

The Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

_____	)	
In the case of:	)	
	)	
St. Pete Behavioral Health Center, Inc.	)	Date: June 24, 2009
(CCN: 10-1447),	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-654
	)	Decision No. CR1968
Centers for Medicare & Medicaid	)	
Services.	)	
_____	)	

**DECISION**

Petitioner, St. Pete Behavioral Center, Inc., is a community mental health center (CMHC) located in St. Petersburg, Florida that participates in the Medicare program as a provider of services. Petitioner wants to bill Medicare for services provided at an alternative location in Lakeland, Florida. The Centers for Medicare and Medicaid Services (CMS) has determined, initially and on reconsideration, that Petitioner may not bill for those services under its current provider agreement, but must apply for a separate provider agreement for the Lakeland site. P. Ex. 1, at 1; P. Ex. 2, at 1. Petitioner now seeks review of that determination, and CMS has moved to dismiss Petitioner’s hearing request.<sup>1</sup>

For the reasons set forth below, I conclude that Petitioner is not entitled to a hearing because CMS’s determination that it must apply for a separate provider agreement is not an initial determination, as defined in 42 C.F.R. § 498.3(b), subject to my review. I grant CMS’s motion to dismiss pursuant to 42 C.F.R. § 498.70(b).

<sup>1</sup> CMS has filed its motion, accompanied by a pre-hearing brief (CMS Br.). Petitioner filed a response to the motion (P. Response) and a pre-hearing brief (P. Br.). CMS submitted a reply brief (CMS Reply). CMS submitted five exhibits (CMS Exs. 1-5) and Petitioner submitted four exhibits (P. Ex. 1-4).

## Discussion

### *1. Petitioner has no right to a hearing because its hearing request does not appeal an initial determination.*<sup>2</sup>

Under section 1866(h)(1) of the Social Security Act (Act), an institution or agency has a right to a hearing to challenge CMS's determination that it is not a provider of services. It is also entitled to a hearing to challenge: 1) CMS's refusals to enter into a provider agreement; 2) CMS's refusal to renew an existing provider agreement; and 3) CMS's determination to terminate a provider agreement. Act §§ 1866(h)(1), 1866(b)(2).<sup>3</sup> Under the statute's implementing regulations, found at 42 C.F.R. Part 498, a provider dissatisfied with CMS's initial determination is entitled to further review, but administrative actions that are not initial determinations are not subject to appeal. 42 C.F.R. § 498.3(d); *Wesley Long Nursing Center*, DAB No. 1937, at 2 (2004). The regulation lists all of CMS's initial determinations. 42 C.F.R. § 498.3(b).

Here, CMS argues that Petitioner is not entitled to a hearing because the challenged determination is not among the initial determinations listed in section 498.3(b). Petitioner, on the other hand, claims that it is entitled to a hearing under 42 C.F.R. § 498.3(b)(2), which describes as an initial determination:

[w]hether a prospective department of a provider, remote location of a hospital, satellite facility, or provider-based entity qualifies for provider-based status under § 413.65 of this chapter . . . .

But, as CMS accurately points out, inasmuch as Petitioner neither sought nor received any determination as to its "provider-based status," this matter is not an appeal of any "provider-based status" determination.<sup>4</sup>

---

<sup>2</sup> My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

<sup>3</sup> "Provider agreement" is defined in 42 C.F.R. § 489.3 as "agreement between CMS and one of the providers specified in § 489.2(b) [which includes CMHCs] to provide services to Medicare beneficiaries and to comply with the requirements of section 1866 of the Act."

<sup>4</sup> Of course, if Petitioner's Lakeland site were to apply unsuccessfully for provider-based status or for Medicare certification as a separate CMHC, it would likely be entitled to a hearing by an Administrative Law Judge under 42 C.F.R. Part 498.

Moreover, Petitioner does not fall within any of the categories described by section 498.3(b)(2). It is not a remote location of a hospital nor a satellite facility (defined as a “part of a hospital that provides inpatient services in a building also used by another hospital . . . .”). 42 C.F.R. §§ 412.22(h)(1), 412.25(e)(1). Nor does it meet the definition of “provider-based entity.” “Provider-based entity” means that the provider of health care services is created or acquired by a main provider “for the purpose of furnishing health care services of a different type from those of the main provider . . . .” 42 C.F.R. § 413.65(a)(2). Petitioner concedes that the Lakeland center provides the same core services as the St. Petersburg center. P. Prehearing Memorandum at 5. Finally, it does not qualify as a “department of a provider” because a “department of a provider” may not by itself qualify to participate in Medicare as a provider. 42 C.F.R. § 413.65(a)(2). Petitioner maintains that its Lakeland center “independently meets all criteria for CMHCs . . . .” P. Prehearing Memorandum at 5.

***2. That representatives from CMS and the Medicare Fiscal Intermediary misled Petitioner does not create a hearing right.***

Petitioner points to CMS’s notice letters which characterize CMS’s determination as an “initial determination” and an “initial denial.” P. Exs. 1 and 2. Petitioner also points out that CMS advised it that, if it disagreed with CMS’s decision, it could request a hearing before an Administrative Law Judge. P. Ex. 2. Petitioner also complains of instances in which representatives from the Fiscal Intermediary and CMS misled it into thinking that the Lakeland Center could bill Medicare under Petitioner’s current provider agreement.

Such misleading communications are unfortunate, but I have no authority to create, under a theory of equitable estoppel or any other theory, hearing rights that are not provided by the statute and regulations. *See Regency on the Lake*, DAB No. 2205, at 6 (2008); *Community Hospital of Long Beach*, DAB 1938 (2004).

***Conclusion***

Because Petitioner has no legal right to a hearing, I dismiss its hearing request pursuant to 42 C.F.R. § 498.70(b).

\_\_\_\_\_  
/s/  
Carolyn Cozad Hughes  
Administrative Law Judge