

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

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In the Case of:)	
Cornerstone Family)	DATE: June 16, 2010
Healthcare,)	
)	
)	
Petitioner,)	Civil Remedies CR2043
)	App. Div. Docket No. A-10-40
)	
- v. -)	Decision No. 2319
)	
Centers for Medicare &)	
Medicaid Services.)	
_____)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Cornerstone Family Healthcare (Petitioner, Cornerstone), a rural health clinic, appeals the December 9, 2009 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes upholding the termination by the Centers for Medicare & Medicaid Services (CMS) of Cornerstone's rural health clinic agreement. Cornerstone Family Healthcare, (CCN: 10-3913), DAB CR2043 (2009) (ALJ Decision). CMS based the termination on a finding by the Florida Agency for Health Care Administration (state agency) that Cornerstone was no longer providing rural health clinic services to the community as of December 15, 2008. We conclude that this finding, which is undisputed, is a legally sufficient ground upon which to terminate Cornerstone's agreement. Accordingly, we sustain the ALJ's decision to uphold the termination.

Legal Background

Section 1861(aa)(2) of the Social Security Act (42 U.S.C. § 1395x(aa)(2)) defines "rural health clinic" as a facility which "is primarily engaged in furnishing to outpatients services described in subparagraphs (A) and (B) of paragraph (1)" and meets several other requirements. The implementing regulations state that a "rural health clinic" means a facility that--

(1) Has been determined by the Secretary to meet the requirements of section 1861(aa)(2) of the Act and part 491 of this chapter; and

(2) Has filed an agreement with the Secretary in order to provide rural health clinic services under Medicare.

42 C.F.R. § 405.2401. Part 491 of 42 C.F.R. sets out the conditions for certification of rural health clinics.

The provision at 42 C.F.R. § 405.2404, captioned "Terminations of agreements," states in part:

(a) *Termination by rural health clinic--*

(1) *Notice to Secretary.* If the clinic wishes to terminate its agreement it shall file with the Secretary a written notice stating the intended effective date of termination.

(2) *Action by the Secretary.* (i) The Secretary may approve the date proposed by the clinic, or set a different date no later than 6 months after the date of the clinic's notice.

* * * * *

(3) *Cessation of business.* If a clinic ceases to furnish services to the community, that shall be deemed to be a voluntary termination of the agreement by the clinic, effective on the last day of business.

(b) *Termination by the Secretary--*(1) *Cause for termination.* The Secretary may terminate an agreement if he determines that the rural health clinic:

(i) No longer meets the conditions for certification under part 491 of this chapter; or

(ii) Is not in substantial compliance with the provisions of the agreement, the requirements of this subpart, any other applicable regulations of this part, or any applicable provisions of title XVIII of the Act; or

(iii) Has undergone a change of ownership.

* * * * *

(3) *Appeal by the rural health clinic.* A rural health clinic may appeal the termination of its agreement in

accordance with the provisions set forth in part 498 of this chapter.

Section 498.3(b), which lists "[i]nitial determinations by CMS" that are appealable, includes "the termination of a rural health clinic agreement in accordance with § 405.2404 of this chapter." 42 C.F.R. § 498.3(b)(8).

Case Background

The following undisputed facts are drawn from the record for the ALJ Decision. Cornerstone was a rural health clinic located at 356 N. Central Street, Umatilla, Florida. The prior owner of the facility, Tavares Family Medical Center (Tavares), was advised by CMS on May 2, 2007 that its "provider agreement" terminated effective March 27, 2007, the date Tavares ceased operation as a rural health clinic. P. Ex. 2, at 1. However, in a March 27, 2008 letter to Cornerstone, CMS had stated that it had been notified of a change in the ownership of the facility effective April 18, 2007. The March 27 letter further stated that "when there is a change of ownership, the . . . provider agreement between the Secretary . . . and the former owner is automatically assigned to the new owner, who is subject to all the terms and conditions of the provider agreement" and that "[p]ayment may be made for services rendered by your facility under the new ownership until your compliance with all Medicare requirements can be confirmed by an on-site survey." ¹ Id. at 2.

¹ Cornerstone submitted two documents for the first time with its request for review: (1) a September 26, 2007 letter from CMS to Tavares Family Medical Center stating that based on information submitted by Tavares about a change of ownership, CMS was "rescinding the termination action outlined in our May 7 [sic], 2007 letter" and (2) a copy of an April 18, 2007 "Bill of Sale" of Tavares' Rural Health Certificate to Cornerstone. We decline to admit these documents into the record. In deciding whether to admit additional evidence, the Board considers whether the proponent of the new evidence has shown good cause for not producing it during the ALJ proceeding. See Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program, www.hhs.gov/dab/divisions/appellate/guidelines/prov.html. Cornerstone does not explain why it failed to produce these documents earlier. In any event, these documents would not have altered our decision because CMS does not dispute that it rescinded its termination of Tavares based on the transfer of ownership to Cornerstone. See CMS Br. at 6.

An employee of the state agency reported that on both December 15 and 18, 2008, he found Cornerstone's facility closed during the business hours posted on the front door and no evidence that services were actually being provided there.² CMS Exs. 3, 4, 5, 8. Cornerstone last submitted a claim to its Medicare fiscal intermediary on June 25, 2008. CMS Ex. 7, at 1. In a January 21, 2009 letter to Cornerstone, CMS stated that "[w]e are terminating your Medicare provider agreement effective December 15, 2008" because the state agency "attempted to conduct a survey at your facility" on that date and "found the provider was not operating at" the 356 N. Central Street address. CMS Ex. 1.

Cornerstone timely appealed CMS's decision pursuant to 42 C.F.R. § 498.40. Before the ALJ, CMS moved to dismiss the appeal for lack of jurisdiction, arguing that, under the applicable regulations, Cornerstone's "Medicare provider agreement is deemed to have been voluntarily terminated" and there is no right to review of a voluntary termination. CMS Motion to Dismiss for Lack of Jurisdiction, Motion for Summary Judgment and Prehearing Brief, dated 7/6/09, at 5. CMS also moved for summary judgment. Id.

The ALJ made two numbered findings of fact and conclusions of law (FFCLs):

1. Petitioner is entitled to review because its termination is "in accordance with 42 C.F.R. § 405.2404" and is therefore a reviewable initial determination.
2. CMS is entitled to summary judgment because the undisputed facts establish that Cornerstone stopped furnishing services to the community and thereby voluntarily terminated its Medicare provider agreement. 42 C.F.R. § 405.2404(a)(3).

ALJ Decision at 2.

Cornerstone filed a timely request for Board review of the ALJ Decision pursuant to 42 C.F.R. § 498.82. CMS did not appeal the ALJ's conclusion in FFCL 1 that Cornerstone is entitled to review.

² The ALJ Decision states that the individual who made the visits was an employee of the fiscal intermediary. ALJ Decision at 3. However, this individual's contemporaneous visit reports as well as his affidavit identify him as a Health Facility Evaluator employed by the state agency. CMS Exs. 3, 4, 8.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. 1866ICPayday.com, DAB No. 2289, at 2 (2009), citing Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). Summary judgment is appropriate when the record shows that there is no genuine dispute of fact material to the result. See 1866ICPayday.com at 2, citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986).

Analysis

The ALJ Decision states, and Cornerstone does not dispute, that Cornerstone "does not claim to have been providing services[.]" ALJ Decision at 3. Cornerstone's only argument before the ALJ and the Board relates instead to the prior termination action by CMS effective March 27, 2007. Cornerstone argues that "CMS made [n]ew [l]aw" and "set a '[precedent]'" by rescinding Tavares' termination due to a change of ownership and that CMS should accord similar treatment to Cornerstone. P. Reply Br. at 3 (emphasis in original).

According to Cornerstone, it had been trying to sell the facility to a physician prior to the termination but had been unable to do so because its cost reports had not yet cleared. Cornerstone further asserts that acceptance of its cost reports was delayed because mail was incorrectly addressed to its street address instead of its post office box. See P. Reply Br. at 2; CMS Ex. 6, at 1-2.

The ALJ rejected Cornerstone's argument that it was entitled to the same treatment accorded Tavares, stating as follows:

Petitioner asks that its agreement be reinstated so that it can again change owners. That Cornerstone previously managed to avoid voluntary termination is irrelevant to the question of whether it ceased furnishing services in 2008. Since the undisputed evidence establishes that it did, I must sustain the termination.

ALJ Decision at 3.

We agree with the ALJ that Cornerstone's argument has no merit. We note first that the facts here are not analogous to those involving the termination of Tavares' agreement in March 2007. CMS terminated that agreement without knowledge that a change in ownership had already occurred. Here, however, Cornerstone acknowledges that no change in ownership has actually taken place.

Moreover, Cornerstone points to nothing in the regulations that would preclude CMS from terminating the agreement of a rural health clinic that had ceased to provide services even if services were resumed after a change of ownership. Indeed, the regulations make "change of ownership" an independent basis for termination by CMS of a rural health clinic's agreement (although they do not require termination on that basis). 42 C.F.R. § 405.2404(b)(1)(iii). Thus, even if Cornerstone had been able to effect a change of ownership prior to the termination, the regulations provide authority under which CMS could have terminated the agreement based on the change of ownership.

Accordingly, we conclude that the ALJ did not err in upholding Cornerstone's termination.

Conclusion

For the foregoing reasons, we affirm the ALJ Decision.

/s/
Judith A. Ballard

/s/
Sheila Ann Hegy

/s/
Stephen M. Godek
Presiding Board Member