



DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services
Office of Hearings
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September 13, 2024

VIA ELECTRONIC DELIVERY

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RE: Hearing Officer Decision
Hearing Officer Docket Number: H-24-00001
Medicare Advantage/Prescription Drug Plan Contract Denial
Clear Spring Health Insurance Company, Contract Number S6946

Dear Mr. Bittinger and Ms. Dargar:

A copy of the Hearing Officer's Decision for the above-referenced appeal is attached.

The Hearing Officer's Decision may be appealed to the Administrator of the Centers for Medicare & Medicaid Services. The parties may request review by the Administrator within 15 calendar days of receiving this decision. *See* 42 C.F.R. § 422.692; 42 C.F.R. § 423.666. Requests for review should be sent via email to Jacqueline R. Vaughn, Director, Office of the Attorney Advisor, at Jacqueline.Vaughn@cms.hhs.gov, with a copy to Arlene O. Gassmann, Paralegal Specialist, at Arlene.Gassmann@cms.hhs.gov.

Sincerely,
Office of Hearings

**DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR MEDICARE & MEDICAID SERVICES**

**CLEAR SPRING HEALTH INSURANCE
COMPANY,
Contract No. S6946**

Petitioner

v.

**CENTERS FOR MEDICARE & MEDICAID
SERVICES,**

Respondent

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**CMS Hearing Officer Case No.:
H-24-00001**

**Review of Termination Notice
and Intermediate Sanctions for
Medicare Advantage /Medicare
Advantage – Prescription Drug
Plan Contract**

**HEARING OFFICER ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT**

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I. FILINGS

- a) October 24, 2023 Clear Spring Health Insurance Company’s (“Clear Spring’s”) Hearing Request on Centers for Medicare & Medicaid Services’ (“CMS”) Termination of Medicare Advantage-Prescription Drug Contract Number S6946;
- b) January 8, 2024 Petitioner’s Brief in Opposition to Contract Termination & Intermediate Sanctions (“Clear Spring Brief”) and Exhibits P-1 through P-42;
- c) March 8, 2024 CMS’ Combined Response to Clear Spring’s Opening Brief and Motion and Memorandum of Law in Support of Summary Judgment (“MSJ”) and Brief in Support Thereof (“CMS Brief and MSJ”) and Exhibits 1 through 27;
- d) April 8, 2024 Clear Spring’s Brief in Reply to CMS; MSJ and Response to Clear Spring’s Opening Brief (“Clear Spring Reply”) and Exhibits 1 through 9;
- e) May 8, 2024 CMS’ Reply to Appellant’s Reply Brief and Memorandum in Opposition to CMS’ Motion for Summary Judgment filed by CMS (“CMS Reply”);
- f) July 5, 2024 Clear Spring’s Supplemental Brief in Reply to CMS’ Reply Brief in Support of its MSJ; and
- g) July 16, 2024 CMS’ Response to Petitioner’s Supplemental Brief Regarding *Loper Bright Enterprises v. Raimondo*.

II. JURISDICTION

This appeal is provided pursuant to 42 C.F.R. § 423.650. The CMS Hearing Officer designated to hear this case is the undersigned, Amanda S. Costabile.

III. ISSUE

Whether CMS’ October 13, 2023 Notice of Termination and Intermediate Sanctions for Clear Spring (Contract No. S6946) was proper.

IV. DECISION SUMMARY

The Hearing Officer does not find any material facts in dispute and grants CMS’ Motion for Summary Judgment. 42 C.F.R. § 423.662(b). Clear Spring does not dispute that its contract S6946 received Part D summary Star Ratings of less than three stars for three consecutive contract years, namely, 2022, 2023, and 2024. *See* 42 C.F.R. § 423.509(a)(4)(x). Despite Clear Spring’s arguments to the contrary, the Hearing Officer finds that CMS had the authority to terminate Clear Spring’s contract and impose intermediate sanctions and that the basis for CMS’ actions was clearly articulated within CMS’ October 13, 2023 “Notice of Termination¹ and Intermediate Sanctions² (Suspension of Enrollment and Marketing) for Prescription Drug Plan Contract Number S6946 [hereinafter “Termination Notice”].” The Hearing Officer also finds that CMS provided Clear Spring with the required notice and sufficient opportunity to correct its deficiencies and improve its Star Ratings to avoid intermediate sanctions and termination actions. Additionally, any discussions that CMS and Clear Spring may have had surrounding the potential reassignment of Low-Income Subsidy (“LIS”) beneficiaries concern a process and inquiry not pertinent to the

¹ Effective December 31, 2024.

² Effective October 29, 2023.

question under the Hearing Officer’s jurisdiction in this matter, i.e., whether CMS’ decision to terminate and impose intermediate sanctions against contract S6946 was inconsistent with the controlling authority. *See* 42 C.F.R. § 423.650(b)(3), (4). Accordingly, the Hearing Officer upholds CMS’ October 13, 2023 termination and imposition of intermediate sanctions for Clear Spring’s contract S6946.

V. PROCEDURAL HISTORY AND STATEMENT OF FACTS

“Clear Spring is an Arizona corporation and an Arizona domiciled life and health insurance company offering Medicare Advantage plans in five states, and a standalone [Part D plan (“PDP”)] in 49 states and the District of Columbia.” Clear Spring Brief at 7. “CMS awarded Clear Spring contract S6946 effective January 1, 2020[,] [with] Clear Spring serv[ing] as a PDP sponsor and operat[ing] a standalone Medicare Part D Prescription Drug Plan.” CMS Brief and MSJ at 11. “Clear Spring and CMS renewed S6946 for contract years 2021, 2022, 2023 and 2024.” *Id.*; *see* CMS Exhibits C-2 through C-5.

Within each year’s MA-PD contract, the following provision appears on page one:

Article II

Functions to be Performed by PDP Sponsor

...

D. QUALITY ASSURANCE/UTILIZATION MANAGEMENT

...

3. PDP Sponsor agrees to maintain a Part D summary plan rating score of at least 3 stars as required by 42 CFR §423.505(b)(26).

CMS Exhibits C-1 through C-5 at 1 (emphasis omitted).

On August 5, 2021, CMS informed plans of the “First Plan Preview of 2022 Star Ratings Data.” CMS Exhibit C-8 at 1. Within the memorandum, CMS states that

[d]uring this first plan preview, CMS expects Part C and Part D sponsors to closely review the methodology and their posted data for each measure. Sponsors should immediately alert CMS of any suspected data issues or errors in order to allow sufficient time to investigate and process any necessary data corrections.

Id. (emphasis omitted).

On September 7, 2021, CMS informed plans of the “Second Plan Preview of 2022 Part C and D Star Ratings Data.” CMS Exhibit C-9 at 1. Within the memorandum, CMS states that

[d]uring this second plan preview, CMS expects Part C and D sponsors to again closely review their posted data for each measure, as well as their preliminary Star

Rating assignments. Sponsors should immediately alert CMS of any suspected data issues or errors during the plan preview in order to allow sufficient time to investigate and process any necessary data corrections.

Id. (emphasis omitted).

CMS states (and Clear Spring did not refute) that “Clear Spring did not dispute the data or CMS’s calculations for the preliminary ratings during the preview period.” CMS Brief and MSJ at 12; *see* CMS Exhibit C-27 at 3.

CMS posted the Contract Year 2022 Star Ratings in October 2021. *Id.* at 12-13. Clear Spring received a Part D summary **2022 Contract Year Star Rating of 2** for its contract S6946. *Id.* (emphasis added).

On February 25, 2022, CMS issued a “CORRECTIVE ACTION PLAN (CAP) REQUEST” (“CAP Request”) to Clear Spring. Clear Spring Exhibit P-8. Within the CAP Request, the letter informs:

CMS advises your organization to take steps to improve its operations in the areas identified above and bring its Summary Star Rating(s) to a level that indicates at least average contract performance, compliant with Medicare requirements. CMS is not requiring a CAP submission from your organization. CMS will simply look at your organization’s star rating performance in the coming year to determine whether you took the necessary corrective action to achieve at least a three-star summary star rating.

Section 17001(b) of the 21st Century Cures Act, enacted in December 2016, prohibited CMS from terminating MA organization contracts based on low Star Ratings through December 31, 2018. With the expiration of this prohibition, CMS announced in a February 6, 2019, Health Plan Management System (HPMS) memorandum that the next contracts eligible for termination would be those with low [Calendar Year (“CY”)] 2020, 2021, and 2022 Star Ratings.

Id. at 2 (emphasis omitted).

On August 5, 2022, CMS informed plans of the “First Plan Preview of 2023 Medicare Parts C and D Star Ratings Data.” CMS Exhibit C-10 at 1. Within the memorandum, CMS states that

[d]uring this first plan preview, CMS expects Part C and Part D sponsors to closely review the methodology and their posted data for each measure. Sponsors should immediately alert CMS of any suspected data issues or errors in order to allow sufficient time to investigate and process any necessary data corrections.

Id. (emphasis omitted).

On September 7, 2022, CMS informed plans of the “Second Plan Preview of 2023 Part C and D Star Ratings Data.” CMS Exhibit C-11 at 1. Within the memorandum, CMS states that

[d]uring this second plan preview, CMS expects Part C and D sponsors to again closely review their posted data for each measure, as well as their preliminary Star Rating assignments. Sponsors should immediately alert CMS of any suspected data issues or errors during the plan preview in order to allow sufficient time to investigate and process any necessary data corrections.

Id. (emphasis omitted).

CMS states (and Clear Spring did not refute) that “Clear Spring did not dispute the data or CMS’s calculations for the preliminary ratings during the preview period.” CMS Brief and MSJ at 12; *see* CMS Exhibit C-27 at 3.

For Contract Year 2023, Clear Spring received a Part D summary **2023 Contract Year Star Rating of 1.5** for its contract S6946. CMS Brief and MSJ at 13 (emphasis added); CMS Exhibit C-6.

On February 24, 2023, CMS issued a second “CORRECTIVE ACTION PLAN (CAP) REQUEST” to Clear Spring. Clear Spring Exhibit P-9. Within the CAP Request, the letter informs:

CMS advises your organization to take steps to improve its operations in the areas identified above and bring its Summary Star Rating(s) to a level that indicates at least average contract performance, compliant with Medicare requirements. CMS is not requiring a CAP submission from your organization. CMS will simply look at your organization’s star rating performance in the coming year to determine whether you took the necessary corrective action to achieve at least a three-star summary star rating.

Please be advised that pursuant to 42 C.F.R. § 423.509(a)(4)(x), your organization will be eligible for termination if it achieves a Part D Summary Star Rating of below three stars for three (3) consecutive years. Please be aware that this letter will be included in the record of your organization’s past Medicare contract performance, which CMS will consider as part of our review of any application for new or expanded Medicare contracts your organization may submit. CMS deems this instance of non-compliance a Part D issue. CMS notes that we are issuing this compliance notice based exclusively on information that we obtained from sources other than the sponsor’s own self-disclosure.

Id. at 2.

On August 8, 2023, CMS informed plans of the “First Plan Preview of 2024 Medicare Parts C and D Star Ratings Data.” CMS Exhibit C-12 at 1. Within the memorandum, CMS states that

[d]uring this first plan preview, CMS expects Part C and Part D sponsors to closely review the methodology and their posted data for each measure. Sponsors should immediately alert CMS of any suspected data issues or errors in order to allow sufficient time to investigate and process any necessary data corrections.

Id. (emphasis omitted).

On September 7, 2023, CMS informed plans of the “Second Plan Preview of 2024 Part C and D Star Ratings Data.” CMS Exhibit C-13 at 1. Within the memorandum, CMS states that

[d]uring this second plan preview, CMS expects Part C and D sponsors to again closely review their posted data for each measure, as well as their preliminary Star Rating assignments. Sponsors should immediately alert CMS of any suspected data issues or errors during the plan preview in order to allow sufficient time to investigate and process any necessary data corrections.

Id. (emphasis omitted).

CMS states (and Clear Spring did not refute) that “Clear Spring did not dispute the data or CMS’s calculations for the preliminary ratings during the preview period.” CMS Brief and MSJ at 12; *see* CMS Exhibit C-27 at 3.

CMS posted the Contract Year 2024 Star Ratings in October 2023. CMS Brief and MSJ at 14. Clear Spring received a Part D summary **Contract Year 2024 Star Rating of 1.5** for its contract S6946. *Id.* (emphasis added).

By letter dated October 13, 2023, CMS issued Clear Spring the Termination Notice.³ Clear Spring Brief at 1; Clear Spring Exhibit P-1. Within the Termination Notice, CMS stated that it had “determined that Clear Spring has substantially failed to carry out its contract with CMS by failing to achieve a Part D summary Star Rating of at least three stars in three consecutive Star Rating periods for contract S6946, . . . in violation of 42 C.F.R. §§ 423.509(a)(4)(x) and 423.505(b)(26) and Art. II.D.3 of the Prescription Drug Plan Contract.”⁴ Clear Spring Exhibit P-1 at 1-2. CMS’ Termination Notice states that

[p]ursuant to 42 C.F.R. § 423.752(b), if CMS makes a determination that could lead to a contract termination under § 423.509(a), CMS may impose intermediate sanctions at § 423.750(a)(1) and (3). Also, pursuant to 42 C.F.R. § 423.756(d), CMS may terminate a contract in addition to imposing sanctions described at § 423.750. Therefore, since CMS has determined that Clear Spring’s contract S6946 has substantially failed to comply with the Part D Star Ratings requirements at § 423.509(a)(4)(x), CMS is imposing intermediate sanctions specified at § 423.750(a)(1) and (3) in addition to terminating contract S6946.

Id. at 3.

Moreover, as background, the Termination Notice indicated that Clear Spring had already received notice that if it did not improve and correct the underlying operations and performance (that, in turn, resulted in low Star Ratings) that Clear Spring may be terminated:

³ The single letter included both the termination determination (effective December 31, 2024) and intermediate sanction determination (effective October 29, 2023).

⁴ *See* CMS Exhibits C-1 through C-5 concerning Contract S6946 for 2020 through 2024.

Clear Spring has been on notice of the need to improve its Part D summary Star Ratings performance since the issuance of the 2022 Star Ratings on October 6, 2021. Each year CMS provides PDPs with two preview periods before Star Ratings become public (see 42 C.F.R. § 423.186(h)(2)). During the preview periods, Clear Spring had the opportunity to review preliminary calculations and seek corrections to the underlying data and calculations before the Star Ratings become public. In addition, Clear Spring received a corrective action notice on February 25, 2022, for its 2022 Star Ratings and on February 24, 2023, for its 2023 Star Ratings. The corrective action notices informed Clear Spring of its Star Rating, informed Clear Spring that it should take steps to improve its operations for the areas that resulted in a low Star Rating, and put Clear Spring on notice that its contract will be eligible for termination if it achieves a Part D Summary Star Rating of below three stars for three (3) consecutive years.

Therefore, pursuant to 42 C.F.R. § 423.509(c), Clear Spring has had notice of its insufficient Part D summary Star Ratings and a reasonable opportunity to correct this deficiency by improving its Star Rating performance, which it failed to do.

Id. at 3-4.

On October 24, 2023, Clear Spring provided CMS with a “Response to notice of intermediate sanctions.” See Clear Spring Exhibit P-19. CMS responded with a letter dated November 6, 2023 (“November 6, 2023 Letter”). Clear Spring Exhibit P-38. Within the November 6, 2023 Letter, CMS states the following (in pertinent part):

Your rebuttal also asserts that sanctioning Clear Spring places LIS beneficiaries at a disadvantage because Clear Spring is one of the few organizations that offers benefits for that population. CMS is aware that the majority of Clear Spring’s members are LIS-eligible and took that fact into consideration when deciding whether to terminate and sanction the plan. During our deliberations, CMS confirmed that there are other plan options with higher Part D Star Ratings available to serve LIS-eligible beneficiaries in all of Clear Spring’s service areas nationwide.

Finally, your rebuttal argues that CMS should not sanction Clear Spring because Clear Spring increased its staffing and operations based on conversations CMS had with Clear Spring when CMS was assessing Clear Spring’s readiness to receive a high number of reassignments. CMS’s communications with Clear Spring about the annual reassignments for 2024 are separate from the decision to terminate and impose intermediate sanctions on Clear Spring for its low Part D Star Ratings.

Id. at 2.

At the same time, by letters dated October 24, 2023, Clear Spring timely requested hearings to appeal the Termination Notice. After acknowledging Clear Spring’s hearing request and assigning Docket Numbers H-24-00001 to the appeal, the Office of Hearings held an October 25, 2023 Pre-Hearing Conference. During the conference, the parties agreed to consolidate briefing for the two

appeals⁵ under Docket Number H-24-00001, and to postpone the November 17, 2023 hearing that had been scheduled. *See* October 26, 2023 Summary of Pre-Hearing Conference Discussion; October 26, 2023 Notice of Hearing. Following Clear Spring’s January 8, 2024 Initial Brief, CMS filed its March 8, 2024 Motion for Summary Judgment and Brief in Support Thereof, then both Clear Spring and CMS filed Reply Briefs on April 8, 2024, and May 8, 2024, respectively. Finally, on July 5, 2024, Clear Spring filed its Supplemental Brief and CMS filed its Supplemental Brief on July 16, 2024.

VI. SUBSTANTIVE AUTHORITY — STAR RATINGS AND TERMINATION ACTIONS

CMS’ Part D Prescription Drug Plan Quality Rating System is a 5-star rating scale (“Star Ratings”) with each Part D sponsor’s ratings calculated and assigned for numerous purposes. *See* 42 C.F.R. § 423.180. CMS explains that one of the purposes for the Star Ratings is “[t]o provide a means to evaluate and oversee overall and specific compliance with certain regulatory and contract requirements by Part D plans, where appropriate and possible to use data of the type described in § 423.182(c).” 42 C.F.R. § 423.180(b)(3).

The regulation at 42 C.F.R. § 423.182(c) describes the content of the Part D Star Ratings as follows:

(c) *Data sources.*

(1) Part D Star Ratings measures reflect structure, process, and outcome indices of quality. This includes information of the following types: Beneficiary experiences, benefit administration information, clinical data, and CMS administrative data. Data underlying Star Ratings measures may include survey data, data separately collected and used in oversight of Part D plans' compliance with contract requirements, data submitted by plans, and CMS administrative data.

(2) Part D sponsors are required to collect, analyze, and report data that permit measurements of health outcomes and other indices of quality. Part D sponsors must provide unbiased, accurate, and complete quality data described in paragraph (c)(1) of this section to CMS on a timely basis as requested by CMS.

(3) For 2021 Star Ratings only, Part D sponsors are not required to submit [Consumer Assessment of Healthcare Providers and Systems] data that would otherwise be required for the calculation of the 2021 Star Ratings.

⁵ Pursuant to CMS’ directive, Clear Spring filed separate written requests for a hearing for both the termination action and the imposition of intermediate sanctions. Clear Spring Exhibit P-1 at 4.

Under 42 U.S.C. § 1395w-112(b)(1), Congress recognized that Part D plans may ultimately be terminated for failure to achieve a minimum quality rating under the 5-star rating system. The statute provides:

(b) Contract requirements

(1) In general

The Secretary shall not permit the enrollment under section 1395w-101 of this title in a prescription drug plan offered by a PDP sponsor under this part, and the sponsor shall not be eligible for payments under 1395w-114 or 1395w-115 of this title, unless the Secretary has entered into a contract under this section with the sponsor with respect to the offering of such plan. Such a contract with a sponsor may cover more than one prescription drug plan. Such contract shall provide that the sponsor agrees to comply with the applicable requirements and standards of this part and the terms and conditions of payment as provided for in this part.

...

(3) Incorporation of certain Medicare Advantage contract requirements
Except as otherwise provided, the following provisions of section 1395w-27 of this title shall apply to contracts under this section in the same manner as they apply to contracts under section 1395w-27(a) of this title:

...

(B) Contract period and effectiveness

Section 1395w-27(c) . . .

...

(F) Procedures for termination

Section 1395w-27(h) of this title.

The above-referenced statutory provisions of section 1395w-27 state the following:

(c) Contract Period and Effectiveness

(1) Period

Each contract under this section shall be for a term of at least 1 year, as determined by the Secretary, and may be made automatically renewable from term to term in the absence of notice by either party of intention to terminate at the end of the current term.

(2) Termination authority

In accordance with procedures established under subsection (h) of this section, the Secretary may at any time terminate any such contract if the Secretary determines that the organization—

- (A) has failed substantially to carry out the contract;
- (B) is carrying out the contract in a manner inconsistent with the efficient and effective administration of this part; or
- (C) no longer substantially meets the applicable conditions of this part.

...

(h) Procedures for termination

(1) In general

The Secretary may terminate a contract with a [Part D plan] under this section in accordance with formal investigation and compliance procedures established by the Secretary under which—

(A) the Secretary provides the [Part D plan] with the **reasonable opportunity** to develop and implement a corrective action plan to correct the deficiencies that were the basis of the Secretary’s determination under subsection (c)(2) of this section; and

(B) the Secretary provides the [Part D plan] with reasonable notice and opportunity for hearing (including the right to appeal an initial decision) before terminating the contract.

...

(3) Delay in contract termination authority for plans failing to achieve minimum quality rating

During the period beginning on [December 13, 2016], and through the end of plan year 2018, the Secretary may not terminate a contract under this section with respect to the offering of [a Part D] plan by a [PDP sponsor] solely because the [Part D] plan has failed to achieve a minimum quality rating under the 5-star rating system under section 1395w-23(o)(4) of this title.⁶

42 U.S.C. § 1395w-112(b)(1) (emphasis added).

When promulgating regulations regarding the Part D program requirements, CMS mandates that a contract with a PDP sponsor must contain a provision stating that “[t]he Part D plan sponsor agrees to [a]ll the applicable requirements and conditions set forth in this part [i.e., Part 423] and in general instructions.” 42 C.F.R. § 423.505(b)(1). The regulatory subsection goes on to provide additional requirements for a Part D sponsor’s contract with CMS, specific to the instant appeal, under 42 C.F.R. § 423.505(b)(26), the Part D sponsor agrees to—

⁶ Section (h)(3) was promulgated through the 21st Century Cures Act, Pub. L. No. 114-255, § 17001, 130 Stat. 1033, 1330 (Dec. 13, 2016). After this moratorium expired, CMS states that it “advised the regulated community that it would resume terminations for low Star Ratings.” CMS Brief and MSJ at 10.

[m]aintain a Part D summary plan rating score of at least 3 stars under the 5-star rating system specified in subpart 186 of this part 423. A Part D summary plan rating is calculated as provided in § 423.186.

Moreover, 42 C.F.R. § 423.509(a)(1)-(3) reiterates the elements listed at 42 U.S.C. § 1395w-27(c)(2)(A)-(C) (incorporated by reference in 42 U.S.C. § 1395-112(b)(3)(B)) regarding when a Part D plan sponsor's contract may be terminated, with CMS further clarifying when it may make a determination under paragraph (a)(1), (2), or (3):

(a) *Termination by CMS.* CMS may at any time terminate a contract if CMS determines that the Part D plan sponsor meets any of the following:

- (1) Has failed substantially to carry out the contract.
- (2) Is carrying out the contract in a manner that is inconsistent with the efficient and effective administration of this part.
- (3) No longer substantially meets the applicable conditions of this part.
- (4) CMS may make a determination under paragraph (a)(1), (2) or (3) of this section if the Part D Plan sponsor has had one or more of the following occur:
 - (i) Based on credible evidence, has committed or participated in false, fraudulent, or abusive activities affecting the Medicare, Medicaid, or other State or Federal health care programs, including submission of false or fraudulent data.
 - (ii) Substantially failed to comply with the requirements in subpart M of this part relating to grievances and appeals.
 - (iii) Failed to provide CMS with valid risk adjustment, reinsurance and risk corridor related data as required under §§ 423.322 and 423.329 (or, for fallback entities, failed to provide the information in § 423.871(f)).
 - (iv) Substantially failed to comply with the service access requirements in § 423.120.
 - (v) Substantially failed to comply with either of the following:
 - (A) Requirements in subpart V of this part.
 - (B) Information dissemination requirements of § 423.128 of this part.

(vi) Substantially failed to comply with the coordination with plans and programs that provide prescription drug coverage as described in subpart J of this part.

(vii) Substantially failed to comply with the cost and utilization management, quality improvement, medication therapy management and fraud, abuse and waste program requirements as specified in subparts D and K of this part.

(viii) Failed to comply with the regulatory requirements contained in this part.

(ix) Failed to meet CMS performance requirements in carrying out the regulatory requirements contained in this part.

(x) **Achieves a Part D summary plan rating of less than 3 stars for 3 consecutive contract years. Plan ratings issued by CMS before September 1, 2012 are not included in the calculation of the 3-year period.**⁷

(xi)

(A) Has failed to report MLR data in a timely and accurate manner in accordance with § 423.2460; or

(B) That any MLR data required by this subpart is found to be materially incorrect or fraudulent.

(xii) Failure of an essential operations test before the start of the benefit year by an organization that has entered into a Part D contract with CMS when neither it, nor another subsidiary of the organization's parent organization, is offering Part D benefits during the current year.

(xiii) The Part D plan sponsor has committed any of the acts in § 423.752 that support the imposition of intermediate sanctions or civil money penalties under § 423.750.

(xiv) Following the issuance of a notice to the sponsor no later than August 1, CMS must terminate, effective December 31 of the same year, an individual PDP if that plan does not have a sufficient number of enrollees to establish that it is a viable independent plan option.

⁷ See 79 Fed. Reg. 29844, 29959 (May 23, 2014); 81 Fed. Reg. 80557 (Nov. 15, 2016); 83 Fed. Reg. 16734 (Apr. 16, 2018); 88 Fed. Reg. 22334 (Apr. 12, 2023).

42 C.F.R. § 423.509(a)(1)-(4)(x) (emphasis added).

Further, in general, the regulations require CMS to provide plans with at least a 30-day period to correct the underlying deficiencies which lead to termination.

(c) *Opportunity to develop and implement a corrective action plan—*

(1) General.

(i) Before providing a notice of intent to terminate the contract, CMS will provide the Part D plan sponsor with notice specifying the Part D plan sponsor's deficiencies and a reasonable opportunity of at least 30 calendar days to develop and implement a corrective action plan to correct the deficiencies.

(ii) The Part D plan sponsor is **solely responsible** for the identification, development, and implementation of its corrective action plan and for demonstrating to CMS that the underlying deficiencies have been corrected within the time period specified by CMS in the notice requesting corrective action.

42 C.F.R. § 423.509(c) (emphasis added).

Within the "Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2013 and Other Changes" Final Rule, CMS explained the development of the 5-star rating system and its use as a basis for termination actions:

We have previously issued guidance (for example, CY 2012 Call Letter, page 119, issued April 4, 2011) to MA organizations and Part D sponsors indicating that we considered organizations with 3 consecutive years of less than 3-star Plan Ratings to be out of compliance with Medicare program requirements. We stated there that organizations with such a Plan Rating history should expect that, prior to initiating a termination action, we would confirm that the data used to calculate the Plan Ratings did reflect an organization's substantial failure to comply with Part C or D requirements. In essence, we noted that poor Plan Rating scores were a strong indication, but not conclusive evidence, of substantial non-compliance. In applying that policy, we include Plan Ratings issued in years prior to the issuance of the guidance to identify organizations whose performance may warrant contract termination.

With the elevation of low Plan Ratings from the status of likely indicator to conclusive evidence of substantial non-compliance, we believe that the use of prospective Plan Ratings is more appropriate in our application of this authority.

...

While the plan ratings were originally developed by CMS as a beneficiary comparison tool, and Congress has authorized the awarding of bonus payments

based on plan rating performance, those facts do not preclude the use of plan ratings as an indicator of contract compliance. To the extent that the ratings provide reliable evidence of compliance with program requirements, they may be used as a basis for contract termination. Our preamble discussion in the proposed rule and this final rule with comment period describes the connections between each plan measure and a Part C or D requirement, noting that the measures are an effective tool for capturing information on the effectiveness of a sponsor’s administrative and management arrangements as opposed to whether the arrangements are merely in place. Thus, a sponsor’s failure to meet minimal performance thresholds for 3 straight years can reasonably be said to be evidence of substantial failure to meet contract requirements.

...

Our use of low plan ratings as a basis for contract termination does not relieve us of our obligation to prove at least one of the three statutory bases for termination. Rather, the plan ratings are a tool that we will use to establish, consistent with the Part C and D statutes, that a sponsor has substantially failed to meet the requirements of its Part C or D contract. As noted previously and in the proposed rule, the data used to calculate the plan ratings are derived directly from a sponsor’s performance of its Medicare program obligations.

77 Fed. Reg. 22072, 22111-13 (Apr. 12, 2012).

The regulation at 42 C.F.R. § 423.752 provides the basis for CMS’ imposition of intermediate sanctions. Specifically, the regulation at 42 C.F.R. § 423.752(b) states that “[i]f CMS makes a determination that could lead to a contract termination under § 423.509(a), CMS may impose the intermediate sanctions at § 423.750(a)(1) and (3).” The intermediate sanction listed at 42 C.F.R. § 423.750(a)(1) involves the “[s]uspension of the Part D plan sponsor’s enrollment of Medicare beneficiaries[,]” while the sanction at 42 C.F.R. § 422.750(a)(3) concerns the “[s]uspension of communication activities to Medicare beneficiaries by [a] [Part D plan sponsor], as defined by CMS.”

In addition, with respect to imposition of intermediate sanctions, the regulations provide

(a)(2) *Opportunity to respond.* CMS allows the Part D plan sponsor 10 calendar days after receipt of the notice to provide a written rebuttal.

42 C.F.R. § 423.756(a)(2).

VII. PROCEDURAL AUTHORITY — RIGHT TO HEARING/MOTION FOR SUMMARY JUDGMENT

Part D plan sponsors receiving a notice of intent to terminate and/or a notice of intermediate sanctions have a right to a hearing under 42 C.F.R. Subpart N of Part 423; 42 C.F.R. § 423.509(d); 42 C.F.R. § 423.756(b). Under 42 C.F.R. § 423.650(b)(3), Part D plan sponsors have “the burden

of proving by a preponderance of the evidence that CMS' determination⁸ was inconsistent with the requirements of § 423.509[.]” The regulation at 42 C.F.R. § 423.662(b) provides that either party may request that the Hearing Officer rule on a motion for summary judgment.⁹ Moreover, 42 C.F.R. § 423.664 specifies that “[i]n exercising his or her authority, the hearing officer must comply with the provisions of title XVIII and related provisions of the Act, the regulations issued by the Secretary, and general instructions issued by CMS in implementing the Act.”

VIII. DISCUSSION AND ANALYSIS

A. Overview

The Hearing Officer does not find any material facts in dispute and grants CMS' Motion for Summary Judgment. 42 C.F.R. § 423.662(b). Clear Spring does not dispute that its contract S6946 received Part D summary Star Ratings of less than three stars for three consecutive contract years, namely, 2022, 2023, and 2024. *See* 42 C.F.R. § 423.509(a)(4)(x). Rather, Clear Spring alleges that CMS did not provide Clear Spring with all of the factors that it considered prior to issuing the October 13, 2023 Termination Notice; that CMS did not provide Clear Spring with the statutorily and regulatorily mandated opportunity to develop and implement a CAP prior to issuing the Termination Notice; and that Clear Spring's communications with CMS regarding potential reassignment of LIS beneficiaries to its contract S6946 materially prejudiced Clear Spring. The Hearing Officer finds, however, that CMS had the authority to terminate Clear Spring's contract and impose intermediate sanctions and that the basis for CMS' actions was clearly and adequately articulated within the Termination Notice; that through the years, CMS provided Clear Spring with clear notification and “reasonable”¹⁰ and sufficient opportunity (well beyond a 30-day minimum window of time) to correct deficiencies and improve its Star Ratings to avoid intermediate sanctions and termination; and that any discussions that CMS and Clear Spring may have had surrounding the potential reassignment of LIS beneficiaries concern a process and inquiry not pertinent to the question under the Hearing Officer's jurisdiction in this matter, i.e., whether CMS' decision to terminate and impose intermediate sanctions against contract S6946 was inconsistent with the controlling authority. *See* 42 C.F.R. § 423.650(b)(3), (4). As such, the Hearing Officer finds that Clear Spring has not proven by a preponderance of the evidence that CMS' decision to terminate and impose intermediate sanctions against contract S6946 was inconsistent with the controlling authority. 42 C.F.R. § 423.650(b)(3), (4). Accordingly, the Hearing Officer upholds CMS' determination to terminate and impose intermediate sanctions for Clear Spring's contract S6946.

⁸ Described at 42 C.F.R. § 423.641(c), “a determination to terminate a contract with a PDP sponsor in accordance with § 423.509.”

⁹ *See* 72 Fed. Reg. 68700, 68714 (Dec. 5, 2007) (“Where no factual dispute exists, the hearing officer may make a decision on the papers, without the need for a hearing.”).

¹⁰ *See* 42 U.S.C. § 1395w-27(h)(1)(A).

B. Parties' Contentions¹¹ and Hearing Officer's Findings

1. Sufficiency of Reasons/Factors for Termination/Intermediate Sanctions within CMS' Termination Notice

Clear Spring argues that CMS' determination regarding the termination action (and, by extension to the intermediate sanctions) was inconsistent with the applicable regulatory requirements set forth under 42 C.F.R. § 423.642(b)(1) (when CMS makes a contract determination under § 423.641, it gives the PDP sponsor written notice that specifies the reasons for the determination). Clear Spring Brief at 2.

Clear Spring asserts that "CMS' determination as to termination was discretionary[;] [that] CMS considered other factors than the expressed ground of Star Rating performance in determining whether to terminate Clear Spring's PDP contract"; and that it was "materially prejudiced . . . in mounting its appeal" as it was not provided "with all the factors CMS considered in its determination." *Id.* at 2-3. In support, Clear Spring states that the language authorizing CMS to terminate a contract based on three consecutive years of low Star Ratings is a discretionary determination as evidenced by the use of "may" in the regulatory language;¹² Clear Spring asserts that "CMS . . . declined to terminate other sponsors that similarly received a Star Rating of less than 3 stars for 3 consecutive years"; and Clear Spring argues that its assertions are evidenced by CMS' statement in the November 6, 2023 Letter ("CMS is aware that the majority of Clear Spring's members are LIS-eligible and took that fact into consideration when deciding whether to terminate and sanction the plan." *Id.* at 30 (emphasis omitted)). *Id.* at 28, 30; *see id.* at 28-30 (for a detailed discussion of Clear Spring's assertions regarding other plans). Clear Spring also points out that "[o]ther contracts escaped termination due to a statutory moratorium Congress imposed via the 21st Century Cures Act, prohibiting terminations based on Star Ratings between December 13, 2016 and December 31, 2018." *Id.* at 30.

Clear Spring reasons that "[g]iven that it is within CMS' discretion to terminate a contract, or not, where a PDP sponsor has received a Star Rating of less than 3 stars for 3 consecutive years and that CMS has previously exercised that discretion to not terminate contracts in such instances, CMS must consider other factors than just Star Rating performance in determining whether to terminate a contract." *Id.* Clear Spring states that CMS "explicitly confirmed" this when it replied, in the November 6, 2023 Letter, to Clear Spring's rebuttal to the intermediate sanctions. *Id.*; *see* Clear Spring Reply at 12.

¹¹ In addition to the three arguments set forth in this subsection, Clear Spring also makes additional policy-related and due process arguments. Clear Spring Brief at 3-4. The arguments concern Clear Spring's assertions that "CMS' Determinations as to Termination and Intermediate Sanctions Should be Overturned Due to Inequities in the Star Rating System" and that "CMS' Actions in Rendering its Determinations Violated Clear Spring's Right to Due Process." *Id.* (emphasis omitted). The Hearing Officer finds that such policy-based and due process arguments are outside of the Hearing Officer's scope of authority under 42 C.F.R. § 423.664 and 42 C.F.R. § 423.650(b)(3). In its briefs, Clear Spring specified that it "set forth these arguments with the understanding that, if the Hearing Officer declines to consider these arguments, the arguments will be preserved for consideration by the CMS Administrator if an appeal is necessary" with respect to its policy-based arguments; and "[t]he arguments in this sub-section are outside of the Hearing Officer's scope of authority" with respect to its due process arguments. *Id.*

¹² *See* 42 C.F.R. § 423.509(a).

In response, CMS states that “Clear Spring omits crucial details about the recent history of CMS’s enforcement authority for low star ratings[,] and that “CMS’s termination authority for low star ratings is relatively new (since 2012).” CMS Brief and MSJ at 23. CMS explains that

there have been multiple periods in its first decade when no terminations occurred due to: (1) the use of prospective ratings (meaning no terminations between 2012 and 2014), (2) CMS’s decision to grant PDP sponsors an additional year’s grace period to improve performance after the issuance of 2015 Star Ratings (meaning no terminations in 2015), and (3) the Congressional moratorium (no terminations between 2017 and 2022, three years after the moratorium expired).

Id. at 23-24. CMS asserts that “[d]uring the brief periods when Part D contracts were eligible for termination, CMS exercised its termination authority for plans with 3 years of low star ratings.”

Id. at 24. CMS argues that its “enforcement actions have been consistent [and that] [a]ny other enforcement action taken or not taken against any other party is irrelevant and not subject to review in this case.” *Id.*

In addressing Clear Spring’s assertions regarding the November 6, 2023 Letter and its content, CMS states that, within that communication, it was “discussi[ng] plan options still available to LIS-eligible beneficiaries in . . . response to Clear Spring’s rebuttal [and that its] explanation of plan alternatives for LIS-eligible beneficiaries was simply a response to an access-to-care argument mounted in Clear Spring’s rebuttal.” CMS Brief and MSJ at 23 n.2. CMS further asserts that “[t]he notice provision that Clear Spring relies on¹³ does not mandate that CMS explain every policy consideration that factors into its decision to exercise its termination authority for low-performing part D contracts [and that] 42 C.F.R. § 423.642(b) requires only that CMS provide a PDP sponsor with written notice of the “[r]easons for the determination[.]” CMS Reply at 9 (emphasis omitted).

Furthermore, CMS argues that

CMS’s stated reasons for terminating Clear Spring’s contract (“that Clear Spring has substantially failed to carry out its contract with CMS by failing to achieve a Part D summary Star Rating of at least three stars in three consecutive Star Rating periods”) is indisputably supported by the facts. Clear Spring has not provided a shred of evidence to counter CMS’s well-supported decision, which complied with 42 C.F.R. § 423.642(b)(1) by listing the reason—three consecutive years of low summary Star Ratings—for the contract termination at issue here.

Id. at 25.

The Hearing Officer concurs with CMS and finds that CMS has the clear authority to proceed with terminating a contract with a PDP sponsor that fails to achieve Part D summary Star Ratings of at least three stars for three consecutive years and that this specific basis was clearly articulated in CMS’ Termination Notice. *See* Clear Spring Exhibit P-1; 42 C.F.R. § 423.509(a)(4)(x). The Hearing Officer finds that Clear Spring’s examples and arguments that it purports show that CMS considered various factors and elected not to terminate certain other contracts in the past are

¹³ The notice provision is within 42 C.F.R. § 423.642(b)(1). *See* Clear Spring Brief at 2.

immaterial. At end, if CMS establishes that one or more of the § 423.509(a)(4) termination criteria exist with respect to a PDP sponsor, as the undisputed facts show here, CMS may terminate its contract with that PDP sponsor. Additionally, the circumstances surrounding other plans is not factually before the Hearing Officer, and, moreover, the Hearing Officer does not have jurisdiction over an argument regarding whether CMS should have exercised its discretion. *See* 42 C.F.R. §§ 423.650(b)(3) and 423.664.

2. Opportunity for Clear Spring to Develop and Implement a CAP

Clear Spring argues that CMS' determination as to termination (and, by extension intermediate sanctions) failed to follow the procedures required by statute at 42 U.S.C. §§ 1395w-27(h)(1)(A) and 1395w-112(b)(3)(F).

Specifically, Clear Spring asserts that within the Termination Notice

[t]he deficiency cited by CMS is Clear Spring's receipt of "a Part D summary plan rating of less than 3 stars for 3 consecutive contract years." That deficiency did not arise, however, until Clear Spring received its third consecutive Part D summary plan rating of less than 3 stars. One Part D summary plan rating of less than 3 stars is not a "deficiency" under a plain reading of CMS' own regulations. Two consecutive Part D summary plan ratings of less than 3 stars are not a "deficiency" under a plain reading of CMS' own regulations. Only after Clear Spring received its third consecutive Part D summary plan rating of less than 3 stars did CMS have a basis to impose intermediate sanctions or terminate Clear Spring's Part D contract.

Clear Spring Supplemental Brief at 2.

Clear Spring states that both the "operative statute" and implementing regulations require CMS "to provide a PDP sponsor with an opportunity to develop and implement a [CAP] to correct the deficiencies that were the basis for the termination." Clear Spring Brief at 34; *see* Clear Spring Reply at 5. Clear Spring states that "CMS failed to provide Clear Spring with such an opportunity where CMS determined to terminate Clear Spring's contract without affording Clear Spring the reasonable opportunity to correct its three consecutive years of Star Ratings below three stars." Clear Spring Brief at 34.

Specifically, Clear Spring argues that

[t]he regulation at 42 C.F.R. § 423.509(c)(1)(i) is of little value if it is interpreted to mean that organizations only have an opportunity to cure deficiencies before a deficiency occurs. A corrective period that is available only before a [CAP] is triggered is a meaningless right and cannot be what is intended. Moreover, CMS expressly provided for exceptions to this process, stating that Part D sponsors would not be provided an opportunity to implement a [CAP] prior to termination in certain circumstances, such as when a delay in termination would pose a serious risk to enrollees. CMS created such exceptions so that it would not have to provide for a cure period in those instances. Low Star Ratings are not listed as one of the exceptions from the corrective action period. If CMS had intended to exclude Part

D sponsors with low-rated contracts from the corrective action period opportunity, CMS could have included that basis in its list of exceptions; it did not.

Clear Spring Brief at 35 (emphasis omitted); *see* Clear Spring Reply at 6.

In response, CMS argues that “Clear Spring’s complaint that it did not have an opportunity to correct its deficiencies is demonstrably untrue: Clear Spring was on notice¹⁴ that it needed to implement a CAP and improve its performance as early as February 2022, almost two years before CMS issued the notice of termination.” CMS Brief and MSJ at 27. CMS states that it complied with the statutory and regulatory mandate “by issuing CAP requests to Clear Spring in February 2022 and February 2023 based on Clear Spring’s low Part D summary Star Ratings in both plan years.” *Id.* at 26. CMS goes on to argue that “[a] PDP sponsor’s third consecutive year of poor performance does not suddenly present ‘a deficiency’ that is amenable to corrective action.” *Id.* at 27. CMS asserts that “[t]o the extent a PDP sponsor has not improved its performance by achieving at least a 3-star rating by the third year, the PDP sponsor ‘has demonstrated consistently that it is unable or unwilling to take corrective action to improve its Part . . . D performance.’” *Id.* (quoting from *Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2013 and Other Changes*, 77 Fed. Reg. 22,072, 22,109 (Apr. 12, 2012)). CMS states that “by the third year of poor ratings, the opportunity for corrective action had already been provided, and the PDP sponsor’s performance did not improve enough to bring its plan into compliance with Part D program requirements.” *Id.*

CMS asserts that

Clear Spring does not explain how it could “correct” its deficiency after it received a third consecutive Star Rating below three stars (for plan year 2024) on October 13, 2023. Because the Star Ratings are based on performance information from previous years and are fixed in time, it is simply not possible for Clear Spring to take any remedial step after October 13, 2023 to change its finalized Star Ratings for 2022, 2023, and 2024. Clear Spring did not challenge its Star Ratings for any of these years during the preview periods or when they were released, and Clear Spring does not claim now that the Star Ratings were calculated in error.

CMS Brief and MSJ at 28.

The Hearing Officer finds CMS’ argument compelling. The Hearing Officer observes that CMS provided Clear Spring with “CORRECTIVE ACTION PLAN (CAP) REQUEST” letters on February 25, 2022, and February 24, 2023. Clear Spring Exhibits P-8 and P-9. Within the February 25, 2022 letter, CMS informs that it “announced in a February 6, 2019, Health Plan Management System (HPMS) memorandum that the next contracts eligible for termination would be those with low [Calendar Year (“CY”)] 2020, 2021, and 2022 Star Ratings.” Clear Spring Exhibit P-8. Within the February 24, 2023 letter, CMS specifically warns “[p]lease be advised that pursuant to 42 C.F.R. § 423.509(a)(4)(x), your organization will be eligible for termination if

¹⁴ In addition to the CAP requests issued in February 2022 and February 2023, CMS states that it provides plans with advance notice of the Part D Star Ratings measures and the plan’s performance under the applicable Part D metrics. CMS Brief and MSJ at 27-28. CMS states that it “has encouraged the regulated community to use each year’s Star Ratings as an ‘interim report[.]’ issued ‘during the 3-year period preceding possible contract termination’ regarding performance. *See* 77 Fed. Reg. 22,114.” *Id.* at 28.

it achieves a Part D Summary Star Rating of below three stars for three (3) consecutive years.” Clear Spring Exhibit P-9 at 2. CMS states that its “notices complied with the statutory¹⁵ and regulatory provisions[] and gave Clear Spring reasonable opportunities to develop and implement a [CAP] to correct its deficiencies, prior to the issuance of the termination notice in October 2023.” CMS Brief and MSJ at 29. The Hearing Officer concurs. In addition, the Hearing Officer observes that the activity and data that CMS used to calculate Clear Spring’s Star Ratings that were “achieved” for contract years 2022, 2023 and 2024 cannot, at this point in time,¹⁶ be “undone.”¹⁷

3. CMS’ Communications with Clear Spring Regarding Potential Reassignment¹⁸ of LIS Beneficiaries

Clear Spring argues as follows:

¹⁵ After the scheduled briefing was complete, the Supreme Court issued a decision in *Loper Bright Enterprises v. Raimonda*, 144 S. Ct. 2244 (2024) (“*Loper Bright*”) on June 28, 2024, which largely addressed the level of judgment and deference to agency interpretation that courts should apply when “deciding whether an agency has acted within its statutory authority.” *Loper Bright* at 2273. The following week, on July 5, 2024, without requesting leave, Clear Spring filed a brief addressing *Loper Bright*. Subsequently, the Hearing Officer formally provided CMS with the opportunity to file an optional responsive brief for the hearing record. See Hearing Officer Letter dated July 5, 2024.

To be clear, as explained in further detail in this section, Clear Spring failed to meet the burden of proof that CMS’ decision to terminate was *inconsistent* with the controlling authorities. 42 C.F.R. §§ 423.650(b)(3), (4); 423.664. In summary, it is undisputed that Clear Spring achieved a Part D summary plan rating of less than three stars for three consecutive years. Moreover, CMS provided Clear Spring a reasonable opportunity (spanning well over thirty days) to take corrective actions and improve its Star Ratings to avoid termination.

Nevertheless, as *Loper Bright* applies to judicial review, as opposed to the agency hearing officer level review here, the Hearing Officer will not reach a fuller *Loper Bright* analysis that would include various issues and factors to evaluate, including but not limited to, whether Congress has explicitly authorized the agency “to exercise a degree of discretion.” *Loper Bright* at 2263.

¹⁶ CMS explains that “[e]ach year, CMS . . . offers Part D sponsors two preview periods to review their data and the methodology relevant to the calculation of their Part D summary Star Ratings, as well as each underlying metric used for the Star Ratings, before the ratings become public.” CMS Brief and MSJ at 5.

¹⁷ CMS explains that

[t]he Star Ratings are based on information from beneficiary experiences collected through surveys, benefit administration information, clinical data, and CMS administrative data. 42 C.F.R. § 423.182(c)(1). The Part D summary Star Ratings reflect measures CMS has found relevant to Part D plan quality, including administrative and management systems, members’ access to prescriptions, communication with members, and other measures of an organization’s ongoing effectiveness in administering and managing the plan. 42 C.F.R. §§ 423.182(c), 423.180-86; 77 Fed. Reg. at 22,109; *Policy & Technical Changes to the Medicare Advantage Program*, 83 Fed. Reg. 16,440, 16,520-21 (April 16, 2018).

CMS Brief and MSJ at 3-4.

¹⁸ CMS explains the “reassignment” process as follows:

Medicare’s payments to Part D plans are determined through a competitive bidding process among PDP sponsors in different geographic regions, which occurs every year in June. CMS Ex. 25, ¶ 4, 6. Each year, after the bidding process concludes, CMS identifies plan sponsors who bid on at least one Part D plan in the region offering basic prescription drug coverage with a premium at or below a threshold amount, to enable the offering of no-premium plans. *Id.*, ¶ 3.4. CMS automatically enrolls eligible low-income individuals into these no-premium plans (called “benchmark” plans) as part of the benefits of the Part D [LIS] program. *Id.*, ¶ 3. Because bidding and benchmark-setting occur every year, a benchmark plan may bid above the regional LIS benchmark premium in a

CMS' communications with Clear Spring as to the Reassignment¹⁹ served to mislead Clear Spring such that Clear Spring was materially prejudiced. Specifically, CMS had stated to Clear Spring that CMS was estimating that Clear Spring would receive over 500,000 reassigned beneficiaries even after CMS was aware of Clear Spring's 2024 Star Rating. Clear Spring reasonably relied on these statements to mean that Clear Spring's contract was not in jeopardy of termination and, therefore, Clear Spring began significant work to prepare for the reassignment to Clear Spring of more than 500,000 beneficiaries. Clear Spring was materially prejudiced by CMS' statements regarding the Reassignment because but for those statements, Clear Spring would have taken greater steps to cure performance-related issues.

Clear Spring Brief at 38-39.

Clear Spring states that “[a] hearing officer may overturn a CMS determination where CMS’ regulations, guidance, or communications were misleading and materially prejudiced the petitioner.” *Id.* at 38. In support, Clear Spring cites to several Hearing Officer decisions concerning the Medicare Advantage-Prescription Drug (“MA-PD”) application appeals. *See* Clear Spring Brief at 31-33; 39-40 (for detailed discussion regarding the MA-PD decisions).

In response, CMS argues that “the [Reassignment] readiness meetings and information requests were part of CMS’s due diligence process for evaluating prospective plan sponsors, who must demonstrate their preparedness to accept reassignments [and that] CMS did not make any assurances to Clear Spring that reassignment to its plan was certain to happen.” CMS Brief and MSJ at 29-30. CMS asserts that “CMS continued reassignment discussions because Clear Spring’s 2024 Star Rating was not yet finalized and because its Part D plan would remain active during the 2024 plan year, even if the plan would ultimately be terminated on the last day of 2024.” *Id.* at 30. Moreover, CMS states that “[t]he reassignment issue is simply not material or within the scope of this Tribunal’s review of the termination decision.” *Id.* at 32

With respect to the MA-PD Hearing Officer decisions cited by Clear Spring, CMS states

Clear Spring cites an inapplicable series of Hearing Officer decisions involving notice requirements that afforded PDP sponsors an opportunity to cure contract applications. *See* [Clear Spring Brief] at 31-33. The cases cited by Clear Spring analyze the agency’s compliance with notice provisions set forth at 42 C.F.R. § 423.503(c) governing review of Part D contract applications. . . . This Tribunal’s reversal of CMS application denials in a limited context does not create broad

subsequent year and no longer qualify as a benchmark plan. *Id.*, ¶ 5. In such cases, CMS “reassigns” the LIS-eligible beneficiaries in the plan to other benchmark plans with the same PDP sponsor, or to other PDP sponsors that have at least one benchmark plan in the beneficiaries’ region. *Id.*, ¶ 5; *see also Medicare Part D Prescription Drug Benefit Manual*, Chapter 3, “Eligibility, Enrollment and Disenrollment,” Section 40.1.5 (Revised August 12, 2020).

CMS Brief and MSJ at 14-15.

¹⁹ Clear Spring describes the meetings as occurring on August 24, 2023 (after the first Star Rating preview for the 2024 Star Ratings); August 31, 2023; and September 14, 2023 (after commencement of the second Star Rating preview period for 2024). Clear Spring Brief at 18-19, 40-41.

authority to reverse a Part D contract termination based on alleged facts that do not involve 42 C.F.R. § 423.509 or any other regulatory requirement.

Id. at 22.

The Hearing Officer concurs and finds that any reassignment discussions between CMS and Clear Spring concern a process and inquiry that is not before the Hearing Officer nor within the Hearing Officer's authority in these appeals. *See* 42 C.F.R. §§ 423.650(b)(3) and 423.664. While Clear Spring argues that, but for the communications, it "would have taken greater steps to cure performance-related issues," the Hearing Officer finds that such communications do not relieve Clear Spring from meeting the minimum Star Rating requirements. Moreover, as opposed to the contract application cases cited by Clear Spring in which the failure of an applicant to obtain application approval can be directly traced back to an alleged ambiguity early in the associated application process, the nexus/causation between the potential Reassignment and Star Ratings is far more remote.

IX. ORDER

The Hearing Officer does not find any material facts in dispute and grants CMS' Motion for Summary Judgment. 42 C.F.R. § 423.662(b). The Hearing Officer upholds CMS' October 13, 2023 termination and imposition of intermediate sanctions for Clear Spring's contract S6946.

Amanda S. Costabile, Esq.
CMS Hearing Officer

Date: September 13, 2024