

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Freeman Oak-Hill Health System
(CCN: 260137),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-132

Decision No. CR4955

Date: October 17, 2017

DECISION

Petitioner, Freeman Oak-Hill Health System, seeks reversal of the reconsidered determination by the Centers for Medicare & Medicaid Services (CMS) affirming CMS's initial determination to deny provider-based status to Petitioner's Miami, Oklahoma facility (Miami facility). However, Petitioner has not shown that its Miami facility meets the provider-based status requirements of 42 C.F.R. § 413.65. In particular, Petitioner has not demonstrated that it satisfied the location-based requirement found at § 413.65(e)(3)(vii). Therefore, I affirm CMS's reconsidered determination denying provider-based status to Petitioner's Miami facility.

I. Background and Procedural History

Petitioner operates a hospital known as Freeman West Hospital. The hospital campus is located in Joplin, Missouri. Located on that campus is the Freeman Heart and Vascular Institute (Institute), which Petitioner also operates to provide inpatient hospital care to cardiology patients at Freeman West Hospital. As part of a cardiac outreach program, the

Institute opened the Miami facility. Petitioner's Brief at 1-2. Petitioner seeks provider-based status for its Miami facility. Wisconsin Physicians Service (WPS), the Medicare contractor, received Petitioner's application for provider-based status¹ for the Miami facility on September 25, 2013. CMS Exhibit (Ex.) 6 at 1. On March 7, 2014, WPS requested additional information from Petitioner regarding the application. CMS Ex. 4. Ultimately, WPS recommended that CMS deny the application. CMS Ex. 1.

On April 11, 2014, CMS denied Petitioner's application for provider-based status for the Miami facility on grounds that the Miami facility did not satisfy the requirement for provider-based status described at 42 C.F.R. § 413.65(e)(3)(vii). CMS Ex. 2. Petitioner timely requested reconsideration on May 14, 2014. CMS Ex. 3 at 1. On reconsideration, CMS upheld the initial denial of provider-based status. CMS Ex. 3 at 2.

On November 24, 2015, Petitioner requested a hearing. The case was originally assigned to Administrative Law Judge Scott Anderson; it was reassigned to me on August 25, 2017. On December 7, 2015, Judge Anderson issued an acknowledgment and pre-hearing order (Pre-hearing Order) establishing a briefing schedule. As directed in the Pre-hearing Order, CMS and Petitioner filed prehearing exchanges, including prehearing briefs (CMS Br. and P. Br., respectively), exhibit and witness lists, and proposed exhibits. CMS submitted nine exhibits (CMS Exs. 1-9), and Petitioner submitted four exhibits (P. Exs. A-D).² As neither party has objected to any of the proposed exhibits, I admit all of them into the record. Neither party submitted witness testimony or identified witnesses to testify.

Along with its prehearing exchange, Petitioner moved for summary judgment. However, because neither party has identified witnesses to testify, I determine that an oral hearing is unnecessary and that it is appropriate to decide this case based on the written submissions of the parties. Civil Remedies Division Procedures § 19(d); Pre-hearing Order ¶¶ 10, 13. I therefore need not decide whether the criteria for summary judgment are met.

¹ The regulation refers to the application as the provider-based "attestation." 42 C.F.R. § 413.65(b)(3).

² Petitioner did not mark its exhibits as directed in paragraph 6 of the Pre-hearing Order. That order warned the parties that improperly marked exhibits may not be admitted into evidence.

II. Issue

The issue in this case is whether Petitioner's Miami facility qualifies for provider-based status under 42 C.F.R. § 413.65.

III. Jurisdiction

I have jurisdiction to hear and decide this case. 42 C.F.R. §§ 498.3(b)(2), 498.22; *Union Hospital, Inc.*, DAB No. 2463 at 2 (2012).

IV. Discussion

A. Statutory and Regulatory Framework

Petitioner, as a hospital, is a “provider of services” (provider) under the Social Security Act (Act). Act § 1861(u); 42 C.F.R. § 400.202. Under Medicare Part A, a provider is entitled to reimbursement for qualified medical care and services it furnishes to Medicare beneficiaries. Act §§ 1811-12, 1814-15. For purposes of payment under the program, Medicare recognizes that a provider, referred to as a “main provider,” may own and operate other facilities that can be located either within or without the provider's main building or campus. 63 Fed. Reg. 47,552, 47,587 (Sept. 8, 1998); *see also* 42 C.F.R. § 413.65(a)(2) (defining main provider as “a provider that either creates, or acquires ownership of, another entity to deliver additional health care services under its name, ownership, and financial and administrative control”). The Act does not refer to provider-based status, but such status “became more important to main providers due to the more favorable Medicare reimbursement available to provider-based entities” compared to reimbursement rates for stand-alone facilities. *Mercy Hospital Lebanon*, DAB CR3320 at 3 (2014); *see also* 63 Fed. Reg. at 47,587-88. To gain a measure of control over provider-based status, CMS's predecessor, the Health Care Financing Administration, proposed a new regulation, 42 C.F.R. § 413.65. The final rule promulgating 42 C.F.R. § 413.65 was issued on April 7, 2000. 65 Fed. Reg. 18,434, 18,504-22, 18,538-41 (Apr. 7, 2000) as amended at 65 Fed. Reg. 58,919, 58,919-20 (Oct. 3, 2000) (delaying the effective date of the regulation).

For a main provider like Petitioner to receive the higher provider-based reimbursement rate for qualified medical care and services delivered to Medicare-eligible beneficiaries at its off-campus facility, it must show that all of the criteria for provider-based status established by 42 C.F.R. § 413.65 are met. *See Union Hospital*, DAB No. 2463 at 2 (quoting 42 C.F.R. § 413.65(d), (e)). The regulation sets forth the following definitions relevant in this case:

Department of a provider means 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, in accordance with the provisions of this section. A department of a provider comprises both the specific physical facility that serves as the site of services 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. A department of a provider may not by itself be qualified to participate in Medicare as a provider under § 489.2 of this chapter, and the Medicare conditions of participation do not apply to a department as an independent entity. For purposes of this part, the term “department of a provider” does not include an RHC [Rural Health Clinic] or, except as specified in paragraph (n) of this section, an FQHC [Federally Qualified Health Center].

Main provider means a provider that either creates, or acquires ownership of, another entity to deliver additional health care services under its name, ownership, and financial and administrative control.

Provider-based entity means a provider of health care services, or an RHC as defined in § 405.2401(b) of this chapter, that is either created by, or acquired by, a main provider for the purpose of furnishing health care services of a different type from those of the main provider under the ownership and administrative and financial control of the main provider, in accordance with the provisions of this section. A provider-based entity comprises both the specific physical facility that serves as the site of services 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. A provider-based entity may, by itself, be qualified to participate in Medicare as a provider under § 489.2 of this chapter, and the Medicare conditions of participation do apply to a provider-based entity as an independent entity.

Provider-based status means the relationship between a main provider and a provider-based entity or a department of a provider, remote location of a hospital, or satellite facility, that complies with the provisions of this section.

42 C.F.R. § 413.65(a)(2) (italics in original). A facility that does not meet provider-based status requirements is treated as a free-standing facility. 42 C.F.R. § 413.65(a)(2), (b).

Subject to exceptions not applicable here, to make a showing that § 413.65's criteria for provider-based status are met, the main provider must submit an attestation to CMS pursuant to 42 C.F.R. § 413.65(b)(3)(ii). CMS then reviews the attestation and makes an initial determination about whether the main provider has shown its off-campus facility qualifies for provider-based status. 42 C.F.R. §§ 413.65(b)(3)(iv), 498.3(b)(2). If the main provider is dissatisfied with CMS's initial determination, it may request reconsideration of the determination in accordance with 42 C.F.R. § 498.22. If necessary, the main provider may then seek further review by an administrative law judge and the appellate division of the Departmental Appeals Board (DAB). *Union Hospital*, DAB No. 2463 at 2 (citing 42 C.F.R. §§ 498.3(b)(2), 498.22, 498.82). Administrative law judge review is conducted under the procedures established by 42 C.F.R. pt. 498. Such review is *de novo*, that is, "a fresh look by a neutral decision-maker at the legal and factual basis for" CMS's action. *Life Care Ctr. of Bardstown*, DAB No. 2479 at 32 (2012) (citation omitted); *The Residence at Salem Woods*, DAB No. 2052 (2006); *Cal Turner Extended Care*, DAB No. 2030 (2006); *Beechwood Sanitarium*, DAB No. 1906 (2004); *Emerald Oaks*, DAB No. 1800 at 11 (2001); *Anesthesiologists Affiliated*, DAB CR65 (1990), *aff'd*, 941 F.2d 678 (8th Cir. 1991).

B. Findings of Fact, Conclusions of Law, and Analysis

1. As Petitioner and the Miami facility are not located in the same state, they must be located in adjacent states "consistent with the laws of both states" in order for the Miami facility to qualify for provider-based status. 42 C.F.R. § 413.65(e)(3)(vii).³

As relevant in this case, assuming the other requirements contained in § 413.65 are met, a main provider can only obtain provider-based status for an off-campus facility "if the [off-campus] facility . . . and the main provider are located in the same State or, when consistent with the laws of both States, in adjacent States." 42 C.F.R. § 413.65(e)(3)(vii). The parties agree that Petitioner opened the Miami facility and submitted an attestation seeking provider-based status for that facility. P. Br. at 1-2; CMS Br. at 1; CMS Ex. 6.

³ My findings of fact/conclusions of law appear as headings in bold italic type.

Therefore, I find that Petitioner is a “[m]ain provider.” 42 C.F.R. § 413.65(a)(2) (italics deleted). CMS does not dispute that the Miami facility is an off-campus facility of the type that may qualify for provider-based status. CMS Br. at 4. Further, the parties agree that Petitioner’s main hospital campus and the Miami facility are not located in the same state but are instead located in Missouri and Oklahoma, respectively. P. Br. at 1-2; CMS Br. at 1. Missouri and Oklahoma are adjacent states. P. Br. at 2; CMS Br. at 6. Consequently, for Petitioner to obtain provider-based status for its Miami facility, it and the Miami facility must be located in those adjacent states “consistent with the laws of both states” 42 C.F.R. § 413.65(e)(3)(vii).

2. *Although Petitioner and the Miami facility are located in adjacent states, Missouri (Petitioner) and Oklahoma (Miami facility), the Miami facility is not located in Oklahoma consistent with the laws of Oklahoma.*

a. *Under Oklahoma law, Petitioner’s Miami facility is an outpatient department, not an outpatient facility, and is thus subject to Oklahoma’s licensing requirements for outpatient departments. OKLA. ADMIN. CODE § 310:667-27-1(f).*

The parties’ disagreement in this case centers on what is required for Petitioner’s Miami facility to be located in Oklahoma “consistent with” Oklahoma law.⁴ To resolve this legal question, I must determine whether Petitioner’s Miami facility is an “outpatient department” of Petitioner, as CMS contends, or whether the Miami facility is, instead, an “outpatient facility” as Petitioner contends. CMS Br. at 3-7; P. Br. at 2-4. Whether the Miami facility is an outpatient “department” or an outpatient “facility” is important under Oklahoma law because an outpatient department must “be located in the hospital facility or at a campus licensed as part of the hospital,” OKLA. ADMIN. CODE § 310:667-27-1(f), whereas an outpatient facility that is “located at a different address from a hospital is eligible to be licensed as part of the hospital but is not required to be licensed,” *id.* § 310:667-1-3(f)(3). In summary, it is CMS’s position that, as an outpatient department, the Miami facility must be licensed under Oklahoma law, while Petitioner argues that Oklahoma law imposes no such requirement, because its Miami location is an outpatient facility.

⁴ CMS does not contend that Petitioner’s main provider location in Missouri is not “consistent with” Missouri law, and the record establishes that Petitioner’s Missouri hospital campus was properly licensed as a general acute care hospital. CMS Ex. 8.

The parties cite to no legal authority under Oklahoma law in support of their competing contentions that the Miami facility is either an outpatient department under § 310:667-27-1 of Oklahoma's administrative code or an outpatient facility under § 310:667-1-3(f)(3). Nor does it appear that any provision of Oklahoma law defines these terms or explains what factors establish that an entity is one or the other. At a minimum, it appears by the plain language of §§ 301:667-1-3 and 301:667-27-1 that an entity cannot be both an outpatient department and an outpatient facility, since the former is required to be located at a campus licensed as part of the hospital whereas the latter is *not* required to be licensed as part of the hospital.

Notwithstanding that Oklahoma law does not offer a bright-line rule distinguishing an outpatient department from an outpatient facility, I find that a preponderance of the evidence before me establishes that the Miami facility is an outpatient department of Petitioner, not an outpatient facility. In making this determination, I give significant weight to Petitioner's own statements describing the Miami facility as an outpatient department. In its attestation, Petitioner represented to CMS that the Miami facility is a "[d]epartment of the provider." CMS Ex. 6 at 4. Later in the attestation, Petitioner answered a series of questions that apply only to hospital outpatient departments. CMS Ex. 6 at 9-10. There would have been no need to respond to these questions if the Miami facility was not an outpatient department. *Id.* Petitioner has only taken up the contradictory position that the Miami facility is actually an outpatient facility during the course of this litigation, after it discovered a strong incentive to backtrack on its attestation. I find Petitioner's attestation to be far more credible than its bare statement in its brief that the Miami facility is a mere "outpatient facility of a Missouri hospital." *Compare* CMS Ex. 6 at 4, 9-10 *with* P. Br. at 4.

Petitioner attempts to bolster its position by citing an email from an Oklahoma State Department of Health compliance officer. P. Ex. C; CMS Ex. 9 at 2. Petitioner's reliance on this email is misplaced. The compliance officer was responding to an email inquiry from Petitioner's then-general counsel regarding the Oklahoma licensure requirements for the Miami facility. In the email inquiry, Petitioner's general counsel wrote the following:

The Miami, OK physician office clinic is staffed by Freeman employed cardiologist [sic] who have an OK physician license. These physicians bill for the services provided under the Freeman Health System provider number. Freeman Health System is a Mo. Nonprofit corporation that operates an acute care hospital in Joplin, Mo. As you know Miami, OK is about 20 miles West of Joplin.

A generic letter stating that Oklahoma does not require a separate state license for physician offices staffed by hospital

employed physicians who have an Oklahoma license to practice medicine in Oklahoma and which clinic is operated under the hospital provider number would allow us to proceed with our CMS application. Is it possible for your agency to issue such a letter?

CMS Ex. 9 at 3. The compliance officer's answer, in full, is as follows:

In response to your emailed question below, *I am unable to speak to your specific project*, however I can tell you that Oklahoma does not have any state licensure requirements for physician offices (with exception to Doctors being licensed individually to practice medicine of course), nor do we have state licensure requirements for rural health clinics.

CMS Ex. 9 at 2 (emphasis added). As is evident from the email, the compliance officer did not—and could not—comment specifically on whether Oklahoma law requires Petitioner's Miami facility to be licensed. Rather, she was speaking generally about the licensure requirements for physician offices and rural health clinics (and relying on counsel's characterization of the facility as a "physician office clinic"). The email thus gives no support to Petitioner's position that its Miami facility is a "physician office" or an "outpatient facility" under Oklahoma law.⁵

By contrast, in addition to Petitioner's own attestation, other evidence supports the conclusion that the Miami facility is an outpatient department of Petitioner. Petitioner characterizes the Miami facility as "the Off-Site Location of Freeman Heart and Vascular Institute," a part of Freeman West Hospital. P. Ex. D at 1. The doctors who work at the Miami facility are "Freeman cardiologist[s]" who "practice full-time in the Joplin facility," Freeman West Hospital. P. Ex. D at 2. Petitioner's signage at the Miami

⁵ By describing the Miami facility as a "physician office clinic" in correspondence to Oklahoma licensing officials, while representing to CMS that the facility is an outpatient department, Petitioner appears to be trying to have it both ways. It seems that Petitioner wished to avoid the burden of becoming licensed as an outpatient department in Oklahoma. However, if it attested to CMS that the Miami facility was simply a physician office, it ran the risk that CMS would presume, based on the provider-based regulation, that "[a] facility that is not located on the campus of a hospital and that is used as a site where physician services of the kind ordinarily furnished in physician offices are furnished is . . . a free-standing facility . . ." 42 C.F.R. § 413.65(b)(4). Thus, though not necessary to my decision, if I found that Petitioner's Miami facility was a physician office that was not required to be licensed in Oklahoma, I would conclude that the facility is not entitled to provider-based status under 42 C.F.R. § 413.65(b)(4).

facility displays the name “Freeman Health System” and “Freeman Heart & Vascular Institute.” CMS Ex. 7. In view of Petitioner’s attestation and this additional evidence, I find that the Miami facility was an outpatient department, not an outpatient facility. Petitioner’s Miami facility was therefore required, under Oklahoma law, to “be located . . . at a campus licensed as part of the hospital,” i.e., Petitioner. OKLA. ADMIN. CODE § 310:667-27-1(f).⁶

b. The Miami facility is not licensed as required under Oklahoma law because it is not located in Petitioner’s hospital facility or at a campus licensed as part of Petitioner’s hospital.

As already explored in the previous section, under Oklahoma law, an outpatient department must “be located in the hospital facility or at a campus licensed as part of the hospital.” OKLA. ADMIN. CODE § 310:667-27-1(f). There is no dispute that the Miami facility is not located in the hospital facility, as the two are located in different states. Therefore, as an outpatient department, Oklahoma law requires that the Miami facility be located at a campus licensed as part of the hospital.

⁶ This is consistent with another federal requirement applicable to any facility for which provider-based status is sought. “The department of the provider . . . and the main provider are operated under the same license, except in areas where the State requires a separate license for the department of the provider . . . or in States where State law does not permit licensure of the provider and the prospective department of the provider . . . under a single license.” 42 C.F.R. § 413.65(d)(1). CMS inexplicably failed to cite § 413.65(d)(1) as a separate basis for denying Petitioner provider-based status for its Miami facility, even though an appellate panel of the Departmental Appeals Board (DAB) has relied on that provision to deny provider-based status for a provider hospital’s remote facility *located in Oklahoma* because that remote Oklahoma facility was not licensed under the main provider’s hospital license. *See The Physicians’ Hospital in Anadarko*, DAB No. 2101 at 6-8, 11 (2007). The panel in that case held that § 413.65(d)(1) “clearly requires that the remote facility actually be licensed on the same license as the provider, in states that, *like Oklahoma*, permit such licensing.” *Id.* at 8 (emphasis added). In light of Petitioner’s attestation admitting that the Miami facility is a “[d]epartment of the provider,” CMS Ex. 6 at 4, section 413.65(d)(1) clearly applies to Petitioner and the Miami facility and, by virtue of *Anadarko*, requires the Miami facility to “actually be licensed on the same license as [Petitioner]” DAB No. 2101 at 8. I need not rely on this provision, however, because I find that Oklahoma state law—which Petitioner must follow to obtain provider-based status for the Miami facility under 42 C.F.R. § 413.65(e)(3)(vii)—imposes the same licensure requirement on Petitioner and the Miami facility as § 413.65(d)(1).

Petitioner concedes in its brief that it “does not have an Oklahoma hospital license” P. Br at 4. Moreover, Petitioner has offered no evidence that its Missouri hospital license (a copy of which CMS submitted as CMS Ex. 8) applies to the Miami facility. Petitioner represents that it “seeks to operate its ‘Miami Facility’ under its Missouri license” and elsewhere states that its “Missouri license . . . will apply to the ‘Miami Facility’ if [its] provider-based application is approved” P. Br. at 4-5. These statements at best indicate that Petitioner hopes that, at some point in the future, its Missouri hospital license will apply to the Miami facility. However, nothing in the record indicates that Petitioner’s Missouri hospital license actually did apply to the Miami facility at the time Petitioner applied for provider-based status for the Miami facility.⁷ Therefore, the only reasonable inference I can draw from the record is that the Miami facility is not located at a campus licensed as part of the hospital. Because the Miami facility is neither located in Petitioner’s hospital facility nor at a campus licensed as part of Petitioner’s hospital, I conclude that the Miami facility is not licensed as required under Oklahoma law.

⁷ If anything, the record indicates the opposite. In response to an inquiry from WPS requesting additional information related to Petitioner’s attestation for provider-based status, Petitioner sent, among other things, a copy of part of a Missouri regulation governing administration of Missouri’s hospital licensing program. CMS Ex. 5 at 2-3. That regulation provides in pertinent part:

An operator of two (2) or more licensed hospitals may submit application to the Department of Health to operate the hospitals as a single licensed hospital. . . . If the application is approved, the hospitals may be named on the licensure application and a single license issued. Also, an operator of a licensed hospital may submit a proposal to provide, at a minimum, all of the required patient care services at a geographical location which at the time of the proposal is not a part of the licensed hospital. . . . Before the Department of Health approves the application, the applicant shall submit an operational proposal to the director of the Department of Health for approval.

MO. CODE REGS. ANN. tit. 19, § 30-20.015 (2007). Petitioner does not allege, and no evidence in the record suggests, that it submitted an application or proposal to the Missouri Department of Health to license the Miami facility under its Missouri hospital license. Furthermore, Petitioner’s hospital license is devoid of any reference to the Miami facility and includes only the address of Petitioner’s main hospital in Joplin, Missouri. CMS Ex. 8.

3. Petitioner is not entitled to provider-based status for the Miami facility.

As already explained above, a main provider can only obtain provider-based status for an off-campus facility “if the [off-campus] facility . . . and the main provider are located in the same State or, when consistent with the laws of both States, in adjacent States.” 42 C.F.R. § 413.65(e)(3)(vii). Petitioner and the Miami facility are neither located in the same state nor located in adjacent states consistent with the laws of both states. Consequently, § 413.65(e)(3)(vii) bars Petitioner from obtaining provider-based status for the Miami facility.

V. Conclusion

CMS correctly determined, both initially and on reconsideration, that the Miami facility did not meet the provider-based location requirements found at 42 C.F.R. § 413.65(e)(3)(vii). CMS Ex. 2 at 1; CMS Ex. 3 at 1. I therefore affirm CMS’s reconsidered determination denying Petitioner provider-based status for the Miami facility.

/s/
Leslie A. Weyn
Administrative Law Judge