Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

City of Sugar Land
Docket No. A-16-36
Decision No. 2719
July 6, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The City of Sugar Land, Texas (City) filed an application with the Centers for Medicare & Medicaid Services (CMS) to enroll in the Medicare program as a supplier of ambulance services. CMS denied the enrollment application, citing its temporary moratorium on the enrollment of new ambulance suppliers in the county where the City is located. The City requested a hearing to challenge the enrollment denial, but an administrative law judge (ALJ) dismissed the hearing request, stating she had no authority to review the issues raised – or to grant the relief requested –by the City. *City of Sugar Land*, ALJ Ruling 2016-3 (2015) (Ruling). The City then filed this appeal.[1] We affirm the dismissal for the reasons stated below.

Legal Background

The Medicare statute authorizes the Secretary of Health & Human Services (Secretary) to impose a "temporary moratorium on the [Medicare] enrollment of new providers of services and suppliers . . . if [she] determines such moratorium is necessary to prevent or combat fraud, waste, or abuse" in the Medicare program. 42 U.S.C. § 1395cc (j)(7)(A). CMS has issued regulations that implement the Secretary's statutory authority in this area. Those regulations are found in 42 C.F.R. §§ 424.570, 424.530(a)(10), and 498.5(l)(4).

Section 424.570 specifies rules governing the imposition, extension, applicability, and enforcement of a temporary moratorium. Paragraph (a)(1) of that section states that CMS "may impose a moratorium on the enrollment of new Medicare providers and suppliers of a particular type . . . in a particular geographic area." 42 C.F.R. § 424.570(a)(1)(i). Paragraph (a)(1) also states that a temporary moratorium "does not apply to changes in practice location, changes in provider or supplier information such as phone number,

[1] On January 7, 2016, one day before filing this appeal, the City filed a motion asking the ALJ to vacate her dismissal ruling. The ALJ denied the motion on January 28, 2016.

address or changes in ownership . . . ." *Id.* § 424.570(a)(1)(iii). In addition, paragraph (a)(1) states that a temporary moratorium "does not apply to any enrollment application that has been approved by the enrollment contractor but not yet entered into PECOS [the internet-based Provider Enrollment, Chain, and Ownership System] at the time the moratorium is imposed." *Id.* § 424.570(a)(1)(iv).

Paragraph (b) of section 424.570 states that a moratorium may be imposed for a period of six months and, "if deemed necessary by CMS," extended in six-month increments. *Id.* § 424.570(b). Notice of the imposition or extension of a temporary moratorium must be published in the Federal Register. *Id.* §§ 424.570(a)(1)(ii), 424.570(b).

Paragraph (c) of section 424.570 states that a "Medicare contractor denies" the enrollment application of a provider or supplier "if the provider or supplier is subject to a moratorium as specified in paragraph (a) of this section." *Id.* § 424.570(c).

Consistent with section 424.570(c), section 424.530(a)(10) authorizes CMS to deny Medicare enrollment if the "provider or supplier submits an enrollment application for a practice location in a geographic area where CMS has imposed a temporary moratorium." *Id.* § 424.530(a)(10).

A provider or supplier may appeal an enrollment denial "in accordance with" the regulations in 42 C.F.R. Part 498, subpart A. *Id.* § 424.545(a). Those regulations state that a prospective provider or supplier dissatisfied with an "initial determination" to deny its Medicare enrollment application may appeal that denial by first asking CMS for "reconsideration." *Id.* § 498.5(l)(1). A party "dissatisfied with [the] reconsidered determination" is "entitled to a hearing before an ALJ." *Id.* § 498.5(l)(2). A party entitled to hearing under section 498.5 may invoke its right to a hearing by filing a "request for hearing" that meets the timeliness and content requirements in section 498.40.

The regulation of particular importance to this case is section 498.5(l)(4), which states:

> For appeals of [enrollment] denials based on § 424.530(a)(10) . . . related to temporary moratoria, the scope of review will be limited to whether the temporary moratorium applies to the provider or supplier appealing the denial. The agency's basis for imposing a temporary moratorium is not subject to review.

Id. § 498.5(l)(4).

Case Background

On July 31, 2013, CMS notified the public in the Federal Register that it was imposing a temporary moratorium on the "Medicare Part B enrollment of ambulance suppliers" in Harris County, Texas (which contains the city of Houston) and in several surrounding counties, including Fort Bend County, which encompasses the City. 78 Fed. Reg. 46,339, 46,344-45 (July 31, 2013). CMS stated that it was "necessary to extend" the moratorium beyond Harris County to "surrounding counties in order to prevent potentially fraudulent ambulance suppliers and providers from enrolling their practices in a neighboring county to avoid the moratorium." *Id*. at 46,345. CMS has since extended the moratorium, without interruption, in six-month increments. Notice of the most recent six-month extension was published in the February 2, 2016 Federal Register. *See* 81 Fed. Reg. 5444.

In early 2015, the City filed an application to enroll in Medicare as an ambulance supplier.[2] CMS Ex. 1, at 1, 2, 6, 10. Because the City sought to provide ambulance services within a county covered by the temporary moratorium, a Medicare contractor denied the application under section 424.530(a)(10) and 42.570(c). CMS Ex. 2. CMS upheld the denial upon reconsideration. CMS Ex. 3.

The City then filed a request for hearing with the ALJ, stating that "[d]espite the moratorium, . . . an exception . . . should be granted" to allow it to provide ambulance service within its jurisdiction. June 8, 2015 Req. for Hearing. CMS responded with a "motion to dismiss." Asserting that the City had admitted to the "applicability of the moratorium," CMS contended that the City's request for an "exception" was "necessarily" a request that the ALJ exceed the scope of her review by "review[ing] the basis for imposing the moratorium." July 17, 2015 Motion to Dismiss at 3. CMS therefore asked the ALJ to dismiss the City's hearing request under 42 C.F.R. § 498.70(b), which permits dismissal if "[t]he party requesting the hearing is not a proper party or does not otherwise have a right to a hearing." *Id.* at 2-3.

The City filed a brief opposing the dismissal motion together with supporting affidavits. In these submissions, the City alleged that, prior to 2015, Fort Bend County (County) provided ambulance services to the City's residents under a "mutual aid agreement" with the City. *See* Aug. 24, 2015 Response to Motion to Dismiss (Resp. to MTD) at 1. In fiscal year 2013, the City decided that its arrangement with the County was no longer satisfactory (due to various concerns, including service quality) and that it would begin to

[2] CMS Exhibit 1 is the City's Medicare Enrollment Application (Form CMS-855B), which was certified by the City's authorized officials on January 27, 2015. The ALJ found that the application was filed on February 2, 2015. Neither CMS nor the City disputes this finding. Ruling at 1-2.

develop its own "fire department-based" ambulance system. *Id.* at 2; P. Ex. 3, ¶¶ 15, 17. The development process (which took approximately two years) involved, among other things, buying ambulances, renovating buildings, hiring and training paramedics, modifying or expanding information technology resources, retaining a billing contractor, and obtaining the necessary state and federal licenses. *See* P. Ex. 3, ¶¶ 18-23; P. Ex. 4, ¶¶ 7-18. The City began to provide ambulance services to its residents on January 1, 2015. P. Ex. 4, ¶ 4.

Pointing to its prior collaboration with the County, the City emphasized to the ALJ that it was not seeking to provide "new ambulance services," that its ambulance services were merely those that had been previously provided under the County's Medicare provider number and "transferred to" the City, and that CMS should have treated its enrollment application as akin to one that reports a "change in ownership." Resp. to MTD at 8, 11-13. The City also contended that the ALJ had the authority to exempt it from the moratorium on these grounds. *Id.* at 12, 13. Finally, the City argued that the moratorium was unjustified and unnecessary (as applied to governmental ambulance service suppliers) and was imposed in violation of certain requirements in section 424.570. *Id.* at 5-11.

The ALJ's Ruling

Citing section 498.5(l)(4), the ALJ ruled that the only issue she was permitted to consider was whether the moratorium "applies" to the City. Ruling at 2. She held that the moratorium does apply to the City because of two undisputed facts: first, the City is located in the moratorium's targeted geographical area; and second, the moratorium was in effect when the City submitted its enrollment application. *Id.* at 3. The ALJ further found that she had "no authority" to "grant exceptions" to the moratorium or to consider the City's "attacks [on] the underlying bases for applying the moratorium." *Id.*

Regarding the City's argument that the moratorium is inapplicable because its ambulance services are not "new" services, the ALJ said:

> . . . [T]he question is not whether the services themselves are new. After all, many, if not most, newly-enrolled providers and suppliers will provide the same services previously provided by others. The question is whether the supplier of the services is new and, on that issue, there is no dispute. Sugar Land was not previously enrolled as a supplier of ambulance services and Fort Bend County did not transfer its provider number to [the City]. It could not do so because it continued to provide those services to county residents outside Sugar Land. So Sugar Land applied as a new supplier and is subject to the moratorium. . . .

Id.

In short, the ALJ concluded that the City had "not raised an issue that I have the authority to review." Ruling at 3. For that reason, she dismissed the City's request for hearing pursuant to section 498.70(b). *Id.* at 3-4. The City then filed this appeal.

Standard of Review

We review a disputed factual issue as to whether the ALJ's decision is supported by substantial evidence in the record as a whole. We review a disputed issue of law as to whether the ALJ's decision is erroneous. *See* Departmental Appeals Board, *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

Discussion

Section 498.5(l)(4) states that, when a provider appeals a Medicare enrollment denial issued under section 424.530(a)(10), as the City did here, the adjudicator's scope of review "is limited to whether the temporary moratorium *applies to*" the provider, and CMS's "basis for imposing a temporary moratorium is not subject to review." 42 C.F.R. § 424.5(l)(4) (italics added). This means that neither an administrative law judge nor the Board may consider the policy merits or legal validity of a temporary moratorium in deciding whether or not to sustain an enrollment denial under section 424.530(a)(10). The only pertinent issue on appeal of a section 424.530(a)(10) denial is whether the moratorium applies to the affected provider or supplier.

In its appeal brief, the City suggests, without clear explanation, that it is not the "type" of provider or supplier covered by the moratorium. *See* City of Sugar Land's Request for Review (RR) at 8. However, substantial evidence in the record establishes that the City is the type of supplier to which the temporary moratorium applies. When asked on the Medicare enrollment application to identify its supplier "type," the City checked "ambulance service supplier." CMS Ex. 1, at 6. "Ambulance supplier" is the supplier type expressly covered by the temporary moratorium. 78 Fed. Reg. at 46,344 (stating that the moratorium covers the "Medicare Part B enrollment of ambulance suppliers" in the geographic areas specified).

Because the City is the type of supplier covered by the moratorium, the "basic factual issues determinative of whether" the moratorium applies to the City are:

- "whether [the] application is an initial application for enrollment in the Medicare program" rather than an application reporting a change in practice location or a change to other information on file with CMS concerning an enrolled provider or supplier (such as provider's or supplier's phone number, address, or owners)[3];

- whether the applicant is "seeking to practice in a geographic area for which the moratorium on enrollments [is] in effect"; and

- whether the enrollment application "had been 'approved' [within the meaning of section 424.570(a)(1)(iv)] when the moratorium went into effect."

UpturnCare Co., d/b/a/ Accessible Home Health Care, DAB No. 2632, at 10 (2015). If the City's enrollment application was an initial application to participate in Medicare, and sought permission to operate in a geographic area targeted by the moratorium, then the moratorium applies to the City unless its application was "approved . . . at the time the moratorium [was] imposed." 42 C.F.R. § 424.570(a)(1)(iv).

In this case, the City indicated on its enrollment application (the CMS-855B) that it was applying as a "new enrollee" in Medicare and that it did not seek to "reactivate," "revalidate," or change information about a previously approved application. CMS Ex. 1, at 2-3. Hence, the City's own representations establish that its application was an initial application to enroll in Medicare as an ambulance service supplier. In addition, there is no dispute that the City sought to operate as an ambulance supplier in a geographic area (Fort Bend County) covered by the temporary moratorium. Furthermore, the City filed its enrollment application *after* the moratorium took effect (in July 2013), and thus the application could not possibly have been "approved . . . at the time the moratorium [was] imposed." For these reasons, the ALJ correctly found that the moratorium in question applies to the City.

In its appeal briefs, the City reiterates its argument that it is not subject to the moratorium because its ambulance services are not "new" but were "previously provided under the Medicare provider number of Fort Bend County . . . ." RR at 3, 4; Reply Br. at 2. The ALJ correctly rejected this argument. The temporary moratorium does not bar the provision of "new services." Rather, it prohibits the Medicare enrollment of newly enrolling suppliers of a particular "type" – namely, new suppliers of ambulance services.

[3] *See also* 76 Fed. Reg. at 5918 (stating that temporary moratoria apply to "[n]ewly enrolling providers and suppliers (that is, initial enrollment applications)"); 42 C.F.R. § 424.570(a)(1)(iii) (indicating that a temporary moratorium "does not apply to changes in practice location" or to "changes in provider or supplier information such as phone number, address or changes in ownership").

78 Fed. Reg. at 46,345 (stating that "no new ambulance suppliers will be enrolled" beginning on the moratorium's effective date); *see also* 42 C.F.R. § 424.570(a)(1)(i) (stating that a temporary moratorium is "on the enrollment of new Medicare . . . suppliers of a particular type").

As an outgrowth of the argument discussed in the previous paragraph, the City contends that CMS should have treated its Medicare enrollment application as having reported a "change in ownership" and exempted it from the moratorium on that ground under section 424.570(a)(1)(iii). RR at 4; Reply Br. at 2. However, CMS was under no obligation to do so given that the City identified itself on the application's face as an organization enrolling for the first time in Medicare and certified that its representations in the application were "true, correct, and complete." CMS Ex. 1, at 27. Nowhere on the application did the City mention or allude to a change in the "ownership" of an enrolled supplier. *See, e.g.*, CMS Ex. 1, at 17 (showing no "change" in the information reported in the section that calls for information about "ownership interest" in, or "managing control" of, the entity that filed the application). In addition, the City's allegations concerning the start-up of its ambulance service do not amount to a change in ownership of an enrolled ambulance supplier. While the City now delivers ambulance services once provided to city residents by Fort Bend County, the City has not established that the City and County were parties to any transaction reasonably viewed as a change of ownership, such as a legal transfer, sale, exchange, consolidation or merger of assets or liabilities relating to the county's ambulance operation. In addition, the City did not assume managerial control of any part of that operation. The City merely discontinued its inter-governmental service agreement with the County, then filled the resulting service gap by starting its own licensed ambulance service. P. Ex. 3, at 13-15, ¶¶ 15-17, 26.

The City suggests that the temporary moratorium does not apply, or was not intended to apply, to a *governmental* ambulance supplier. RR at 8, 10. However, the City cites no legal authority supporting that proposition, and we see no basis in the language of the applicable regulations for distinguishing between public and private ambulance companies. Section 424.570(a) – which spells out the criteria for determining whether a "supplier" is "subject to" a temporary moratorium – makes no distinction between governmental or non-governmental suppliers. *See* 42 C.F.R. § 424.570(a), (c). The term "supplier" is itself defined in CMS's regulations without reference to ownership or affiliation. *Id.* § 400.202 (defining a supplier to mean an "entity other than a provider, that furnishes health care services under Medicare"). In its review, the Board is bound by the applicable regulations. *Vijendra Dave, M.D.*, DAB No. 2672, at 8 (2016). Absent any indication in the language of the regulations that the Secretary intended to treat public ambulance suppliers any differently than private ambulance suppliers for purposes of the moratorium, the Board may not find such a distinction. Furthermore, the temporary moratorium, as described in the July 31, 2013 Federal Register, purports to

cover *any* ambulance supplier within the targeted counties and articulates no distinction between governmental and private suppliers. 78 Fed. Reg. at 46,344-46,345. And nothing in the February 2011 rulemaking which adopted section 424.570 suggests that CMS intended to categorically exempt government-affiliated suppliers from the scope of a temporary moratorium.[4] *See* 76 Fed. Reg. 5862, 5918-5928 (Feb. 2, 2011).

To the extent that the City is arguing that CMS could and should have taken the City's municipal status and other unique circumstances into account in deciding whether to deny its enrollment application under section 424.530(a)(10), we cannot overturn the enrollment denial on that ground. Even assuming CMS had discretion to refrain from issuing the denial in these circumstances, it chose not to do so, and we have no authority to review that choice. In general, ALJ and Board review of enrollment denials is limited to deciding whether CMS has established a legal basis for its action. *See Brian K. Ellefsen, D.O.*, DAB No. 2626, at 6-7 (2016). Hence, if the record demonstrates that CMS was "legally authorized to deny an enrollment application," then we must uphold the denial and may not "substitute [our] discretion for that of CMS . . . in determining whether, under the circumstances, denial is appropriate." *Id.* at 7. Here, as discussed, CMS was authorized to deny the City's enrollment application under section 424.530(a)(10) because the record demonstrates that the City was "subject to" the temporary moratorium as specified in section 424.570(a).

The City's appeal briefs make the following additional points:

- When initially imposed, the temporary moratorium was "entirely based on Medicare and Medicaid data analysis for Harris County" (RR at 4);

- CMS's reason for expanding the moratorium to surrounding counties – to "prevent potentially fraudulent ambulance suppliers and providers from enrolling their practices in a neighboring county [such as Fort Bend County] to avoid the moratorium" (78 Fed. Reg. at 46, 345) – is "flawed when it is applied to prevent the transfer of an existing EMS ambulance services from one governmental unit, Fort Bend County, to another governmental unit, the City of Sugar Land, which are both located in Fort Bend County" (RR at 5);

[4] We note that CMS declined to draw a distinction in its enrollment screening regulations (in 42 C.F.R. § 424.518) between government-owned and non-government-owned providers and suppliers, including ambulance suppliers. As proposed, the screening regulations assigned a "limited" risk level to "public or government-owned ambulance services suppliers" and a "moderate" (higher) risk level to "non-public, non-government owned or affiliated" ambulance suppliers. 76 Fed. Reg. at 5868, 5869. In response to public comment, however, CMS eliminated the public-private distinction for *all provider or supplier types* in its screening regulations and assigned ambulance suppliers to the "moderate" screening level. *Id.* at 5872-5873, 5894.

- CMS failed to satisfy the conditions in section 424.570(a)(2) for imposing the temporary moratorium because it did not consider "existing data" about Fort Bend County in determining whether new ambulance service suppliers in that locality would pose a significant potential for fraud, waste, or abuse (RR at 6-7);

- Data that CMS reviewed did not support the imposition of a temporary moratorium on new ambulance supplier enrollments in Fort Bend County (RR at 7-8);

- CMS has not made "new factual findings to support" the continuation of the moratorium on enrollment of new ambulance service providers in Fort Bend County (Reply Br. at 3, 5);

- In imposing and extending the moratorium, CMS failed to consider "steps that the State of Texas has taken to prevent fraudulent providers from entering the EMS industry" – steps that are "sufficient to prevent fraudulent activity without the continued imposition of the moratorium" (RR at 9; Reply Br. at 7); and

- The moratorium does not serve its stated purpose of preventing Medicare fraud and "simply provides an avenue for the federal government to avoid paying for services that would otherwise clearly qualify for Medicare and Medicaid reimbursement" (RR at 10).

We decline to consider these contentions because they question the sufficiency of CMS's legal and factual bases for imposing (and extending) the temporary moratorium and are therefore outside the scope of review specified in section 498.5(l). The Board has no authority to ignore or expand the regulatory limits on its scope of review.

The City contends that if its appeal is rejected, it will have "absolutely no adequate remedy at law to challenge CMS' arbitrary, capricious, and unfounded application of the moratorium to Fort Bend County and the resulting denial of [its] valuable right to participate in the Medicare/Medicaid programs." Reply Br. at 9. We express no opinion about what legal steps the City could take to challenge the imposition or extension of the temporary moratorium. Such a challenge, whatever its merit, may not be heard in this administrative appeal.

Conclusion

The undisputed facts demonstrate that CMS's temporary moratorium on the enrollment of new ambulance suppliers in Fort Bend County, Texas applies to the City. That circumstance authorized CMS to deny the City's 2015 enrollment application under 42 C.F.R. § 424.530(a)(10). The City has raised various issues concerning the substance and validity of the moratorium, but those issues fall outside the applicable scope of our review. In addition, the City does not contend that dismissal of its hearing request deprived it of an opportunity to present its case on any issue within the scope of review or was otherwise used inappropriately by the ALJ to decide the case. For these reasons, we affirm the dismissal of the City's June 8, 2015 request for hearing.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Christopher S. Randolph
Presiding Board Member