Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Regency on the Lake (CCN: 23-5621),	)	Date: March 20, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-566
	)	Decision No. CR1760
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

Petitioner, Regency on the Lake (Petitioner or facility), is a long-term care facility, located in Fort Gratiot, Michigan, that was initially certified to participate in the Medicare program as a provider of services on the day it passed its federal Life Safety Code (LSC) survey – January 18, 2007. Petitioner nevertheless challenges the Centers for Medicare & Medicaid Services' (CMS's) determination as to that effective date, and contends that its participation should have started on December 15, 2006.

CMS asks for summary affirmance, which Petitioner opposes.[1] Because I find that the facility could not participate in the Medicare program until it underwent and passed a federal LSC survey, I grant CMS's motion and conclude that the facility's effective date of participation in the Medicare program is January 18, 2007.

[1] CMS has submitted 21 proposed exhibits, identified as CMS Ex. 1 – CMS Ex. 21. Petitioner has submitted 16 proposed exhibits which we have identified as P. Ex. 1 – P. Ex. 16. Although, in its brief, Petitioner incorrectly refers to its exhibits as "Resp. Exs.," the documents themselves are correctly marked.

Discussion

CMS is entitled to summary judgment because, as a matter of law, the facility could not be certified any earlier than the date it passed the federal LSC survey.[2]

Summary judgment is appropriate here because this case turns on a question of law and presents no genuine dispute as to any material fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986); *Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F.3d 168, 172-173 (6th Cir. 2004).

To participate in the Medicare program, a facility must enter into an agreement with the Secretary of Health and Human Services, and must meet certain statutory and regulatory requirements. Social Security Act (Act) §§ 1864, 1866; 42 C.F.R. § 488.20. As a general rule, the facility must be surveyed by CMS or a state survey agency to determine its compliance with program requirements. The survey and certification process and procedures for facilities seeking to participate in the Medicare program are set out in the Act at section 1819(g) and are further defined in the regulations at 42 C.F.R. § Part 488, subparts A and E, as well as the State Operations Manual (SOM) issued by CMS. *See Forest Glen Skilled Nursing & Rehab. Ctr.*, DAB No. 1887, at 2 (2003).

Among other requirements, the facility must meet the provisions of the Life Safety Code (LSC) of the National Fire Protection Association applicable to nursing homes. Act § 1819(d)(2)(B); 42 C.F.R. § 483.70(a). There are limited exceptions to this requirement. The Secretary has the authority to waive specific provisions of the LSC if their rigid applications "would result in unreasonable hardship upon a facility, but only if such waiver would not adversely affect the health and safety of residents or personnel," or, if the Secretary finds that state codes adequately protect residents and personnel, the provisions of the federal code shall not apply. Act § 1819(d)(2)(B)(i) and (ii); *see also* 42 C.F.R. § 483.70(a)(2) and (3). As discussed below, neither exception applies here.

State agencies survey facilities to determine their compliance with federal requirements, and make recommendations to CMS, which makes the final certification determination. 42 C.F.R. § 488.330; *see also* 42 C.F.R. § 489.10(d). Where all federal requirements are met on the date of the survey, the facility's provider agreement "is effective on the date the survey (including Life Safety Code survey, if applicable) is completed. . . ."[3] 42

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[2] I make this one finding of fact/conclusion of law.

[3] The separate reference to the LSC reflects the fact that the LSC survey may be conducted separately from the rest of the survey, as occurred here. *Oak Lawn Endoscopy*,

(continued...)

C.F.R. § 489.13(b). The state survey agency's decision as to when to conduct an initial survey of a prospective provider is not subject to appeal. 42 C.F.R. § 498.3(d)(15).

CMS also requires that a facility be

> in operation and providing services to patients when surveyed. This means that at the time of survey, the institution must have opened its doors to admissions, be furnishing all services necessary to meet the applicable provider . . . definition, and demonstrate the operational capability of all facets of its operations. To be considered "fully operational," initial applicants must be serving a sufficient number of patients so that compliance with all requirements can be determined.

CMS Ex. 21, at 20 (SOM § 2008A).

In this case, Petitioner applied to be a provider of services under the Medicare program in April 2006. On October 24, 2006, the state fire safety inspector visited the facility, conducted a *state* fire safety inspection, and found the facility in compliance with *state* fire safety code requirements. CMS Ex. 20, at 2 (Connell Decl. ¶ 3). On November 17, 2006, the state agency conducted its initial state licensure survey and found the facility to be in compliance with the remaining state licensure requirements. After the facility obtained its state license, the state licensing officer gave it permission to admit five to six residents so that it could become "fully operational." CMS Ex. 6; CMS Ex. 18, at 3 (Turner Decl. ¶ 14). CMS has instructed state agencies to conduct the required federal surveys within 90 calendar days of the date that the facility notifies the agency that it is fully operational, "if possible." CMS Ex. 21, at 20 (SOM § 2008A).

Here, the state agency completed the Initial Medicare/Medicaid Certification Survey on December 15, 2006, well within the 90 days recommended by CMS. It found the facility in compliance with applicable federal health requirements and forwarded its findings to CMS for review and final approval. CMS Ex. 1; CMS Ex. 5, at 2; CMS Ex. 7; CMS Ex. 18, at 2 (Turner Decl. ¶¶ 5-6); P. Ex. 5.

Then, on January 18, 2007 (still well within the recommended 90 days), the state fire inspector returned to conduct the facility's initial federal LSC survey. After the survey, the state found the facility in substantial compliance with the applicable federal LSC

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[3](...continued)
DAB No. 1952, at 4 n.1 (2004).

requirements and forwarded its recommendation to CMS. CMS Ex. 20, at 2-3 (Connell Decl. ¶¶ 7-10); CMS Ex. 18, at 2 (Turner Decl. ¶ 7); CMS Ex. 2. By letter dated February 6, 2007, CMS notified Petitioner that its request to participate in the Medicare program was accepted and that its effective date of participation was January 18, 2007. CMS Ex. 9, at 1.

Thus, Petitioner seems to fall easily within the ambit of 42 C.F.R. § 489.13(b) and may not be certified any earlier than the date of the LSC survey. *See Cmty. Hosp. of Long Beach*, CR1118, at 3-4 (2003), *aff'd* DAB 1938 (2004). The facility does not fall within any exception to that provision. Petitioner has not argued that the Secretary has allowed application of the state code in place of the federal LSC. Indeed, it seems that the State of Michigan has asked for that substitution, but its request is pending. CMS Ex. 20, at 3 (Connell Decl. ¶ 13). With respect to waiving specific provisions of the federal LSC, CMS was not asked to do so here, and, in any event, that waiver is not a waiver of the requirement for the survey itself. *Forest Glen* at 11, 19 (" [P]ermitting a determination of 'substantial compliance' outside the context of completion of on-site surveys to identify any deficiencies would jeopardize beneficiary health and safety, undercut the survey and certification process, and place an untenable burden on CMS and the appeals process.").

Petitioner nevertheless argues that it is entitled to the earlier certification because 1) state employees misled it into admitting additional residents following the December 18 federal health survey;[4] and 2) the October 24, 2006 state fire safety inspection satisfied the requirements of the federal LSC.

First, Petitioner's purported reliance on the statements of state employees was misplaced. According to Petitioner, at the time of the October 2006 state fire inspection survey, the facility administrator asked the fire inspector, Brent Connell, "if we were 'ready to go' and he responded in the affirmative." P. Ex. 10 (Leverenz Decl. ¶ 3). Petitioner also claims that in a December 18, 2006 conversation, the facility's licensing officer, Alice Turner, said " that the facility was free to admit residents." P. Ex. 10 (Leverenz Decl. ¶ 9). Finally, Petitioner points to a state document, issued December 19, 2006, by the Division of Nursing Home Monitoring, titled "Notice of Licensure/Certification Action." The document says that the facility's licensure and certification survey was December 15, 2006, and checks the box that says the "State Survey agency certifies/recertifies compliance with Medicare/Medicaid program requirements." P. Ex. 5.

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[4] On December 15, 2006, the facility had admitted six residents, none Medicare recipients. CMS Ex. 1, at 1. As of January 18, 2007, the facility had admitted 28 residents, although the record is silent as to their Medicare status. CMS Ex. 2; CMS Ex. 20, at 2 (Connell Decl. ¶ 9).

I do not see anything particularly misleading about any of these communications. The alleged conversations were ambiguous, at best.[5] The phrase "good to go," for example, has a wide variety of interpretations in this context, and Administrator Leverenz obviously understood that it did not mean – in October – that the facility was then qualified for Medicare certification. Permission to admit residents (originally granted in November) does not mean that the facility was Medicare-eligible. The state's notice reflected the state's findings and recommendations to CMS, not any final agency determination. In this regard, Petitioner's reliance on the statements of state employees seems particularly unreasonable because the facility knew, or should have known, that neither a state agency nor its employees are empowered to find a facility eligible to participate in the Medicare program. Only the *Secretary* (for whom CMS acts) has the final authority to make that determination. 42 C.F.R. § 488.18(c).

But even if the communications were misleading, that would not justify my ignoring the regulations. The facility is charged with knowing the Medicare participation requirements, including the requirement that it pass a federal LSC survey before it can be certified. Those who seek public funds must

> act with scrupulous regard for the requirements of [the] law. . . . [T]hose who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to [the] law.

Heckler v. Cmty. Health Srvs. of Crawford County, 467 U.S. 51, 63 (1984). The Departmental Appeals Board recently relied on the language of *Heckler* to reiterate that, where a party has knowledge of the truth, or

> had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying on the representation or concealment.

Wade Pediatrics, DAB No. 2153, at 24-25 (2008) (citing 467 U.S. 51 at 61 n.10). Where, as here, the statute and regulation unambiguously set forth requirements for beginning Medicare participation, I have no authority to waive those requirements based on any theory of estoppel. *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997).

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[5] The Supreme Court has expressed particular skepticism at a Medicare participant's reliance on oral advice. *Heckler v. Cmty. Health Srvs. of Crawford County*, 467 U.S. 51 (1984).

With respect to Petitioner's assertion that the state licensure survey may substitute for the federal survey, Petitioner does not claim that CMS exempted the state from enforcing federal LSC requirements based on the adequacy of the state requirements. *See* 42 C.F.R. § 483.70(a)(3); CMS Ex. 20, at 3 (Connell Decl. ¶13). And I have no authority to exempt Petitioner from those survey requirements based on any state licensure result. While the content of the surveys undoubtedly overlap somewhat, as a matter of law, they are not equivalent. *See Cmty. Hosp. of Long Beach*, CR1118, at 5 (2003), *aff'd* DAB 1938 (2004) ("[a] state agency's survey for state licensing is not determinative of, or equal to, a survey to certify a provider for Medicare participation.").

Moreover, here the October survey predated admission of any residents. As part of the federal LSC survey, Inspector Connell reviewed the adequacy of the facility's fire drill plans and the actual fire drills conducted. CMS Ex. 20, at 2 (Connell Decl. ¶ 8); *see also* CMS Ex. 21, at 20 (SOM § 2008A) (Prior to the federal survey, the facility must be "fully operational," i.e., it must be serving a sufficient number of patients so that compliance with all requirements can be determined.).

Conclusion

For all of the reasons discussed above, I find that CMS correctly certified Petitioner for Medicare participation on the date its federal LSC survey was completed – January 18, 2007.

/s/
Carolyn Cozad Hughes
Administrative Law Judge