Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Union Hospital, Inc.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-512

Decision No. CR2422

Date: September 1, 2011

DECISION

I grant summary judgment in favor of the Centers for Medicare and Medicaid Services (CMS) and against Petitioner, Union Hospital, Inc. I find that the undisputed material facts establish that three entities affiliated with Petitioner – Associated Physicians & Surgeons Clinic, LLC (AP&S), Providence Medical Group, LLC (PMG), and The Hope Center (Hope) – do not qualify as provider-based facilities that are part of Petitioner for Medicare reimbursement purposes.

I. Background

On December 17, 2010, CMS notified Petitioner that it had inappropriately billed the Medicare program for services provided incident to physicians' services at AP&S, PMG, and Hope. In its notice to Petitioner, CMS asserted that Petitioner could only bill for services that were performed at a hospital or at an off-site location that qualified under Medicare regulations as a department of a hospital. CMS advised Petitioner that services provided at these three entities did not satisfy Medicare reimbursement criteria for provider-based reimbursement because these entities were not a department of Petitioner.

Petitioner requested reconsideration of this determination. On reconsideration, CMS again ruled against Petitioner. Petitioner then requested a hearing, and the case was assigned to me for a hearing and a decision.

CMS moved for summary judgment. With its motion CMS filed proposed exhibits that it identified as CMS Exhibit (Ex.) 1 – CMS Ex. 21. Petitioner opposed CMS's motion. It filed proposed exhibits that it identified as P. Ex. 1 – P. Ex. 9. I receive all of the parties' exhibits into the record.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue is whether AP&S, PMG, and Hope qualify as a department, or departments, of Petitioner for Medicare billing purposes.

B. Findings of Fact and Conclusions of Law

I find that the undisputed facts establish that neither AP&S, PMG, nor Hope qualify as a department of Petitioner because none of these entities is operated under the same license as is Petitioner.

It is in the financial interest of a hospital such as Petitioner to claim reimbursement under Medicare for services performed in its facilities, or in facilities that it owns or operates. Equally, it is in the interest of a hospital to claim reimbursement for services that are provided by facilities that are affiliated with it but that are not under its direct ownership or control. Recognizing that fact, the Secretary of the Department of Health and Human Services has determined that there must be rules that clearly define the circumstances under which a hospital may bill services as "provider-based." Not to do so would "risk increasing program payments and beneficiary coinsurance with no commensurate benefit to the Medicare program or to beneficiaries . . . ." 65 *Fed. Reg.* 18,434-01, 18504 (Apr. 7, 2000). Thus, Medicare Part B will only pay for hospital services and supplies furnished incident to a physician's services to outpatients, if the services are furnished in a hospital or in a facility or location that is a "department" of a hospital.

The term "department" is defined at 42 C.F.R. § 413.65(a)(2) to be:

> A facility or organization that is either created by, or acquired by, a main provider for the purpose of furnishing health care services of the same type as those furnished by the main provider under the name, ownership, and financial and administrative control of the main provider . . . A department of a provider comprises both the

> specific physical facility that serves as the site of service of a type for which payment could be claimed under the Medicare or Medicaid program, and the personnel and equipment needed to deliver the services at that facility . . . .

The regulations presume that a free-standing facility that is owned by a hospital but that is not located on the hospital campus is not a department of that hospital. 42 C.F.R. § 413.65(b)(4). The presumption that a free-standing facility is not a hospital department is rebuttable, but the burden falls squarely on the hospital seeking to establish that facility as a department to prove that the facility satisfies all applicable criteria for department status. *Id.*

Those criteria are set forth at 42 C.F.R. § 413.65(d). A facility or entity must satisfy *all* of the criteria stated in this regulation to qualify as a department. Nothing in the regulation permits a facility or an entity to be qualified as a department of a hospital, if it satisfies less than all of the regulatory criteria. Nor are there provisions in the regulation for waiver of the requirement that all criteria be met.

The undisputed facts establish that Petitioner is a Medicare participating hospital in the State of Indiana. AP&S, PMG, and Hope are free standing facilities also located in Indiana. Prior to September 2006, these entities were independent medical oncology groups housed in buildings that were not on Petitioner's campus. In September 2006, Petitioner entered into agreements with each of them. CMS Ex. 6 at 2. The stated purpose of these agreements – described by Petitioner's chief financial officer as "management service agreements" – was to enable each of the three entities to provide services to the public as a department of Petitioner. CMS Ex. 6 at 1, 2.

The regulatory presumption is that AP&S, PMG, or Hope, given that they are free-standing, are not departments of Petitioner, even if they have management service agreements with Petitioner and even if the agreements state as a purpose that the entities become a department of Petitioner. Petitioner may overcome that presumption, only if it proves that the three entities meet all of the regulatory criteria for department status.

One of these criteria is that the entity for which department status is sought must be operated under the same license as the hospital, except in the situation where State law requires that the entity be licensed separately. 42 C.F.R. § 413.65(d)(1). Indiana law does not require that an entity such as AP&S, PMG, or Hope, be licensed separately from Petitioner. *See* 410 IND. ADMIN. CODE 15-1.3-1(c), 410 IND. ADMIN. CODE 15-1.3-2; CMS Ex. 1 at 3, CMS Ex. 21, ¶¶ 1,2,5. Consequently, these entities must be operated under the same license as Petitioner

to be a department or departments of Petitioner for Medicare reimbursement purposes.

The undisputed facts establish that, during the years 2007-2010 (the time period that is at issue in this case), none of the three entities were included on Petitioner's State license to operate an acute care hospital. CMS Ex. 8 – CMS Ex. 11. Therefore, Petitioner, AP&S, PMG, and Hope failed to satisfy the regulatory requirement that the entities be operated under Petitioner's license, and these entities may not be classified as a department or departments of Petitioner for Medicare reimbursement purposes.

Petitioner argues that I should not hear and decide the licensure issue. To do so, according to Petitioner, would deny it due process. Petitioner asserts that CMS failed to cite the issue of licensure in its reconsideration determination. CMS found other failures by Petitioner and the three entities to comply with the requirements of 42 C.F.R. § 413.65(d) but, on reconsideration, failed to make a specific finding that Petitioner, AP&S, PMG, and Hope were not operated under the same license. That omission, according to Petitioner, is a favorable finding on the licensure issue. However, according to Petitioner, even if that omission is not a favorable finding, the failure by CMS to make a finding on reconsideration as to the licensure issue absolutely bars it from raising that issue now.

I find this argument to be without merit. Nothing bars CMS from raising issues before me not decided at reconsideration, so long as it gives Petitioner adequate notice and Petitioner has opportunity to be heard on those issues. *Columbus Nursing and Rehab Ctr.*, DAB No. 2398, at 9 n.4 (2011). CMS raised the issue of licensure in its motion for summary judgment. Petitioner had 30 days to address the issue. That is ample notice and more than ample opportunity for Petitioner to frame a defense to CMS's allegations. That is especially so, because, even if the issue of licensure was not addressed in the reconsideration determination, it was clearly a basis for CMS's initial determination, and Petitioner knew that CMS had at one point found that Petitioner and the three entities had failed to meet the "same license" criterion of the regulation.

Petitioner does not contend that there is any dispute of fact as to whether Petitioner, AP&S, PMG, and Hope were operated under the same license. Effectively, it concedes that the three entities were licensed separately from Petitioner. However, it argues that, even if AP&S, PMG, and Hope were not operated under the same license as Petitioner, there exist facts that would show that these entities essentially operated under the same terms and conditions as Petitioner's license. In effect, Petitioner argues that AP&S, PMG, and Hope were functioning under circumstances that were equivalent to being operated under

Petitioner's license. That, according to Petitioner, is de facto compliance with the same license requirement of the regulation.

Petitioner argues that it has facts to prove that it had requested the State of Indiana to include the three entities as part of Petitioner's hospital license. It argues also that the American Osteopathic Association (AOA) had confirmed the operation of the three entities under standards deemed by CMS to verify compliance with the conditions of participation for hospitals. Petitioner's Brief at 18. Thus, according to Petitioner, it operated AP&S, PMG, and Hope in a manner that was indistinguishable from the way in which these entities would be operated, were they to be licensed in common with Petitioner. *Id.*

This argument fails as a matter of law. The regulation does not recognize an equivalent status to a common license. Thus, a facility does not establish itself to be a department of a hospital by proving that the manner in which it was operated was equivalent to being operated under the same license as the hospital. Nor may a facility argue that it met all the criteria for a common license but did not share a license for purely technical reasons. Finally, a facility may not argue that it should be "deemed" to be licensed in common with a hospital because it met the standards of a private accreditation body such as AOA.

The issue of equivalence was addressed and decided by the Departmental Appeals Board (Board) in *Physicians' Hosp. in Anadarko,* DAB No. 2101 (2007). The Board held in that case that the plain meaning of the regulation, as well as the regulation's preamble, made it evident that there is no exception (other than that stated in the regulation) to the rule that a subordinate facility had to be operated under the same license as a hospital in order to qualify as a department of the hospital. Thus, the regulation does not recognize the concept of "equivalence" to common licensure. *Physicians' Hosp. in Anadarko,* DAB No. 2101 (2007).

CMS argues in its motion that the three entities did not satisfy other regulatory criteria for operation as a department of Petitioner. For example, CMS asserts that AP&S, PMG, and Hope did not satisfy the regulatory requirement for department status that the subordinate facility be held out to the public and other payers as being part of the main provider (Petitioner). CMS's Brief at 15-19. I do not address this argument or other arguments concerning additional regulatory criteria for department status because it is unnecessary that I do so. The undisputed facts establish that Petitioner, AP&S, PMG, and Hope were not operated under the same license, and that is enough to show, as a matter of law, that Petitioner and the

three subordinate facilities cannot overcome the regulatory presumption that the facilities were not a department or departments of Petitioner.

/s/
Steven T. Kessel
Administrative Law Judge