Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

West Norman Endoscopy Center, LLC,

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-58

Decision No. CR2120

Date: April 26, 2010

DECISION

I grant summary judgment in favor of the Centers for Medicare and Medicaid Services (CMS) and against Petitioner, West Norman Endoscopy Center, LLC. I find Petitioner's effective date of participation in the Medicare program is March 18, 2009, the date Petitioner met all federal requirements.

I. Background

Petitioner, an ambulatory surgical center (ASC) located in Norman, Oklahoma, disputes the effective date of its approval to participate in the Medicare program. The following facts are undisputed. Chintan A. Parikh, M.D., and Andrew W. Black, M.D., own Petitioner. Melissa Kepner is Petitioner's managing employee. CMS Exhibit (CMS Ex.) 1 at 1, 10, 28; Petitioner's Response Brief (P. R. Br.) at 3. On July 29, 2008, the Accreditation Association for Ambulatory Health Care, Inc. (AAAHC) conducted an initial survey of Petitioner. CMS Ex. 2; P. R. Br. at 3. By letter dated August 25, 2008, AAAHC notified Petitioner that AAAHC had recommended Petitioner for participation in the deemed status program and awarded Petitioner a six-month term of accreditation effective July 29, 2008. *Id*.

TrailBlazer Health Enterprises, LLC (TrailBlazer) is the Medicare fiscal intermediary for Petitioner. CMS Ex. 4; P. R. Br. at 3. On September 3, 2008, Petitioner submitted its initial CMS Form 855B to TrailBlazer.[1] CMS Exs. 1, 4; P. R. Br. at 3. On or about October 17, 2008, Petitioner submitted a request for certification in the Medicare program. CMS Ex. 3; P. R. Br. at 3. By letter dated January 29, 2009, TrailBlazer notified Petitioner that its enrollment application had been closed due to its failure to timely submit additional information.[2] CMS Ex. 4; P. R. Br. at 4.

On January 29-30, 2009, AAAHC re-surveyed Petitioner and identified standard-level deficiencies. CMS Ex. 5 at 1; P. R. Br. at 4. On February 2, 2009, Petitioner submitted a second CMS Form 855B, which Petitioner states that TrailBlazer required. CMS Ex. 6; P. R. Br. at 4. TrailBlazer received the second CMS Form 855B on February 3, 2009. CMS Ex. 6 at 1; P. R. Br. at 4. Petitioner submitted an approved plan of correction (POC) to AAAHC, with an effective date of February 26, 2009. CMS Ex. 5 at 1; P. R. Br. at 4. By letter dated March 20, 2009, AAAHC advised Petitioner that it must submit evidence that its corrective actions were complete and that it was in Medicare deemed status. CMS Ex. 5 at 1; P. R. Br. at 5. AAAHC further advised Petitioner that CMS had the authority to determine Petitioner's continued participation in Medicare deemed status. *Id*. AAAHC awarded Petitioner a three-year accreditation, effective January 30, 2009. *Id*.

On May 14, 2009, CMS notified Petitioner that its agreement for participation in Medicare had been accepted and that its effective date of participation was March 18, 2009. The letter also advised Petitioner of its right to request reconsideration of that effective date. CMS Ex. 7; P. R. Br. at 5. Petitioner requested reconsideration on May 29, 2009. Petitioner argued that it had submitted its original application to TrailBlazer in September 2008 and that its application was not processed until December 22, 2008. This delay caused Petitioner financial hardship (Petitioner asserts that its reconsideration letter also stated that it had diligently pursued information about what additional information TrailBlazer might need and that TrailBlazer had been unable to provide that information. In addition, Petitioner asserts that the references to defects in its application noted in the December 22, 2008 letter did not include a specific request for information regarding those defects). CMS Ex. 8; P. R. Br. at 5-6. By letter dated June 15, 2009, Petitioner requested that CMS change its effective date to July 29, 2008, the date of its AAAHC accreditation. CMS Ex. 9; P. R. Br. at 6.

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[1] An ASC uses CMS Form 855B to apply to enroll in Medicare.

[2] Petitioner notes that, as of that date, it had not been notified as to what was missing from the application. And, as will be discussed below, Petitioner asserts that TrailBlazer's actions prevented Petitioner from finding out why its enrollment application was thought to be incomplete. P. R. Br. at 4.

By letter dated August 17, 2009, CMS denied Petitioner's request for reconsideration and affirmed its determination that Petitioner's effective date was March 18, 2009. CMS Ex. 10; P. R. Br. at 6. CMS found that Petitioner did not meet all applicable federal requirements, including clearance of the CMS Form 855B, for participation in Medicare at the time Petitioner received AAAHC accreditation on July 29, 2008. *Id*.

On October 10, 2009, Petitioner filed a request for hearing. The parties represented that they believed this case might be best addressed via motions for summary disposition. My Order of December 2, 2009, established a schedule for the filing of motions and briefs. CMS submitted its Motion for Summary Disposition (CMS Br.) on December 15, 2009, accompanied by CMS Exs. 1–10. Petitioner filed its Motion for Summary Disposition (P. Br.) on December 30, 2009, accompanied by Petitioner's Exhibits (P. Exs.) A–S. Petitioner submitted P. R. Br. on December 29, 2009, accompanied by a March 3, 2009 letter to Petitioner from TrailBlazer (which I mark as P. Ex. T) and a copy of CMS Ex. 8.[3] CMS submitted a Response (CMS R. Br.) on December 31, 2009.[4]

II. Applicable Law

Title XVIII of the Social Security Act (Act) provides for payment of part or all of the cost of covered services furnished to eligible individuals by qualified providers of services and suppliers. Section 1832(a)(2)(F) of the Act authorizes Medicare Part B coverage for services furnished in connection with surgical procedures specified by the Secretary of Health and Human Services (Secretary) at an ASC that meets health, safety, and other standards specified by the Secretary and has entered into an agreement with the Secretary to participate and accept payment as an ASC (meeting applicable standards is referred to as certification).

42 C.F.R. Part 416 sets forth Medicare conditions for ASC participation. 42 C.F.R. § 416.26 sets forth the steps necessary for an ASC to qualify for Medicare and have CMS accept and approve its agreement. An ASC may qualify for a participation agreement if

[3] By motion dated March 4, 2010, Petitioner requested that I order the parties to confer in good faith regarding a possible settlement. I am without authority to compel settlement discussions. *See* 42 C.F.R. § 498.

[4] On January 25, 2010, I directed the parties to brief what application and effect, if any, the decision in the case of *Renal Care Partners of Delray Beach, LLC*, DAB No. 2271 (2009) might have on the issues in this case. Both parties submitted briefs. The *Renal Care* decision does not affect this case. The *Renal Care* decision addressed the effective date for an end stage renal disease supplier (ESRD). Unlike ASCs, however, ESRDs do not have a specific regulation governing their effective date, and ESRDs are not accredited and deemed in compliance by a Medicare-approved accrediting body.

it is "deemed" to be in compliance with the conditions of participation in Subpart C of Part 416, meaning that it is accredited by a national accrediting body or licensed by a state agency that CMS has determined provides reasonable assurance that the conditions are met. 42 C.F.R. § 416.26(a). Otherwise, the ASC must be surveyed by a state agency for compliance with the conditions of Subpart C. 42 C.F.R. § 416.26(b). CMS reviews the recommendation and other evidence relating to the qualification of the ASC and, if the facility meets the requirements of Subpart B of Part 416, CMS sends the ASC notice of its determination, as well as two copies of the ASC agreement. 42 C.F.R. § 416.26(c). If the ASC wishes to participate in Medicare, it must have its authorized representative sign both copies of the agreement and file them both with CMS. 42 C.F.R. § 416.26(d). If CMS accepts the agreement, it returns one of the copies to the ASC with a notice of acceptance specifying the effective date of the ASC's participation for coverage in the program. 42 C.F.R. § 416.26(e).

The effective date for Medicare participation for an ASC is also subject to the requirements of 42 C.F.R. § 489.13. For a provider or supplier who has been deemed to meet requirements, the effective date depends on whether the provider or supplier is subject to requirements in addition to the accredited organization's approved program. If so, then the effective date "is the date on which the provider or supplier meets all requirements, including the additional requirements." 42 C.F.R. § 489.13(d)(1)(i). If not, then the effective date is the date of the "initial request for participation if on that date the provider or supplier met all Federal requirements." 42 C.F.R. § 489.13(1)(ii).

III. Issues

Whether summary disposition is appropriate; and

Whether Petitioner is eligible for a Medicare participation effective date on a date prior to March 18, 2009.

IV. Summary Judgment

In *Senior Rehab. and Skilled Nursing Ctr.*, DAB No. 2300 (2010), the Departmental Appeals Board (Board) stated the standards for summary judgment:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Kingsville Nursing and Rehabilitation Center*, DAB No. 2234 at 3 (2009), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). While the Federal Rules of Civil Procedure (FRCP) are not binding in this administrative appeal, we are guided by those rules and by judicial decisions on summary judgment in determining whether the ALJ properly granted summary judgment. *See Thelma Walley*, DAB No. 1367 (1992). . . . The party moving for summary

> judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *Kingsville* at 3, citing *Celotex*, 477 U.S. at 323. If the moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact - - a fact that, if proven, would affect the outcome of the case under governing law. *Id.* at 586, n.11; *Celotex*, 477 U.S. at 322. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). . . . Whether summary judgment is appropriate is a legal issue that we address de novo. *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). In reviewing whether there is a genuine dispute of material fact, we view the proferred evidence in the light most favorable to the non-moving party. *Kingsville* at 4, and cases cited therein.

Senior Rehab., DAB No. 2300 at 3. The Board has also noted that the role of an administrative law judge (ALJ) in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ must not assess the credibility or the weight of evidence in the context of summary disposition. *Holy Cross Village at Notre Dame*, DAB No. 2291 at 4-5 (2009).

Viewing the material facts in the light most favorable to Petitioner, I find that the law compels my conclusion that Petitioner's effective date is March 18, 2009.

V. Discussion

Petitioner asserts that, after submitting its enrollment application, it received confirmation of TrailBlazer's receipt of the application on September 10, 2008. That letter stated that if additional information was needed, TrailBlazer would communicate with Petitioner within 30 days after the receipt date. P. Ex. B. On December 22, 2008, after a 110-day delay, TrailBlazer notified Petitioner that its application was deficient but did not provide specific or detailed information regarding what the deficiencies were. Specifically, TrailBlazer simply checked certain boxes denoting certain deficiencies, and the absence of specifics or details from TrailBlazer's "checklist" is the source of many of the problems that bedeviled Petitioner's application from that point on.

Petitioner corrected the indicated deficiencies but did not realize that it had to submit a voided check or deposit slip because, on the December 22, 2008 letter, the box that included the phrase "you must include a voided check or deposit slip" was not checked.

P. Ex. F. Petitioner asserts that it diligently tried to find out what else might be required by TrailBlazer but could not do so because at various times: TrailBlazer's computer was down; TrailBlazer's telephone system was not accepting calls; and when Petitioner talked with a TrailBlazer employee, that employee was unable to describe in any helpful way whatsoever what the problem was with Petitioner's application. Petitioner asserts it was not until the day after TrailBlazer denied Petitioner's application that TrailBlazer provided the explanation that Petitioner should have provided a voided check or deposit slip. P. R. Br. at 1-2. As a result, Petitioner asserts that its assigned effective date should be earlier than March 18, 2009, because: TrailBlazer failed to provide notice of the deficiency by explaining what Petitioner needed to do to complete its application; TrailBlazer did not respond, or responded inaccurately, to Petitioner's multiple attempts to determine what information TrailBlazer needed; and TrailBlazer's delay was excessive, unreasonable, and in violation of its own procedures. P. Br. at 1-2, 10. Petitioner asserts that its effective date should be September 3, 2008, the day it submitted its enrollment application. Alternatively, Petitioner asks that if I find the December 22, 2008 notice was sufficient, I should order the effective date to be November 13, 2008, a date which would take into account TrailBlazer's failure to notify Petitioner of any deficiencies within 30 days. P. Br. at 11-12. Petitioner argues as an initial matter that the requirements for certifying an outpatient surgery center at 42 C.F.R. § 489.13(d) do not require submission of a CMS Form 855B or acceptance of that application by TrailBlazer. P. R. Br. at 7-8.

Petitioner's argument that the requirements for certifying an ASC do not require submission of a CMS Form 855B must fail. As pointed ALJ Alfonso J. Montaño pointed out in *Innovative Pain Treatment Surgery Ctr. of Temecula, Inc.*, DAB CR1932 (2009):

> Every ASC which wishes to enroll as a Medicare supplier must complete and submit CMS Form 855B. The information in this form is used in part to ensure that no payments are made to suppliers who are excluded from participation in the Medicare program pursuant to section 1128 of the Act or who are prohibited from providing services to the federal government under section 2455 of the Federal Acquisition Streamlining Act of 1994, 31 U.S.C. § 6101. *See* State Operations Manual (SOM) section 2005 ["Suppliers should be informed of the enrollment process so that they do not expect instant Medicare effective dates"]. Thus, the provided information is an important aspect of the Department's efforts to effectively prevent supplier fraud and abuse and to ensure that Medicare does business with only trustworthy and qualified providers and suppliers. The information that is required to be provided in this form is what 42 C.F.R. § 416.26(c) refers to as "other evidence relating to the qualification of the ASC" which CMS must review in order to determine whether to accept the ASC. If the ASC has not provided this information prior to its accreditation survey, thereby giving the contractor and CMS time to verify the information, then that form is considered an additional requirement under the terms of 42 C.F.R.

> § 489.13(d)(1)(i). Thus, under the applicable regulation at 42 C.F.R. § 489.13(d)(1)(i), the effective date of the approval is the date that it meets all the additional requirements. . . . The absence of specifying CMS Form 855B as an "additional requirement" in the regulations is not determinative. 42 C.F.R. § 416 gives CMS the authority to set requirements for an ASC's participation in the Medicare program. And Part 416 specifically provides that CMS will review whatever other evidence relating to the qualification of the ASC for enrollment. 42 C.F.R. § 416.26(c). It would be impracticable, indeed impossible, to specify all forms and information requirements necessary in the regulation.

Innovative Pain Treatment Surgery Ctr., DAB CR1932 at 6-7. In this case, Petitioner submitted its CMS Form 855B after its AAAHC accreditation, and the submission of the CMS Form 855B was a requirement of its certification process.

For purposes of this summary disposition analysis, I accept that: Petitioner attempted to discover what it needed to complete its application; at various times, TrailBlazer's computer system was down, and its phones were not being answered; and Petitioner was not informed by a TrailBlazer employee that it needed to submit a voided check or deposit slip until the day after TrailBlazer denied its first enrollment application.[5] Petitioner argues that TrailBlazer unreasonably delayed processing its enrollment application and did not assist Petitioner adequately in completing the application. However, neither the Act nor the regulations require that CMS, or its contractor, process an enrollment application within a specific time frame. Thus, any delay or ineptness by TrailBlazer in processing Petitioner's initial application, although perhaps more than simply regrettable, is not a basis for Petitioner to receive an earlier effective date. And, it remains true that Petitioner's application was not complete when TrailBlazer closed the application. A provider seeking enrollment in Medicare does not have an interest in the program until CMS acts independently to approve an enrollment application. *Plaza Surgical Ctr.*, DAB CR1705 (2007); *Mariner Health Home Care of Metro West*, DAB CR980 (2002). Here, Petitioner did not meet all federal requirements until it had submitted a complete CMS Form 855B enrollment application.

What Petitioner asks me to do as the thrust of its arguments above concerning TrailBlazer's unreasonable delay and failure to notify it regarding what it needed to provide to complete its enrollment application is to require CMS to remedy TrailBlazer's

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[5] CMS asserts that TrailBlazer's December 22, 2008 notice clearly identified two deficiencies in Petitioner's application: a missing "Add date" entry; and a missing legal business name and supporting document for the EFT agreement. CMS notes that Petitioner's Administrator requested clarification from a TrailBlazer employee only with regard to the "Add date" entry. P. Ex. G. CMS asserts that it is "specious" for Petitioner to argue that it was confused or that TrailBlazer's notice was ambiguous. I do not have to resolve this issue to decide the case.

purported failures, and to order CMS to give it an earlier effective date. Petitioner's arguments may arguably be reasonable, but they are unmistakably equitable arguments. I have no authority under equitable principles to establish an earlier effective date. *Oklahoma Heart Hosp.*, DAB No. 2183 (2008).

VI. Conclusion

Petitioner's effective date of participation in the Medicare program is March 18, 2009, as that is the date that CMS has determined it met all federal participation requirements.

/s/
Richard J. Smith
Administrative Law Judge