Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Caring Hearts Home Hospice,
(CCN: 14-1664),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-52

Decision No. CR4884

Date: July 10, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS) terminated the Medicare provider agreement of Caring Hearts Home Hospice (Petitioner or Caring Hearts), effective September 20, 2016. Petitioner requested a hearing to challenge the termination. However, Petitioner did not comply with my directions for preparing the case for a hearing and decision. I issued an Order to Show Cause requiring Petitioner to submit its proposed evidence in proper form. Petitioner did not respond to the Order to Show Cause. As explained more fully below, Petitioner has failed to submit evidence showing that Petitioner was in compliance with Medicare participation requirements. I therefore affirm CMS's decision to terminate Petitioner's participation in Medicare.

I. Procedural Background

Caring Hearts formerly participated in Medicare under the name Evergreen Hospice Care, Inc. (Evergreen). *See, e.g.*, CMS Exhibit (Ex.) 8. On March 11, 2016, a surveyor for the Illinois Department of Public Health (IDPH or state agency) attempted to complete a survey at Evergreen, but found the office location closed. CMS Ex. 3. Based on the failed survey attempt, the state agency concluded that Evergreen had ceased operations and so informed CMS. *See* CMS Ex. 7. In a letter dated April 14, 2016, CMS

informed Evergreen that CMS regarded Evergreen's closure as a voluntary withdrawal from Medicare.[1] *Id.* In a letter dated April 27, 2016, a representative of Caring Hearts informed CMS that Evergreen had not ceased operations, but had relocated and was doing business under a new name, "Caring Heart [sic] Home Hospice." CMS Ex. 8. The April 27 letter further represented that Caring Hearts was fully operational and that its administrator and staff were available at its new address from 9:00 a.m. until 5:00 p.m. Monday through Friday. *Id.*

On June 20-22, 2016, the state agency conducted a recertification survey (June 22 survey) during which surveyors concluded that Caring Hearts failed to comply with eight conditions of participation. CMS Exs. 1, 11, 13. The state agency explained that, to avoid termination, Caring Hearts must submit an acceptable plan of correction. CMS Ex. 6. Caring Hearts submitted two plans of correction that the state agency found unacceptable. *See* CMS Ex. 5 at 1. CMS therefore notified Caring Hearts that its provider agreement would be terminated on September 20, 2016. CMS Ex. 5 at 2. However, CMS offered the opportunity for a resurvey if Caring Hearts submitted a credible allegation of compliance. *Id.* Caring Hearts did so, and the state agency conducted a resurvey on September 13, 2016 (September 13 revisit). CMS Ex. 2. At the September 13 revisit the state agency found that Caring Hearts remained out of compliance with three conditions of participation. *Id.* Based on those findings, CMS concluded that Caring Hearts had failed to come into compliance with participation requirements. CMS Ex. 4. Accordingly, Caring Hearts' Medicare provider agreement was terminated effective September 20, 2016. *Id.*

Caring Hearts requested a hearing to challenge the termination and the case was assigned to me for a hearing and decision. I issued an Acknowledgment and Pre-Hearing Order (Pre-hearing Order) which required the parties to submit pre-hearing exchanges, which were to include legal arguments, proposed exhibits, the written direct testimony of any proposed witness, and requests to cross-examine the opposing party's proposed witnesses. CMS timely submitted its pre-hearing exchange, accompanied by 32 proposed exhibits (CMS Exs. 1-32), in the form required by my Pre-hearing Order. Petitioner submitted a response (P. Br.), accompanied by three exhibits it labeled "A" through "C" (P. Exs. A-C). In the absence of objection, I admit into evidence CMS Exs. 1-32 and P. Exs. A-C.

Neither Petitioner's response nor its proposed exhibits were in the form required by my Pre-Hearing Order. Because Petitioner appears pro se, I did not simply strike the

[1] CMS's letter of April 14, 2016, states that the attempted survey took place on March 15, 2016, whereas the statement of deficiencies identifies the date as March 11, 2016. *Compare* CMS Ex. 7 *with* CMS Ex. 3. The record does not reveal which date is correct; however, it is the fact of the attempted survey that is significant, not the precise date on which it occurred.

nonconforming response, but instead issued an Order to Show Cause in which I explained the corrections required of Petitioner. For example, Petitioner's brief, in effect, represents the statement of Petitioner's administrator; however, it was not submitted in the form of an affidavit or declaration under penalty of perjury, as required by my Pre-hearing Order. The Order to Show Cause directed Petitioner to resubmit the administrator's statement in that form. The Order to Show Cause further informed Petitioner that if Petitioner failed to make the required corrections, I would impose sanctions on Petitioner. Petitioner did not respond to the Order to Show Cause. Therefore, as discussed more fully below, I accord little weight to the factual assertions in Petitioner's brief and accept the allegations and arguments in CMS's brief as uncontested.

Further, my Pre-hearing Order informed the parties that I would convene an in-person hearing only if a party provided written direct testimony of a witness or witnesses and the opposing party requested to cross-examine. CMS offered the written direct testimony of one witness. *See* CMS Ex. 10. Petitioner did not offer the written direct testimony of any witness, even after being reminded of the need to do so in the Order to Show Cause. Nor did Petitioner request to cross-examine CMS's witness. Accordingly, an in-person hearing is unnecessary and I issue this decision based on the written record.

II. Issue

The sole legal issue before me is whether CMS properly terminated Caring Hearts' Medicare provider agreement.

III. Discussion

A. Applicable Legal Authority

The statutory requirements for hospices providing Medicare services are established at section 1861(dd) of the Social Security Act (Act).[2] In order to participate in the Medicare program, a hospice must be certified as meeting Medicare participation requirements and have an approved provider agreement with CMS.

The regulations implementing section 1861(dd) of the Act appear at 42 C.F.R. part 418. The regulations require hospices to comply with specified conditions of participation,

[2] The current version of the Social Security Act can be found at: *https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm*. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

including, as relevant here, quality assessment and performance improvement (42 C.F.R. § 418.58); infection control (42 C.F.R. § 418.60); and core services (42 C.F.R. § 418.64). Section 489.53(a)(3) of the regulations grants CMS the discretionary authority to terminate any Medicare provider agreement if the provider "no longer meets the appropriate conditions of participation . . . ." 42 C.F.R. § 489.53(a)(3).

Termination of a provider agreement is an initial determination subject to review by an administrative law judge. 42 C.F.R. §§ 488.24(c), 498.5(b). Before the administrative law judge, CMS must establish a prima facie case that it had a basis for termination, then the burden of persuasion shifts to the facility to prove by a preponderance of the evidence that it was in substantial compliance with the statutory and regulatory requirements. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 at 15 (2004), *aff'd*, 129 F. App'x 181 (6th Cir. 2005).

B. Findings of Fact and Conclusions of Law

1. CMS established a prima facie case that Petitioner failed to comply with Medicare conditions of participation.[3]

CMS offered the written direct testimony of Pamela Powell, R.N., a Health Facilities Surveillance Nurse employed by IDPH (Surveyor Powell). CMS Ex. 10 ¶ 2. Surveyor Powell was the team leader for the team that conducted the June 22, 2016 recertification survey of Caring Hearts. CMS Ex. 10 ¶ 5. She also conducted the September 13, 2016 revisit survey of Caring Hearts. CMS Ex. 10 ¶ 8. Surveyor Powell states under penalty of perjury that the survey findings recorded in the Statements of Deficiencies (SODs) for each survey (CMS Exs. 1 and 2) "are true and accurate summaries of [her] record review, observations, and interviews, and contain true and correct statements of [her] opinions, findings, and conclusions . . . ." CMS Ex. 10 ¶ 7; *see also id.* ¶ 8. The June 22 survey found that Caring Hearts had eight condition-level deficiencies. CMS Ex. 10 ¶ 6; *see also* CMS Ex. 1. At the time of the September 13 revisit, Surveyor Powell concluded that Caring Hearts remained out of compliance, based on her finding that three condition-level deficiencies remained uncorrected. CMS Ex. 10 ¶ 9; *see also* CMS Ex. 2. Based on Surveyor Powell's observations, CMS concluded that Caring Hearts was out of compliance with three conditions of participation for hospices and terminated Caring Hearts' Medicare participation, effective September 20, 2016. CMS Ex. 4.

CMS determined that Caring Hearts failed to comply with the following conditions of participation:

[3] My findings of fact and conclusions of law appear as numbered headings in bold italic type.

> 42 C.F.R. § 418.58 – Quality Assessment and Performance Improvement;
> 42 C.F.R. § 418.60 – Infection Control; and
> 42 C.F.R. § 418.64 – Core Services.

CMS Ex. 4 at 1. CMS has made a prima facie showing that Caring Hearts failed to comply with the cited conditions of participation.

a. 42 C.F.R. § 418.58

The condition of participation for quality assessment and performance improvement (QAPI) requires:

> The hospice must develop, implement, and maintain an effective, ongoing, hospice-wide data-driven quality assessment and performance improvement program. The hospice's governing body must ensure that the program: Reflects the complexity of its organization and services; involves all hospice services (including those services furnished under contract or arrangement); focuses on indicators related to improved palliative outcomes; and takes actions to demonstrate improvement in hospice performance. **The hospice must maintain documentary evidence of its quality assessment and performance improvement program and be able to demonstrate its operation to CMS**.

42 C.F.R. § 418.58 (emphasis added). The surveyor found that Caring Hearts did not provide documentation showing that the facility had an active QAPI program in place. CMS Ex. 10 ¶ 12; *see also* CMS Ex. 2 at 2-6; CMS Ex. 30. While she acknowledged that Caring Hearts produced documents showing that it had *policies* for conducting QAPI, the surveyor found no evidence that the policies were actually implemented. CMS Ex. 10 ¶ 12; *see also* CMS Ex. 2 at 2-6.

b. 42 C.F.R. § 418.60

The condition of participation for infection control requires:

> The hospice must maintain and document an effective infection control program that protects patients, families, visitors, and hospice personnel by preventing and controlling infections and communicable diseases.

42 C.F.R. § 418.60. In findings similar to those regarding Petitioner's QAPI activities, the surveyor concluded that, while Caring Hearts was able to produce an infection control policy, it "offered no evidence it had taken steps to implement the policy." CMS Ex. 10 ¶ 15; *see also* CMS Ex. 2 at 6-9; CMS Ex. 31.

c. 42 C.F.R. § 418.64

The condition of participation for core services provides:

> A hospice must routinely provide substantially all core services directly by hospice employees. These services must be provided in a manner consistent with acceptable standards of practice. These services include nursing services, medical social services, and counseling.

42 C.F.R. § 418.64. The surveyor found that Petitioner failed to produce evidence that it employed a qualified pastoral counselor, or that Petitioner had hired or contracted with a physician to serve as its medical director. CMS Ex. 10 ¶ 17; *see also* CMS Ex. 2 at 9-11. Surveyor Powell also attempted to interview Caring Hearts' registered nurse and its chaplain, but was informed that the nurse was unavailable on that day and that the chaplain was out of the country and was unavailable for the entire week. CMS Ex. 10 ¶ 18; CMS Ex. 2 at 10. Because the nurse and chaplain were unavailable, and there was no evidence that Petitioner had engaged a medical director, Surveyor Powell concluded that Petitioner was not in a position to provide core services to its patients.

As to each regulation, the surveyor concluded that Petitioner's noncompliance substantially limited the capacity of Caring Hearts to furnish adequate care and adversely affected the health and safety of patients. CMS Exs. 2, 10. Based on Surveyor Powell's declaration and the observations she recorded in the SOD, I find that CMS has made a prima facie showing that Caring Hearts failed to comply with the Medicare conditions of participation for hospices.

2. Petitioner's submissions do not establish that it was in compliance with all Medicare conditions of participation.

As its brief, Petitioner submitted a statement by its administrator in which she denies the surveyor's findings. However, as explained above, the administrator's statement was not submitted in the form of an affidavit or declaration under penalty of perjury as required by my Pre-Hearing Order and reiterated in the Order to Show Cause. For this reason, the statement of the administrator is entitled to little weight when compared with the declaration of the surveyor submitted by CMS. First, in contrast to the surveyor's declaration, the administrator's statement was not made under penalty of perjury. Second, the administrator's explanations are self-serving and are not corroborated by documentary evidence. Finally, even if I accepted the administrator's statement as credible, it does not fully refute the surveyor's findings.

With respect to the finding that Caring Hearts did not comply with the condition of participation for QAPI, the administrator states that Caring Hearts' QAPI plan was "in place and effective" at the time of the resurvey. P. Br. at 1. This statement is not

inconsistent with the surveyor's conclusion that Caring Hearts had policies in place, but failed to document any actual QAPI activities. Further, the administrator's statement that QAPI activities "were being conducted on [a] quarterly basis" does not demonstrate that any such activities had been completed at the time of the revisit survey. *See id.* Significantly, Petitioner has not offered any documents to show that it was actively engaging in QAPI activities at that time.

Petitioner's administrator similarly denies that Caring Hearts failed to have an infection control program in place. P. Br. at 2. On the other hand, the administrator admits that Caring Hearts had not collected any infection control data because the "agency cannot have data collection if [patient] census was zero." *Id.* Further, as is true of its arguments regarding its QAPI activities, Petitioner did not offer any documents to establish that its infection control program existed as more than a policy on paper. Thus, Petitioner has not refuted the surveyor's conclusion that Caring Hearts had infection control policies in place, but failed to document that it had taken any actions based on those policies.

Finally, Petitioner's administrator denies that Caring Hearts was out of compliance with the condition of participation for core services. P. Br. at 2-3. The administrator states that Petitioner has a qualified chaplain and a full-time medical director and avers that the hospice is run by a nurse practitioner under the supervision of a medical doctor. P. Br. at 3. In support of its administrator's assertions, Petitioner submitted a copy of its chaplain's diploma (P. Ex. A) and a letter from its medical director (P. Ex. C). Neither the administrator's assertions nor the documents submitted rebut CMS's prima facie case.

First, even if Petitioner's chaplain was properly qualified based on his Master of Theology degree (P. Ex A), this does not rebut the surveyor's finding that Petitioner failed to implement a back-up plan to provide spiritual counseling or bereavement counseling to any admitted patients and their families while its chaplain was traveling out of the country. Second, Petitioner does not respond at all to the surveyor's finding that its registered nurse was unavailable for an interview with the surveyor. If Petitioner was unable to produce its nurse for an interview with the surveyor, I infer that there was likewise no nurse available to provide services to any admitted patients on that date. Finally, the letter from Caring Hearts' medical director avers that he has been in that position since July 7, 2016. P. Ex. C. If I accept that statement at face value,[4] I would conclude that Petitioner had a medical director and was therefore capable of complying with the core services standard for physician services at 42 C.F.R. § 418.64(a). However, it does not appear that CMS relied on a violation of the core services standard for physician services in concluding that Petitioner failed to meet the condition of participation for core services. *See* CMS Ex. 2 at 9-11. Thus, even if I found Petitioner in compliance with the physician services standard, such a finding would not establish

[4] The medical director's statement, like that of the administrator, was not submitted as an affidavit or declaration under penalty of perjury.

that Petitioner complied with the condition for core services as a whole, because Petitioner has not refuted that it lacked personnel to provide nursing and counseling services at the time of the revisit survey.

In summary, Petitioner's administrator failed to offer testimony or documentary evidence to rebut CMS's prima facie case. I therefore conclude that CMS has proved that Petitioner failed to comply with the Medicare conditions of participation for hospices.

3. Petitioner failed to comply with Medicare conditions of participation; therefore, CMS was authorized to terminate Petitioner's Medicare provider agreement.

To participate in the Medicare program as a provider of services, a hospice must meet the conditions of participation set forth in 42 C.F.R. part 418. CMS is authorized to terminate the provider agreement of a hospice that does not comply with the applicable conditions of participation. 42 C.F.R. § 489.53(a)(3). In the present case, CMS has offered evidence that Petitioner failed to comply with the conditions of participation for hospices. Petitioner failed to show that it was in compliance with all conditions of participation. Therefore, CMS was authorized to terminate Petitioner's provider agreement.

IV. Conclusion

For all of the reasons discussed above, I find that Petitioner was out of compliance with Medicare participation requirements. I therefore affirm CMS's determination to terminate Petitioner's participation in the Medicare program effective September 20, 2016.

_____/s/_____
Leslie A. Weyn
Administrative Law Judge