

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Capitol Hill Community)	DATE: March 24, 1997
Rehabilitation and)	
Specialty Care Center,)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-96-014
)	Decision No. CR469
Health Care Financing)	
Administration.)	
)	

DECISION

BACKGROUND

Pending before me is the issue of what relief, if any, Petitioner is entitled to receive as a result of the allegedly unreasonable manner in which the Health Care Financing Administration (HCFA) determined the amount of the civil money penalty (CMP) to be paid by Petitioner. HCFA imposed the CMP after having found Petitioner out of compliance with various Medicare and Medicaid participation requirements. By notice dated September 20, 1995, HCFA issued its determination that Petitioner should pay a total of \$80,400 for 41 days of noncompliance, calculated at the rate of \$4000 per day for the first 19 days and \$200 per day for the subsequent 22 days.

I was informed during the initial prehearing conference that Petitioner was disputing the portion of the CMP calculated at the rate of \$4000 per day. Letter by Direction of ALJ to Parties dated Dec. 8, 1995. As Petitioner also reconfirmed during a subsequent prehearing conference, Petitioner did not dispute the existence of the deficiencies found by HCFA. Order of Sept. 24, 1996, at 1. Instead, Petitioner explained that it was challenging the manner in which HCFA had imposed the CMP because, in Petitioner's view, HCFA had failed to

consider certain relevant information concerning Petitioner's financial condition. Id.

From December 1995 until September 1996, I stayed the proceedings before me at the parties' request. During the stay, counsel for HCFA filed written status reports which informed me that the parties had not reached any settlement agreements, but that HCFA was considering Petitioner's request for HCFA to waive collection of the CMP imposed against Petitioner. Status Reports dated Feb. 16, 1996 and Mar. 29, 1996. HCFA informed me also that it had committed to make a decision on Petitioner's waiver request based on those financial documents Petitioner had submitted and would submit pursuant to HCFA's request. Id. However, I returned the case to active status after counsel for HCFA reported that Petitioner did not provide the additional financial data requested by HCFA by the date agreed to by Petitioner. Status Report dated July 12, 1996.

I established a briefing schedule pursuant to the parties' agreement to identify the pertinent legal issues in writing and file appropriate motions for a resolution of those issues. Order dated September 24, 1996. With supporting briefs and exhibits¹, HCFA has requested that I grant summary disposition in favor of HCFA on the issue of whether HCFA had properly considered Petitioner's financial condition, as required by 42 C.F.R. § 488.438(f)(2), in calculating the amount of the CMP assessed against Petitioner. Petitioner has filed a brief in support of its request that I vacate the CMP determination issued by HCFA and return the matter to HCFA for further consideration of Petitioner's financial condition. P. Br. at 7.²

■ HCFA's brief in chief ("Brief of the Health Care Financing Administration in Support of its Motion for Summary Disposition" will be abbreviated as "HCFA Br.," and HCFA's reply brief will be abbreviated as "HCFA Reply." The 13 exhibits submitted by HCFA will be denoted as "HCFA Ex. 1 through 5" and "HCFA Ex. 7 through 14." (HCFA Ex. 6 is a blank page and HCFA Ex. 14 corrects a typographical error contained in paragraph 10 of HCFA Ex. 12.) I receive into evidence HCFA Ex. 1 through 5 and 7 through 14.

² I use "P. Br." to denote the document titled "Brief of Capitol Hill Community Rehabilitation and Specialty Care Center in Opposition to Motion for Summary Disposition." Petitioner has filed no exhibits in support of its position.

In this decision, I grant HCFA's motion for summary disposition and deny Petitioner's request for remand.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLS)

I summarize below my findings and conclusions, annotated with the section of the decision where I have analyzed the relevant facts and law:

1. In any CMP case, a petitioner is entitled to a hearing on the merits in this forum on only two issues: whether a basis exists for HCFA's imposition of a CMP, and (if so) whether the amount of CMP imposed by HCFA is reasonable. Discussion, I.
2. Petitioner has challenged only the procedures used by HCFA to investigate Petitioner's financial condition for the purpose of determining a CMP amount. Background; Discussion, I and II.
3. HCFA has the discretion to use whatever process it deems appropriate to evaluate a provider's financial condition prior to issuing a notice imposing a CMP. Discussion, II.
4. I have no authority to dictate the process HCFA must follow prior to reaching its determination. Discussion, II.
5. Petitioner has not articulated any legal theory to support a possible reduction of the \$4000 per day CMP amount based on Petitioner's financial condition. Discussion, II.
6. Petitioner has not made any argument or showing that, if the case were to proceed to an evidentiary hearing, Petitioner has evidence which may prove the unreasonableness of the \$4000 per day CMP amount set by HCFA. Discussion, II.
7. Petitioner's complaint against HCFA's procedures does not constitute a justiciable controversy entitling it to an evidentiary hearing. Discussion, II.
8. HCFA is entitled to summary disposition in its favor. Discussion, II; FFCLS 1 - 7.

9. While the proceedings in this case were stayed by agreement of the parties, Petitioner submitted a request for HCFA to waive the collection of the CMP, and HCFA had agreed to process the waiver request with use of financial information Petitioner had provided and would provide by an agreed-to date. Discussion, III.

10. Petitioner did not provide the additional financial information requested by HCFA for deciding Petitioner's waiver request. Discussion, III.

11. The merits of Petitioner's waiver request are beyond the scope of these proceedings. Discussion, III.

12. The parties' dealings with one another pursuant to the waiver request filed by Petitioner are relevant to the issue of whether this case should be remanded to HCFA for consideration of Petitioner's financial condition based on documents and information requested directly from Petitioner. Discussion, III.

13. Independent of the reasons for granting summary disposition in favor of HCFA, I find that no useful purpose can be served by granting Petitioner's request that this case be remanded to HCFA for further consideration of Petitioner's financial condition. Discussion, III.

14. It is appropriate to deny Petitioner's request for remand. Discussion, III; FFCLs 9 - 13.

DISCUSSION

I. The issue in this case and the parties' arguments

As I had explained in a ruling in Baltic Country Manor, HCFA, C-96-281, there are only two main issues on which a petitioner may request a hearing in a CMP case: whether there existed a basis for HCFA's imposition of a CMP, and, assuming that a basis exists, whether the CMP amount imposed by HCFA is reasonable. Ruling on CMP Issue (Dec. 11, 1996). Here, as discussed above, Petitioner has expressly waived any challenge to the basis alleged by HCFA in imposing the CMP. Accordingly, the findings of noncompliance contained in the survey reports and HCFA notice letters of record (e.g., HCFA Ex. 2, 4, 5, 7) are accepted as true.

The record evidence establishes that there are two rates of CMP imposed by HCFA. HCFA Ex. 7. For the period from July 21 until August 8, 1996, HCFA imposed the CMP amount

of \$4000 per day³ pursuant to its determination that Petitioner's noncompliance constituted immediate jeopardy to residents during these 19 days. For the period from August 9 until August 29, 1996, HCFA imposed the CMP amount of \$200 per day⁴ pursuant to HCFA's determination that Petitioner was still not in compliance with program requirements but had eliminated the immediate jeopardy to its residents. Id.

As Petitioner has made clear during the prehearing conferences and in its brief to me, its objection is to HCFA's having decided to impose a CMP at the rate of \$4000 per day without having first solicited information from Petitioner concerning its financial condition. Letter by Direction of ALJ dated Dec. 8, 1995; P. Br. at 1 - 3. Both parties agree that HCFA was under an affirmative duty pursuant to 42 C.F.R. § 488.438(f)(2) to consider Petitioner's financial condition in setting the amount of a CMP. HCFA did not deny that it had decided to impose the \$4000 per day amount without having solicited relevant financial information from Petitioner.

HCFA relied upon various affidavits (e.g., HCFA Ex. 3, 8, 9, 10) to explain that it had used an indirect method of inquiry to evaluate Petitioner's financial condition. Instead of soliciting information from Petitioner, HCFA had contacted Petitioner's Medicare fiscal intermediary, the State surveying agency, and the Medicaid agency in order to find out whether these entities knew of any financial problems experienced by Petitioner. HCFA Br. at 7. HCFA argued that its pre-determination method of inquiry was valid in this case because, as demonstrated by the affidavits it submitted, the State surveying agency, Medicare intermediary, and Medicaid agency may be reasonably expected to have information or clues bearing on program providers' fiscal soundness. HCFA Br. at 14 - 20.

³ HCFA is authorized to impose a CMP within the range of \$3050 to \$10,000 per day for deficiencies which constitute immediate jeopardy. 42 C.F.R. § 488.438(a)(1).

⁴ HCFA is authorized to impose a CMP within the range of \$50 to \$3000 per day where the deficiencies do not constitute immediate jeopardy but either caused actual harm or have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(2).

Petitioner argued in response that the process used by HCFA in deciding the CMP amount was flawed. Petitioner observed that HCFA's process was not designed to obtain information about a facility's financial condition, but "to determine if third parties know anything that might indicate that the facility is in financial difficulty." P. Br. at 3. Petitioner complained that HCFA had chosen such a course when it could have simply asked some direct questions of Petitioner. Id. Petitioner argued also that the process used by HCFA has forced Petitioner to take an appeal, when HCFA was required by law to consider Petitioner's financial condition before HCFA decides on a CMP amount. P. Br. at 5.

II. Reasons for granting of HCFA's motion for summary disposition

Even though Petitioner's criticisms of HCFA's process appear to have logical merit, I am granting HCFA's motion for summary disposition. I do so because HCFA has the discretion to use whatever process it deems appropriate to evaluate a provider's financial condition prior to issuing a notice imposing a CMP. I have no authority to dictate the process HCFA must follow prior to reaching its determination. Petitioner has not articulated any legal theory to support a possible reduction of the \$4000 per day CMP amount based on Petitioner's financial condition. In addition, Petitioner has not made any argument or showing that, if the case were to proceed to an evidentiary hearing, Petitioner has evidence which may prove the unreasonableness of the \$4000 per day CMP amount set by HCFA. I discuss below each of these main reasons for granting summary disposition in favor of HCFA.⁵

Neither the regulations nor statutes specify the procedures HCFA must follow in determining a facility's financial condition. As explained in the preamble to the regulations, no factors were specified in the regulations for determining a facility's financial conditions because such factors are considered unique for each facility. 59 Fed. Reg. 56,204 (Nov. 10, 1994). Additionally, as discussed in my ruling in Country, the only two issues which may be presented to an administrative law judge for adjudication are HCFA's basis for imposing a CMP and the reasonableness of the CMP amount. Therefore, as a matter of law, I cannot compel HCFA to use a process which solicits financial information

⁵ To the extent HCFA has asserted any other basis for seeking summary disposition, I have rejected them.

directly from providers prior to HCFA's formulating a determination on the amount of CMP to be assessed. Nor can I enjoin HCFA from gathering information about a facility's financial condition by indirect means or from third parties. I must uphold HCFA's authority to exercise its discretion in the manner it sees fit (which I do here by granting HCFA's motion for summary disposition), irrespective of whether Petitioner or I think HCFA has acted prudently. There is no right to a hearing on the issue of whether the process used by HCFA in ascertaining a provider's financial condition was reasonable or unreasonable. 42 C.F.R. § 498.3.

If Petitioner believed that financial information not gathered by HCFA has resulted in HCFA's imposing an unreasonably high amount of CMP, Petitioner had the opportunity to make such arguments to me and disclose the existence of its supporting evidence pursuant to my scheduling order. In using Rule 56 of the Federal Rules of Evidence for guidance in evaluating HCFA's motion for summary disposition, I note the following relevant provisions:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P.

I note in addition that a provider's financial condition is only one of several factors HCFA is required to consider in determining the amount of a CMP to be imposed. 42 C.F.R. §§ 488.404; 488.438(f). In this case, HCFA showed by affidavit that it followed the regulatory requirements by having considered also Petitioner's compliance history and the seriousness of Petitioner's noncompliance in determining the \$4000 per day rate. HCFA Ex. 3. In evaluating Petitioner's compliance history (42 C.F.R. § 488.438(f)(1)), HCFA's agent concluded that, since Petitioner was opened and certified in 1993, "this was the second time in three years that it was found to be in serious noncompliance with Medicare requirements." HCFA Ex. 3, at 3 - 4. In evaluating the seriousness of Petitioner's deficiencies

(42 C.F.R. § 488.404(b)), HCFA's agent stated also that he and his colleagues compared Petitioner's deficiencies to those in other facilities where immediate jeopardy to residents had been found. Even though HCFA ultimately determined that Petitioner's deficiencies were serious enough to constitute immediate jeopardy to residents for the first 19 days (HCFA Ex. 5, 7), HCFA did not impose a penalty near the \$10,000 per day maximum potential rate because its agents found several mitigating factors when Petitioner's deficiencies were compared to those of other facilities also having noncompliance at the immediate jeopardy level. HCFA Ex. 3, at 4 - 5. Therefore, whether or not the \$4000 per day amount is reasonable cannot be decided solely on the basis of Petitioner's financial condition. Petitioner has offered nothing to refute HCFA's evidence that additional factors were material to HCFA's determination of the CMP amount, that Petitioner had a poor compliance history, and that severity of Petitioner's noncompliance was at immediate jeopardy level.⁶

Here, even assuming that HCFA had not made its determination based on any other factor specified by regulation, HCFA has filed a motion for summary disposition with affidavits showing that it made inquiries concerning Petitioner's financial condition with entities reasonably expected to have such information and that no information came to HCFA's attention to indicate that imposing a CMP of \$4000 per day would be inappropriate to Petitioner's financial condition. HCFA Br. at 13 - 14 and affidavits cited therein. In opposition to HCFA's motion for summary disposition, Petitioner has not even alleged to me that the \$4000 per day amount is unreasonably high given Petitioner's financial condition. Petitioner has not introduced any evidence to show that Petitioner's financial status was materially worse than that perceived by HCFA and would, therefore, make a CMP in the amount of \$4000 per day appear unreasonable.⁷ Nor has Petitioner

⁶ The regulation codified at 42 C.F.R. § 498.61(b) states, "In civil money penalty cases, HCFA's conclusions as to a [skilled nursing facility]'s or [nursing facility]'s level of noncompliance must be upheld unless clearly erroneous."

⁷ After having submitted financial information to HCFA in order to request that HCFA waive collection of the CMP (HCFA Ex. 11), Petitioner argued that HCFA's Exhibits 11, 12, and 13 show that the financial information submitted to HCFA would "tend to support a

set forth any reason for its failure to identify or include such evidence at this time.

Petitioner has not even articulated any legal theory related to its financial condition in support of a possible reduction of the CMP amount. HCFA contended in seeking summary disposition that, as a matter of law, an otherwise appropriate CMP amount cannot be lowered unless imposing that amount would put the affected facility out of business. HCFA Br. at 9 - 10 (relying on the agency comment that "it is not our intention to put facilities out of business[,]" published at 59 Fed. Reg. 56,116, 56,204 (Nov. 10, 1994)]. Accordingly, HCFA has requested summary disposition based on its theory and evidence that Petitioner's payment of the CMP amount would not put it out of business. HCFA Br. at 9 - 10, 22.

Petitioner's response brief does not include any disagreement with HCFA's theory that "putting a facility out of business" is the only legally valid measuring stick for deciding whether an otherwise appropriate CMP amount should be lowered. Nor has Petitioner alleged or attempted to demonstrate that paying the CMP amount would put it out of business. In the absence of any disagreement from Petitioner on the foregoing legal and factual matters asserted by HCFA, it is immaterial whether Petitioner is experiencing financial difficulties.

contention that it is in financial difficulty." P. Br. at 6. However, Petitioner has not made the contention that Petitioner is in financial difficulty. Petitioner argued instead that HCFA's refusal to consider Petitioner's information adequate "cast[s] doubt upon HCFA's stated policy to seek and consider additional information when it has reason to believe a facility is experiencing financial difficulties[,]" and that "HCFA now, at least, has sufficient reasons to go back to Blue Cross of Maryland, one of its primary sources for its initial conclusion, and to inquire as to whether it now has information ... to believe that [Petitioner] is experiencing financial difficulty." P. Br. at 6. Moreover, even if I were to assume that the documents from Petitioner referenced in HCFA's Exhibits 11, 12, and 13 show that Petitioner is experiencing financial difficulties, there has been no effort by Petitioner to assert whether its financial difficulties are serious in light of its known assets, or to correlate the extent of its financial problems with any possible theory that \$4000 per day should be considered an unreasonable amount of CMP.

Petitioner has made known since the prehearing conferences in this case that it is seeking redress for its complaint that HCFA had set the CMP amount at \$4000 per day without having solicited financial information directly from Petitioner. As discussed below, the redress Petitioner seeks for its complaint is a remand of the case to HCFA for further considerations. Petitioner is, in essence, seeking only to change the procedures used by HCFA. Petitioner's complaint against HCFA's procedures does not constitute a justiciable controversy entitling it to an evidentiary hearing.

Accordingly, I grant HCFA's motion for summary disposition.

III. Denial of Petitioner's request that the financial condition issue be remanded to HCFA for further consideration

The regulation codified at 42 C.F.R. § 498.56(d) permits the remand of a case to HCFA for further proceedings when new issues impinging on the rights of an affected party arise following the filing of a hearing request. In this case, Petitioner has a right to contest the reasonableness of the amount of a CMP imposed against it. The methods used by HCFA in arriving at what HCFA considered to be a reasonable CMP amount were not known to Petitioner until HCFA filed its motion for summary disposition. Since Petitioner was never given notice that HCFA was considering imposing a CMP in the amount of \$4000 per day, Petitioner had no opportunity to transmit relevant financial information to HCFA before HCFA decided to impose a CMP in said amount. Accordingly, I have construed Petitioner's request that I "vacate the CMP imposed by HCFA and ... return it [i.e., the question of Petitioner's financial condition] to HCFA for further consideration" (P. Br. at 7) as a request for remand under 42 C.F.R. § 498.56(d).

I have considered Petitioner's remand request independently of those reasons which led me to grant summary disposition in favor of HCFA.

I am denying Petitioner's request for remand because, after the first prehearing conference was held, HCFA gave Petitioner the opportunity to submit financial information for HCFA's consideration. While the proceedings before me were stayed at the parties' request, HCFA was willing to and did in fact consider the financial information submitted by Petitioner. HCFA Ex. 12, 14. These actions were undertaken by HCFA in response to Petitioner's request for HCFA to waive

collection of the CMP from Petitioner.⁸ HCFA Ex. 11; Status Report dated February 16, 1996. However, despite Petitioner's apparent agreement to do so, Petitioner then failed or refused to provide HCFA with the follow-up information HCFA deemed necessary. HCFA Ex. 12 - 14; Status Report dated July 12, 1996.

I have reviewed HCFA's reasons for requiring additional information from Petitioner. There is nothing inherently unreasonable in HCFA's requests for additional documents. In its brief to me, Petitioner has given no explanation for its failure or refusal to provide the information HCFA requested. Nor has Petitioner indicated that it would be more willing to provide such information to HCFA should I grant its remand request. Petitioner has demonstrated no practical need for a remand.

The merits of Petitioner's request for waiver are not within the scope of the proceedings before me. See, Ruling on CMP Issues (Dec. 10, 1996) in Baltic Country

■ In its brief, Petitioner has objected to HCFA's use of certain documents because Petitioner believes that "discussions of a settlement nature should not be included as evidence in a case." P. Br. at 3. Petitioner did not specify the exhibits to which it was objecting. However, as HCFA correctly noted, the documents referenced by HCFA were financial documents which Petitioner submitted in support of its request for a "hardship waiver" -- not as part of its offer to compromise the CMP amount. HCFA Reply at 7; HCFA Ex. 11, at 1 (Petitioner stated, "Since you indicated that your client did not look favorably upon the foregoing offer [of paying \$200 per day for 41 days], we would like to pursue a waiver of the penalty upon grounds of financial hardship. Enclosed herein are financial statements of the nursing home").

The efforts made by the parties pursuant to Petitioner's waiver request were reported to me in the various Status Reports filed by HCFA between February and July of 1996. When Petitioner received copies of those Status Reports, Petitioner did not inform me that the documents submitted to HCFA were for compromising the CMP amount by agreement, as opposed to supporting the request for waiver. Moreover, I have not used HCFA's exhibits referencing those financial documents provided by Petitioner for the purpose of ascertaining Petitioner's liability for the CMP amount of \$4000 per day. Instead, I have used such exhibits to evaluate the feasibility of adopting the remand procedure requested by Petitioner.

Manor. However, the parties' dealings with one another pursuant to Petitioner's request for waiver are relevant to whether a remand of this case to HCFA is necessary, appropriate, or of potential benefit to either party. Given the evidence of record concerning Petitioner's request for waiver, I conclude that remanding this case to HCFA for further consideration of Petitioner's financial condition would be nonproductive and therefore inappropriate.

CONCLUSION

For the reasons stated above, the amount of the CMP imposed by HCFA is upheld pursuant to my granting of HCFA's motion for summary disposition and my denial of Petitioner's request for remand.

/s/

Mimi Hwang Leahy

Administrative Law Judge