Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Union Hospital, Inc.
Docket No. A-12-9
Decision No. 2463
June 11, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Union Hospital, Inc. (Union Hospital, Petitioner), an Indiana hospital, appeals the September 1, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel granting summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS). *Union Hospital, Inc.*, DAB CR2422 (2011) (ALJ Decision). The ALJ sustained CMS's denial of provider-based status for three off-site entities affiliated with Union Hospital. The ALJ determined the three entities did not meet the federal requirements for provider-based status as departments of Union Hospital because undisputed evidence demonstrates that none of the entities were included on Union Hospital's license to operate an acute care hospital. For the reasons explained below, we sustain the ALJ Decision.

Applicable law and regulation

The Medicare program pays health care "providers," which includes hospitals, for the medical items and services they furnish to Medicare beneficiaries. Act §§ 1811-12; 42 C.F.R. § 400.202 (definition of provider). For program payment purposes, Medicare recognizes that a provider, such as a hospital, may own and operate another type of facility, such as a department or outpatient clinic, that is located on or apart from the provider's main building or campus. 63 Fed. Reg. 47,552, 47,587 (Sept. 8, 1998). However, in order to receive payment applicable for provider based facilities, the facility must show that the qualifications for "provider based status" are met.

At 42 C.F.R. § 413.65, the regulations contain "[r]equirements for a determination" by CMS "that a facility or an organization has provider-based status." "*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]." 42 C.F.R. § 413.65(a) (2) (italics in original).

Section 413.65 "determines whether a facility . . . has sufficient connections to a hospital so that it can be considered a part thereof and, for example, can submit claims under the hospital's provider number." *U.S. ex rel. Kosenske v. Carlisle HMA, Inc.*, 554 F.3d 88, at 98 (3rd Cir. 2009). In issuing section 413.65, CMS's predecessor agency explained that it was seeking "to ensure that higher levels of Medicare payment and increases in beneficiary liability for deductibles or coinsurance (which can all be associated with provider-based status) are limited to situations where the facility or organization is clearly and unequivocally an integral and subordinate part of a provider." 65 Fed. Reg. 18,434, 18,506 (Apr. 7, 2000).

Any "facility or organization" seeking provider-based status must submit to CMS an attestation that it fulfills the criteria in section 413.65 so that CMS may "make a determination as to whether the facility or organization is provider-based." 42 C.F.R. § 413.65(b), (b)(3)(iii), (iv). CMS's grant of provider-based status "is required before the main provider may treat the facility or organization as provider-based for billing or cost reporting purposes." 65 Fed. Reg. at 18,512.

A facility located off the campus of a potential main provider seeking provider-based status "must meet **all** of" the requirements in paragraph section 413.65(d) and additional requirements in section 413.65(e) and (f) "to be determined by CMS to have provider-based status." 42 C.F.R. § 413.65(d), (e) (emphasis added); *see* 65 Fed. Reg. at 18,509 ("a facility or organization will be found to be provider-based only when it is in compliance with *all* standards set forth in these final rules." Italics in original). At issue in this appeal is the requirement in paragraph (d)(1), "Licensure," which as relevant requires that:

> The department of the provider, the remote location of a hospital, or the satellite facility 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, the remote location of a hospital, or the satellite facility, or in States where State law does not permit licensure of the provider and the prospective department of the provider, the remote location of a hospital, or the satellite facility under a single license.

Section 413.65(d)(1) (emphasis added). A prospective provider may request that CMS reconsider a determination that it does not qualify for provider-based status under section 413.65, and may appeal an adverse reconsideration decision before an ALJ and before the Board. 42 C.F.R. §§ 498.3(b)(2), 498.22, 498.82.

Background

CMS notified Union Hospital on December 17, 2010 that since 2007, the hospital had inappropriately billed the Medicare program for services provided incident to physicians' services at the offices of three off-site entities in Terre Haute, Indiana that did not have

provider-based status. ALJ Decision at 1; CMS Ex. 1. The three off-site entities were Associated Physicians & Surgeons Clinic, LLC (AP&S), Providence Medical Group, LLC (PMG), and The Hope Center (Hope). CMS determined that the off-site entities failed to satisfy 11 separate requirements for provider-based status in section 413.65, including the licensure requirement at section 413.65(d)(1). CMS Ex. 1. Union Hospital requested reconsideration from CMS, which on April 12, 2011 upheld its determination that the off-site entities were not eligible for provider-based status. CMS Ex. 5. CMS found that Union could not demonstrate compliance with four requirements of section 413.65, but did not cite the licensure requirement at paragraph (d)(1). *Id.*

Before the ALJ, CMS moved for summary judgment on several grounds, including that AP&S, PMG and Hope were not included on Union Hospital's license issued by the Indiana State Department of Health (ISDH). CMS filed a brief in support of its motion and proposed exhibits 1–21. Union submitted a brief in opposition to CMS's motion and filed proposed exhibits 1–9. The ALJ granted summary judgment in favor of CMS, and ruled "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." ALJ Decision at 2. The ALJ also found that because that conclusion "is enough to show, as a matter of law," that the three off-site entities were not operated under Union Hospital's license and were not departments of Union Hospital, he did not need to address CMS's determination that AP&S, PMG and Hope failed to meet other requirements in the regulation to be granted provider-based status with Union Hospital. *Id*. at 5-6.

Union Hospital's arguments

Union disputes the following unnumbered findings and conclusions from the ALJ Decision:

- "[T]he 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." ALJ Decision at 2.

- "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." *Id*. at 3.

- "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." *Id.* at 4

- "Nothing bars CMS from raising issues before me not decided at reconsideration, so long as it gives Petitioner adequate notice and Petitioner has [an] opportunity to be heard on those issues." *Id.*

- "In effect, Petitioner argues that AP&S, PMG, and Hope were functioning under circumstances that were equivalent to being operated under Petitioner's license." *Id.* at 4-5.

- "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." *Id.* at 5-6.

See P. Request for Review (RR) at 4-15. Union Hospital argues that summary judgment was inappropriate because there is a genuine dispute of material fact over whether AP&S, PMG and Hope were "operated under the same license" as Union Hospital, as required by section 413.65(d)(1) for them to be granted provider-based status. Union also argues that the ALJ should not have addressed the issue of licensure because CMS "failed to raise the licensure issue in its Reconsidered Determination" after having previously cited licensure as a ground for denial of provider-based status in its initial determination dated December 10, 2010, and thus "is precluded from re-raising an issue previously resolved in Petitioner's favor." RR at 5.

<u>Standard of Review</u>

Whether summary judgment is appropriate is a legal issue that we address de novo. *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918, at 3-5 (2004). Summary judgment is appropriate only if there are no genuine disputes of fact material to the result. *Everett Rehabilitation and Medical Center,* DAB No. 1628, at 3 (1997). Our standard of review on a disputed issue of law is whether the ALJ decision is erroneous, and the Board may modify, reverse or remand an ALJ decision if a legal conclusion necessary to the outcome of the decision is erroneous or the decision is contrary to law or applicable regulations. *Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs,* available at http://www.hhs.gov/dab/divisions/appellate/guidelines/index.html; *Big Bend Hospital Corp.*, DAB No. 1814 (2002), *aff'd*, *Big Bend Hospital Corp. v. Thompson*, 88 F. App'x 4 (5th Cir. 2003).

Analysis

I. The ALJ did not err in granting summary judgment in favor of CMS.

A. The ALJ did not err in determining that there was no genuine dispute of material fact over whether the three off-site locations were operated under the same license as Union Hospital.

The Board addressed the requirement in section 413.65(d)(1) that a provider and its remote location be "operated under the same license" for the remote location to be granted provider-based status in *Physicians' Hospital in Anadarko*, DAB No. 2101 (2007). The Board concluded that this requirement was not met where the hospital's remote location was not licensed by the state as part of the hospital, as state law permitted. *Anadarko* at 6, 7. The Board held that the requirement that a provider and its remote location be operated under the same license "clearly requires that the remote facility actually be licensed on the same license as the provider, in states that . . . permit such licensing." *Id*. at 8 (emphasis added). The Board found that the plain language of section 413.65(d)(1) does not support a "conclusion that a facility seeking provider-based status need not actually be licensed by the state as part of the provider." *Id*. In so doing, the Board observed that the preamble to the final rule adopting section 413.65 describes paragraph (d)(1) as "the requirement that provider-based facilities share a common license with the main provider" in states "with laws that permit common licensure of the provider and the prospective provider-based department under a single license." *Id*., citing 65 Fed. Reg. at 18,513 (emphasis added). The preamble refers to this requirement as "the licensure requirement." *Id*. citing 65 Fed. Reg. at 18,513, 18,528. The Board concluded that the preamble "shows that the requirement of the regulation that a provider and a remote facility be 'operated under the same license' means that the remote facility must actually be licensed as part of the provider, as opposed to merely being eligible to be licensed." *Id*. (emphasis added).

Union Hospital did not meet this requirement because, as the ALJ found, undisputed evidence shows that during the relevant time period of 2007 through 2010, AP&S, PMG and Hope were not included on Union Hospital's hospital license, even though Indiana law permits a hospital's off-site locations to be included on its hospital license.[1] ALJ Decision at 3-4. CMS submitted copies of Union Hospital's license for the years 2007 through 2010 with its Motion for Summary Judgment. Each license includes an "off premise list" of off-site locations authorized to operate under the hospital's license. CMS Exs. 8-11. It is not disputed that the three off-site locations at issue do not appear on the

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[1] Union Hospital does not dispute that Indiana law does not require a hospital's off-site locations to be licensed separately from the hospital, and permits the off-site locations to be operated under the same license as the hospital. ALJ Decision at 3 and CMS Motion for Summary Judgment at 12, each citing 410 Ind. Admin. Code 15-1.3-1(c) (listing requirements applicable if "multiple buildings are licensed under a single license") and 15-1.3-2 (requiring that a copy of "the license" be posted in "each separate hospital building of a multiple hospital building system").

off premise lists attached to Union Hospital's hospital licenses. *Id*. CMS also submitted the declaration of a Public Health Nurse Surveyor Supervisor with ISDH, who "review[s] requests by hospitals to add off-site facilities to their licenses to ensure that the offsite facilities meet applicable licensure requirements." CMS Ex. 21, at 1, ¶ 1. She testified that none of the three off-site locations are included on Union Hospital's hospital license for the years 2007 through 2010. *Id*. at 1-2, ¶ 2.

On appeal, Union Hospital does not dispute or even comment on this evidence that AP&S, PMG and Hope were not listed on its hospital license for the years 2007 through 2010. Thus, as in *Anadarko*, "[t]he ALJ correctly concluded that state licensure was required for provider-based status, and that Petitioner neither alleged nor proffered evidence to show that [the off-site locations were] included on Petitioner's [State] hospital license or [were] otherwise licensed as part of Petitioner." *Anadarko* at 1-2. There was no error in the ALJ's determination that there were no disputed issues of material fact and that P&S, PMG and Hope did not qualify for provider-based status.

Union Hospital attempts to distinguish *Anadarko* on the ground that, unlike the hospital in that case, Union Hospital "requested that each of the Locations be included on its acute care hospital license, beginning in 2007, and operated the Locations pursuant to all licensure requirements from that date forward" and "had the Locations subject to survey as outpatient departments of Petitioner by its accreditation agency, and operated the Locations under its license."[2] P. Reply at 5, 6-7. Union Hospital argues that "ISDH's licensure requirements . . . permit Petitioner to substitute an accreditation survey for a State licensure survey." RR at 9-10, citing P. Ex. 2 (printout from ISDH website stating that "[i]f a hospital is accredited, the hospital may substitute the accreditation survey for the state licensure on-site survey."). Union Hospital asserts that the accreditation surveys, coupled with its request to have the locations added to its state license, constitute "significant evidence that the Locations were operated under the same license as Petitioner" and show "that a dispute existed as to whether the Locations operated under Petitioner's hospital license." P. Reply at 6; RR at 10.

Accepting for the purposes of reviewing the ALJ's grant of summary judgment that the accreditation surveys could demonstrate that Union Hospital operated its off-site locations in compliance with state requirements would not compel a different result than in *Anadarko*. As here, the hospital in *Anadarko* argued that it "meets the requirements of [state law] for operating the remote facility under its hospital license." *Anadarko* at 6. The Board held, however, that "even assuming that [the off-site location] did meet [the State's] requirements to be licensed," the hospital had provided "no analysis or discussion of the federal regulation to support a conclusion that a facility seeking

[2] It is not disputed that Union Hospital's "private accreditation body" is the Health Facilities Accreditation Program (HFAP) of the American Osteopathic Association. ALJ Decision at 5, citing P. Br. at 18; P. Br. at 16; RR at 8; P. Ex. 3, at 2, ¶ 4 (decl. of Union Hospital's Systems Director).

provider-based status need not actually be licensed by the state as part of the provider." *Id*. at 8 (emphasis added). The Board stated that the preamble language "leaves no doubt that provider-based status is not available to a facility . . . that could be licensed by the State as part of the provider hospital, but is not." *Id*. (emphasis added). As noted above, the Board concluded that the language of section 413.65(d)(1) "clearly requires that the remote facility actually be licensed on the same license as the provider, in states that . . . permit such licensing." *Id*. To find otherwise, the Board stated, "essentially would require CMS to accept Petitioner's belief that it complies with the State licensing requirements, without any State verification in the form of a license showing that the State has determined that Petitioner and [the off-site locations] in fact met those requirements." *Id*. at 8-9 (emphasis added). The regulation states that a facility "is not entitled to be treated as provider-based simply because it or the main provider believe it is provider-based." 42 C.F.R. § 413.65(b). As in *Anadarko*, it is here "undisputed that [the State] has not verified Petitioner's allegation of compliance with the State requirements by adding [the off-site locations] to Petitioner's license." DAB No. 2101, at 7 (emphasis added). Thus, AP&S, PMG and Hope were not eligible for provider-based status absent their inclusion on Union Hospital's hospital license, regardless of whether Union Hospital "did, in fact, operate the Locations in accordance with the licensure requirements," as it contends. P. Reply at 5.

Union Hospital also attempts to distinguish *Anadarko* on the ground that Union Hospital "never chose for the Locations to not be licensed." P. Reply Br. at 6. In *Anadarko*, the hospital did not request inclusion of its off-site facility on its state hospital license until after CMS had denied its request for provider-based status, and the Board cited the preamble statement that "if a facility could be licensed as part of a main provider but chooses not to be, the facility cannot reasonably be seen as an integral and subordinate part of that provider." *Anadarko* at 8, citing 65 Fed. Reg. at 18,513. However, the preamble reference to a facility that chooses not to be licensed was provided to "disagree with [a] commenter's view that licensure should not be viewed as an indicator of integration" between the main provider and its remote location. 65 Fed. Reg. at 18,513. That response does not support a conclusion that facilities that have sought but not yet received inclusion on a state hospital license are exempt from "the requirement that provider-based facilities share a common license with the main provider." *Id*. (emphasis added). Indeed, the response to the comment in the preamble demonstrates that the licensure requirement is to be broadly applied, and is consistent with the other statements in the preamble, cited above, indicating that remote locations must be actually included on the hospital's license.

As in *Anadarko*, "the sole issue of material fact before the ALJ was whether [the off-site locations were] included on Petitioner's license" and "there is no genuine dispute about the fact that [the off-site locations are] not licensed as part of Petitioner, although [State] law permits that licensing arrangement." *Anadarko* at 6, 7. The undisputed fact that

AP&S, PMG and Hope were not included on Union Hospital's own hospital license as permitted by Indiana law similarly "compels the conclusion" that the off-site locations were "not operating under Petitioner's hospital license" and were thus "not entitled to provider-based status." *Id.* at 9. Thus, the ALJ did not err in concluding that the undisputed evidence established that the three locations were not operated under Union Hospital's license, as required for the off-site locations to be granted provider-based status.

B. The ALJ did not err in addressing the licensure issue.

Union Hospital also argues that the ALJ erred by addressing the licensure issue because CMS, in its reconsideration determination, did not cite licensure as a basis for the denial of provider-based status. The ALJ stated that "[n]othing 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." ALJ Decision at 4. Union Hospital argues that on reconsideration, the licensure issue "was decided in Petitioner's favor" because it submitted "supporting documentation to address the issue of licensure" and CMS in its reconsideration decision "did not include licensure" among the four regulatory standards for provider-based status "with which Petitioner could not demonstrate compliance." RR at 11-12. Union Hospital argues that CMS, by raising licensure in its motion for summary judgment, did not comply with regulation requiring CMS to make a reconsidered determination "affirming or modifying the initial determination and the findings on which it was based" and to issue a notice that "specifies the conditions or requirements of law or regulations that the affected party fails to meet . . . ." 42 C.F.R. §§ 498.24(c), 498.25(a)(3).

The ALJ correctly rejected this argument. In *Green Hills Enterprises, LLC*, DAB No. 2199 (2008), the Board found no error where CMS raised, and the ALJ addressed, bases for the denial of the facility's application to enroll as a Medicare provider in addition to the bases stated in CMS's determination notice. The Board stated that it–

> has consistently held that after an administrative appeal has commenced, a federal agency may assert and rely on new or alternative grounds for the challenged action or determination as long as the non-federal party has notice of and a reasonable opportunity to respond to the asserted new grounds during the administrative proceeding.

Green Hills Enterprises at 8, citing *United Medical Home Care, Inc.*, DAB No. 2194, at 13 (2008), and *Texas Health and Human Services Commission*, DAB No. 2187, at 5 n.3 (2008). Moreover, the Board noted that "even assuming inadequate notice, it will not find a due process violation absent a showing of resulting prejudice." *Id.*, citing *Livingston Care Center*, DAB No. 1871, at 20 (2003), *aff'd*, *Livingston Care Ctr. v. U.S. Dep't of Health and Human Servs.*, 388 F.3d 168 (6th Cir. 2004).

In this case, Union Hospital received adequate notice of CMS's reliance on Union Hospital's not being licensed. CMS in its motion for summary judgment specifically stated that it "hereby gives notice that in addition to those bases set out in the April 12, 2011 reconsideration decision, CMS is relying on Union Hospital's failure to include its off-site locations on its hospital license as a basis for CMS' decision denying Union Hospital's off-site locations' provider-based status." CMS Motion for Summary Judgment at 12, n.5. CMS supported its motion with copies of the hospital license for the relevant years, as well the declaration of the ISDH Surveyor Supervisor. Union Hospital did not assert before the ALJ and has not asserted to the Board that it lacked sufficient opportunity to obtain evidence that might have raised a material factual dispute as to whether the off-site locations were listed on its hospital license. Union Hospital was also on notice about this issue because CMS's initial determination cited the licensure issue as one of the reasons for denying the three facilities provider-based status. CMS Ex. 1. Given that off-site locations must actually be listed on a provider's state license to qualify for provider-based status, addressing the licensure issue did not entail complex or extensive factual development. Moreover, there is nothing in CMS's reconsideration decision actually stating that the licensure issue had been resolved in the facility's favor. Thus, Union Hospital had sufficient opportunity to respond to CMS's arguments.

Conclusion

For the foregoing reasons, we affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member