

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Bluegrass Orthopaedics Surgical)	Date: March 25, 2008
Division, LLC,)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-507
)	Decision No. CR1766
Centers for Medicare & Medicaid)	
Services.)	
)	

DECISION

A group of Kentucky physicians created the Bluegrass Orthopaedics Surgical Division, LLC (Petitioner), which seeks Medicare certification as an ambulatory surgical center (ASC). The Centers for Medicare & Medicaid Services (CMS) has determined that Petitioner does not qualify for ASC certification because it does not have the license required by state law, and federal regulations require that an ASC meet state licensure requirements. CMS therefore denied Petitioner's application, and Petitioner appeals. The parties agree that the issues before me are purely legal, and do not require an in-person hearing. Order (January 22, 2008). They have filed cross-motions for summary judgment.¹

Because Kentucky law requires that an ASC be licensed, and Petitioner does not have a state license, I grant CMS's motion for summary judgment, and deny Petitioner's motion.

¹ CMS has submitted eight exhibits (CMS Exs. 1-8); Petitioner has submitted 21 exhibits, including its supplemental exhibit, the transcript of a deposition of Gregory D'Angelo, M.D. (P. Exs. 1-21).

Discussion

*Petitioner does not qualify for Medicare certification as an ASC because Kentucky law requires licensure and Petitioner does not have a state license.*²

Medicare Part B will pay for services furnished in connection with certain surgical procedures performed in an ASC that 1) meets health, safety and other standards specified by the Secretary of Health and Human Services and 2) has entered into an agreement with the Secretary to participate and accept payment as an ASC. Social Security Act (Act) § 1832(a)(2)(F). Regulations governing ASC certification are found at 42 C.F.R. Part 416. Among other requirements, the ASC “must comply with State licensure requirements.” 42 C.F.R. § 416.40.

Under Kentucky law, “no person shall operate any health facility in this Commonwealth without first obtaining a license . . . which . . . shall specify the kind or kinds of health services the facility is authorized to provide. A license . . . shall be issued for a specific location. . . .” KRS § 216B.105(1) (CMS Ex. 5, at 1). In defining “health facility” the state law explicitly includes ambulatory surgical centers. KRS § 216B.015(12) (CMS Ex. 5, at 6). The parties agree that Petitioner does not have a state license to operate as an ASC.

The plain language of the federal regulation and the Kentucky licensure statute should leave no room for doubt that CMS properly declined to certify Petitioner as an ASC.

Petitioner nevertheless points to the federal regulatory definition of an ASC, and argues that it satisfies that definition: it is a distinct entity, and it operates exclusively for the purpose of providing surgical services to patients not requiring hospitalization. P. Motion for Summary Disposition, at 2-3, citing 42 C.F.R. § 416.2. But the definition also requires that an ASC meet the conditions set forth in subparts B and C of Part 416. 42 C.F.R. § 416.2. One of the conditions listed under subpart C is that the ASC comply with state licensure requirements. 42 C.F.R. § 416.40.

Petitioner then points to its accreditation by the Accreditation Association for Ambulatory Health Care, Inc., and claims that such accreditation “constitutes a determination that [it] meets or exceeds all pertinent Medicare conditions of participation.” P. Motion for Summary Disposition, at 3. Under the regulations, CMS *may* deem an ASC to be in compliance with any or all of the conditions set forth in Subpart C if it is accredited by a national accrediting body, but the regulations also specifically require:

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

(2) In the case of deemed status through accreditation by a national accrediting body, where State law requires licensure, the ASC *complies with State licensure requirements*.

Emphasis added. 42 C.F.R. § 416.26(a)(2).

Petitioner next points to a provision in Kentucky law that exempts physicians' offices from licensure requirements. KRS § 216B.015(4). *See* P. Motion for Summary Disposition, at 4-5. In a letter dated January 24, 2005, the General Counsel for the Kentucky Cabinet for Health & Family Services, which is the state agency charged with administering most of Kentucky's health care programs, opined that a physicians' office may purchase medical equipment for performing surgical procedures without incurring additional licensure requirements. In that letter, counsel emphasized that his office had not investigated Petitioner's status, so he was not certifying that it was a physician's office. Rather, he based the opinion on his understanding that Petitioner's expenditures were within a certain statutory threshold, and that the proposed equipment "would be located entirely within the physicians' private offices or clinic." P. Ex. 3.

Both the Kentucky statute cited and agency counsel's letter plainly refer to a physicians' practice that performs surgeries, not to an ASC.³ CMS reasonably points out that Petitioner cannot be both a physicians' practice and an ASC. According to Kentucky state regulations, a physicians' practice "provide[s] health care services." 900 KAR 6:050, section 1(14) (P. Ex. 19, at 1). Such a practice would not meet the regulatory definition of an ASC because it provides a broad range of services and does not operate "exclusively for the purpose of providing surgical services." 42 C.F.R. § 416.2.

³ I note that Congress and the drafters of the regulations recognized that surgeries are performed in physicians' offices, but excluded those procedures from the list of ASC-covered procedures. Citing a report that accompanied the Omnibus Budget Reconciliation Act of 1980 (which amended the Social Security Act to authorize coverage for surgical services performed in an ASC), drafters of the regulations noted:

Congress intended procedures currently performed on an ambulatory basis in a physician's office that do not generally require the more elaborate facilities of an ASC not be included in the list of [Medicare] covered [ASC] procedures.

69 Fed. Reg. 69,177, 69,179 (November 26, 2004), *citing* H.R. Rep. No. 96-1167, at 390.

Conclusion

For the reasons discussed above, I find that this matter presents no dispute over genuine issues of material fact, so summary judgment is appropriate. Petitioner is not entitled to Medicare certification as an ASC because it does not meet state licensure requirements.

/s/ Carolyn Cozad Hughes
Administrative Law Judge