DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Pennsylvania Department of Public Welfare DATE: September 30, 1981
Docket No. 80-101-PA-HC
Decision No. 217

DECISION

Introduction

On May 30, 1980, the Pennsylvania Department of Public Welfare (Pennsylvania, State) requested reconsideration of the April 30, 1980 decision by the Health Care Financing Administration (HCFA, Agency) to disallow $1,367,968 in Federal financial participation (FFP) for Title XIX (Medicaid) services provided at the Sara Allen Nursing Home from April 1, 1977 through September 30, 1979. HCFA determined that there was no valid provider agreement in effect between the facility and the State during that period of time. After the State supplemented its application for review and the Agency responded to the appeal, the Board issued an Order to Show Cause on October 16, 1980 pertaining to one of the two major issues in the appeal. This Order encompassed 38 appeals brought by several States, including Pennsylvania. The Board issued a second Order to Show Cause on November 3, 1980 which pertained to the other major issue in this appeal. Pennsylvania responded to both Orders but chose not participate in a conference stemming from the first Order. Also included in the record are responses by both parties to questions posed by the Board on May 12, June 29, and July 2, 1981.

As will be discussed below, we find that Pennsylvania law does provide for continued validity of a provider agreement pending appeal from a termination and therefore brings this appeal within the scope of MSA-PRG-11. The State is entitled to FFP for services performed during the period April 1, 1977 through January 30, 1978 but is not entitled to any for the remainder of the disallowance period.

Statement of the Case

The provider agreements for the Sara Allen Nursing Home, which provided both skilled nursing and intermediate care services, were set to expire on March 17, 1977. Both agreements contained clauses providing for the automatic cancellation of the agreements as of January 31, 1977. The cancellation clauses would be invoked unless certain events took place.

(See further discussion on page 5.) The State notified the facility on February 25, 1977 that "the Department was acting to initiate the automatic cancellation clause." (Letter to Board dated July 23, 1981.) The facility requested an administrative hearing under 71 P.S. §1710.31.

According to the State, subsequent to the "notice of termination" (Application for Review, p. 4), representatives of the State and facility met to discuss correction of deficiencies in the facility. The State determined that corrections could be made and that the facility should not be terminated from the Medicaid program. On April 15, 1977, a health management corporation assumed responsibility for the operation and maintenance of the facility and subsequently proposed corrections which were accepted by the survey agency. From April 1977 to September 1978, the survey agency "continually monitored" the correction efforts. The State has admitted that there were no certifications or provider agreements executed between March 17, 1977 and September 6, 1978. (Letter to Board dated September 11, 1980.)

The State has asserted that "on March 17, 1978, a new Plan of Correction was developed and made part of the provider agreement entered into by the Department and the Home on September 6, 1978." (Application for Review, pp. 4-5.) In response to a question posed by the Board, the State admitted that there was no certification of the facility prior to execution of that provider agreement and subsequent to the expiration of the prior one. (State's letter to Board dated September 11, 1980.)* On January 23, 1980, the termination was upheld after a hearing, but the facility had withdrawn from the Medicaid program on September 12, 1979.

The issue before this Board is whether FFP is available for services provided by this facility after the termination of its provider agreement pending an appeal by the facility under State law of the State's decision to terminate the facility from the Medicaid program, and if so, for what period.

Discussion

1. The Applicability of MSA-PRG-11

MSA-PRG-11 (PRG-11), a December 1971 Program Regulation Guide issued by the predecessor to HCFA, sets out the basic rule that FFP is not available if a facility does not have a currently effective provider agreement, but notes two exceptions:

*In its early submissions, the State appeared to indicate that it considered the September 6, 1978 provider agreement to be valid. In response to the second Order, the State has withdrawn its argument as to the validity of this provider agreement. ("Grantee's Response to Order to Show Cause" dated November 24, 1980.)

1) [If] State law provides for continued validity of the provider agreement pending appeal; or
2) [If] the facility is upheld on appeal and State law provides for retroactive reinstatement of the agreement.

HCFA has contended that even if the State is required by State law to continue payments, FFP is not authorized because the first part of PRG-11 has been superceded by subsequent regulations. However, in Ohio Department of Public Welfare, Decision No. 173, April 30, 1981, the Board held (p. 14) that PRG-11 had not been nullified, repealed, or amended. The Board applied the first exception set forth in PRG-11 where a facility appeals the termination or nonrenewal of its provider agreement and a court orders the state to continue payments. The effect of this exception is limited in duration, as discussed in the second part of this discussion. In Colorado Department of Social Services, Decision No. 187, May 31, 1981, the Board concluded (p. 7) that its holding in Ohio also applied to an appeal under the Colorado Administrative Procedure Act. See also, Georgia Department of Medical Assistance, Decision No. 192, June 30, 1981; Minnesota Department of Public Welfare, Decision No. 215, September 24, 1981.

Our discussion will focus only on the first exception set forth in PRG-11 since the facility was not upheld on appeal and the second exception, therefore, does not apply.

Pennsylvania law pertaining to administrative appeals at 71 P.S. §1710.31 states that:

> No adjudication shall be valid as to any party unless he shall have been afforded an opportunity to be heard.

An "adjudication" is defined in 71 P.S. §1710.2(a) as "any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, or obligations of any or all of the parties to the proceeding in which the adjudication is made...."

The State has asserted that the decision to terminate the facility represented an "adjudication" under State law (Brief in Support of the State's Appeal, p. 2); the Agency has not refuted this assertion. Two cases cited by the State in its "Brief In Support of the State's Appeal" dated June 12, 1981, stand for the proposition that the hearing must take place before Agency action can be taken and that the status quo remains until such a hearing. In Fair Rest Home v. Dept. of Health, 401 A.2d 872 (1979), the court concluded that under State law, a nursing home's license could not be revoked prior to a hearing. In Smith v. Dept. of Public Welfare, filed August 21, 1980, 938 C.D. 1980, the

court dealt with a disputed suspension of a doctor from the Medicaid program. The doctor had been notified that he was entitled to an administrative hearing, but that a request for a hearing would not stay the suspension. The court determined that the notice of suspension is an "adjudication" under State law, and that the doctor was entitled to a pre-suspension hearing. The court enjoined the State from enforcing its suspension order until a hearing could be held and a final determination made on the merits of the suspension order.

Both the State statutory language and the case law supports the conclusion that the decision to terminate Sara Allen was an "adjudication" so that no action could be taken to actually terminate the facility until the facility had been afforded the opportunity for a hearing. We find, therefore, that Pennsylvania law meets the requirement of a State law for the purposes of the first exception set forth in PRG-11.

The Agency has argued that even if Pennsylvania law can be construed as requiring FFP during the appeal period, the facts of this appeal differentiate it in significant ways from the facts in the Ohio appeal, and therefore, the Board's reasoning in Ohio should not be applied to this appeal. In particular, the Agency highlights language in the decision that a court order continuing Medicaid payments "is merely to preserve the status quo pending review and does not pretend that the provider is in compliance" (p. 15) and that the Board did not include court orders "intended merely to give the facility more time to achieve compliance" (p. 15). By citing the facts in the instant appeal, the Agency insinuates that the constant communication between the State and facility and the delay in the administrative hearing shows that the State pretended that Sara Allen was in compliance and gave the facility more time to achieve compliance. Indeed, in its July 2, 1981 submission, the Agency states:

> the State agency apparently opted to indefinitely postpone an administrative hearing designed to finalize its termination action while it sought to bring Sara Allen into compliance...The State agency did not merely continue Sara Allen in the Medicaid program by force of State law pending a final adjudication; rather, the State kept the final adjudication pending. (pp. 2-3)

The Agency's emphasis on the Ohio quotations it chooses to cite is misplaced. First, Ohio involved only court orders, and the aforementioned language on page 15 refers only to orders; in Ohio there was no statutory appeal right effectively maintaining a provider agreement in effect during the pendency of an appeal. In Pennsylvania, on the other hand, there is such a right, which in this case was invoked. Second, the

sentence emphasizes that the order staying termination must not be intended merely to give a facility more time to achieve compliance. The Agency asks us to make circumstantial inferences concerning the motives of the facility and the State in maintaining an appeal, but we decline to do so. The facility took advantage of a statutory right to have a hearing before its termination took effect. Given such a statutory provision, we assume that when a facility takes an appeal, it is primarily contesting the State's decision and is not merely seeking time to achieve compliance.

2. The Period for Which FFP is Available

The Ohio decision stated that if the first exception set out in PRG-11 is applicable, the rule for providing FFP following the termination date of a provider agreement is that "the period of reimbursable services may not exceed 12 months... except that if within the aforesaid 12 months a state surveys the facility and makes a new determination on certification, FFP may not be available beyond the date of that determination..." (p. 14). See also, Colorado Department of Social Services, Decision No. 187, May 31, 1981, p. 8.

a. The automatic cancellation clause

The issue is whether the State should be entitled to FFP from the automatic cancellation date (January 31, 1977) or from March 17, 1977, the expected expiration date of the provider agreements if the automatic cancellation clauses had not taken effect.

A facility may be certified with deficiencies if it enters into a plan of correction with the state agency. Certification may be for a conditional term of 12 months, subject to an automatic cancellation clause that the certification will expire at the close of a predetermined date unless the corrections have been satisfactorily completed or the state survey agency informs the Title XIX agency that the facility has made substantial progress in correcting deficiencies. 42 CFR 449.33(a)(4)(iii)(B).

The Board specifically asked whether the State had provided the necessary documentation (See 42 CFR 449.33(a)(4)) to prevent the cancellation date from taking effect; the State provided no direct response. No such documentation is in the record, and under Federal regulations, the provider agreements would have been automatically cancelled on January 31, 1977. The State has also asserted (Letter to Board dated July 23, 1981) that:

> By letter dated February 25, 1977, the facility was advised that the Department was acting to initiate the automatic cancellation clause... [T]he Department, as a matter of state law, was prohibited from actually implementing the termination clause without first providing the facility an opportunity to contest the termination of its provider agreements.

Although the record does not indicate the date that the facility appealed, the Agency has acknowledged that it has in its records some documentation dated March 9, 1977, "the date that the State acknowledged receipt of the facility's appeal of the State's invocation of the provider agreement cancellation clause with respect to both SNF and ICF services." Agency Response dated July 28, 1980, p. 3.

The State has asserted that State practice at that time (as evidenced by the incorporation of a standard provision in every provider agreement) required that a party appeal the notification of a pending adjudication within 30 days of the notification. The State's notice of termination issued almost a month after the date of the automatic cancellation so that the facility did not appeal within 30 days of the expiration date as set by the automatic cancellation clause. Nevertheless, the facility did appeal within 30 days of the State's notification and the State therefore considered its appeal to be timely. Under the first exception set forth in PRG-11, the relevant date is the automatic cancellation date--January 31, 1977--since it is on this date that the provider agreement expired under the terms of the automatic cancellation clause.

b. Survey determinations

As was stated on page 4, FFP is available for a period of time following termination not to exceed 12 months except if there has been a survey during that period and a determination on that survey. FFP is not available beyond the date of that determination. The State has provided documentation of a survey done in January 1978. Letter to Board dated June 12, 1981 and Attachment C. The State has also provided documentation of a "survey determination" based on the January survey which states that the facility did not comply with Federal, State, and local laws. (Letter to Board dated July 23, 1981.)

This determination does not affect the disallowance because (1) the State asserts that the determination was made on February 1, 1978, which falls outside of the year period following the automatic cancellation clause, and (2) there is no evidence that this determination was anything more than a file memorandum rather than a certification determination

since it was not communicated to the single State agency or facility. See Washington Department of Social and Health Services, Decision No. 176, May 26, 1981.

Conclusion

For the reasons stated above, we find that part one of MSA-PRG-11 is applicable and that the disallowance is overturned for services rendered from April 1, 1977 through January 31, 1978. The disallowance is upheld for services rendered from February 1, 1978 through September 30, 1979. The parties should calculate the amount of FFP appropriately paid for services in accordance with our determination. If the parties are unable to reach an agreement, the Board will consider an appeal on the amount involved at that time.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle, Panel Chair