

**CENTERS FOR MEDICARE AND MEDICAID SERVICES**  
**Hearing Officer Decision**

**In the Matter of:** \*

**Provider Partners Health Plan** \*                    **Docket No.**

**Denial of Initial Application** \*                    **2015 MA/PD App. 1.**

**Medicare Advantage Organization** \*

**Contract Year 2016, Contract No. H8067**

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**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

I.        ISSUE

Whether Provider Partners Health Plan (“Applicant”) proved by a preponderance of the evidence that the Center for Medicare and Medicaid Services’ (“CMS”) denial of its Medicare Advantage (“MA”) plan application was inconsistent with regulatory requirements, as CMS did not permit the Applicant to correct a deficiency beyond the final submission deadline.

II.        DECISION

The Hearing Officer finds that there is no genuine dispute of material fact and grants CMS’ Motion for Summary Judgment. The Applicant has not established by a preponderance of the evidence that CMS’ denial was inconsistent with controlling authority. The Applicant failed to properly and timely establish that it met CMS’ network adequacy standards for urologists in Baltimore County, Maryland.

III.        BACKGROUND

Any entity seeking to contract as a MA organization must fully complete all parts of a certified application, in the form and manner required by CMS.<sup>1</sup> Specifically, CMS requires that applications be submitted through the Health Plan Management System (“HPMS”) and in accordance with instructions and guidelines that CMS may issue. CMS is responsible for determining whether an entity qualifies as a MA organization and whether proposed MA plans meet the regulatory requirements.<sup>2</sup>

Under current regulations and procedures, after receiving an application, CMS reviews the application for any deficiencies. CMS notifies the organization of any deficiencies by e-mailing a Deficiency Notice, and affords the organization an opportunity to amend its

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<sup>1</sup> See 42 C.F.R. §§ 422.503(b)(1) and 422.501(c) (2014).

<sup>2</sup> 42 C.F.R. § 422.501(d)(1).

application. If an applicant fails to cure the deficiencies, CMS will issue a Notice of Intent to Deny (“NOID”). The NOID affords applicants a second opportunity to cure its application. The regulations provide that, after a NOID is issued, an applicant has a final 10-day period to cure any deficiencies in order to meet CMS’ requirements, or else CMS will deny the application. After review, CMS notifies each applicant of its determination and the basis for its determination.<sup>3</sup> The formal NOID process is outlined in 42 C.F.R. § 422.502(c)(2):

(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.<sup>4</sup>

If CMS denies a MA application, the organization is entitled to a hearing before a CMS Hearing Officer. The regulations dictate 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 (application requirements) and 422.502 (evaluation and determination procedures).<sup>5</sup> 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.<sup>6</sup>

#### IV. STATEMENT OF FACTS

Both parties agree that there are no material facts in dispute. The Applicant submitted a timely initial application to offer a MA Special Needs plan in ten Maryland counties.<sup>7</sup> Next,

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<sup>3</sup> 42 C.F.R. § 422.502(c).

<sup>4</sup> 42 C.F.R. § 422.502(c)(2)(i)-(iii).

<sup>5</sup> 42 C.F.R. § 422.660(b)(1).

<sup>6</sup> 42 C.F.R. § 422.684.

<sup>7</sup> CMS’ Memorandum and Motion for Summary Judgment (“CMS’ Brief”) at 5, Jun. 12, 2015.

CMS reviewed the application and e-mailed a Deficiency Notice to the Applicant on March 11, 2015.<sup>8</sup>

Among other things, one of the noted issues in the Deficiency Notice was the number of urologists that met CMS' criteria.<sup>9</sup> The Applicant submitted revised application materials by the deadline.<sup>10</sup> To cure the urology deficiency, the Applicant added a urologist to its Harford County network on March 17, 2015.

Nonetheless, on April 20, 2015, CMS issued its NOID (which identified deficiencies that are not the subject of this appeal) to the Applicant. The NOID provided that the deadline to cure any identified deficiencies was April 30, 2015.<sup>11</sup> The NOID did not note any remaining deficiencies in urology.

The day following the NOID issuance, one of the urologists withdrew from the Applicant's provider network.<sup>12</sup> As a result of this withdrawal, the Applicant removed the doctor from its network.<sup>13</sup> This action caused the Applicant's Baltimore County network, which is the subject of this appeal, to fall under the threshold of the required number of urologists. The Applicant timely submitted revised materials in response to the identified deficiencies in the previously-issued NOID; however, the Applicant failed to recognize or correct the Baltimore County deficiency.<sup>14</sup>

On May 1, 2015, the day after the NOID cure period ended, the Applicant realized there was a Baltimore County deficiency and e-mailed CMS to request an opportunity to correct an "inadvertent clerical error."<sup>15</sup> The Applicant stated that it could cure the Baltimore County deficiency by designating one of its Harford County urologists as eligible to participate in both the Harford County and Baltimore County networks.<sup>16</sup> CMS denied the Applicant's request on May 4, 2015 because CMS could not "make an exception for [the Applicant] to allow for an updated submission outside of the established timeframes."<sup>17</sup>

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<sup>8</sup> CMS' Brief at 5.

<sup>9</sup> Applicant's Initial Brief ("Applicant's Brief") at 2, Jun. 8, 2015.

<sup>10</sup> CMS' Brief at 5.

<sup>11</sup> *Id.* at 6; *see also* Applicant's Brief Ex. 2 at 1 [NOID].

<sup>12</sup> Applicant's Brief at 3.

<sup>13</sup> *Id.*

<sup>14</sup> CMS' Brief at 6 (the deadline to cure was April 30, 2015).

<sup>15</sup> Applicant's Brief Ex. 8 at 1 [E-mail Request to Correct Clerical Error]; *see also* Applicant's Brief at 3 (the clerical error was that, on March 17, 2015, the Applicant did not take advantage of designating the same urologist used to cure the Harford County deficiency as also participating in Baltimore County's network).

<sup>16</sup> *See id.*

<sup>17</sup> *Id.*

Consequently, on May 27, 2015, CMS issued its denial of the application.<sup>18</sup> The denial stated that “. . . CMS has found that your contracted network of providers does not meet CMS network standards.”<sup>19</sup> Specifically, the denial was based on the inadequate network of urology providers in Baltimore County.<sup>20</sup>

The Applicant appealed CMS’ denial to the Hearing Officer pursuant to 42 C.F.R. § 422.660. The Applicant timely filed its brief with the Hearing Officer. CMS subsequently filed a Motion for Summary Judgment, and in response, the Applicant filed a Cross-Motion for Summary Judgment.

#### V. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

In exercising his or her authority, the Hearing Officer must comply with the provisions of Title XVIII and related provisions of the Social Security Act, regulations issued by the Secretary, and general instructions issued by CMS in implementing the Act.<sup>21</sup>

The Applicant argues that CMS may not deny its application based on a deficiency that was not expressly identified in the NOID.<sup>22</sup> The Applicant contends that CMS is required “. . . to provide conditional approval if an applicant remedies all defects in the [NOID].”<sup>23</sup> The Applicant states that CMS expressly addressed this issue in the Preamble to the April 25, 2010 Final Rule (“Preamble”):

*Comment:* One commenter recommended that CMS explicitly provide in the regulation for a process to permit applicants to cure deficiencies identified by CMS subsequent to the issuance of the [NOID]; and that if such an opportunity is not provided, CMS should base any denial notice only on issues raised in the [NOID] and not on deficiencies that are identified later in the application review process.

*Response:* When we have discovered a deficiency after we have issued a [NOID], we have not disapproved that application based on the failure to correct the new deficiency. Rather, we approve the application (assuming all corrections have been made based on deficiencies identified in the [NOID]), but communicate to the applicant that the newly identified deficiency must be corrected

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<sup>18</sup> Applicant’s Brief Ex. 1 [Denial].

<sup>19</sup> *Id.*

<sup>20</sup> Applicant’s Brief at 4 (“. . . the only application deficiency was the failure to meet CMS’ access standards for urologists in Baltimore County.”).

<sup>21</sup> 42 C.F.R. § 422.688.

<sup>22</sup> Applicant’s Brief at 4.

<sup>23</sup> *Id.*

prior to executing a Medicare contract. If the issue is not so corrected, it immediately becomes the subject of a CMS contract compliance action.<sup>24</sup>

The Applicant argues that CMS was clear that applicants have an additional cure period for deficiencies identified *after* the issuance of the NOID.

The Hearing Officer notes that this response to the commenter's question should not be read in isolation, but in the context of the overall regulatory scheme and application review process. The regulations and the Proposed Rule provide that CMS does not permit additional modifications or documentation after the expiration of the 10-day period following CMS' issuance of a NOID.<sup>25</sup> Further, CMS explains elsewhere in the Preamble that it will not give any special consideration or allow exceptions to the requirements.<sup>26</sup> Thus, the Hearing Officer finds that the Preamble language is most fairly and logically read as addressing whether an applicant has an additional opportunity to correct an application in which the deficiency was not timely discovered due to *CMS error*.

The Hearing Officer finds that the Applicant's position, if accepted, diminishes the application review process as a whole.<sup>27</sup> The application process is designed to apply to all applicants in a fair and transparent manner.<sup>28</sup> The process is comprised of a coordinated chain of events, including (1) an initial application deadline, (2) the issuance of a deficiency notice, (3) submission of a revised application, (4) exception request deadline, (5) the issuance of a NOID, (6) the opportunity to respond to a NOID, and (7) a final review. Furthermore, the process is structured over an annual cycle, making adherence to deadlines understandably important from a programmatic standpoint. The Hearing Officer agrees with CMS that providing the Applicant an additional opportunity to cure would, in effect, extend CMS' final application submission deadline, and minimize the significance of the application review mechanism as whole.

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<sup>24</sup> 75 Fed. Reg. 19678, 19684 (Apr. 15, 2010).

<sup>25</sup> See 42 C.F.R. § 422.502(c)(2)(iii); 74 Fed. Reg. 54634, 54641 (proposed Oct. 22, 2009) ("The purpose of the proposed regulatory change is to clarify that information submitted after 10 days from the notice will under no circumstances be reviewed for the purpose of approving an application.").

<sup>26</sup> 75 Fed. Reg. at 19683-84.

<sup>27</sup> The Applicant claims that correcting the error would be an "administrative task that could be accomplished in less than a minute." Applicant's Brief at 2. In contrast, CMS contends that allowing the Applicant to correct the deficiency would be inconsistent and unfair to other applicants. CMS' Brief at 8.

<sup>28</sup> The Preamble provides:

We design our solicitations to ensure that all organizations have a fair opportunity to demonstrate their qualifications for an MA or PDP contract. As noted in the preamble to the October 2009 proposed rule, allowing exceptions to requirements to address unique circumstances would undermine the need for a uniform application process applied fairly to all applicants.

*Id.* at 19683.

In addition, the Applicant cites to two Hearing Officer decisions in which the Hearing Officer determined that the applicants were materially prejudiced by CMS.<sup>29</sup> The Applicant recognizes that the “. . . facts of these cases differ from the instant one . . .,” but contends that “. . . the key underlying point is that the applicant will be materially prejudiced by CMS’ failure to give it due notice and the opportunity to cure.”<sup>30</sup> The Hearing Officer finds that the cases cited by the Applicant are even more distinguishable from the instant case than the Applicant suggests. In both of those cases, *CMS’ failure* to properly explain the deficiency or fully execute its review process materially prejudiced the applicants.<sup>31</sup> In this case, however, there is no allegation or evidence that CMS caused the Applicant’s error.

Finally, the Hearing Officer notes that the Applicant was in a position to both ensure that its doctors were assigned to all eligible counties and to identify its filing error and correct it prior to the final submission deadline of April 30, 2015.<sup>32</sup>

#### VI. DECISION AND ORDER

The Hearing Officer finds that the Applicant has not established by a preponderance of the evidence that CMS’ denial is inconsistent with controlling authority. The Applicant failed to properly and timely establish that it met CMS’ network adequacy standards for urologists in Baltimore County, Maryland. Therefore, CMS’ Motion for Summary Judgment is hereby granted.



Benjamin R. Cohen, Esq.  
CMS Hearing Officer

Date: July 7, 2015

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<sup>29</sup> See Applicant’s Brief at 6-7 (citing to Gateway Health Plan of Ohio, Inc., 2013 MA/PD App. 6 and Arkansas Superior Select, Inc., 2014 MA/PD App. 2).

<sup>30</sup> Applicant’s Brief at 7.

<sup>31</sup> See Gateway Health Plan of Ohio, Inc., 2013 MA/PD App. 6 and Arkansas Superior Select, Inc., 2014 MA/PD App. 2.

<sup>32</sup> CMS developed a standardized network criteria and an automated review process for applicants to self-determine their own network adequacy. See 75 Fed. Reg. at 19684.