CENTERS FOR MEDICARE & MEDICAID SERVICES
HEARING OFFICER DECISION

In the Matter of:	*	
Essence Healthcare, Inc.	*	
	*	
Denial of Initial Applications to Offer Medicare Advantage/Medicare Advantage-Prescription Drug Plans	*	**Docket No. H-21-0009**
	*	
Contract Year 2022 **Contract No. H8567**	*	
	*	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

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I. FILINGS

This Order is being issued in response to the following:

(a) Essence Healthcare, Inc.'s ("EHI") Hearing Request submitted by letter dated June 2, 2021;
(b) Applicant's Brief to Appeal the Centers for Medicare & Medicaid Services' ("CMS") Denial of Applicant's Medicare Advantage ("MA") Applications ("EHI Brief") dated June 10, 2021;
(c) CMS' Memorandum and Motion for Summary Judgment Supporting CMS' Denial of EHI's Initial Application for a MA Prescription Drug ("MA-PD") Plan ("CMS MSJ") dated June 17, 2021; and
(d) Applicant's Reply Brief ("EHI Reply Brief") dated June 22, 2021.

II. ISSUE

Whether CMS' denial of EHI's application to offer new MA services, due to a failure to timely meet State licensure application requirements, was inconsistent with regulatory requirements.

III. DECISION SUMMARY

The Hearing Officer grants CMS' Motion for Summary Judgment. The parties agree that there is no dispute of material facts. CMS denied EHI's application because it, as the applicant for Contract Number H8567, did not hold the required license. Rather, the license was held by its subsidiary, Essence Healthcare of Georgia ("EHG"), which was established in April 2021.

Through this appeal, EHI requests that CMS exercise regulatory flexibility to substitute EHG as the applicant on EHI's application. EHI asserts that if the Georgia Department of Insurance ("DOI") notified EHI of a domicile related requirement earlier, EHG would have obtained a Georgia-based Health Maintenance Organization ("HMO") license for purposes of applying with CMS by the February 2021 deadline application. EHI alleges COVID-related staffing issues adversely impacted the accuracy and timeliness of the guidance it received from the Georgia DOI. EHI also claims that the EHI and EHG applications are materially the same and that approving the application (under EHG) would provide greater plan options for Georgia beneficiaries.

The CMS Hearing Officer does not possess the broad scope of discretionary authority that EHI seeks; rather, the Hearing Officer must decide if CMS' determination was consistent with regulatory requirements. (42 C.F.R. §§ 422.660 and 422.688). It is undisputed that EHI failed to timely meet licensure requirements. EHI has not established by a preponderance of the evidence that CMS' denial of its application was inconsistent with controlling authority.

IV. BACKGROUND

Any entity seeking to contract as an MA organization must fully complete all parts of a certified application in the form and manner required by CMS. (*See* 42 C.F.R. §§ 422.501(c) and 422.503(b)(1) (2016).) Specifically, CMS requires that an application be submitted through the

Health Plan Management System ("HPMS") and in accordance with instructions and guidelines that CMS may issue. Among other requirements, an applicant must provide:

> Documentation of appropriate State licensure or State certification that the entity is able to offer health insurance or health benefits coverage that meets State-specified standards applicable to MA plans, and is authorized by the State to accept prepaid capitation for providing, arranging, or paying for the comprehensive health care services to be offered under the MA contract. (42 C.F.R. § 422.501(c)(i).)

For State licensure, applicants must attest in their application that they are licensed under State law as a risk-bearing entity eligible to offer health insurance or health benefits coverage in each State in which the applicant wishes to offer one or more MA plans. (42 C.F.R. § 422.400(a).) CMS requires applicants to verify this attestation by uploading an executed copy of the State license certificate with their application if the applicant was not previously qualified by CMS in that State. (*See* Part C – MA and 1876 Cost Plan Expansion Application, located at https://www.cms.gov/Medicare/Medicare-Advantage/MedicareAdvantageApps/index.html.)

Applicants must also attest that the scope of their license or authority allows the applicant to offer the type of MA plan or plans (*e.g.*, Preferred Provider Organization, HMO, etc.) that it intends to offer in the State. (42 C.F.R. § 422.400(c).) With the application, applicants must submit a CMS State Certification Form executed by the State that confirms and certifies that the plan type to be offered by the applicant is within the scope of the license. (*See* Part C – MA and 1876 Cost Plan Expansion Application.)

Under current regulations and procedures, after receiving an application, CMS reviews the application for any issues. CMS then notifies the applicant of any deficiencies by e-mailing a Deficiency Notice. This is an applicant's first opportunity to amend its application.

If an applicant fails to cure its deficiencies, CMS will issue a Notice of Intent to Deny ("NOID"). (42 C.F.R. § 422.502(c)(2)(i).) The NOID affords an applicant a second opportunity to cure its application. (*See* 42 C.F.R. § 422.502(c)(2)(ii).) After a NOID is issued, an applicant has a final ten-day period to cure any deficiencies in order to meet CMS' requirements; otherwise, CMS will deny the application. (*Id.* § 422.502(c)(2)(ii)–(iii).)

The formal NOID process is outlined at 42 C.F.R. § 422.502(c)(2)(i)–(iii), which states:

> (i) If CMS finds that the applicant does not appear to be able to meet the requirements for an MA organization or Specialized MA Plan for Special Needs Individuals, CMS gives the applicant notice of intent to deny the application for an MA contract or for a Specialized MA Plan for Special Needs Individuals a summary of the basis for this preliminary finding.

> (ii) Within 10 days from the intent to deny, the applicant must respond in writing to the issues or other matters that were the basis for CMS' preliminary finding and must revise its application to remedy any defects CMS identified.
>
> (iii) If CMS does not receive a revised application within 10 days from the date of the notice, or if after timely submission of a revised application, CMS still finds that the applicant does not appear qualified or has not provided CMS enough information to allow CMS to evaluate the application, CMS will deny the application.

If after review, CMS denies the application, written notice of the determination and the basis for the determination is given to the applicant. (42 C.F.R. § 422.502(c)(3).)

If CMS denies an MA application, the applicant is entitled to a hearing before a CMS Hearing Officer. (42 C.F.R. § 422.502(c)(3)(iii).) Furthermore, the applicant has the burden of proving by a preponderance of the evidence that CMS' determination was inconsistent with the requirements of 42 C.F.R. §§ 422.501 (application requirements) and 422.502 (evaluation and determination procedures). (42 C.F.R. § 422.660(b)(1).) In addition, either party may ask the Hearing Officer to rule on a Motion for Summary Judgment. (42 C.F.R. § 422.684(b).) The authority of the Hearing Officer is found at 42 C.F.R. § 422.688, which specifies that "[i]n exercising his or her authority, the hearing officer must comply with the provisions of title XVIII [of the Social Security Act ("Act")] and related provisions of the Act, the regulations issued by the Secretary, and general instructions issued by CMS in implementing the Act."

V. PROCEDURAL HISTORY AND STATEMENT OF FACTS

EHI is a legal entity located in Missouri that intended to operate an HMO and a PPO plan in Georgia as a foreign domiciled entity.[1] EHI began its research to support such expansion in 2019. EHI explained that it typically reaches out to, and offers to visit, a targeted State's insurance department to make introductions and determine if foreign-domiciled entities are permitted in the jurisdiction. However, due to the COVID 19 public health emergency, EHI was unable to visit the Georgia regulators. However, based on its interpretation of Georgia's statutes and regulations, it believed that the State allowed foreign domiciled entities, such as EHI, to hold a Georgia license.[2]

In December 2020, EHI filed an HMO license application with Georgia's DOI as a foreign domesticated entity.[3] On February 17, 2021, EHI filed an application with CMS to offer MA-PD products under Contract Number H8567 in Georgia.[4]

As previously noted, the HMO license application to Georgia's DOI and the MA-PD application to CMS for Contract Number H8567 were developing concurrently. EHI explained that on or

[1] EHI Brief at 3.
[2] *Id.* at 3-4.
[3] *Id.* at 4.
[4] *Id.* at 3; CMS MSJ at 1.

about April 9, 2021, the DOI analyst that it was consulting with informed EHI that it received evidence of EHI's good standing from Missouri. The DOI analyst indicated that he would present the application to the DOI Director for review for final approval.[5] However, on April 13, 2021, EHI was notified that the Director concluded its HMO license application could not be reviewed because the State does not allow foreign domiciled entities to hold HMO licensure.[6] Later that day, EHI and the DOI Director met by video conference. EHI explained:

> The Director recommended to the Company that they withdraw their EHI licensure application and submit a new application under a Georgia domiciled entity, as but for the issue of domicile, the information submitted by EHI was sufficient to grant a license. Specifically, the Director informed EHI that he was willing to work with the Company to enable it to get the right structural requirements in place so that the State could grant the HMO license within the timeframe required for CMS approval of the H8567 application. The Director further noted that his Department was understaffed and was working on a hybrid schedule due to the public health emergency, whereby staff work primarily from home but are in the office on an intermittent basis. The Director informed EHI that it was his belief that this contributed to the failure of his staff to previously inform the Company of the domicile requirement and he would have expected the issue to have been raised with EHI at the time the license application was submitted in December 2020 or shortly thereafter.[7]

Based on the Director's advice, EHI quickly established EHG, a legal entity domiciled in Georgia, and the Georgia DOI approved this entity's HMO license application on April 26, 2021.[8]

As for the concurrent MA-PD application process, on March 23, 2021, CMS notified EHI of deficiencies in both the Part C and Part D portions of its application.[9] EHI responded to the Part D deficiencies on March 31,[10] and on April 19 was advised that there were no longer any Part D deficiencies.[11] That same day, however, EHI also received a NOID for the Part C portion of Contract Number H8567, noting State licensure deficiencies.[12]

On April 29, 2021, EHI submitted materials to CMS in response to the NOID for the Part C portion of Contract Number H8567, providing background regarding the inability of foreign domiciled companies to hold HMO licenses within the State of Georgia, as well as documentation that EHG

[5] EHI Brief at 4.
[6] *Id.* at 4-5.
[7] *Id.* at 5.
[8] *Id.* at 5-6. *See also* EHI Exhibit P-7.
[9] EHI Brief at 6. *See also* EHI Exhibit P-1.
[10] EHI Exhibit P-2.
[11] EHI Exhibit P-3.
[12] EHI Exhibit P-4.

was approved by the State to hold the application.[13] On June 2, EHI received a Notice of Denial citing the following deficiencies:

> - Copy of State Licensure - You failed to submit satisfactory evidence that your organization is licensed under State law as a risk-bearing entity eligible to offer health insurance or health benefits coverage, including the authority to offer the MA product for which you are applying, across your entire service area.
> - The legal entity name on the state license does not match the legal entity name provided to CMS.[14]

EHI filed its Request for a Hearing on June 2, 2021. An Acknowledgement Letter was issued June 3, and the parties submitted their briefs pursuant to the briefing schedule therein. In CMS' responsive brief, it moved for summary judgment in its favor.

VI. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Officer must comply with the provisions of Title XVIII of the Act — Health Insurance for the Aged and Disabled — and related provisions of the Act, regulations issued by the Secretary of Health and Human Services, and general instructions issued by CMS in implementing the Act. (42 C.F.R. § 422.688.)

The regulations are clear that an applicant must document that it has a State license or State certification to meet CMS' standards. (*See* 42 C.F.R. § 422.501(c)(1)(i).) EHI failed to meet the application requirements when it submitted its initial application and failed to timely cure the deficiencies by April 29, 2020 — the deadline established in the NOID.[15]

EHI frames its issue in this matter as "whether CMS should exercise its regulatory flexibility" to substitute its newly formed, separate legal entity which is domiciled in Georgia as the Applicant for Contract Number H8567.[16] EHI claims that difficulties at the Georgia DOI were to blame for the circumstances resulting in denial of its application to CMS.[17] EHI speculates that the deficiencies in its application with regard to the domicile requirement would have been noticed earlier if the Georgia DOI employees were not working outside of their normal operating procedures (*i.e.*, remote work), and further believes the Georgia DOI was understaffed while reviewing its application.[18] EHI also alleges that being forced to communicate with Georgia regulators in a virtual format, rather than in person, contributed in it misunderstanding the State's requirements to hold an HMO license.[19] Rather, EHI asserts that if it "had been made aware of the issue in the timeframe that would have been expected during the Department's pre-COVID operations, EHI would have had sufficient time to obtain an HMO license under a Georgia

[13] EHI Exhibit P-5.
[14] EHI Exhibit P-4.
[15] *Id.*
[16] EHI Brief at 7.
[17] *Id.* at 8-9.
[18] *Id.* at 5.
[19] *Id.* at 5, 9.

domiciled entity and apply to CMS with such entity by the CMS application date during mid-February."[20]

Similarly, EHI concludes that substituting the Applicant for Contract Number H8567 to its newly formed entity would not result in any material changes to the contract or the services provided.[21] EHI also claims that approval of Contract Number H8567 would provide greater plan options for Georgia beneficiaries.[22]

CMS' position is that there are no disputed material facts, and that EHI cannot demonstrate it has met all of the Part C requirements within the application process. As a result, CMS moves for summary judgment.[23] CMS denied EHI's application because it, as the Applicant for Contract Number H8567, did not hold the required HMO license. Rather, the license was held by EHG, a separate legal entity.[24] CMS provides a reasoned explanation regarding why it does not accept a license for a different legal entity. CMS articulates:

> Since the legal entity, EHI, is the applicant, CMS cannot accept a license for a different legal entity that did not appropriately apply. It is never permissible to change applicants once applications have been submitted. The materials that EHI submitted as part of the application (e.g. financial forms, *See* Exhibit C14) cannot be transferred to a different applicant. As such, CMS received licensure for EHG, an entity that did not complete the application with the required materials for review by the February 17, 2021 deadline. Therefore, CMS issued a denial letter on June 2, 2021.[25]

EHI does not contest CMS' position that the controlling authority requires the applicant itself to hold the appropriate State license to be approved by CMS. Rather, EHI seeks "regulatory flexibility" (*i.e.*, substituting EHG as the applicant on EHI's application) on the basis that if it "had been made aware of the issue [by the Georgia DOI] earlier, it would have obtained an HMO license under a Georgia domiciled entity to timely apply with CMS by the February deadline application date.

The CMS Hearing Officer does not possess a broad scope of discretionary authority to provide the relief EHI seeks. The Hearing Officer must decide if CMS' determinations were consistent with regulatory requirements. (42 C.F.R. §§ 422.660 and 422.688.) The Hearing Officer finds that EHI failed to timely meet CMS' application requirements. Thus, CMS' denials were an appropriate

[20] *Id*. at 5.
[21] *Id*. at 9-10. EHI argues that the application for EHI and EHG are "materially the same." For example, it explains "as a newly incorporated entity, EHG relies on its parent EHI's Audited and Financial statements to demonstate fiscal soundness," in which CMS found no deficiencies, and that "EHG relies on the same downstream vendors" and operating plan "as described in EHI's original application." EHI Reply Brief at 3.
[22] EHI Reply Brief at 4.
[23] CMS MSJ at 7.
[24] EHI Exhibit P-4; CMS MSJ at 5.
[25] CMS MSJ at 7.

exercise of its delegated authority. Accordingly, the Hearing Officer grants CMS' Motion for Summary Judgment.

VII. ORDER

CMS' Motion for Summary Judgment is granted.

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Benjamin R. Cohen, Esq.
CMS Hearing Officer

Date: July 29, 2021

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Office of the Attorney Advisor

August 13, 2021

VIA EMAIL ONLY

Ms. Helaine I. Fingold
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Re: Essence Healthcare, Inc., MAPD Docket No. H-21-0009
(Contract Year 2022) (Contract No. H8567)

Dear Ms. Fingold:

This is to advise that the Administrator of the Centers for Medicare & Medicaid Services (CMS) has declined to review the CMS Hearing Officer's in the captioned case.

Pursuant to 42 CFR 422.692, if the Administrator declines to review the hearing officer decision or the Administrator does not make a determination regarding review within 30 calendar days, the decision of the hearing officer is final.

Sincerely yours,

Jacqueline Vaughn

Jacqueline R. Vaughn
Attorney Advisor

Enclosure

cc: Ms. Kelli McDermott, CMS/CM
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