 1396d(l)(2)(A).

The Secretary has implemented regulations for the enrollment into the Medicare program of FQHCs. According to 42 C.F.R. § 405.2401(b), A FQHC is:

> [A]n entity that has entered into an agreement with CMS to meet Medicare program requirements under §§ [sic] 405.2434 and--
>
> (1) Is receiving a grant under section 329, 330, or 340 of the Public Health Service Act, or is receiving funding from such a grant under a contract with the recipient of such a grant and meets the requirements to receive a grant under section 329, 330 or 340 of the Public Health Service Act;
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> (2) Based on the recommendation of the PHS, is determined by CMS to meet the requirements for receiving such a grant;
>
> (3) Was treated by CMS, for purposes of part B, as a comprehensive federally funded health center (FFHC) as of January 1, 1990; or
>
> (4) Is an outpatient health program or facility operated by a tribe or tribal organizations under the Indian Self-Determination Act or by an Urban Indian organization receiving funds under title V of the Indian Health Care Improvement Act.

In order to participate in the Medicare program as a FQHC, an entity must enter into an agreement with CMS, the content and terms of the agreement are specified in 42 C.F.R. § 405.2434. The effective date of the agreement with CMS "is the date CMS accepts the signed agreement, which assures that all Federal requirements are met." 42 C.F.R. § 405.2434(b). Part 491 of 42 C.F.R. establishes the conditions for participation for rural health clinics and the conditions for coverage for FQHCs, i.e. the conditions that must be met for Medicare reimbursement for services or supplies provided to eligible beneficiaries.

The procedures for filing to participate in the Medicare program as a FQHC are established by 42 C.F.R. § 405.2430(a). An entity that wishes to participate in Medicare as a FQHC makes a request to CMS for an agreement. CMS sends the entity a written notice of the disposition of its request for an agreement. CMS sends the entity two copies of the agreement when the following requirements are met: the PHS recommends that the entity qualifies as a FQHC; the FQHC assures CMS that it meets the requirements of 42 C.F.R. Part 405, subpart X and part 491; and the FQHC terminates other provider agreements except as specified in the regulation. The entity must sign and return both copies of the agreement to CMS. If CMS accepts the agreement, it returns to the entity one copy of the agreement with a notice of acceptance that specifies the effective date of its participation as a FQHC, which is determined in accordance with 42 C.F.R.

§ 405.2434. If CMS fails to enter an agreement with an entity, the entity is entitled to a hearing in accordance with 42 C.F.R. Part 498. 42 C.F.R. § 405.2430(d).

The hearing before an ALJ is a de novo proceeding. *Anesthesiologists Affiliated, et al*, DAB CR65 (1990), *aff'd*, 941 F.2d 678 (8th Cir. 1991); *Emerald Oaks*, DAB No. 1800, at 11 (2001); *Beechwood Sanitarium*, DAB No. 1906 (2004); *Cal Turner Extended Care*, DAB No. 2030 (2006); *The Residence at Salem Woods*, DAB No. 2052, (2006). The Departmental Appeals Board (the Board) has previously addressed an appropriate allocation of the burden of persuasion and the burden of going forward with the evidence in cases subject to 42 C.F.R. Part 498. The Board has held that CMS must make a prima facie showing of the basis for its action and CMS has the initial burden of going forward with the evidence. "Prima facie" means that the evidence is "(s)ufficient to establish a fact or raise a presumption unless disproved or rebutted." *Black's Law Dictionary* 1228 (8th ed. 2004); s*ee also Hillman Rehabilitation Center*, DAB No. 1611, at 8 (1997), *aff'd Hillman Rehabilitation Center v. U.S. Dept. of Health and Human Services*, No. 98-3789 (GEB), slip op. at 25 (D.N.J. May 13, 1999). To prevail, a petitioner has the burden of persuasion and must overcome the CMS prima facie showing by a preponderance of the evidence. *Batavia Nursing and Convalescent Center*, DAB No. 1904 (2004); *Batavia Nursing and Convalescent Inn*, DAB No. 1911 (2004) *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. Appx. 181 (6th Cir. 2005); *Emerald Oaks*, DAB No. 1800; *Cross Creek Health Care Center*, DAB No. 1665 (1998); *Hillman Rehabilitation Center*, DAB No. 1611.

B. Issues

Whether summary judgment is appropriate.

Whether September 13, 2007 is the correct effective date of Petitioners' participation in the Medicare program as FQHCs.

C. Analysis

1. Facts

This statement of facts is based upon the evidence and the undisputed allegation of facts from the pleadings of the parties. Pursuant to paragraph A.5.b of the Prehearing Order, any fact alleged in the parties' pleadings not specifically denied may be accepted for purposes of summary judgment. All favorable inferences are drawn in favor of Petitioners for purposes of deciding this case by summary judgment.

Sea Mar Community Health Center (Sea Mar), is a non-profit community health center operating several clinics, all designated FQHCs, throughout the State of Washington. Sea Mar is accredited by the Joint Commission on the Accreditation of Healthcare Organizations (JACHO). In 2006, Peninsula Community Health Services, another non-profit community health center, requested that Sea Mar take over operation of two of its clinics, one at 1813 Sumner Street, Aberdeen (Aberdeen site), Washington, and the other at 3010 State Route 109, Copalis Beach, Washington (Copalis Beach site). Both the Aberdeen and Copalis Beach sites participated in the Medicare program as FQHCs when operated by Peninsula Community Health Services. Sea Mar assumed the lease obligations for the Aberdeen and Copalis Beach clinics, purchased the clinic equipment, hired staff, and began providing care to Medicare eligible patients on November 1, 2006. P. Opp. at 1-4; CMS Memo. at 2-6.

On December 11, 2006, HRSA gave Petitioners a Community Health Care Center Grant, based on the addition of the Aberdeen and Copalis Beach sites and directed Petitioners to file Form CMS-855A for designation of the locations as FQHCs. Sea Mar applied for and received National Provider Identification numbers for both clinics in December 2006. Sea Mar submitted enrollment applications, Form CMS-855A, for the Aberdeen and Copalis Beach sites to the wrong Medicare contractor, National Government Services (NGS) in California. NGS did not forward the Sea Mar applications to the correct Medicare contractor or notify Sea Mar of the error. Sea Mar discovered its error despite receiving no response from NGS. Sea Mar submitted an application to the correct Medicare contractor, UGS Wisconsin, for the Aberdeen site in July 2007 and for the Copalis Beach site in August 2007. Rogelio Riojas, Executive Director of Sea Mar, signed agreements for the Aberdeen and Copalis Beach sites on August 9, 2007, and they were received by the Medicare contractor on August 17, 2007. The Medicare contractor recommended that CMS approve Petitioners' applications by letter dated September 13, 2007. CMS approved Petitioners' applications, issued provider numbers for each, and executed the required participation agreements with effective dates of September 13, 2007.

My conclusions of law are set forth in bold followed by my analysis.

2. Summary judgment is appropriate in this case because there are no disputed issues of material fact.

An ALJ may decide a case by summary judgment, without an oral evidentiary hearing, if the case presents no genuine issues of material fact. *Crestview Parke Care Center v. Thompson,* 373 F.3d 743, 750 (6th Cir. 2004); *Livingston Care Center v. U.S. Dept. of Health and Human Services,* 388 F.3d 168 (6th Cir. 2004). The Board has previously

approved the use of a summary judgment procedure "akin to the summary judgment standard contained in Federal Rule of Civil Procedure 56" in cases subject to 42 C.F.R. Part 498. *Crestview Parke Care Center*, 373 F.3d 743, 750. Under that rule, the moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Livingston Care Center,* 388 F.3d at 173*, citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, n.11 (1986); *see also Vandalia Park,* DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). A mere scintilla of supporting evidence is not sufficient. "If the evidence is merely colorable or is not significantly probative summary judgment may be granted." *Livingston Care Center*, 388 F.3d,173, *quoting Anderson v. Liberty Lobby,* 477 U.S. 242*,* 249-50 (1986). In deciding a summary judgment motion an ALJ may not make credibility determinations or weigh conflicting evidence, but must instead view the entire record in the light most favorable to the non-moving party, and all reasonable inferences drawn from the evidence in that party's favor. *Innsbruck HealthCare Center,* DAB No. 1948 (2004); *Madison Health Care, Inc.,* DAB No. 1927 (2004).

The Prehearing Order advised the parties that the Federal Rules of Civil Procedure (Fed. R. Civ. P.) and the Federal Rules of Evidence do not apply to proceedings before ALJs assigned to the Departmental Appeals Board, Civil Remedies Division. However, the Prehearing Order also advised the parties that both the Federal Rules of Evidence and the Fed. R. Civ. P. may be consulted as guides for resolution of issues due to the fact that further review in this case may be by the federal courts. Based upon the language of the Prehearing Order, prior decisions of the Board and ALJs that relied upon summary judgment procedures akin to those of Fed. R. Civ. P. 56 and related cases, and the parties' reference to cases that involved application of Fed. R. Civ. Pro. 56, I conclude that the parties were on notice of the summary judgment procedures and standards applicable to this case. *Wade Pediatrics*, DAB No. 2153, at 15-17 (2008). This case is appropriate for summary judgment. There is no genuine dispute as to any material fact and I have drawn all favorable inferences in favor of Petitioners, the non-movants, for purposes of summary judgment. This decision turns upon the interpretation of regulatory provisions, which are issues of law, and their application to the undisputed material facts.

3. Pursuant to 42 C.F.R. §§ 405.2432(2)(b)(1) and 489.13(a)(2)(i), the effective date of Petitioners' participation as FQHCs is September 13, 2007.

CMS determined that September 13, 2007, is the effective date of Petitioners' agreements and participation as FQHCs in the Medicare program, and their eligibility to receive reimbursement from Medicare for services and supplies delivered to Medicare eligible beneficiaries. Petitioners request that I change their effective date to November 1, 2006. Petitioners argue that they are entitled to an effective date of participation of November 1, 2006, on two theories. However, none of the theories advanced by Petitioners provide grounds for the relief they seek.

Petitioners argue that, pursuant to 42 C.F.R. § 489.13(d)(2), they are entitled to a retroactive effective date of November 1, 2006. The effective date of a provider's or supplier's participation is determined in accordance with 42 C.F.R. § 489.13. Pursuant to 42 C.F.R. § 489.13(d), a provider or supplier that is accredited by a national accrediting organization, that meets all federal requirements, and that meets any additional requirements beyond those included in the accrediting organization's program may be accepted for participation in Medicare.

Petitioners assert that they met all the requirements of 42 C.F.R. § 489.13(d) on November 1, 2006, when Sea Mar assumed operation of the Aberdeen and Copalis Beach sites. I accept for purposes of summary judgment that Sea Mar was at all relevant times accredited by JCAHO and that the Aberdeen and Copalis Beach sites were FQHCs when operated by Peninsula Community Health Services. I also accept for purposes of summary judgment that Petitioners met federal requirements and any additional requirements, except that it is undisputed that Petitioners had not completed the required application process for FQHCs on November 1, 2006. Petitioners argue that they are entitled to an effective date retroactive to November 1, 2006, pursuant to 42 C.F.R. § 489.13(d)(2) which provides, "[i]f a provider or supplier meets the requirements . . . of this section, the effective date [of participation] may be retroactive for up to one year to encompass dates on which the provider or supplier furnished, to a Medicare beneficiary, covered services for which it has not been paid."

Petitioners' argument is without merit as 42 C.F.R. § 489.13(d)(2) does not apply to FQHCs. Pursuant to 42 C.F.R. § 489.13(a), section 489.13 is applicable to all Medicare provider agreements except those specified in subsection 489.13(a)(2). Subsection 489.13(a)(2) provides that "[f]or an agreement with a community mental health center (CMHC) or a Federally qualified health center (FQHC) the effective date is the date on which CMS accepts a signed agreement which assures that the CMHC or FQHC meets all

Federal requirements." 42 C.F.R. § 489.13(a)(2). I conclude that the plain language of subsection 489.13(a)(2) excludes FQHCs and CMHCs from application of 42 C.F.R. § 489.13. Furthermore, 42 C.F.R. § 489.13 sets forth rules for the determination of the effective date of participation for suppliers and providers that are generally applicable. Not only are FQHCs excluded from the coverage of section 489.13 by the plain language of subsection 489.13(a)(2), FQHCs are subject to the specific rule for determining their effective date of participation established by 42 C.F.R. § 405.2434(b), which provides that the effective date of the agreement with CMS "is the date CMS accepts the signed agreement, which assures that all Federal requirements are met." The specific rule of 42 C.F.R. § 405.2434(b) is reflected in 42 C.F.R. § 489.13(a)(2). There is no real conflict between the two regulatory provisions, but if a conflict was perceived, the specific regulatory provision applicable to FQHCs should be considered to control over the regulatory provision generally applicable to providers and suppliers. No exception to this well accepted rule of statutory construction is present in this case. *See* 2 B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 51:2 (7th ed. 2008).

Petitioners also argue that equity and considerations of public policy require that they be granted an effective date of November 1, 2006. Petitioners contend that Sea Mar assumed operation of the Aberdeen and Copalis Beach sites and thereby prevented Medicare beneficiaries from losing access to care. I accept for purposes of summary judgment that Petitioners provided much needed medical services to Medicare beneficiaries at the Aberdeen and Copalis Beach sites from November 1, 2006 through September 13, 2007. P. Opp. at 5-7. CMS argues that I have no authority to grant equitable relief as requested by Petitioners. CMS Memo. at 5. CMS is correct and, as a matter of law, I am without authority to grant Petitioners the relief they seek on equitable or public policy grounds. ALJs and the Board have no equitable powers under the authority granted them by statute and regulations, and have so recognized on numerous occasions. *See, e.g., Oklahoma Heart Hospital*, DAB No. 2183, at 15 (2008).

III. Conclusion

For the forgoing reasons, summary judgment is granted for CMS and the effective date of participation as FQHCs in the Medicare program for Petitioners is September 13, 2007.

/s/
Keith W. Sickendick
Administrative Law Judge