Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:		
Cass County Memorial Hospital, (CCN: 16-5560),	)	Date: May 22, 2009
Petitioner,	)	
- v. -	)	Docket No. C-09-188 Decision No.CR1955
Centers for Medicare & Medicaid Services.	)	

DECISION GRANTING SUMMARY DISPOSITION TO CENTERS FOR MEDICARE & MEDICAID SERVICES

I grant summary disposition to the Centers for Medicare & Medicaid Services (CMS) sustaining its determination to terminate the Medicare participation of Petitioner, Cass County Memorial Hospital.

I. Background

Petitioner is a critical access hospital located in Atlantic, Iowa. Its premises include a 10-bed skilled nursing facility (SNF). The SNF was certified to participate in the Medicare program. As a Medicare participant the SNF was required to comply with the requirements of sections 1819 and 1866 of the Social Security Act (Act) and of implementing regulations at 42 C.F.R. Parts 483 and 488. Its hearing rights in this case are governed by regulations at 42 C.F.R. Part 498.

Petitioner's SNF was surveyed for compliance on November 14, 2008 (November survey). The surveyors found that Petitioner was not complying with Medicare participation requirements and CMS concurred in that finding. On December 2, 2008, CMS told Petitioner that its SNF's participation in Medicare would be terminated effective January 1, 2009. CMS advised Petitioner that the basis for termination was that its SNF was not primarily engaged in providing skilled nursing services.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. CMS then moved for summary disposition. Petitioner opposed the motion.

CMS attached 11 exhibits to its motion and it designated these exhibits as CMS Ex. 1-CMS Ex. 11. Petitioner attached 14 exhibits to its brief in opposition to CMS's motion and it designated these exhibits as P. Ex. 1-P. Ex. 14. In addition, Petitioner submitted the affidavit of its administrator, which it designated as P. Ex. A. I receive all of these exhibits into the record and I cite to some of them in this decision as references. However, I make no evidentiary findings based on the exhibits. I base my decision on the law and the undisputed facts as averred by the parties.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue that I decide is whether Petitioner was in compliance with Medicare participation requirements.

B. Findings of fact and conclusions of law

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

1. In order to be eligible for participation in the Medicare program a SNF must be an institution or a distinct part of an institution that is primarily engaged in providing skilled nursing care to residents and it must comply with all Medicare participation requirements set forth in the Act and regulations.

Section 1819(a)(1)(A) of the Act defines a skilled nursing facility to be "an institution (or a distinct part of an institution) which – (1) is primarily engaged in providing to residents – (A) skilled nursing care and related services . . . ."

The intent of the Act is clear. In order to qualify as a SNF a facility must, at a minimum, be organized as an entity whose purpose is to provide skilled nursing care in compliance with Medicare participation requirements. That means that its services must be provided separately and apart from any entity within which the facility is organized. Commingling the physical premises or the services offered by a SNF with those of other enterprises makes it difficult or impossible for CMS to ascertain whether those services are being offered in compliance with the requirements of law.

The Secretary of the United States Department of Health and Human Services describes via regulation the criteria that a facility must meet to satisfy the requirement that it be a distinct part of another institution. 42 C.F.R. § 483.5(b). In addition to satisfying all other Medicare participation criteria a distinct part SNF must be physically distinguishable from the larger institution that houses it.

Being "primarily engaged" in providing services means actually providing the services for which certification is sought or received. *Arizona Surgical Hospital, LLC,* DAB No. 1890 (2003). The capacity to provide services is not legally the equivalent to actually providing them. A SNF which merely has the capacity to provide services but which does not actually provide them is not primarily engaged in providing services and not eligible to participate in the Medicare program. *See United Medical Home Care, Inc.*, DAB No. 2194 (2008).

The Act and implementing regulations at 42 C.F.R. Part 483 set forth a comprehensive regulatory scheme that every SNF must comply with as a prerequisite to participating in Medicare. For example, a SNF must:

- Maintain a quality assessment and assurance committee, consisting of its director of nursing services, a physician designated by the facility, and at least three other members of the facility's staff, which meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary, and which develops and implements appropriate plans of action to correct identified deficiencies. Act, section 1819(b)(1)(B);

- Use the services of a registered professional nurse at least eight consecutive hours a day, seven days a week. Act, section 1819(b)(4)(C)(i); and

Failure to comply with any participation requirement, including the ones that I have cited, is grounds for termination of participation in Medicare. Act, section 1866(b)(2).

2. The undisputed material facts of this case establish that Petitioner failed to qualify for participation as a distinct part of an institution that is primarily engaged in providing skilled nursing care to residents. They establish also that Petitioner was not complying with Medicare participation requirements.

These are the facts which I find to be undisputed and the basis for my decision. Petitioner's primary function is as a hospital. It operates three corridors, or hallways, in which it houses patients. Petitioner purported to operate its SNF as seven rooms in one of those hallways. Other rooms in that hallway are reserved for hospital inpatients. The facility's nursing station is at the convergence of the three hallways in the hospital. The nurses who sit at that station oversee both the operations of the hospital and those of the SNF. The hospital does not restrict access to its SNF so that either patients or staff of the hospital may freely commingle with SNF residents, to the extent that there are any of them.

The SNF is not physically separated from the hospital itself. There is no separate entrance or exit for the SNF. There is no sign to demarcate the SNF from the hospital. Visitors entering the facility could not distinguish that part which is the hospital from the SNF.

Petitioner's SNF has no full-time staff who are dedicated to its operations. Staffing is comprised of hospital staff who are assigned to the SNF on an as-needed basis. Records of the staff are not maintained separately for SNF personnel. Petitioner does not have separate management for its SNF. The SNF does not have a quality assurance committee that is separate and distinct from that which the hospital has, nor is there a physician who has been assigned to sit exclusively as a member of the SNF's quality assurance committee.

As of November 14, 2008, Petitioner's SNF had a total of two residents. Both of these individuals were hospice patients.

These undisputed facts establish that Petitioner was not operating its SNF in compliance with Medicare participation requirements. Consequently, CMS was authorized to terminate Petitioner's participation in Medicare. First, Petitioner's SNF was not a distinct part of Petitioner. The facts show that Petitioner did not maintain a separate facility for its SNF. Rather, the SNF – to the extent that it existed at all – consisted merely of a few beds on one corridor of Petitioner's hospital. There was nothing about the SNF's operation that supports a finding that

it was a distinct part within the hospital. It was not physically distinguishable from the hospital. It had no separate entrance or exit. It had no sign demarcating it as a SNF. It had no separate nursing station. Hospital staff and patients were free to commingle with any potential residents in the SNF. It had no dedicated staff and no dedicated quality assurance committee.

Second, the undisputed facts establish that, as of the November survey, Petitioner's SNF was not primarily engaged in providing nursing care to residents. As of the November survey the SNF had only two residents and these were individuals who were enrolled in the Medicare hospice program. I take notice that hospice care is a special program developed to provide care to an individual who has been certified to be within the final six months of his or her life. Although hospice care clearly includes many of the elements of skilled nursing care it does not include all of those elements. For example, SNFs are expected to provide care for individuals who are anticipated to have only short stays while they recover from medical problems and, for these individuals, SNFs must provide therapeutic and recuperative care.

In any event, the number of residents at Petitioner's SNF as of the November survey was de minimis and insufficient for Petitioner to establish that it met Medicare participation requirements. There simply were insufficient residents on board for CMS to ascertain whether the SNF was providing all requisite services in a manner that complied with Medicare participation requirements. *See United Medical Home Care, Inc.*, DAB No. 2194.

Third, the undisputed facts show that, in at least two respects, Petitioner's SNF failed to satisfy Medicare participation requirements. Petitioner failed to maintain a quality assessment and assurance committee that complied with statutory requirements. Act, section 1819(b)(1)(B). A facility's quality assurance committee must consist of the facility's director of nursing services, a physician designated by the facility, and at least three other members of the facility's staff. That committee must meet at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary. And, the committee must develop and implement appropriate plans of action to correct identified quality deficiencies. *Id.*

Petitioner had no dedicated quality assessment and assurance committee. Moreover, Petitioner has furnished no facts showing that whatever quality assurance committee it may have had for its hospital operations met at least quarterly to review the activities of the SNF.

Petitioner is additionally required by statute to use the services of a registered professional nurse at least eight consecutive hours a day, seven days per week. Act, section 1819(b)(4)(C)(i). The Act contains no exceptions to this requirement. It does not, for example, allow a hospital with a distinct part SNF to assign staff to the SNF on an as-needed basis. The undisputed facts show that Petitioner had no dedicated staff assigned to it. Staff were assigned as the need arose. That is a clear violation of the law.

Petitioner makes a number of arguments in response to CMS's motion. None of them raise valid defenses. As an element of these arguments Petitioner avers facts which it contends raise disputes which may not be adjudicated by summary judgment. I accept as true all of the facts asserted by Petitioner. None of them call into question the undisputed facts that I rely on for this decision. Nor do these facts establish a basis for me to rule against CMS as a matter of law. I find Petitioner's arguments to be without merit even if the facts on which Petitioner relies are true.

Petitioner asserts that it is a critical access hospital enrolled in the Medicare program under 42 C.F.R. Part 485. Petitioner's brief at 2. It asserts that it has "authority to utilize its licensed hospital beds as swingbeds for the provision of skilled nursing care." *Id.;* P. Ex. A, at 2 ¶ 6. From this assertion Petitioner appears to be arguing that it is authorized explicitly by some entity to operate its SNF as an integrated element of its hospital operations and not as a distinct part of the facility. Thus, it seems to be contending that it enjoys some explicit exemption from the Act's requirement that the SNF be operated as a distinct part.

It is unclear to me the nature of Petitioner's asserted authority to operate swingbeds which have the dual function as hospital and skilled nursing beds. Petitioner has cited to no source of this alleged authority. It has provided me with no document showing that any agency of government ever authorized it explicitly to commingle its SNF and hospital operations. But, even assuming that some agency granted Petitioner this authority as part of its hospital license or even as part of its hospital certification, that does not amount to an exception from the law's requirement that Petitioner operate its SNF as a distinct part of its hospital facility. Petitioner has identified no facts to show that CMS ever granted it such an exception. As I explain above, there are sound reasons for requiring a SNF that is operated by another entity to function as a distinct part of that entity.

Petitioner then appears to argue that it is entitled to receive an exception or a waiver from Medicare participation requirements even if it has not been formally granted one. It argues that it has always been aboveboard in its intentions to commingle its SNF operations with those of the hospital and that this was understood and accepted by relevant authorities. Petitioner's brief at 2-4.

As support for this argument Petitioner contends that it obtained a certificate of need from the State of Iowa to operate its SNF as a distinct part of the hospital. This certificate, according to Petitioner, was granted on the basis of a plan that it presented to the Iowa Department of Public Health which implied that it would be using hospital beds as SNF beds for approximately 15 percent of inpatient days at the hospital. *Id.* According to Petitioner, it made it:

> clear from the beginning that it had no intention of hiring any new staff or changing any of . . . [Petitioner's] then current staffing levels to account for the change from acute care to skilled beds . . . . Thus, from its inception, the SNF was not intended to be separately staffed.

Petitioner's brief at 4.

Petitioner also argues that its SNF has been subject to surveys in the past that were conducted on behalf of CMS but that it had never been told that the SNF had run afoul of, or was being operated contrary to, basic Medicare participation requirements. Petitioner's brief at 4-6. It also asserts that it had very limited SNF activities in both 2007 and 2008, consisting of only 20 days of resident stay in the SNF in 2007 and 43 days of resident stay in the SNF in 2008. Petitioner seems to suggest that CMS either knew or should have known about these very limited SNF operations but never cited them prior to November 2008 as a basis for terminating Petitioner's SNF certification. *Id.*

I conclude that Petitioner is not entitled to a waiver of Medicare requirements governing distinct part SNFs even if it always made its intentions known to commingle its hospital and SNF care and even if CMS may have known about such commingling and the very limited scope of Petitioner's SNF care. First, I have no authority to order CMS to waive Medicare requirements. I am unaware of any authority which would allow me to compel CMS to grant such a waiver.

Second, Petitioner's argument seems to devolve into an assertion that it is entitled to operate its SNF as an entity whose activities are commingled with those of Petitioner's hospital because various government agencies knew what Petitioner was doing but chose not to object. Effectively, Petitioner's argument is an assertion of equitable estoppel or laches against CMS.

The fact that entities of government – including CMS – might have been aware that Petitioner commingled its SNF and hospital activities does not provide any legal justification for Petitioner to continue to do so. Petitioner's argument is without merit because there is nothing in either the Act or implementing regulations that allows for CMS to be estopped as Petitioner contends it should be.

Petitioner's next argument is to assert that CMS's termination of its Medicare participation was arbitrary and capricious. It characterizes the CMS determination to terminate its participation as "a clear case of an administrative agency abusing its discretion in a most arbitrary and capricious manner." Petitioner's brief at 7. This argument is a restatement of Petitioner's equitable estoppel argument. *Id.*, at 6-8. I find it to be without merit for the same reason that I find Petitioner's other iteration of the same argument to be without merit. Nothing in the Act or in implementing regulations would allow me to apply the doctrine of equitable estoppel against CMS.

Petitioner then asserts that it should have been given an opportunity to remediate the noncompliance identified by CMS. It contends that, absent a finding of immediate jeopardy-level noncompliance, it should have been given a period of time within which it could have corrected any problems identified at the November survey or subsequently by CMS. Petitioner's brief at 8-9.

However, Petitioner concedes that CMS has the authority to terminate the participation of a SNF where there is noncompliance, whether or not that noncompliance is at the immediate jeopardy level. Petitioner's brief at 8. Indeed, CMS's authority to terminate a provider's participation for *any* level of noncompliance is made explicit in the Act. Act, section 1866(b)(2)(A). Consequently, there is no merit to Petitioner's argument that CMS should have allowed it the opportunity to remediate before terminating Petitioner's Medicare participation.

Besides, it would not have been possible for Petitioner to remediate the noncompliance that CMS identified. Petitioner's noncompliance was fundamental and irremediable. In order to comply with Medicare participation requirements Petitioner would have had to: physically segregate its SNF operations from those of its hospital; hire and employ a dedicated staff that provided care only to SNF residents; establish separate committees to evaluate and oversee the care provided by the SNF; and, above all, to serve a meaningful population of residents. These changes in operation are antithetical to what Petitioner had established. As Petitioner acknowledges, its entire SNF operation was premised on the idea that it could commingle its SNF and hospital activities and devote time and space to SNF functions only on an as needed basis.

Petitioner contends that it does in fact have a quality assurance committee that is responsible to oversee the care provided by its SNF. Petitioner's brief at 10; P. Ex. A, at 7 ¶ 26. The "fact" that Petitioner relies on is a bare conclusion by Petitioner's administrator that Petitioner has such a committee. *Id.* That assertion, assuming it to be true, begs the question of whether Petitioner's quality assurance committee satisfies legal requirements for a SNF quality assurance committee.

Petitioner has provided no documentation to explain how its quality assurance committee is structured or how it operates. In particular, Petitioner does not deny CMS's assertion that it had no *separate* quality assurance committee dedicated only to overseeing SNF operations which was composed of the individuals whose membership is required by law and which met on at least a quarterly basis.

Petitioner argues additionally that it has staffed its hospital and the SNF in compliance with Iowa state regulations that, allegedly, allow for the sharing of certain categories of staff between a hospital and a SNF. Petitioner's brief at 10-11. However, in making this argument Petitioner concedes that: Iowa regulations require a SNF and a hospital to maintain separate staff for licensure purposes; and, that it does not maintain separate staff for its SNF.

Regardless of what Iowa law might say, Medicare requirements for participation as a SNF are clear. Iowa's laws do not trump the federal statutes governing Medicare participation. A participating SNF must have dedicated staff and, in particular, the dedicated services of a registered professional nurse at least eight hours a day and seven days a week. Petitioner acknowledges that it did not satisfy these requirements.

Petitioner also effectively concedes that it has not had residents receiving skilled nursing care since February 2008. Petitioner's brief at 11. It asserts that it has "not been able to identify any regulatory requirement that a distinct part SNF unit must maintain any particular census, or have individuals admitted at all times in order to keep the provider agreement in good standing." *Id.* Petitioner may be correct in asserting that there is no regulation that states this requirement verbatim. However, and as the Departmental Appeals Board has held, actively providing care to residents is an essential element of a provider being primarily engaged in providing services. *United Medical Home Care, Inc.,* DAB No. 2194, at 10, 12; *Arizona Surgical Hospital, LLC,* DAB No. 1890, at 6-8. Having the hypothetical or potential capacity to provide care is simply not the equivalent of actually providing such care. *Arizona Surgical Hospital, LLC,* DAB No. 1890, at 8.

Finally, Petitioner asserts that CMS's determination to terminate its Medicare participation was made in a manner that is contrary to Medicare participation regulations. Petitioner's brief at 14-16. As support for this argument Petitioner cites to 42 C.F.R. § 424.540, a regulation which addresses the circumstances when CMS may deactivate a provider or supplier's Medicare billing privileges. Among the reasons allowing deactivation stated by the regulation is failure by a provider or supplier to submit Medicare reimbursement claims for a period of 12 consecutive calendar months. 42 C.F.R. § 424.540(a)(1). Petitioner asserts that this regulation:

> stands for the fact that the mere presence of periods of inactivity, even lengthy periods of up to and in excess of one year, are insufficient to find that a SNF is not primarily engaged in the provision of services to residents and thus ineligible to participate in the Medicare program.

Id., at 15.

I find this argument to be unpersuasive. The section of the regulations cited by Petitioner is intended to give CMS discretion to cease accepting Medicare reimbursement claims from a provider or a supplier that has been inactive for a period of 12 consecutive months or more. It gives CMS a tool that it may use in addition to terminating a provider's participation where that provider is not primarily engaged in providing services to beneficiaries. But, that tool does not limit CMS's authority, it supplements it. Thus, CMS could terminate the participation of a provider who had ceased claims activity for 12 or more consecutive months if it found that the provider had ceased providing any care to beneficiaries *and* it could also cease accepting and processing reimbursement claims from that provider. But, nothing in the regulation cited by Petitioner limits CMS's choice of remedies.

/s/
Steven T. Kessel
Administrative Law Judge