

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

In the Case of:)	DATE: July 20, 2007
)	
The Physicians' Hospital in)	
Anadarko,)	
)	
Petitioner,)	Civil Remedies CR1460
)	App. Div. Docket No. A-06-119
)	
- v. -)	Decision No. 2101
)	
Centers for Medicare &)	
Medicaid Services.)	
)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

The Physicians' Hospital in Anadarko (Petitioner), an Oklahoma hospital, appeals the June 15, 2006 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes granting summary disposition in favor of the Centers for Medicare & Medicaid Services (CMS). The Physicians' Hospital in Anadarko, CR1460 (2006) (ALJ Decision). The ALJ sustained CMS's denial of provider-based status for Petitioner's remote physical therapy/occupational therapy facility, Rehab Services in Chickasha (Rehab Services). The ALJ determined that Rehab Services did not meet the federal requirements for provider-based status because Oklahoma had not licensed Rehab Services as part of Petitioner. It is not disputed that provider-based status means higher Medicare reimbursement. ALJ Decision at 2, n.1.

For the reasons discussed below, we sustain the ALJ Decision. The ALJ correctly concluded that state licensure was required for provider-based status, and that Petitioner neither alleged nor proffered evidence to show that Rehab Services is included on

Petitioner's Oklahoma hospital license or is otherwise licensed as part of Petitioner. There was no error in the ALJ's determinations that there are no disputed issues of material fact and that Rehab Services does not qualify for provider-based status.

Applicable law and regulation

"Provider-based status means the relationship between a main provider and a provider-based entity or a department of a provider, remote location of a hospital, or satellite facility, that complies with the provisions of [42 C.F.R. § 413.65]." 42 C.F.R. § 413.65(a)(2). The provisions of section 413.65 at issue here "generally require that a facility seeking provider-based status operate on the same state license as the main provider." ALJ Decision at 5. The regulation provides:

(d) Requirements applicable to all facilities or organizations. Any facility or organization for which provider-based status is sought, whether located on or off the campus of a potential main provider, must meet all of the following requirements to be determined by CMS to have provider-based status:

(1) Licensure. The department of the provider, the remote location of a hospital, or the satellite facility and the main provider are operated under the same license, except in areas where the State requires a separate license for the department of the provider, the remote location of a hospital, or the satellite facility, or in States where State law does not permit licensure of the provider and the prospective department of the provider, the remote location of a hospital, or the satellite facility under a single license. If a State health facilities' cost review commission or other agency that has authority to regulate the rates charged by hospitals or other providers in a State finds that a particular facility or organization is not part of a provider, CMS will determine that the facility or organization does not have provider-based status.

42 C.F.R. § 413.65(d)(1). The parties do not dispute the applicability of this provision to the instant case.¹

¹ Sections 413.65(d) and (e) list a number of other
(continued...)

Background

The relevant facts are reported in the ALJ Decision. CMS denied Petitioner's application for provider-based status for Rehab Services in January 2004, after the Oklahoma State Department of Health (OSDH) informed CMS in a letter of December 22, 2003 that "Rehab Services . . . is not licensed, either alone or under the hospital's license" ALJ Decision at 1-2, 4, citing CMS Exhibit (Ex.) 6. CMS advised Petitioner that its request for provider-based status was denied because Rehab Services did not satisfy the licensure requirements at 42 C.F.R. § 413.65(d)(1). Id. at 2, citing CMS Ex. 7, also in the record as Petitioner (P.) Ex. 5. Petitioner requested reconsideration of CMS's determination. Id.

OSDH advised Petitioner in a letter of February 13, 2004 that outpatient facilities located at different addresses from a hospital may be licensed as part of the hospital if certain requirements are met. ALJ Decision at 5, citing CMS Ex. 9. OSDH subsequently informed CMS in a letter of August 29, 2005 that Petitioner had not requested the addition of Rehab Services to its hospital license. ALJ Decision at 4, citing CMS Ex. 11. CMS denied Petitioner's request for reconsideration and affirmed the denial of provider-based status in a notice dated November 18, 2005. ALJ Decision at 2, citing CMS Ex. 12, also in the record as P. Ex. 10. Also on November 18, 2005, Petitioner requested that OSDH "designate Rehab Services as a remote facility to the hospital's license." P. Request for Review of ALJ Decision (RR) at 4; see ALJ Decision at 4 (Petitioner "acknowledges that adding Rehab Services to its license is an issue that is currently pending before the State Agency"). Neither party disputes these facts.

The ALJ Decision

The ALJ concluded that CMS had properly determined that Rehab Services did not qualify for provider-based status because it did not operate under Petitioner's hospital license, as permitted by Oklahoma law and as required by federal regulations for Rehab

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requirements, relating to the operation of the provider and the remote location or facility, that must be met for the remote location or facility to qualify as provider based. Those other requirements are not at issue here.

Services to be designated as a provider-based facility.² The ALJ found that CMS had presented evidence that Rehab Services did not operate on Petitioner's hospital license, in the form of letters from OSDH stating that Rehab Services was not licensed either alone or under Petitioner's license and that, as of August 29, 2005, Petitioner had not yet requested the addition of Rehab Services to its hospital license. ALJ Decision at 4, citing CMS Ex. 6 (letter dated December 22, 2003 from OHDS to CMS stating that Rehab Services is not licensed, either alone or under Petitioner's license) and CMS Ex. 11 (letter dated August 29, 2005 from OSDH to CMS stating that no such request had been made). The ALJ further found that Petitioner had not claimed that Rehab Services was operating under Petitioner's hospital license and, moreover, had acknowledged that adding Rehab Services to its license was an issue that was pending before OSDH. Id., citing P. Br. at 3, 8 and P. Ex. 9 (November 18, 2005 letter from Richard M. Klinge to OSDH). The ALJ determined that summary disposition was thus appropriate because Petitioner had failed to tender evidence showing that a dispute existed as to whether Rehab Services operated under Petitioner's hospital license.³

The ALJ rejected Petitioner's position that because CMS had not produced a certified copy of Petitioner's hospital license, the issue of whether Rehab Services operated under Petitioner's license was unresolved. ALJ Decision at 4. The ALJ concluded that Petitioner was required to produce evidence establishing a

² The ALJ observed that Oklahoma law allows a hospital to include a remote facility under its license if certain requirements are met, and does not preclude Petitioner and Rehab Services from operating under a single license. Those requirements, which the ALJ described as being similar to federal requirements for provider-based status, are: 1) the facilities are separated by no more than fifty (50) miles; 2) both facilities are operated by the same governing body with one administrator; and 3) the medical staffs for both facilities are totally integrated so that a practitioner's privileges extend to all facilities operated under the common license. ALJ Decision at 5, citing Okla. Admin. Code § 310:667-1-3(f).

³ The ALJ also concluded, in response to CMS's motion to dismiss for lack of subject matter jurisdiction, that she had jurisdiction to review denials of provider-based status, and jurisdiction to review this case. ALJ Decision at 1, 3. CMS did not challenge that determination on appeal, and we do not address it further.

factual dispute as to whether it meets the federal licensure requirements, and that it should not be a significant burden for any appropriately licensed facility to produce its own license. Id. at 4-5. While the ALJ agreed with Petitioner that all reasonable inferences were to be drawn in its favor, the ALJ found that whether Rehab Services operated under Petitioner's hospital license was a factual issue not subject to inferences, as "[e]ither the facility is on the hospital license or it is not." ALJ Decision at 5, n.6.⁴

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs; Batavia Nursing and Convalescent Center, DAB No. 1911, at 7 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, No. 04-3687 (6th Cir. Aug. 3, 2005); Hillman Rehabilitation Center, DAB No. 1611, at 6 (1997), aff'd, Hillman Rehabilitation Ctr. v. U.S. Dep't of Health and Human Servs., No. 98-3789 (GEB) at 21-38 (D.N.J. May 13, 1999).

Summary judgment is appropriate when the record shows that there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). The party moving for summary judgment bears the initial burden of showing the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine factual dispute. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This burden may be discharged by showing that there is no or insufficient evidence proffered to support a judgment for the non-moving party. Id. at 325.

⁴ The record before the ALJ included CMS's exhibits 1-12, which CMS submitted with its motion for dismissal or summary judgment and the ALJ admitted. See ALJ Decision at 2. One day after issuance of the ALJ Decision, the Civil Remedies Division of the Departmental Appeals Board received CMS's pre-hearing brief and an exhibit list that refers to CMS exhibits 13 and 14; CMS cited its exhibit 14 before the Board. CMS exhibits 13 and 14 were not considered in rendering our decision.

Petitioner's arguments

Petitioner argues that the ALJ's decision to grant summary disposition in favor of CMS was erroneous, as Petitioner "disputes, denies and contests" that Rehab Services does not operate under Petitioner's hospital license or meet the requirements for provider-based status. P. RR at 5. Petitioner argues that to oppose summary disposition it "is only required to produce evidence establishing a factual dispute as to whether it meets the federal licensure requirements" and that it has met this burden because "[i]t is undisputed that Rehab Services meets the requirements of [Oklahoma law] for operating the remote facility under its hospital license" and because "Oklahoma law does not require that Rehab Services be separately licensed." P. Reply to CMS Opposition to RR at 2-3, 5. Petitioner also argues that the ALJ's determination to deny Petitioner the opportunity for a hearing and to grant summary disposition in favor of CMS violated Petitioner's constitutional rights.⁵

Analysis

A hospital's remote location or facility is eligible for provider-based status if the remote facility and the provider "are operated under the same license," except where, among other exceptions not relevant here, the state either requires a separate license for the remote facility or does not permit licensure of both facilities under a single license. 42 C.F.R. § 413.65(d)(1). Oklahoma permits a hospital's remote facility to be operated under the same license as the provider, provided it is included on the provider's license. CMS Exs. 6; 8, at 20-22; 9. Thus, the sole issue of material fact before the ALJ was whether Rehab was included on Petitioner's license. The record before the ALJ discloses no dispute that it was not.

Petitioner does not assert that Rehab Services is included on Petitioner's Oklahoma hospital license. Neither does Petitioner question the accuracy of the letters from OSDH reporting that Rehab Services was not licensed under Petitioner's license. Petitioner moreover confirms that it has requested that OSDH designate Rehab Services as a remote facility on Petitioner's hospital license, and reports that, as of the time it filed its reply to CMS's opposition to the request for review of the ALJ Decision, it was in the process of responding to OSDH's request

⁵ Petitioner also requests attorneys fees and "other relief as is just and equitable." P. RR at 7. Inasmuch as we sustain the ALJ Decision, we do not address that request.

for additional information, which was dated November 21, 2005. P. Reply to CMS Opposition to P. RR at 3, n.3. Petitioner further acknowledges that OSDH has not yet performed what Petitioner calls "the ministerial task" of "designating Rehab Services as a remote facility on Petitioner's license."⁶ Id. at 3. Before the Board, Petitioner did not proffer any evidence that OSDH had granted Petitioner's request or that Rehab Services has been added to Petitioner's license. See 42 C.F.R. § 498.86(a) (the Board may admit into the record evidence in addition to that introduced at the ALJ hearing if the Board considers the additional evidence relevant and material to an issue presented by the case).⁷ Thus, there is no genuine dispute about the fact that Rehab Services is not licensed as part of Petitioner, although Oklahoma law permits that licensing arrangement.

Petitioner instead argues that its mere assertion that Rehab Services meets Oklahoma's requirements for operating under Petitioner's license and that Petitioner has requested that OHDS add Rehab Services to Petitioner's license establishes a factual dispute as to whether it meets the federal licensing requirements for provider-based status, making summary judgment improper. P. Reply to CMS Opposition to RR at 2. Petitioner in effect argues that Rehab Services is "operated under the same license" as Petitioner for the purpose of the federal regulation because it is eligible under Oklahoma law to be licensed as part of Petitioner. However, Petitioner has not presented any evidence that it actually meets Oklahoma's licensing requirements, and it is undisputed that Oklahoma has not verified Petitioner's allegation of compliance with the State requirements by adding Rehab Services to Petitioner's license.⁸

⁶ Petitioner argues that the ALJ "ignored" evidence of Petitioner's request to add Rehab Services to Petitioner's hospital license. Id. at 3. The ALJ did not ignore this evidence but cited Petitioner's request as evidence that Rehab Services was not licensed as part of Petitioner. ALJ Decision at 3.

⁷ Since Petitioner has not proffered such evidence we need not decide whether it would be material to our decision.

⁸ As noted above, those requirements are that the facilities be separated by no more than 50 miles, be operated by the same governing body with one administrator, and have an integrated medical staff with privileges to practice at either
(continued...)

But even assuming that Rehab Services did meet Oklahoma's requirements to be licensed, Petitioner provides no analysis or discussion of the federal regulation to support a conclusion that a facility seeking provider-based status need not actually be licensed by the state as part of the provider. Indeed, the plain language of the regulation does not support that conclusion. The regulation is titled "licensure," and requires that both the provider and the remote facility "are operated under the same license," except where the state "requires a separate license" for the remote facility, or in states where state law does not permit "licensure of the provider and the [remote location] under a single license." 42 C.F.R. § 413.65(d)(1) (emphasis added). The underscored language of the regulation clearly requires that the remote facility actually be licensed on the same license as the provider, in states that, like Oklahoma, permit such licensing.

Moreover, the preamble to the final rule adding section 413.65 shows that the requirement of the regulation that a provider and a remote facility be "operated under the same license" means that the remote facility must actually be licensed as part of the provider, as opposed to merely being eligible to be licensed. The preamble describes section 413.65(d)(1) as "the requirement that provider-based facilities share a common license with the main provider," which applies in states "with laws that permit common licensure of the provider and the prospective provider-based department under a single license." 65 Fed. Reg. 18,434, 18,513 (Apr. 7, 2000) (emphasis added). It refers to this requirement as "the licensure requirement." *Id.* at 18,513, 18,528. As regards a facility that could be licensed as part of a provider but is not, CMS stated that its "view is that if a facility could be licensed as part of a main provider but chooses not to be, the facility cannot reasonably be seen as an integral and subordinate part of that provider." *Id.* at 18,513. Here, Petitioner and Rehab Services do not "share a common license" because Rehab Services has not been included on Petitioner's hospital license, even though Oklahoma clearly permits such "common licensure." The preamble leaves no doubt that provider-based status is not available to a facility, such as Rehab Services, that could be licensed by the State as part of the provider hospital, but is not.

Petitioner's argument essentially would require CMS to accept Petitioner's belief that it complies with the State licensing

⁸(...continued)
 facility. Okla. Admin. Code § 310:667-1-3(f).

requirements, without any State verification in the form of a license showing that the State has determined that Petitioner and Rehab Services in fact met those requirements.⁹ Such a requirement is not supported by the regulations. Furthermore, the regulations specifically rule out such a requirement by stating that a facility "is not entitled to be treated as provider-based simply because it or the main provider believe it is provider-based." 42 C.F.R. § 413.65(b).

Petitioner's argument that Oklahoma law does not require that a provider-based entity be separately licensed is irrelevant. P. RR at 5. CMS does not argue that Rehab Services must be licensed separately from Petitioner in order to qualify for provider-based status. Instead, it is Petitioner's failure to have Rehab Services licensed under Petitioner's own hospital license as permitted by Oklahoma law that compels the conclusion that Rehab Services is not operating under Petitioner's hospital license and is thus not entitled to provider-based status.

Petitioner argues that "CMS did not meet its burden of production by failing to submit a certified copy of [Petitioner's hospital] license, address the state law procedure for adding remote locations, or explain lines of authority and decision-making within OSDH on licensure." P. RR at 6. Since it is undisputed that Rehab Services is not licensed, CMS had no obligation to

⁹ The record indicates that Oklahoma's law requires that a remote facility actually be licensed, rather than merely comply with the State requirements for licensure. The Oklahoma law states that a hospital "may operate inpatient and outpatient facilities under one (1) license . . . as long as the [preceding] requirements are met" and that "[h]ospitals making appropriate application that have been determined to be compliant with these standards are eligible for a license." Okla. Admin. Code § 310:667-1-3(f) (emphasis added); see CMS Ex. 8, at 20-22. The OSDH Facility Services Director confirmed in a letter to CMS that "[i]f the hospital wants to represent the facility as part of the hospital and bill the services using the hospital's license and provider number, the site must be included in the hospital['s] license. If they want to represent it as a separate entity and bill the services as a separate entity, they are not required to license it as part of the hospital." CMS Ex. 11. Thus, in the absence of a license, Petitioner and Rehab Services do not operate "under (1) one license" for the purpose of the Oklahoma law.

produce Petitioner's hospital license.¹⁰ Petitioner did not explain how any additional information about state licensing procedures could place any material facts in dispute. CMS accordingly met its initial burden of establishing a basis for summary disposition.

If a party moving for summary disposition carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Lebanon, at 4-5; White Lake Family Medicine, P.C., DAB No. 1951, at 12 (2004), citing Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, at 586 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317, at 322-25. Petitioner did not meet this burden. Petitioner has not proffered any evidence to show that Oklahoma has licensed Rehab Services as part of Petitioner or under Petitioner's hospital license and that Petitioner thus operated Rehab Services under Petitioner's license as required for provider-based status where, as here, the State allows a provider's remote locations or facilities to be operated under the provider's license. There was thus no error in the ALJ's determination that this appeal presents no factual issues subject to any inferences that could be drawn in Petitioner's favor, or in the ALJ's conclusion that summary judgment is appropriate because this case presents no genuine dispute over issues of material fact.¹¹

Petitioner also argues that granting summary judgment was not appropriate prior to the completion of the "constitutional requisite" of discovery, and cites court decisions to the effect that summary judgment cannot be granted (or a hearing on a motion for summary judgment denied) if the nonmoving party has not had an opportunity to make full discovery. P. Reply to CMS Opposition to RR at 4-5 (citations omitted). None of these cases

¹⁰ CMS did submit what appears to be a copy of Petitioner's Oklahoma hospital license, for the period July 1, 2003 through June 30, 2004, although there is no indication that it is a certified copy. CMS Ex. 8, at 17. The document contains no reference to Rehab Services.

¹¹ Petitioner argues that an unresolved issue is "whether the remote location will be added *retroactive* to the date when the hospital began operating [Rehab Services] as part of the hospital." P. Reply to CMS Opposition to RR at 3 (emphasis in original). Given that Oklahoma has not added Rehab Services to Petitioner's license as required for provider-based status, that issue has no bearing on our decision.

indicates that there is a "constitutional requisite" of discovery prior to summary disposition in these administrative proceedings.¹² Moreover, Petitioner, in its opposition to CMS's motion for summary judgment, did not request discovery or argue that it needed materials from CMS in order to respond to CMS' motion. Finally, there is no material fact to be discovered since the only material fact is whether Rehab Services is licensed as part of Petitioner and Petitioner does not dispute (and evidence of record clearly shows) that it is not licensed. The ALJ was not required to afford Petitioner the opportunity for discovery where there were no material facts in dispute.

As the federal regulation requires that Rehab Services actually be licensed under Petitioner's hospital license, not just that it meet the requirements for licensing, the only fact material to this appeal before the ALJ was whether Oklahoma had licensed Rehab Services as part of Petitioner. CMS presented unrebutted evidence, and Petitioner itself concedes, that Oklahoma has not licensed Rehab Services as part of Petitioner, even though Oklahoma permits licensing eligible remote facilities as part of a provider. Accordingly, Petitioner has not identified any disputed fact material to this appeal, and there was no error in the ALJ's determination to grant summary disposition in favor of CMS.

¹² While it is well-established that summary judgment is appropriate in these administrative proceedings and that the Federal Rules of Civil Procedure can be used as guidance, the rules are not controlling here. See, e.g., Guardian Health Care Center, DAB No. 1943, at 15 (2004) (the Federal Rules of Civil Procedure are not controlling in proceedings under 42 C.F.R. Part 498).

Conclusion

For the reasons discussed above, we uphold the ALJ Decision.

_____/s/
Judith A. Ballard

_____/s/
Donald F. Garrett

_____/s/
Sheila Ann Hegy
Presiding Board Member