

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

In the Matter of:

**Constellation Health, LLC
Contract Nos.: H3054, H4876, H8266,**

Petitioner

v.

**Centers for Medicare & Medicaid
Services,**

Respondent

**Hearing Officer Docket No.:
2019 MA/PD-08 (Term)**

**ORDER GRANTING MOTION TO DISMISS AND
DENYING REQUEST FOR HEARING**

I. FILINGS

This Order is being issued in response to the following submissions:

- (a) Request for Hearing Regarding the Notice of Expedited Termination (filed by I. Colón, as former President and Chief Executive Officer (“CEO”) of Constellation Health, LLC (“CH”)), dated July 15, 2019;
- (b) The Centers for Medicare & Medicaid Services’ (“CMS”) Motion to Dismiss for Cause and Motion to Stay the Deadlines in the Case Pending a Decision on Respondent’s Motion, filed August 12, 2019 (“CMS’ Motion to Dismiss”);
- (c) CH’s Opposition to CMS’ Motion to Dismiss/Reply to Motion to Stay, dated August 15, 2019 (“CH’s Opposition”);
- (d) CMS’ Reply Brief to CH’s Opposition, filed August 26, 2019 (“CMS’ Reply”);
- (e) CH’s Appeal Brief dated August 26, 2019 (“CH’s Brief”);
- (f) CH’s Motion to Inform Recent Events, Request Preliminary Stay of the Proceedings and Supplemental Arguments re: Constellation Health’s Legal Standing to Appeal, dated September 9, 2019; and

(g) Correspondence from Mr. Colón and CMS to the Hearing Officer which provides procedural updates of the Court of First Instance and Federal District Court cases.

II. JURISDICTIONAL ISSUES

Whether a former official of CH has standing to appeal CMS' June 27, 2019 termination of CH's Medicare Advantage – Prescription Drug (“MA-PD”) Contract Numbers H3054, H4876 and H8266.

III. SUMMARY OF DECISION

CMS' Motion to Dismiss is granted and CH's request for hearing is denied. Pursuant to the regulations at 42 C.F.R. §§ 422.660 and 422.662, and 42 C.F.R. §§ 423.650 and 423.651, the former President/CEO did not have the right to a hearing as he was not an authorized official of CH at the time he filed the appeal request. The only entity entitled to file an appeal request challenging the termination was the Puerto Rico Office of the Insurance Commissioner (“OIC”).

IV. PROCEDURAL HISTORY AND STATEMENT OF FACTS

CMS is authorized to enter into contracts with companies to provide medical coverage under the Medicare Advantage program to their plan enrollees through Medicare Part C (*see* 42 U.S.C. § 1395w-27), as well as private prescription drug benefits to their plan enrollees under Medicare Part D (*see* 42 U.S.C. § 1395w-112). Regulations governing Parts C and D of the Medicare program are set forth at 42 C.F.R Parts 422 and 423, respectively.

CH is a health insurance company in Puerto Rico that has been providing medical and prescription drug coverage to Medicare-eligible beneficiaries under the Medicare Advantage program since 2014 pursuant to three contracts with CMS: H3054, H4876, and H8266. (*See* CMS Motion at 2). Between November, 2011, when CH was created, and June, 2019, Mr. Colón held the positions of President and CEO of CH. (CMS' Motion to Dismiss, Exhibit 1 at 1). In 2015, the Commissioner of Insurance of Puerto Rico (“the Commissioner”) sought to rehabilitate CH due to a capital impairment and unstable financial condition. (CMS' Motion to Dismiss, Exhibit 10 at 2). CH's financial difficulties continued to progress, and in April 2016, the Commissioner initiated proceedings to liquidate CH, alleging the company was insolvent. (CH's Opposition, Exhibit 3 at 4-5). Instead of ordering that CH be liquidated, however, the Court of First Instance in the Commonwealth of Puerto Rico, San Juan Judicial Center, Superior Division (“the CFI”), entered an Order Regarding Rehabilitation Process (“Rehabilitation Order”). (CMS' Motion to Dismiss, Exhibit 3).

The Rehabilitation Order, entered April 29, 2016, appointed the Commissioner as the Rehabilitator and ordered that she was legally vested with all of CH's assets, property, contracts, and rights of action. (*Id.* at 1, ¶ 3). The Rehabilitation Order also prohibited CH “from exercising its corporate powers” or exercising any control over its assets, and prohibited CH's officers, managers, shareholders, etc., from otherwise “exercising corporate or business functions or taking any action on behalf of or at the behest of the organization without prior authorization of the Rehabilitator” (except with regards to raising capital) of CH. (*Id.* at 3, ¶¶ 7, 8).

CH has reported a negative net worth every year since entering its contracts with CMS in 2014. (CMS' Motion to Dismiss, Exhibit 12 at 3). In 2016, 2017 and 2018, CMS sent letters to CH warning that the organization failed to adhere to CMS' fiscal soundness requirements. (CMS' Motion to Dismiss, Exhibits 4-6, Exhibit 12 at 3-6). CMS reported that in 2019, it received dozens of complaints related to CH's enrollees being unable to access medical services due to CH failing to pay providers. The complaints detailed millions of dollars in unpaid claims and asserted that CH was not responding to providers about the claims. As a result, providers began cancelling their contracts with CH and refusing service to CH's enrollees, some of whom were seeking treatment for serious illnesses. (CMS' Motion to Dismiss, Exhibit 12 at 4-5).

In April 2019, approximately three years after the entry of the Rehabilitation Order, the Commissioner sought a Provisional Liquidation Order ("PLO") to convert the rehabilitation process into liquidation proceedings. (See CMS' Motion to Dismiss, Exhibit 9). Ultimately, on June 7, 2019, the CFI entered a PLO designating the Commissioner as the Liquidator and officially dissolving CH. The PLO specifically prohibited CH from "executing or renewing contracts in Puerto Rico and anywhere in the world." (*Id.* at 26, ¶ 4). Through the PLO, the Commissioner was thereafter "legally vested with title on all the property, contracts, and rights of action" of CH. (*Id.* at 27, ¶ 7). Further, the CFI expressly ordered the Commissioner to execute a "Mutual Termination Agreement" with CMS to effectuate cancellation of all of CH's contracts with CMS. (*Id.* at 28, ¶ 11-12). CH and its representatives, including its directors, shareholders and officers, were also immediately prohibited from exercising any corporate powers or business functions on CH's behalf. (*Id.* at 30-31, ¶ 18).

On June 9, 2019, the Commissioner submitted a mutual termination request to CMS. (CMS' Motion to Dismiss, Exhibit 11). On June 10, 2019, CH filed a Motion for Certiorari and to stay the liquidation proceedings in the CFI. The PLO was stayed by the Commonwealth of Puerto Rico's Court of Appeals on the same day. (CMS' Motion to Dismiss, Exhibit 10 at 7). The Commissioner also removed Mr. Colón and other senior management of CH from their positions with the company the same day. (CMS' Motion to Dismiss, Exhibit 1 at 1).

On June 27, 2019, CMS terminated CH's contracts citing CH's "lack of fiscal soundness, inability to meet its financial obligations and provide adequate access to care to its enrollees." (CMS' Motion to Dismiss, Exhibit 12 at 6). CMS outlined CH's history of financial difficulties and cited specific instances in which providers did not receive payment for services and where enrollees were not able to access medically necessary items and service. (*Id.* at 3-6).

In summary, CMS found:

Constellation has substantially failed to comply with its contracts pursuant to 42 C.F.R. §§ 422.510(a)(1) and 423.509(a)(1). Constellation is carrying out its contracts in a manner that is inconsistent with the efficient and effective administration of Part C and D of the Medicare statute and parts 422 and 423 of 42 C.F.R. pursuant to 42 C.F.R. §§ 422.510(a)(2) and 423.509(a)(2). Constellation no longer

substantially meets the applicable conditions of parts 422 and 423 pursuant to 42 C.F.R. §§ 422.510(a)(3) and 423.509(a)(3).

- Constellation has failed to ensure enrollees receive coverage of basic benefits through the provision of arrangements with providers or by paying for the services in violation of 42 C.F.R. § 422.100(a) and Art. III.A.1. of the contracts (numbers H3054, H4876 and H8266).
- Constellation has failed to pay its contracted providers in accordance with the terms of its contracts in violation of 42 C.F.R. § 422.520(b)(1) and Art. III.D.1. and 2 of the contracts (numbers H3054, H 4876 and H8266).
- Constellation has failed to maintain a positive net worth for five consecutive years in violation of 42 C.F.R. §§ 422.504 (a)(14) and 423.505(b)(23) and Art. XI.D. of the contracts (numbers H3054, H4876 and H8266) and Art. XIII.F. of the MA-PD addendum.

(Id., Exhibit 12 at 6) (emphasis in original).

Constellation has failed substantially to provide medically necessary items or services (under law or under the contract) that are required to be provided to an individual covered under the contract, which has adversely affected (or the substantial likelihood of adversely affecting) the individual pursuant to 42 C.F.R. §§ 422.510(a)(4)(xiv), 422.752(a)(1), 423.509(a)(4)(xiv), and 423.752(a)(1).

- Constellation's providers (in which it has arrangements to provide services) are refusing to furnish benefits to enrollees due to not receiving payment for outstanding claims.

Constellation's financial difficulties are so severe that its ability to make necessary health and prescription drug services available is impaired to the point of posing an imminent and serious risk to the health of its enrollees pursuant to 42 C.F.R. §§ 422.510(b)(2)(i)(B) and 423.509(b)(2)(i)(B).

- Constellation's decreasing net worth, its lack of a viable rehabilitation plan to move Constellation out of receivership, its financial insolvency, and the ongoing litigation that could result in its liquidation demonstrate the severity of Constellation's financial difficulties.

- Constellation is failing to pay providers and those providers are not furnishing necessary services to enrollees that Constellation is contracted to provide.
- Constellation's enrollees are unable to access care and in some cases cannot get urgently needed medications and services.

(*Id.* at 7) (emphasis in original).

On July 15, 2019, Mr. Colón filed the instant request for hearing in which he seeks administrative appeal of CMS' termination of CH's contracts. (CMS' Motion to Dismiss, Exhibit 13).

With regard to the litigation referenced herein, CH's request for a writ of certiorari was denied, and the order staying the proceedings was set aside by Puerto Rico's Court of Appeals on July 12, 2019. (CMS' Motion to Dismiss, Exhibit 10 at 8, 19). Neither party appealed the Court's decision and the time for doing so has elapsed. Instead, on August 13, 2019, Mr. Colón, along with other plaintiffs, filed suit in the United States District Court for the District of Puerto Rico under Civil Case Number 3:19-cv-1775. (*See* CH's Opposition, Exhibit 3). In that suit, which is currently pending, Plaintiffs seek that the court: issue a Declaratory Judgment decreeing that the Defendants' actions and omissions deprived Plaintiffs of their rights; reinstate Plaintiffs to their previous positions; and grant compensatory and punitive damages. (*Id.* at 14).

V. REGULATORY AUTHORITY- RIGHT TO HEARING

The regulation at 42 C.F.R. § 422.660(a)(2) provides an MA organization the right to a hearing, as follows:

§ 422.660 Right to a hearing, burden of proof, standard of proof, and standards of review.

(a) *Right to a hearing.* The following parties are entitled to a hearing:

(2) An MA organization whose contract has been terminated in accordance with § 422.510.

Likewise, the regulation at 42 C.F.R. § 422.662¹ further specifies the person who may file the appeal request for the MA organization, the timeframe, and the parties that may join the hearing at the discretion of the hearing officer. The regulation states:

§ 422.662 Request for hearing.

(a) *Method and place for filing a request.*

¹ *See also* 42 C.F.R. § 423.651 (Part D).

(1) A request for a hearing must be made in writing and filed by an **authorized official of the contract applicant or MA organization** that was the party to the determination under the appeal.

(2) The request for the hearing must be filed in accordance with the requirements specified in the notice.

(b) *Time for filing a request.* A request for a hearing must be filed within 15 calendar days after the receipt of the notice of the contract determination or intermediate sanction.

(c) *Parties to a hearing.* The parties to a hearing must be—

(1) The parties described in § 422.660;

(2) At the discretion of the hearing officer, any interested parties who make a showing that their rights may be prejudiced by the decision to be rendered at the hearing; and

(3) CMS.

42 C.F.R. § 422.662 (emphasis added).

VI. DECISION

CMS' Motion to Dismiss is granted. By regulation, a request for a hearing may only be filed by an authorized official of the MA-PD organization. (42 C.F.R. §§ 422.622(a)(1) and 423.651(a)(1)). On June 10, 2019, Mr. Colón was removed from his position as President and CEO of CH thus he has no authority to act on CH's behalf. (CMS' Motion to Dismiss, Exhibit 11). Therefore, Mr. Colón does not have standing to appeal CMS' decision to terminate CH's contracts.

In short, the only entity authorized to file a timely appeal (within 15 days of the termination notice) on behalf of CH was the Commissioner. As noted above, the June 7, 2019 PLO specifically prohibited CH itself from "executing or renewing contracts." (CMS' Motion to Dismiss, Exhibit 9 at 26, ¶ 4). Instead, under the PLO, the Commissioner was "legally vested with title on all the property, contracts, and rights of action" of CH (*id.* at 27, ¶ 7), while CH officers were prohibited from exercising any corporate powers or business functions on behalf of CH. (*Id.* at 30-31, ¶ 18).

Although 42 C.F.R. § 422.662(c)(2) provides for the option to participate as an "interested party" at the hearing officer's discretion, the Hearing Officer agrees with CMS that "the addition of an 'interested party' is predicated on there being a valid hearing request filed by an authorized official of the MA organization in the first place." (CMS' Reply at 4). Similarly, Mr. Colón argues that his hearing request should be accepted as a derivative action. (CH's Opposition at 9-11). While derivative actions may permit shareholders or members to enforce rights not pursued by a corporation in U.S. District Courts (*see* Federal Rules of Civil Procedure, Rules 1 and 23.1), the regulations governing administrative appeals of MA-PD contract terminations are clear that only an authorized official may request a hearing.

Accordingly, the Hearing Officer dismisses the appeal because Mr. Colón was not an authorized official of CH pursuant to 42 C.F.R. §§ 422.660 and 422.662 and 42 C.F.R. §§ 423.650 and 423.651² and thus lacked standing to file the subject administrative appeal on behalf of CH.

VII. ORDER

CMS' August 12, 2019 Motion to Dismiss is hereby granted. The July 12, 2019 Request for Hearing Regarding the Notice of Expedited Termination is hereby denied.

Brenda D. Thew

Brenda D. Thew, Esq.
CMS Hearing Officer

Date: October 29, 2019

² The Hearing Officer will not reach a substantive determination regarding the factual and legal findings contained within CMS' June 27 termination letter. Nevertheless, the Hearing Officer notes that Mr. Colón does not fully refute the violations cited within the termination letter; rather he largely takes issue with the Commissioner's actions, alleging that CH's failures "were for events mishandled by the [OIC] and its Auxiliary Rehabilitator." (CH's Brief at 1). As a general matter, the Hearing Officer notes that to the extent that an MA-PD organization fails to meet the requirements of 42 C.F.R. Parts 422 and 423, including but not limited to imposing health risk on its enrollees, CMS is justified to impose sanctions and terminate contracts, regardless of actual or perceived fault of outside entities.