

**CENTERS FOR MEDICARE & MEDICAID SERVICES
HEARING OFFICER DECISION**

IN THE MATTER OF:	*	
Longevity Health Plan of New Jersey Insurance Company, Inc.	*	DOCKET NO. 2018 MA/PD APP. 02
	*	
Medicare Advantage/Prescription Drug Organization Application Denial	*	
	*	
Contract Year 2019	*	
Contract No. H5221	*	
	*	

ORDER GRANTING REQUEST TO DISMISS

The Centers for Medicare & Medicaid Services (CMS) Hearing Officers designated to hear this case are the undersigned, Benjamin Cohen and Stephany Young.

I. ISSUE

Whether the Hearing Officers have jurisdiction over Longevity Health Plan of New Jersey Insurance Company, Inc.'s (Longevity) challenge to CMS' March 19, 2018 notification that Longevity's Medicare Advantage Prescription Drug (MA-PD) application was invalid on the basis that the applicant was not yet incorporated?¹

II. DECISION

The Hearing Officers do not have jurisdiction over this appeal. 42 C.F.R. §§ 422.501(c)(1) and 423.502(c)(2)² indicate that entities (or their authorized individuals) may obtain a determination regarding whether they are qualified to provide an MA/PD plan. Such determinations are appealable to the CMS Hearing Officer under §§ 422.660(a) and 423.650(a). Section 2.4.4 of CMS' Part D Application Instructions further instruct that the legal entity that submits an application must be the same entity that will enter into a contract. In this instance, as the application was submitted on behalf of a legal entity not yet in existence (because it was awaiting State certification), CMS' March 19, 2018 notification was not a determination. Accordingly, the Hearing Officers grant CMS' Request to Dismiss.

¹ CMS asserts that its decision with respect to Longevity is not within the Hearing Officers' jurisdiction and requests that the Hearing Officers dismiss the matter. CMS Reply Brief at 1, 6.

² The Part C regulations (42 C.F.R Part 422) and the Part D regulations (42 C.F.R Part 423) covering application requirements and appeals are parallel.

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.³ The Social Security Act (the Act) authorizes the Secretary of the United States Department of Health & Human Services (the Secretary) to contract with entities seeking to offer MA and Medicare outpatient prescription drug (Part D) benefits to their plan enrollees.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 An organization may not offer MA or Part D benefits unless it has entered into a contract with CMS.⁶ An MA organization offering coordinated care plans (including HMOs) must offer Part D benefits in the same service area.⁷ Entities seeking to offer a new MA product must demonstrate, through the submission of an application developed by CMS, that they meet the qualifications.⁸ In order to meet the requirement that they offer a Part D plan, MA organizations must also meet the Part D application requirements to demonstrate their qualification as a Part D sponsor.⁹

The regulations at 42 C.F.R. §§ 422.501(c)(1) and 423.502(c)(1) entitled “Completion of an application” address who must complete the application to become an MA and Part D sponsor and establishes a qualification to obtain a determination. Section 422.501(c)(1) dictates:

- (1) *In order to obtain a determination* on whether it meets the requirements to become an MA organization [Part D plan sponsor in § 423.502(c)(1)] and is qualified to provide a particular type of MA plan, *an entity*, or an individual authorized to act for the entity (*the applicant*), must fully complete all parts of a certified application, *in the form and manner* required by CMS. (Emphasis added).

Next, the regulations at §§ 422.660(a) and 423.650(a) entitled “Right to a hearing” continues as follows:

- (a) The following parties are entitled to a hearing:
 - (1) A contract applicant that has been determined to be unqualified to enter into a contract with CMS under Part C of Title XVIII of the Act in accordance with §§ 422.501 and 422.502 [under Part

³ See 42 U.S.C. § 1395w-21 *et seq.*; see also 42 C.F.R. § 422.4(a)(1) “[a] coordinated care plan is a plan that includes a network of providers that are under contract or arrangement with the organization to deliver the benefit package approved by CMS.”

⁴ 42 U.S.C. § 1395w-27; see also *id.* § 1395w-112.

⁵ 42 C.F.R. §§ 422.400 *et seq.*, 422.503(b) *et seq.*

⁶ 42 U.S.C. § 1395w-27(a); see also *id.* § 1395w-112(b)(1).

⁷ 42 C.F.R. § 422.4(c)(1); see also 42 U.S.C. § 1395w-112 (Medicare Part D).

⁸ 42 C.F.R. § 422.501(c)(1).

⁹ 42 C.F.R. §§ 422.500(a), 423.500.

D of Title XVIII of the Act in accordance with § 423.502 and § 423.503 of this part in § 423.650(a)].

- (2)
- (3)
- (4)
- (5) An applicant that has been determined to be unqualified to offer a Specialized MA Plan for Special Needs Individuals.¹⁰

Section 2.4.4 of CMS' Medicare Prescription Drug Benefit (Part D) Solicitation for Applications for Medicare Prescription Drug Plan 2019 Contracts establishes a requirement for legal entities (or applicants).¹¹ The section provides:

[t]he legal entity that submits this [Part D] application must be the same entity with which CMS enters into a Part D contract, or in the case of an MA-PD and Cost Plan sponsor, the same legal entity seeking an addendum to an MA or Cost Plan contract.

In regards to proof of an organization's authority to transact business, Section 3.1.1.B of the Solicitation for Applications states:

B. Upload organizational background and structure information. Submit this information by downloading the appropriate template found in HPMS that mimics the Appendix entitled, Organization Background and Structure. Also upload into HPMS proof of your organization's incorporation, such as articles of incorporation or a certificate of good standing from your state of incorporation. You must demonstrate that your organization was incorporated and recognized by the state of incorporation as of the date the application was due.¹²

IV. FACTUAL AND PROCEDURAL BACKGROUND

On January 10, 2018, CMS posted the final Solicitations for Applications for Part C (Medicare Advantage and 1876 Cost Plan Expansion) and for Medicare Prescription Drug Plan 2019 Contracts on its website. The applications were due to CMS by February 14, 2018. Both the MA and Part D Solicitations instructed potential applicants that CMS would not review applications submitted after the February 14 application submission deadline.¹³

¹⁰ The regulations at 42 C.F.R. §§ 422.641 and 423.641 entitled "Contract determinations" further encompasses those contract determinations which are reviewable. Under 42 C.F.R. § 422.641, such determinations include: (a) A determination that an entity is not qualified to enter into a contract with CMS under Part C of title XVIII of the Act [Part D of title XVIII of the Act in § 423.641 and (d) A determination that an entity has been determined to offer a Specialized MA Plan for Special Needs Individuals.

¹¹ See 42 C.F.R. § 422.501(c)(1).

¹² <https://www.cms.gov/Medicare/Prescription-Drug-Coverage/PrescriptionDrugCovContra/Downloads/2019-Part-D-Application.pdf>.

¹³ CMS' Response to Longevity's Request for Hearing at 2.

On February 13, 2018, Longevity submitted both MA and Part D applications for a coordinated care plan contract to CMS. CMS assigned Longevity's applications contract number H5221. In Section 3.1.1.B of Longevity's Part D application, in response to CMS' request for applicants to upload proof of their organizations' incorporation, Longevity stated:

The filing of the Certificate of Incorporation for a New Jersey stock insurance company (thus establishing it as a legal entity) requires certification of the Certificate of Incorporation by the Commissioner of the New Jersey Department of Banking and Insurance (i.e. the Commissioner's certification precedes filing of the certificate). We anticipate the Commissioner will certify the Certificate of Incorporation for Longevity Health Plan of New Jersey Insurance Company, Inc. on or before February 21, 2018.¹⁴

On March 19, 2018, CMS sent a notification of Non-Receipt of 2019 MA-PD Application to Longevity for contract number H5221. In the notice, CMS advised Longevity that it does not consider a contract year (CY) 2019 Medicare Advantage-Prescription Drug Plan Sponsor application to have been submitted under contract number H5221 because Longevity had not legally formed as of February 13, 2018, the day on which the application was submitted, and one day prior to the application deadline of February 14, 2018. CMS advised Longevity that no additional material would be accepted or considered under contract number H5221 during the CY 2019 application cycle. Further, CMS indicated that it affords no administrative appeal rights for this determination.¹⁵

On March 21, 2018, Longevity filed a Request for Reconsideration with CMS. Shortly thereafter, on March 23, 2018, Longevity filed a Request for a Hearing with the CMS Office of Hearings. Longevity stated in its Request for Hearing "given that time is of the essence and CMS has taken the position that its decision is not administratively reviewable, Longevity is filing this request for a hearing."¹⁶

On March 27, 2018, the CMS Hearing Officer acknowledged receipt of Longevity's Hearing Request and provided CMS with the option of filing a written response to Longevity's Request for Hearing. On March 30, 2018, CMS filed a response to Longevity's Request for Hearing asking that the case be dismissed. On April 3, 2018, Longevity filed a response to CMS' March 30th letter.

V. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Officers do not have jurisdiction over this appeal. As the application was submitted on behalf of a legal entity not yet in existence, CMS' March 19, 2018 notification was not an appealable determination.¹⁷

¹⁴ *Id.* at 3.

¹⁵ Longevity's Request for Hearing at 4.

¹⁶ *Id.* at 3.

¹⁷ Per 42 C.F.R. § 422.688 "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."

Section 2.4.4 of CMS' Part D Solicitation for Applications for Medicare Prescription Drug Plan 2019 Contracts requires the legal entity that submits the application to be the same entity with which CMS enters into the contract. The section states:

[t]he legal entity that submits this application [Part D application] must be the same entity with which CMS enters into a Part D contract, or in the case of an MA-PD and Cost Plan Sponsor, the same legal entity seeking an addendum to an MA or Cost Plan Contract.

The regulations at 42 C.F.R. §§ 422.501(c)(1) and 423.502(c)(1) dictate that “*in order to obtain a determination*” on whether it meets the requirements to become an MA organization or Part D plan sponsor, an *entity* must complete the application in the form and manner required by CMS. Moreover, the appeal regulations at 42 C.F.R. §§ 422.660(a) and 423.650(a) provide that the right to appeal to the CMS Hearing Officer is limited to parties who received a determination.¹⁸ In this instance, as the application was submitted on behalf of a legal entity (corporation) not yet in official existence, CMS' decision that Longevity was not entitled to appeal was proper.

Longevity maintains that CMS allows unincorporated organizations and joint enterprises to apply for and receive contracts. Longevity argues that CMS' practice “undermines CMS' position” not to accept an application from an unincorporated entity.¹⁹ The Hearing Officers find, however, that the present appeal does not concern CMS' policy regarding whether or not it accepts applications from non-corporate entities or maintains a policy for joint enterprises. CMS articulates its concerns as follows:

The purpose of the MA and Part D application processes is for CMS to determine whether the entities seeking MA and Part D contracts are in fact qualified to hold MA and Part D sponsor contracts. § 422.503(b)(1) and § 423.504(b)(1). For that process to be effective and useful, the entity submitting the application on or before the submission deadline must be the entity that will ultimately enter into the MA-PD contract. More importantly, the act of submitting an application must be attributed to a legally recognized and organized entity. Absent such legal status, the application submitted under the name of an unorganized entity cannot be said to have been submitted by the application deadline. Accordingly, CMS has taken the position that “an MA-PD applicant must be a legal entity that, at a minimum, in the eyes of the law has the capacity to enter into contracts and be held responsible for the performance of the obligations of those contracts.” CMS Letter, March 19, 2018.²⁰

Longevity further contends CMS' decision that an organization, represented as a corporation, cannot act or authorize anyone to act on its behalf before it is formally incorporated under the laws

¹⁸ See also 42 C.F.R. §§ 422.641 and 42 C.F.R. 423.641 defining appealable contract determinations.

¹⁹ Longevity's Response to CMS' March 30, 2018 letter at 2-3.

²⁰ CMS' Response to Longevity's Request for Hearing at 3.

of a state, “undermines the Federal-State regulatory structure of the Medicare Advantage program” which provides, in Section 30.1 of Chapter 10 of the Medicare Managed Care Manual, that State licensure requirements apply. Longevity argues CMS’ decision invalidates the New Jersey process and its recognition of who may be an applicant for a license and how those applications are analyzed by New Jersey’s Department of Banking and Insurance.²¹ The Hearing Officers note that the Medicare Managed Care Manual passage makes clear that CMS may not override any requirements related to incorporation that states may impose on applicants as a condition for obtaining licensure. The Hearing Officers concur with CMS “that the record contains no evidence that CMS compromised or affected New Jersey’s review and approval of health insurers’ applications for licensure.”²² CMS’ policy simply requires that an MA-PD applicant be the same legally recognized entity which ultimately enters the contract with CMS.

As the application was submitted on behalf of a legal entity not yet in existence, Longevity did not compete all parts of the MA and Part D applications in the form and manner required by CMS. Thus, a determination per 42 C.F.R. §§ 422.501(c)(1) and 423.502(c)(1) on whether it meets the requirements to become an MA organization or Part D Plan sponsor was not issued to Longevity by CMS.

VI. ORDER

The Hearing Officers lack jurisdiction over the issue presented in Longevity’s Request for Hearing. CMS’ Request to Dismiss is granted.

/Benjamin R. Cohen/
Benjamin R. Cohen, Esq.
Hearing Officer

Date: April 20, 2018

/Stephany Young/
Stephany Young, Esq.
Hearing Officer

Date: April 20, 2018

²¹ *Id.* at 3-4; Longevity’s Request for Hearing at 2.

²² CMS’ Response to Longevity’s Request for Hearing at 5.