The Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the case of:	)	
	)	
Missouri Baptist Hospital – Sullivan (CCN: 28-0015),	)	Date: August 11, 2009
	)	
Petitioner,	)	Docket No. C-09-108
	)	Decision No. CR1987
- v. -	)	
	)	
The Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) that Petitioner, Missouri Baptist Hospital-Sullivan does not qualify under Medicare participation requirements as a critical access hospital (CAH).

I. Background

Petitioner is a hospital in Sullivan, Missouri. It applied to CMS to be certified under Medicare participation requirements as a CAH. CMS determined that Petitioner did not qualify and Petitioner requested a hearing in order to challenge that determination. The case was assigned to me for a hearing and a decision and I established a schedule for the parties to file proposed exhibits, including the written direct testimony of any proposed witnesses, and briefs. After the parties completed their exchanges I decided that there were no issues that required an in-person hearing and I afforded the parties the opportunity to file final briefs. Petitioner filed a final brief, CMS did not.

With its pre-hearing exchange CMS filed eight proposed exhibits which it identified as CMS Ex. 1 – CMS Ex. 8. Petitioner filed six proposed exhibits with its pre-hearing exchange which it identified as P. Ex. 1 – P. Ex. 6. I receive the parties' proposed exhibits into evidence.

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether Petitioner is precluded from CAH certification due to its proximity to another hospital or CAH.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision. I set these forth below as separate headings.

1. In order to qualify as a CAH a hospital must satisfy the distance standard of section 1820(c)(2)(B)(i)(I) of the Social Security Act.

Section 1820(c)(2)(B)(i)(I) of the Social Security Act (Act) states that, as a prerequisite for qualifying as a CAH, a hospital must be:

> located more than a 35-mile drive (or, in the case of mountainous terrain or in areas with only secondary roads available, a 15-mile drive) from a hospital, or another [CAH] . . . .

An implementing regulation restates this language. 42 C.F.R. § 485.610(c).

Neither the Act nor the regulation defines the term "secondary roads." However, CMS has provided guidance as to the meaning of the term in its State Operations Manual (SOM). The SOM defines a "primary road" to be either:

- A numbered federal highway, including interstates, intrastates, expressways or any other numbered federal highway; or

- A numbered State highway with 2 or more lanes each way . . . .

SOM, Chapter 2, § 2256A.[1]

[1] An earlier policy statement defined the term "secondary road" explicitly by stating that a secondary road is "any state or local road, paved or unpaved, that does not meet the definition of 'primary road' as herein stated." State Survey Agency Directors Letter, Location and Relocation of Critical Access Hospitals (CAHs) and Relocation of Necessary Provider CAHs, S&C-06-04 (November 14, 2005). This policy statement was replaced effective September 7, 2007 with the current SOM language.

The SOM states additionally that:

> A CAH may qualify for application of the "secondary roads only" criterion if there is a combination of primary and secondary roads between it and any hospital or other CAH, so long as more than 15 of the total miles from the hospital or other CAH consists of areas in which only secondary roads are available. To apply this criterion, measure the total driving distance, and subtract the portion of that distance in which primary roads are available. If the result is more than 15 miles, then the 15-mile criterion is met.

Id.

The SOM does not explicitly define the term "secondary road" but, logically, it comprises any road that does not meet the SOM's "primary road" definition. A secondary road, therefore, is any road that is not a numbered federal highway or a numbered State highway with two or more lanes each way.

The SOM recognizes that there may be a situation where there is a combination of primary and secondary roads separating hospitals and it provides guidance as to how CMS should, in such a circumstance, establish whether an applicant for CAH participation meets the "secondary roads only criterion" of the Act and the implementing regulation. Pursuant to the SOM's guidance a facility can qualify as a CAH if the total mileage separating it from another hospital or CAH includes at least 15 miles of secondary roads. Consequently, a hospital may qualify as a CAH if it is less than 35 miles from the nearest CAH or hospital *if* at least 15 of those miles consist of roads that are not a numbered federal highway or a numbered State highway with two or more lanes each way.

Petitioner argues that the SOM is merely advisory and does not have binding legal effect. Moreover, it asserts that the SOM's explicit definition of primary roads and implicit definition of secondary roads are unduly restrictive and fail to take into account the realities of driving between rural facilities. It urges that I disregard the SOM's guidance in favor of a more flexible test that it advocates. Essentially, it contends that I should focus on driving *time* between facilities rather than on the types of roads that separate them.

Petitioner argues the purpose of the legislation authorizing CAH certification is to improve the quality of, and access to, hospitals and other health services for a State's rural residents. Petitioner's pre-hearing brief at 3. It contends the only reasonable way to read the Act's reference to "secondary roads", given that there is no statutory definition of the term, is to focus on what driving problems would serve to delay access to hospital care in a rural setting. According to Petitioner:

> [T]he only basis for determining what Congress considered to be a secondary road in a rural area and when it intended for the secondary road criterion to apply to a hospital seeking CAH designation is the reference to time in the [Act's] legislative history.

Id. at 4. Petitioner then cites to the House of Representatives Report supporting its version of the final legislation which stated that a facility seeking CAH certification had to be:

> [L]ocated a distance that corresponds to a travel time of greater than 30 minutes (using . . . guidelines specified [in the] . . . Code of Federal Regulations . . .), from [another] hospital . . . .

H.R. Rep. No. 105-149, at 392 (1997). Thus, according to Petitioner, it is elapsed driving time that serves as a criterion for deciding whether an applicant for CAH status is sufficiently far away from another CAH or hospital to qualify. And, from that, Petitioner reasons that one must measure the total time it takes to drive from one facility to another – regardless of the state of the roads – in order to make a determination of eligibility. Petitioner suggests that a facility should qualify as a CAH if total elapsed driving time from that facility to another CAH or to a hospital exceeds 30 minutes.

The problem with the "driving time" test advocated by Petitioner is that it is not present in the Act or in implementing regulations. Congress was explicit in stating that the way to establish eligibility was to measure the *distance* between facilities. The House report cited by Petitioner does not support its contention that driving time is the true criterion for measuring eligibility because it supports a version of the legislation that was not finally enacted.

Petitioner did not argue persuasively why I should disregard the guidance given by the SOM. There is room for the Secretary to interpret the Act's distance standard for deciding CAH eligibility because the Act does not define what is a primary or a secondary road. In any such circumstance, the judgment of the Secretary, acting through her delegate CMS, becomes important. Here, CMS has made a judgment about what is a reasonable way of determining whether a road is primary, and by extension, secondary. That judgment is on its face consistent with the Act's distance standard and should be accorded deference. I discern no reason to conclude that the policy stated in the SOM is arbitrary or contrary to the plain language of the Act or of the implementing regulation.

The effect of the SOM is to draw a bright line between what is and what is not a secondary road. Some facilities will qualify for CAH certification as a consequence of that line and others will not. That fact does not render CMS's judgment arbitrary or

unfair. It is clear that Congress, in enacting section 1820(c), intended that there be a dividing line between facilities which qualified and those that did not based on their distance from other CAHs or hospitals. What the Secretary has done, via CMS, implements what Congress intended.[2]

2. Petitioner does not qualify as a CAH because it does not satisfy the distance standard established by the Act, by the implementing regulation, and by the SOM.

The undisputed facts of this case are as follows. The nearest hospital to Petitioner is St. John's Mercy Hospital in Washington, Missouri (St. John's). That hospital is situated 31.14 miles away from Petitioner. CMS Ex. 1, at 4, 53. In order to drive from Petitioner to St. John's, using the shortest possible route, one must travel over various portions of Interstate Highway 44 (I-44), Missouri Route (MO Rt.) 47, and U.S. Highway 50. CMS Ex. 1, at 53-54.

The distance traveled over I-44 is 15.15 miles. I-44 has two or more lanes and meets the SOM's definition of a primary road. The entrance ramp to I-44 is 0.27 miles and the exit ramp is 0.30 miles. These two ramps also meet the SOM's definition of a primary road because they consist of two lanes of one-way travel. MO Rt. 47 is mostly one lane in each direction but it has two segments of two lanes, one extending for 0.17 mile and the other, in the town of Washington, Missouri, being 1.33 miles in length. These segments also meet the SOM's definition of a primary road due to the fact that they have two lanes of travel in each direction. CMS Ex. 1, at 53-54. These stretches of road total 17.22 miles when added together.

The remaining stretches of MO Rt. 47 and U.S. Highway 50 do not meet the SOM's definition of a primary road because they are not two lanes in each direction. These stretches of road total 13.92 miles when added together.

Petitioner does not qualify as a CAH under the SOM's criteria because the total distance of secondary roads between Petitioner's facility and St. John's is less than 15 miles. CMS's determination not to qualify Petitioner as a CAH is clearly grounded on the SOM's criteria and I sustain it because, as I discuss above, at Finding 1, the SOM's criteria constitute the Secretary's reasonable interpretation and application of the Act.

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[2] A distance standard such as that enacted by Congress and applied by CMS is objective in that it establishes measurable criteria for deciding whether a facility qualifies for CAH certification. By contrast, the driving time standard advocated by Petitioner is subjective for the reason that driving times vary depending on factors such as individual drivers, times of day, traffic conditions, and weather and road conditions. The SOM guidance plainly is consistent with the objective standard of the Act whereas a driving time standard such as Petitioner advocates would be inconsistent with that standard.

Petitioner argues that, even if the SOM's criteria must be applied, they should not result in a finding that the entrance and exit ramps to I-44 and the 1.33 mile stretch of Mo. Rt. 47 in Washington, Missouri constitute primary roads. It asserts that the SOM's definition of primary roads applies only to State *highways* and not to other roads even if those roads have two lanes running in each direction. Relying on a 2005 iteration of the SOM, Petitioner asserts that a primary road consists only of:

> a State-divided highway with two or more lanes each way, or any road with at least two contiguous miles with a speed limit of 45 mph or greater.

State Survey Agency Directors Letter, Location and Relocation of Critical Access Hospitals (CAHs) and Relocation of Necessary Provider CAHs, S&C-06-04 (November 14, 2005). It contends that neither the access and exit ramps of I-44 nor the stretch of MO Rt. 47 in Washington meet this definition. Therefore, according to Petitioner, these stretches of road should count as secondary and Petitioner satisfies the 15 miles of secondary road separation criterion for certification as a CAH.

However, the language relied on by Petitioner is not current. The current version of the SOM supersedes the version which Petitioner relies on and does not make the distinction made by the earlier version. It is reasonable to conclude that CMS intended not to rely on the language of the 2005 version any longer when it deleted it from the SOM. There is nothing in the current SOM that would suggest that the access and exit ramps of I-44 and the stretch of MO Rt. 47 in Washington, Missouri are not highways and primary roads. Indeed, the access and exit ramps of I-44 are designed and maintained as part of that highway and the stretch of MO Rt. 47 in Washington is part of a State designated highway even if the character of the road changes from rural to urban as it passes through the town.

Petitioner argues further that:

> A highway is a particular type of road that is characterized by high speed limits, as CMS has recognized, limited access, multiple lanes, no traffic lights and no cross-traffic. In contrast, numbered State roads, like the disputed sections of the route between [Petitioner and St. John's], that are undivided, have lower speed limits, traffic lights, and cross-traffic are not highways, even if they have more than one lane in each direction for a short distance.

Petitioner's final brief at 3-4. But, Petitioner offers no support for its advocated definition of a highway. In particular, Petitioner points to nothing showing that CMS has adopted this definition as part of its current SOM. I cannot conclude that CMS

intended its definition of a primary road – and by extension a secondary road – to mean anything other than that which it explicitly states in the current SOM. Petitioner's argument consequently fails.

/s/
Steven T. Kessel
Administrative Law Judge