Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of: Detroit Hope Hospital, (CCN: 23-0298), Petitioner, - v. - Centers for Medicare & Medicaid Services.	Date: December 8, 2009 Docket No. C-09-490 Decision No. CR2041

DECISION

Petitioner, Detroit Hope Hospital (Petitioner or Detroit Hope) is an institution located in Detroit, Michigan that, until April 30, 2009, was certified to participate in the Medicare program as a hospital. Based on surveys completed March 12 and April 29, 2009, the Centers for Medicare and Medicaid Services (CMS) terminated Detroit Hope's program participation because the institution did not meet the statutory definition of "hospital," and was not in substantial compliance with all Medicare conditions of participation for hospitals.

Petitioner here challenges its termination. Petitioner concedes that it was without nurses or attending physicians, but claims that such personnel were unnecessary because the individuals occupying its beds were not patients, but "guests." Petitioner admits to most of the other deficiencies cited -- absence of clinical records, no overall plan or budget, damaged physical plant -- but claims that the problems were beyond the institution's control (roof damage, water damage, contractor incompetence, employee sabotage) and complains that CMS did not give it sufficient opportunity to correct.

CMS now moves for summary judgment.

I grant CMS's motion. As discussed below, the undisputed evidence establishes that Detroit Hope did not meet the statutory definition of a "hospital," and was not in substantial compliance with all Medicare conditions of participation at the time of its surveys. CMS was therefore authorized to terminate its Medicare provider agreement.

I. Background

A hospital is an institution that, among other requirements, primarily engages in providing to inpatients, "by or under the supervision of physicians," (A) diagnostic and therapeutic services for medical diagnosis, treatment, and care of injured, disabled or sick persons, or (B) rehabilitation services for injured, disabled, or sick persons. Social Security Act (Act) § 1861(e). It may participate in the Medicare program as a provider of services if it meets the statutory definition and complies with regulatory requirements, called conditions of participation. Act, § 1861(e); 42 C.F.R. Part 482; 42 C.F.R. § 488.3. On the other hand, CMS, acting on behalf of the Secretary of Health and Human Services, may terminate a provider agreement based on the provider's failure to comply substantially with the provisions of section 1861 or the regulations governing its program participation. Act § 1866(b)(2); 42 C.F.R. § 489.53(a)(1).

The Secretary contracts with state survey agencies to survey providers "as frequently as necessary" to ascertain compliance with program requirements and to confirm the correction of deficiencies. 42 C.F.R. § 488.20(b).

Here, on March 12, 2009, the Michigan Department of Community Health (state agency) completed a complaint investigation/recertification survey and determined that Detroit Hope was not in substantial compliance with six Medicare conditions of participation for hospitals: 42 C.F.R. § 482.12 (governing body), 42 C.F.R. § 482.13 (patient's rights), 42 C.F.R.§ 482.21 (quality assessment performance improvement), 42 C.F.R. § 482.23 (nursing services), 42 C.F.R. § 482.24 (medical records), and 42 C.F.R. § 482.41 (physical environment/life safety code). The surveyors also concluded that the facility's noncompliance posed immediate jeopardy to resident health and safety. CMS Exhibits (Exs.) 1, 4. In a letter dated April 8, 2009, CMS advised Detroit Hope that its Medicare provider agreement would terminate on April 30, 2009. The letter told Petitioner that "[t]ermination can only be averted by correction of these deficiencies immediately" and instructed the institution on submitting a plan of corrections. CMS Ex. 1, at 2. The letter also advised Petitioner of its hearing rights.

Detroit Hope subsequently submitted plans of correction, claiming correction dates of no later than April 25, 2009. CMS Exs. 4, 5. The state agency's surveyors then revisited Detroit Hope on April 28 and 29, 2009. They determined that the institution was still not in substantial compliance with 42 C.F.R. § 482.12 (governing body); 42 C.F.R. § 482.21 (quality assessment performance improvement); and 42 C.F.R. § 482.23 (nursing services). They also determined that the deficiencies continued to pose immediate

jeopardy to patient health and safety. CMS Exs. 6, 9. In a letter dated May 6, 2009,[1] CMS notified Detroit Hope that it remained out of substantial compliance with these conditions of participation, that it failed to meet the statutory definition of a hospital because it did not provide 24-hour nursing services, and it was not primarily engaged in providing to inpatients diagnostic, therapeutic or rehabilitative services by or under the supervision of physicians. CMS Ex. 9. The letter confirmed that the institution's Medicare participation had been terminated on April 30, 2009, and reminded Petitioner that its appeal rights were set forth in CMS's April 8, 2009 notice letter.

Petitioner timely requested a hearing.

CMS moves for summary affirmance. CMS argues that the undisputed evidence establishes that Detroit Hope did not meet the statutory definition of a hospital, and that the institution was not in substantial compliance with 42 C.F.R. §§ 482.12, 482.21, and 482.23; based on these deficiencies, CMS properly terminated Detroit Hope's program participation.

Petitioner has not challenged the survey findings *per se*, but disavows responsibility for many of the deficiencies, and complains that it was not given sufficient opportunity to correct because the state surveyors revisited the facility prior to April 30, 2009.

With its motion for summary judgment, CMS filed a brief (CMS Br.) and 35 proposed exhibits (CMS Exs. 1-35). Petitioner has filed a brief (P. Br.) and 31 proposed exhibits. (P. Exs. 1-31).[2]

II. Issues

I consider whether summary judgment is appropriate.

On the merits, the sole issue before me is whether Detroit Hope met the statutory definition of a hospital and was in substantial compliance with the Medicare conditions of participation for hospitals.

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[1] CMS sent a virtually identical letter on May 5, 2009, but it apparently contained an error regarding the revisit dates, so CMS sent a corrected version the following day. CMS Ex. 8.

[2] For unexplained reasons, Petitioner numbered its first 11 exhibits (P. Exs. 1-11), but marked the remaining documents with letters (A-T). To conform to Civil Remedies Division practices we have re-marked those documents P. Exs. 12-31.

III. Discussion

Summary Judgment. Summary judgment is appropriate if a case presents no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Illinois Knights Templar Home*, DAB No. 2274, at 3-4 (2009), and cases cited therein.

The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Center v. Dep't of Health & Human Services,* 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, n.11 (1986); s*ee also Vandalia Park,* DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center,* DAB No. 1918 (2004).

> 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 . . . .

Illinois Knights Templar, at 4, citing *Kingsville Nursing and Rehabilitation Center*, DAB No. 2234, at 3-4 (2009); *Livingston Care Center*, DAB No. 1871, at 5 (2003).

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *Brightview Care Center*, DAB 2132, at 2, 9 (2007); *Livingston Care Center*, 388 F.3d at 172; *Guardian Health Care Center,* DAB No. 1943, at 8 (2004); *but see*, *Brightview*, DAB 2132, at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). Moreover, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cf. Guardian Health Care Center*, DAB No. 1943, at 11 ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.").

A. CMS is entitled to summary judgment because the undisputed facts establish that Detroit Hope did not meet the statutory definition of a hospital and did not comply with all Medicare conditions of participation.[3]

To meet the statutory definition of a "hospital," an institution must, among other requirements:

- primarily engage in providing to inpatients "by or under the supervision of physicians," diagnostic and therapeutic services for medical diagnosis, treatment, and care of injured, disabled or sick persons or rehabilitation services for the rehabilitation of injured, disabled, or sick persons (Act § 1861(e)(1));

- maintain clinical records on all patients (Act § 1861(e)(2));

- provide 24-hour nursing services, "rendered or supervised by a registered professional nurse," and have on duty "at all times" a registered nurse or a licensed practical nurse (Act § 1861(e)(5)); and

- have in effect an overall plan and budget that meets certain statutory requirements: has an annual operating budget that includes all anticipated income and expenses related to items considered income and expenses; provides for a 3-year capital expenditures plan; provides for annual review and updating; and is prepared under the direction of the institution's governing body (or its representative committee), the administrative staff, and medical staff (Act §§ 1861 (e)(1) and 1861(z)).

Petitioner does not dispute CMS's assertions that, at the time of the survey, Detroit Hope had no medical/surgical inpatients; it was not providing 24-hour nursing services; it could produce virtually no clinical records; and it lacked an overall plan and budget. *See*, *e.g.*, P. Br. at 10-11, 13, 17. Petitioner explicitly admits that:

- "[t]he absence of part of [Detroit Hope's] management and nurses led the [state agency] surveyors to conclude that the hospital was not in compliance with [three conditions of participation] . . ." (P. Br. at 5);

- since January 17, 2009, it "voluntarily suspended its medical/surgical admissions" (P. Br. at 10);

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[3] My findings of fact and conclusions of law are set forth, in italics and in bold, in the discussion captions.

- individuals observed occupying the medical/surgical beds on the third floor "were not registered for admission, nor were they under supervision of a nurse, or supervision by a doctor" and thus were not considered inpatients (P. Br. at 10-11);

- "there were no patients when the surveyors visited. The persons on the third floor were not patients" (P. Br. at 13);

- "[Detroit Hope] did not have patients during the time of the survey visit. . . . It did not have clinical records. . . ." (P. Br. at 17).

These undisputed facts should justify the entry of summary judgment here because they show that Detroit Hope did not meet the statutory definition of hospital. *Arizona Surgical Hospital, LLC*, DAB No. 1890, at 7 (2003) ("Given Petitioner's inability to comply with the statutory definition, the ALJ was not required to take additional evidence.")

Moreover, these undisputed facts also mean that Detroit Hope was not in substantial compliance with 42 C.F.R. § 482.23 which requires 24-hour nursing services furnished or supervised by a registered nurse.

Nor has Petitioner produced any evidence to establish that it was it in substantial compliance with 42 C.F.R. § 482.12, which requires an effective governing body that appoints and oversees the institution's medical staff. Under the governing body's direction, the institution must prepare an overall plan that includes an annual operating budget prepared according to generally accepted accounting principles. The plan must provide for three years worth of capital expenditures and include sources of financing for major expenditures. Petitioner does not claim that it met this condition at the time of the surveys, and the document it identifies as its "business plan" is dated 2006, and seems to address primarily the institution's first year of operations. Section 5 of that document, which purportedly covers Medical Staff and Medical Staff Bylaws, is empty. P. Ex. 12.

Finally, Detroit Hope was not in substantial compliance with 42 C.F.R. § 482.21, which requires "an effective, ongoing, hospital-wide, data-driven quality assessment and performance improvement program"(QAPI). Petitioner does not argue that it had such a plan in place at the time of the surveys, and the document it submits as its QAPI plan is dated May 20, 2009, well after the date of its termination. P. Ex. 13.

B. Petitioner has not proffered evidence showing that it was forced into temporary noncompliance by circumstances beyond its control.

Although it does not dispute the survey findings of noncompliance, Petitioner suggests that its deficiencies should be excused because they were purportedly caused by circumstances beyond the institution's control. According to Petitioner, it "voluntarily suspended its medical/surgical admissions" as of January 17, 2009, because a major snow

storm damaged its roof. Petitioner claims that the institution then sustained substantial water damage "that included a major part of the hospital," destroying medical records, and damaging urgent care facilities, medical surgical floors, auxiliary services, the telephone system, and information technology related to patient admission, billing and hospital protocol. P. Br. at 2-3. More than three months later, Detroit Hope had not resumed admissions, nor corrected other deficiencies purportedly attributable to the storm. Petitioner also complains that certain contract employees, some through ignorance and others through malice, destroyed records and vandalized hospital property.

The Departmental Appeals Board has not ruled on whether CMS may terminate an institution whose deficiencies are attributable to circumstances beyond its control. In *Arizona Surgical Hospital, LLC*, DAB No. 1890 (2003), a state sanction precluded a Medicare-certified hospital from accepting patients. As a result, at the time of its surveys, the institution had no inpatients and was not providing services to inpatients. Concluding that the institution did not meet the statutory definition of a hospital, the Board sustained its termination. The Board also approved the administrative law judge's (ALJ's) refusal to consider "whether CMS could terminate a hospital that briefly failed to meet any of the definitional requirements of section 1861(e) due to situations such as loss of clinical records or emergency reductions in nursing staff." The Board reasoned that since petitioner had proffered no evidence suggesting "that it was a compliant inpatient hospital forced into a situation of temporary noncompliance due to the [state's] prohibition on inpatient admissions," the issue was not before the ALJ.

I recognize that CMS may, from time to time, exercise its discretion and decline to terminate a temporarily noncompliant institution, particularly where its deficiencies appear to be beyond the institution's control. But, where CMS declines to exercise such discretion, I am aware of nothing in the statute or regulations that gives me the authority to prevent the agency from enforcing statutory and regulatory requirements, and Petitioner here has pointed to no such authority.[4] Nevertheless, like the ALJ in *Arizona Surgical*, I need not and do not decide this issue. Petitioner here has proffered no evidence suggesting that it was an otherwise compliant hospital "forced into a situation of temporary noncompliance."

First, Petitioner has not established that, "but for the storm," it would have met the statutory and regulatory requirements. CMS asserts that well before January 17, 2009, Detroit Hope had stopped admitting medical/surgical patients. Petitioner has proffered no evidence to show otherwise.

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[4] I note also that a patient's welfare is no less jeopardized because a missing roof was caused by an Act of God (out of the provider's control) rather than deferred maintenance (within the provider's control).

Second, the storm occurred more than three months prior to the April survey. After more than three months, Detroit Hope was far from resolving its most basic problems. I question whether, based on its more than 3 months of wide-spread noncompliance, Detroit Hope falls within the category of institutions described in *Arizona Surgical* – institutions that "briefly" failed to meet a definitional requirement.

Third, Petitioner has not explained how the storm damage precluded the institution from employing appropriate staff and putting together the necessary plan and budget.

Fourth, what should have been inpatient beds were obviously habitable because they were occupied at the time of the surveys.[5] According to Petitioner, those beds could have been vacated and filled with inpatients almost immediately. P Br. at 10-11.

Finally, Petitioner blames many of its difficulties on the conduct of contract employees. Following the storm, employees of a salvage company hired to clear out the damage "unfortunately due to . . . unfamiliarity with hospital protocols, decided to get rid of all the soiled material" which apparently included the institution's clinical records, hospital protocols, and hospital management papers. P. Br. at 3, 8.

Petitioner also complains that the company it hired to manage its psychiatric floor, Urban Health Outreach, "failed to maintain a quality of patient management, failed to follow the hospital's rules and regulations of patient care, failed the survey that was conducted by the Joint Commission [on the Accreditation of Hospitals (JCAH)] . . . ." P. Br. at 6. Petitioner charges that, because the program's first management team was "not up to the standard of in-patient psychiatric hospital care," one of Urban Health Outreach's directors assumed the post of interim director. But, again according to Petitioner, she had no background or experience in hospital management, and she appointed a similarly-unqualified manager. P. Br. at 6-7. After Urban Health Outreach failed its JCAH survey, Detroit Hope terminated its contract. Urban Health staff then "started vandalizing the hospital property," and filing anonymous complaints with the state agency. P. Br. at 7.

For summary judgment purposes, I accept these allegations as true. But a provider does not escape responsibility for maintaining compliance by placing blame on the actions of its employees or its contractors. *See* 42 C.F.R. § 483.20(k)(3) (services "arranged by the facility must . . . meet professional standards of quality"). It is well-settled that a provider "cannot disown the consequences" of its deficiencies by the simple expedient of pointing the finger at those who act as its agents, and are empowered to make and carry out decisions for it. *Emerald Oaks*, DAB No. 1800, n. 3 (2001); *accord, Ridge Terrace*, DAB No. 1834, at 8 (2002).

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[5] The individuals in beds on the institution's medical/surgical wing were not hospital patients, but "temporary guests," who were not "under the supervision of a nurse, or the supervision of a doctor." P. Br. at 10-11.

C. Petitioner is not entitled to an opportunity to correct.

As the above discussion shows, Petitioner does not dispute the validity of the survey findings. Instead, Petitioner bases its appeal on CMS's purported failure to afford it adequate opportunity to correct its deficiencies. In Petitioner's view, CMS violated the law because it revisited the facility prior to April 30, 2009. P. Br. at 2. According to Petitioner, CMS visited the institution "prematurely and unannounced" on April 27-29, 2009, even though Detroit Hope had not submitted its full package with corrections. P. Br. at 5.

The most obvious problem with this contention is that the state agency scheduled its resurvey in response to Petitioner's representation that its deficiencies were or would be corrected no later than April 25, 2009. CMS Ex. 4. Moreover, as of April 29, 2009, Detroit Hope was an institution with no inpatients, no nurses, and no physicians to oversee care.[6] It lacked a workable overall plan or budget. Even drawing every inference in the light most favorable to Petitioner, its suggestion that, with one or two additional days to correct, it would have achieved substantial compliance is simply not reasonable.

Moreover, when a provider's Medicare participation is terminated because of alleged noncompliance, "the critical date for establishing compliance is the survey date." *Carmel Convalescent Hospital*, DAB No. 1584, at 12 (1996); *Rosewood Living Center*, DAB No. 2019, at 11 (2006). A provider's efforts to bring itself into compliance after the date of the resurvey are "completely irrelevant to the facility's appeal of [CMS's] determination to terminate." *Carmel*, DAB No. 1584, at 13.[7]

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[6] Detroit Hope asserts that, subsequent to the surveys, its Board hired a new Chief Operating Officer, a Director of Nursing and contracted with agencies to provide nurses, citing P. Ex. 14 as evidence of the contracted services. P. Br. at 5. In fact, P. Ex. 14 is an unnumbered jumble of documents. It includes what appear to be executed and unexecuted agreements for equipment, janitorial services, and volunteers, but no agreement with a Chief Operating Officer or Director of Nursing.

[7] *Carmel* involved a long-term care facility (SNF/NF), whose governing rules are not completely identical to those of other providers (*compare, e.g*., 42 C.F.R. § 488.28 *with* 42 C.F.R. § 488.402). However, as I explained in an earlier decision, the Board based its conclusions on rules applicable to all providers. *Therapy Management Services, Inc. d/b/a CompRehab*, DAB CR1892, at 4-5 (2009).

As it did here, CMS may afford providers an opportunity to correct deficiencies prior to termination. *See* 42 C.F.R. § 488.28 (A deficient provider may continue to participate only if the facility has "submitted an acceptable plan of correction for achieving compliance within a reasonable time.") However, a provider is entitled to an opportunity to correct only if it has submitted an acceptable plan of correction and *its deficiencies are no more serious than standard level*. 42 C.F.R. § 488.28(c)(1). CMS is not required to afford a provider the opportunity to correct a condition-level deficiency before terminating its program participation. Thus, Petitioner's claims that it was on the brink of correction at the time of its termination are irrelevant. *See Community Home Health*, DAB No. 2134, at 14; *Excelsior Health Care Services, Inc.*, DAB no. 1529, at 6-7 (1995).

IV. Conclusion

Because no one disputes that, at the time of its surveys, Detroit Hope did not meet the statutory definition of hospital and was not in substantial compliance with Medicare conditions of participation, CMS was authorized to terminate its provider agreement. I therefore grant CMS's motion for summary judgment.

/s/

Carolyn Cozad Hughes
Administrative Law Judge