CENTERS FOR MEDICARE AND MEDICAID SERVICES
HEARING OFFICER DECISION

IN THE MATTER OF:

Moda Health Plan, Inc.	*	
	*	DOCKET NO. 2013 MA/PD APP. 3
Denial of Initial Application to Qualify as a	*	
Medicare Advantage/Prescription Drug Organization	*	
Contract Year 2014, Contract No. H1307	*	
	*	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

I. JURISDICTION

This appeal is provided pursuant to 42 C.F.R. § 422.660. The Centers for Medicare and Medicaid Services (CMS) Hearing Officer designated to hear this case is the undersigned, Michael J. McDougall.

II. ISSUE

Whether CMS properly denied Moda Health Plan, Inc.'s (Moda) initial application to offer a Medicare Advantage – Prescription Drug (MA-PD) plan for contract year 2014.

III. PROGRAM BACKGROUND

The Medicare Advantage (MA or Part C) program offers Medicare beneficiaries the option of receiving health care benefits through a privately-operated coordinated care delivery system.[1] Organizations that are approved to offer MA-PD benefits are required to maintain a provider network that ensures "adequate access to covered services" for its plan enrollees in each operative service area. This network must include a variety of providers, including primary care physicians, specialists, and hospitals.[2] In addition, MA organizations must offer an outpatient prescription drug benefit in the service areas in which they offer a Part C benefit.[3]

The Secretary of the United States Department of Health & Human Services (the Secretary) is authorized to contract with entities seeking to offer MA and MA-PD benefits.[4] Through regulation, the Secretary has delegated this contracting authority to CMS, which has established the general provisions for entities seeking to qualify as MA-PD plans.[5]

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[1] *See* 42 U.S.C. § 1395w-21 *et seq.*
[2] 42 C.F.R. § 422.112(a)(1).
[3] 42 C.F.R. § 422.4(c)(1). *See also, generally,* 42 U.S.C. § 1395w-112 (Medicare Part D).
[4] 42 U.S.C. § 1395w-27.
[5] 42 C.F.R. §§ 422.400 *et seq.*, 422.503(b) *et seq.*

Potential MA-PD organizations submit applications to CMS, in which the applicant organization must document that it has a provider network in place that meets CMS requirements.[6] These applications must be completed "in the form and manner required by CMS."[7] Presently, CMS requires the electronic submission of MA-PD applications via the Health Plan Management System (HPMS) program.[8]

After receiving a MA-PD application, CMS makes a determination as to whether the applicant organization meets all of the relevant program requirements.[9] This determination is based solely on information contained in the application or obtained by CMS through methods such as onsite visits.[10] CMS conducts elements of the application review process using a computer program within HPMS known as the Automated Criteria Check (ACC). The ACC is used to assess the sufficiency of applicant care networks at both the provider and facility levels.[11]

If the ACC assessment reveals network shortcomings, CMS issues a Deficiency Notice outlining the relevant issues.[12] Following the transmittal of a Deficiency Notice, applicants may review the ACC report, submit updated provider information, and file a timely Exception Request concerning any provider and service area criteria that it is unable to meet. CMS guidance notes that the agency will consider these requests for exceptions to the network requirements "under definite and limited circumstances." Each Exception Request must be accompanied by supporting documentation that shows "how local community patterns of care support the proposed network of providers/facilities and those specialty types for which the applicant is requesting an exception."[13] Furthermore, agency guidance establishes that plans have "one opportunity" to submit an Exception Request, and this occurs "immediately following the issuance of the CMS-generated [ACC] report generated after the receipt by CMS of the Applicant's response to the deficiency notice."[14] CMS requires Exception Requests to be submitted electronically via a dedicated request template.[15]

Before final disapproval of an MA-PD application, CMS must provide a formal "Notice of Intent to Deny," which provides the basis for the denial and gives the applicant ten days to cure the deficiencies in its application. The regulatory requirement for curing an application is stated at 42 C.F.R. § 422.502(c)(2)(ii - iii) as follows:

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[6] 42 C.F.R. § 422.501(c)(2).
[7] 42 C.F.R. § 422.501(c)(1).
[8] CMS Memorandum and Motion for Summary Judgment (CMS Memorandum) at 3.
[9] 42 C.F.R. § 422.502(a)(2).
[10] 42 C.F.R. § 422.502(a)(1).
[11] CMS Memorandum at 3.
[12] CMS Exhibit D, *MA HSD Provider and Facility Specialties and Network Adequacy Criteria Guidance* (Network Adequacy Guidance) at 10. *Also available at* http://www.cms.gov/Medicare/Medicare-Advantage/MedicareAdvantageApps/Downloads/CY2014-HSD-Provider-and-Facility-Specialties-Criteria-Guidancev2.pdf (last visited June 25, 2013).
[13] *Id.*
[14] *Id. See also* CMS Exhibit E, *HSD Instructions for CY 2014 Applications* at 9 ("All Exceptions must be requested and supported with appropriate documentation within the timeframe established by CMS.")
[15] CMS Exhibit D, Network Adequacy Guidance at 10.

> (ii) Within 10 days from the date of the intent to deny, the contract 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.
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> (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.

CMS guidance also indicates that if a Notice of Intent to Deny identifies a previously-submitted Exception Request, the applicant may submit a corrected Exception Request during the cure period, but only "for the same contract id (*sic*), county and specialty code as was originally submitted."[16]

If CMS denies a MA-PD application, the applicant organization is entitled to a hearing before a CMS hearing officer.[17] The regulation at 42 C.F.R. § 422.660(b)(1) dictates that "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 and 422.502]."[18] In addition, the regulations governing the hearing process provide that either party may ask the Hearing Officer to rule on a Motion for Summary Judgment.[19]

IV. Factual and Procedural Background

In response to CMS' solicitation for 2014 MA-PD plan applications, Moda submitted an application, No. H1307, to offer MA-PD services in twelve Oregon counties. CMS' initial review of this application revealed certain deficiencies, including shortcomings with Moda's provider network. Following a March 13, 2013 Deficiency Notice, CMS provided Moda the opportunity to address these flaws.[20] Moda responded on March 28, 2013, and provided amended provider network information, including an Exception Request concerning access to Nephrology specialists in Lake County.[21]

CMS reviewed this additional information, and on April 26, 2013 issued a Notice of Intent to Deny Moda's MA-PD application. In addition to certain network contract documentation

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[16] *Id.*
[17] 42 C.F.R. § 422.660.
[18] *See supra* p. 2. (The regulations at 42 C.F.R. §§ 422.501 and 422.502 establish the contract application requirements and review procedures).
[19] 42 C.F.R. § 422.684. *See also* Medicare Program, Revisions to the Medicare Advantage and Part D Prescription Drug Contract Determinations, Appeals and Intermediate Sanctions Processes, 72 Fed. Reg. 68700, 68714 (December 5, 2007) (Preamble to final rule stating, "In ruling on such a [Summary Judgment] motion, we propose that the hearing officer would be bound by the CMS regulations and general instructions. Where no factual dispute exists, the hearing officer may make a decision on the papers, without the need for a hearing.").
[20] CMS Exhibit F, *Deficiency Notice*.
[21] CMS Memorandum at 4.

deficiencies, CMS indicated that Moda's network of providers did not meet CMS network standards.[22] In this notice, CMS also denied of Moda's Exception Request for Nephrology in Lake County. Moda was afforded a ten day timeframe to address the application deficiencies. The deadline for Moda to provide documentation demonstrating that it had cured these items was May 7, 2013 (the cure deadline).

Moda filed additional information with CMS prior to the cure deadline, including an amended Exception Request purporting to cover Nephrology specialty services in Lake County. However, this Exception Request was inadvertently submitted to cover Neurosurgery providers.[23] Following its review of this additional material, CMS issued a final denial of the contract application on May 31, 2013. This denial was based on a finding of remaining network deficiencies. CMS pointed to five provider deficiencies and one facility deficiency.

In issuing this denial, CMS noted that the provider networks in several counties within the applicant's service area lacked specialist or facility coverage for certain treatment specialties. These counties, as well as the specialties, were listed as follows:

	County	Deficiency/Specialty or Facility
1.	Lake	Nephrology
2.	Lake	Pulmonology
3.	Malheur	Gastroenterology
4.	Umatilla	Oncology- Medical, Surgical
5.	Umatilla	Rheumatology
6.	Harney	Outpatient Dialysis [facility deficiency]

On June 12, 2013, Moda filed a timely appeal from this determination.

V. MODA'S CONTENTIONS

In its appeal brief, Moda first noted the difficulties in establishing adequate provider networks in the largely rural eastern Oregon service area that would be covered under application H1307. Moda then described the circumstances surrounding each deficiency noted by CMS, as well as the remedial measures taken to address the situation. Moda did not contest the existence of any of the cited deficiencies, but rather conceded some degree of responsibility in each case.

For example, concerning the Lake County Nephrology deficiency, Moda cited "human error" as the cause of its submission of the "incorrect exception" request that had been submitted for Neurosurgery services. The Lake County Pulmonology deficiency was attributed to a failed contract negotiation with the sole Pulmonologist that met the time and distance standards in the county.[24] For both Lake County deficiencies, Moda asked CMS to consider additional exception request materials.[25]

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[22] CMS Exhibit H, *Notice of Intent to Deny*.
[23] Moda Brief at 2.
[24] Moda Brief at 2.
[25] *See* Moda Exhibit 1, *Medicare Advantage HSD Exception Template: Nephrology (Lake County)*; Moda Exhibit 4, *Medicare Advantage HSD Exception Request Template: Pulmonology (Lake County).*

Contractual issues were also the cause of the Malheur County Gastroenterology deficiency. Moda claimed that the while the terms of a provider agreement that would have remedied this item "had been agreed upon," the contract was not executed prior to the cure deadline.[26] To illustrate this point, Moda provided the signature page from an untimely-executed contract as evidence that the plan had in place an agreement in principle prior to the established cure deadline.[27]

Moda's responses to the deficiencies cited by CMS with regard to Umatilla County echoed those raised above. The Oncology – Medical/Surgical requirement was not met because "human error" led the plan to misidentify the number of counties for which access requirements had to be met.[28] Moda asked CMS to accept documentation that it had a provider agreement in place, prior to the cure deadline, which, it is claimed, would have satisfied this requirement.[29] Moda claimed that the cited Rheumatology network deficiency stemmed from the failure of the contracting physician to execute the provider agreement prior to the cure deadline, and asked CMS to reassess this shortcoming based on the date of agreement in principle rather than the date of contract execution.[30] A copy of this contract signature page was also provided.[31]

With regard to the Harney County Outpatient Dialysis deficiency, the plan pointed to the rural nature of the county as contributing to a "pronounced lack of specialty providers meeting the ACC [network] standards." [32] Moda indicated that it had submitted, and received approval for, a number of other Exception Requests for this particular county. However, due to human error Moda did not submit an Exception Request for Outpatient Dialysis facility coverage. Moda therefore requested that CMS consider an exception request to the network requirements.[33]

Moda concluded its brief by acknowledging that it "failed to document its compliance with certain ACC [network] standards prior to the final submission date." The plan contended that it presently meets these standards, "with only a few limited exceptions attributable either to provider unwillingness to provide services to Medicare members or a complete lack of specialty providers within the geographic area."[34]

VI. CMS' CONTENTIONS

In its brief CMS argued that there is no factual dispute that Moda did not meet CMS Network Standards.[35] CMS noted that Moda acknowledged the provider and facility deficiencies were not resolved prior to the cure deadline. CMS argued that it properly denied Moda's application based on the information timely provided through the MA-PD application process and that

[26] Moda Brief at 2.
[27] Moda Exhibit 5, *Contract signature page for Idaho Gastroenterology Associates*.
[28] Moda Brief at 3.
[29] Moda Exhibit 6, *Contract signature page for St. Mary Medical Center*.
[30] Moda Brief at 3.
[31] Moda Exhibit 7, *Contract signature page for Derek Peacock, MD*.
[32] Moda Brief at 3.
[33] Moda Exhibit 8, *Medicare Advantage HSD Exception Template: Outpatient Dialysis (Harney County)*
[34] Moda Brief at 3.
[35] CMS Memorandum at 5.

neither it, nor the CMS Hearing Officer, may consider any information provided by Moda during the MA-PD appeal process.[36] For these reasons, CMS moved for Summary Judgment.[37]

VII. DECISION

The Motion for Summary Judgment is granted. Moda did not meet its burden of proof, set forth at 42 C.F.R. § 422.660(b)(1), in demonstrating that CMS' determination was inconsistent with program contracting requirements.

The undisputed facts in this case support CMS' conclusion that Moda's 2014 MA-PD application, No. H1307, did not meet program requirements. In March 2012, CMS provided Moda with a Deficiency Notice concerning its contract application. At that time, Moda responded by providing the agency with updated information concerning its provider network, which also included a timely initial Exception Request concerning Nephrology services in Lake County.

Pursuant to program regulations, CMS next issued a Notice of Intent to Deny for application H1307. In this notice, CMS brought the remaining provider network flaws to the attention of Moda. CMS also provided a final opportunity for the plan to rectify the situation. Although Moda took actions to address these deficiencies, including an attempt to file a corrected Exception Request for Nephrology services in Lake County, the plan concedes that the network sufficiency issues were either not fully remedied or not adequately conveyed to CMS prior to the May 7, 2013 cure deadline. Accordingly, CMS denied application No. H1307.

Through the appeals mechanism, Moda now offers additional information in another attempt to fix its application. However, program regulations at 42 C.F.R. § 422.501(c) require all contract applications to be completed "in the form and manner required by CMS."[38] The current application was not completed in this fashion. For example, while the Lake County Nephrology Exception Request was timely submitted following the Deficiency Notice, the changes to this request were erroneously filed to cover Neurosurgery services in Lake County. In addition, in its appeal brief, Moda asked CMS to consider two newly-submitted Exception Requests concerning Pulmonology services in Lake County and Outpatient Dialysis facilities in Harney County. Clearly these untimely Exception Requests were not submitted in the "form and manner" required by CMS.

In addition to the Exception Request issues outlined above, Moda offered information concerning three contracts that it believes would address network deficiencies. This information was intended to demonstrate that, prior to the cure deadline, Moda had in place provider contracts or agreements in principle that would have resulted in a sufficient provider network. However, this information was submitted after the cure deadline and CMS is under no obligation to consider the materials.

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[36] *Id.* at 6.
[37] *Id.* at 7.
[38] 42 C.F.R. § 422.501(c).

VIII. CONCLUSION

The Hearing Officer finds that CMS acted within its authority in denying application H1307. CMS' Motion for Summary Judgment is granted.

Michael J. McDougall
Hearing Officer

June 27, 2013