The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:	)	
	)	
InterCare Community Health Network Inc. (CCN: 23-1929),	)	Date: May 5, 2009
	)	
Petitioner,	)	Docket No. C-09-68
	)	Decision No. CR1947
- v. -	)	
	)	
The Centers for Medicare & Medicaid Services.	)	
	)	

DECISION GRANTING SUMMARY DISPOSITION TO CENTER FOR MEDICARE & MEDICAID SERVICES

I grant summary disposition to the Centers for Medicare & Medicaid Services (CMS) sustaining its determination to establish May 19, 2008 as the effective date for participation in the Medicare program of Petitioner, InterCare Community Health Network, Inc. I deny Petitioner's cross motion for summary disposition.

I. Background

On March 25, 2008 Petitioner applied to participate in the Medicare program as a Federally Qualified Health Center (FQHC). CMS determined to accept Petitioner's application and to enroll Petitioner in the program effective May 19, 2008. Petitioner sought reconsideration of this determination, arguing that its application should have been accepted by CMS effective April 1, 2008. On reconsideration CMS affirmed its initial determination. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. CMS moved for summary disposition. Petitioner opposed the motion and cross moved for summary disposition. CMS filed a brief in opposition to Petitioner's cross motion.

CMS submitted eight proposed exhibits, which it designated as CMS Ex. 1 – CMS Ex. 8, in support of its motion for summary disposition. Petitioner submitted a single exhibit, which it designated as P. Ex. A, in opposition to CMS's motion and in support of its cross motion for summary disposition. CMS then submitted four additional exhibits, which it identified as CMS Ex. 9 – CMS Ex. 12, in response to Petitioner's cross motion for summary disposition. I receive all of these exhibits into the record of this case and I cite to some of them in the body of this decision. I note, however, that there are no disputed material facts in this case and I make no evidentiary findings based on the parties' exhibits.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether May 19, 2008 is the effective date of Petitioner's enrollment in the Medicare program.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

1. An FQHC may not be enrolled as a Medicare participant until CMS accepts a signed agreement from the FQHC which assures that it meets all participation requirements.

There are basic criteria which every applicant for participation in Medicare must satisfy as a prerequisite to enrollment. First, the applicant must satisfy all Medicare participation requirements. In order to satisfy these requirements an applicant must, among other things, complete an enrollment application and supply all of the information required of it by 42 C.F.R. § 424.510(d)(2). Second, CMS must accept a signed agreement from the applicant which assures that all federal participation requirements are met. 42 C.F.R. § 405.2434(b)(1); *see* 42 C.F.R. § 489.13(a)(2).

Completion of an application for enrollment is not by law synonymous with acceptance. Enrollment cannot occur until CMS formally accepts a signed agreement from an applicant. An applicant may not be deemed to have been enrolled at a date that is earlier than the acceptance date. The regulations contemplate that CMS or an entity or entities 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.

2. CMS reasonably determined to accept Petitioner's application for enrollment effective May 19, 2008.

These facts are undisputed. On April 10, 2008, National Government Services (NGS), a Medicare intermediary acting on behalf of CMS, received an application from Petitioner to enroll as an FQHC. CMS Ex. 2, at 5. The application was made on a form known as a "CMS 855A". *Id.* The enrollment application contained an attestation statement signed on behalf of Petitioner on April 8, 2008 which attested specifically that Petitioner was in compliance with federal requirements governing FQHCs. CMS Ex. 4, at 3. The form was not complete and on subsequent dates Petitioner provided NGS with additional information that was necessary to complete its application for enrollment. For example, the application lacked necessary information concerning Petitioner's Public Health Service Grant. It also was missing identifying information concerning a member of Petitioner's management. Petitioner submitted additional relevant information on April 24, April 30, May 2, and May 6, 2008. CMS Ex. 2, at 8, 22, 37, 39, 45-57, 64, 68, 69, 71, 72.

On May 19, 2008 NGS forwarded to CMS the completed enrollment application. However, NGS erroneously sent the application to the wrong regional office. It rectified that error on June 11, 2008 when it forwarded the completed enrollment application to CMS's Chicago regional office. CMS Ex. 2, at 1-2; CMS Ex. 3. In forwarding the application NGS advised CMS that it had reviewed it and that it had found no evidence that the application should be denied. CMS Ex. 2, at 2; CMS Ex. 3, at 2. On June 18, 2008, CMS notified Petitioner that its request for enrollment as an FQHC had been approved with an effective date of participation of May 19, 2008. CMS Ex. 4. CMS did not penalize Petitioner for the delay caused by NGS's erroneous forwarding of Petitioner's application to the wrong office. CMS accepted the application effective the date when NGS completed its review.

The gravamen of Petitioner's argument that it should be enrolled effective April 1, 2008 is that it should not be held hostage to the administrative review process. Petitioner argues that it acted in good faith to provide expeditiously to NGS all of the information that NGS demanded of it. It asserts that, if there were delays in the review process, none of them were its fault and it should not be penalized for those delays. For example, Petitioner asserts that it had completed and submitted an initial application for

participation on March 25, 2008. Petitioner's opposition to CMS's motion for summary disposition and cross motion for summary disposition (Petitioner's brief) at 2. It asserts that it had to resubmit its application because of faulty advice that it received from NGS. *Id.*

Petitioner does not contend that it actually satisfied all regulatory requirements for enrollment as of April 1, 2008. It concedes that it had not provided NGS or CMS with all that was necessary to qualify as an FQHC by that date. In fact, the chronology of events supplied by Petitioner corroborates that it did not supply NGS with all necessary information until a date subsequent to April 1. P. Ex. A, at 2.

That Petitioner may have experienced some delays in providing NGS with all necessary information – even if those delays may have been caused by errors committed by NGS – is no basis for me to order Petitioner to be enrolled on a date that is earlier than the date when NGS completed its review of the application and found that Petitioner met all participation requirements. The regulatory criteria for enrollment allow no such exception to the rule governing when enrollment will be made effective. Even assuming all of Petitioner's complaints and assertions to be true there is nothing in the regulations which requires CMS to accept an application for enrollment on a date that is earlier than the date when the application is complete and when CMS or the entity delegated to act on its behalf have completed a review of the application.

Petitioner relies on a decision by the Departmental Appeals Board in *Family Health Services of Darke County*, DAB No. 2092 (2007) to support its argument that it should have been enrolled effective April 1, 2008. In fact, there is nothing in the *Darke County* decision that supports Petitioner's argument.

In *Darke County* a Board appellate panel remanded an administrative law judge decision with instructions that the judge decide whether CMS may have "accepted" applications for participation by two FQHCs over the course of more than two years of dealing with these entities in which CMS arguably acted as if they had been enrolled. The Board panel was particularly concerned with the possibility that the entities had supplied CMS with all of the information necessary to qualify as an FQHC even if they had not filled out and filed a formal application for FQHC participation. The Board panel remanded the case so that the administrative law judge could decide whether CMS had constructively accepted the applications at a date or dates prior to the date when CMS formally accepted them.

Darke County was predicated on the possibility that CMS received all that it needed to accept applications for FQHC and constructively accepted that information – as demonstrated by a possible course of dealing with the applicants – even if the applicants failed to fill out the requisite forms. Here, however, there is no argument that CMS received all of the requisite information and constructively accepted it at some date

earlier than May 19, 2008. Petitioner is arguing that CMS should be made to accept its application as of April 1, 2008 *even if* Petitioner had not supplied NGS or CMS with all necessary information and attestations by that date. That is an argument that is not addressed by the *Darke County* decision and, indeed, there is nothing in that decision that suggests that a Board appellate panel would agree with Petitioner's argument.

At bottom, Petitioner's argument rests on equitable considerations. It contends, essentially, that it is the victim of errors that it did not make or which were induced by the actions of others. Had the process worked optimally, according to Petitioner, it would have been enrolled by April 1, 2008. However, I have no authority to address considerations of equity. The regulations are unequivocal. An applicant for FQHC enrollment may not be enrolled until it provides all requisite information and assurances to CMS or to the entity that CMS designates to act on its behalf *and* CMS determines to accept the application as complete. In this case, acceptance did not occur until May 19, 2008 and that is the effective date of Petitioner's enrollment.

/s/
Steven T. Kessel
Administrative Law Judge