Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Snowden at Fredericksburg and Mary Washington Hospital,	Date: August 5, 1997
Petitioners,	
- v. -	Docket No. C-95-183 Decision No. CR486
Health Care Financing Administration.	

DECISION

I decide that the Health Care Financing Administration (HCFA) properly certified Petitioner, Snowden at Fredericksburg (Petitioner Snowden) to participate in the Medicare program as a psychiatric hospital, effective December 28, 1992. I decide additionally that HCFA properly determined that Petitioner Snowden could not be considered to be a component of Petitioner Mary Washington Hospital (Petitioner MWH), for Medicare reimbursement purposes, beginning June 1, 1992 and thereafter.

As I discuss in greater detail below, Petitioner MWH is an acute care hospital that is located in Fredericksburg, Virginia. Petitioner MWH has been certified to participate in Medicare as an acute care hospital for many years. Prior to the inception of Petitioner Snowden, Petitioner MWH offered limited psychiatric hospital care. Petitioner Snowden is a psychiatric hospital which opened in 1992 that also is located in Fredericksburg, Virginia. Petitioners MWH and Snowden are tied closely to each other, in physical proximity, and in their ownership and management. The purposes of creating Petitioner Snowden included offering more comprehensive, and more visible, psychiatric hospital care than that which had been offered previously by Petitioner MWH. HCFA certified Petitioner Snowden to participate in Medicare as a psychiatric hospital, effective December 28, 1992.

On September 26, 1995, Petitioners requested a hearing. In their request, Petitioners asserted that HCFA should be directed to certify Petitioner Snowden to participate in Medicare as a psychiatric hospital earlier than December 28, 1992. Petitioners asserted, additionally, that Petitioner Snowden was a component of Petitioner MWH during the period from the inception of Petitioner Snowden's operation in June, 1992 until December 28, 1992. Petitioners contended that Petitioner MWH is entitled to claim reimbursement from Medicare for the psychiatric services that Petitioner Snowden provided to Medicare beneficiaries during this period.

HCFA moved to dismiss Petitioners' hearing requests on the ground that Petitioners had no right to a hearing. On April 9, 1996, I issued a ruling denying HCFA's motion. Ruling on Motion to Dismiss Request for Hearing (Ruling).

On January 28, 1997, I issued an order assigning to Petitioners the burdens of coming forward with evidence and proving that HCFA incorrectly determined the certification date of Petitioner Snowden, and that HCFA incorrectly determined that Petitioner Snowden was not a component of Petitioner MWH. On February 25, 1997, I held an in-person hearing in Washington D.C. At that hearing, Petitioners presented the testimony of three witnesses. Additionally, Petitioners offered as evidence, and I received from them, 23 exhibits (P. Ex. 1 - 15, 17 - 24). HCFA offered as evidence, and I received from it, 40 exhibits (HCFA Ex. 1 - 40).

I afforded the parties the opportunity to submit post-hearing briefs and reply briefs. HCFA submitted a post-hearing brief and a reply brief. Petitioners jointly submitted a post-hearing brief and a reply brief.

Petitioners submitted 10 attachments with their post-hearing brief (Attachments "A" through "J"). Attachments "A", "B", and "C" appear to be documents of an evidentiary nature which Petitioners could have offered, but did not offer, at the February 25, 1997 hearing. I conclude that I should not receive into evidence Attachments "A", "B", and "C" inasmuch as Petitioners have made no showing as to why they are offering them untimely. Attachments "D" through "J" are copies of administrative decisions or opinions which Petitioners and HCFA have discussed in their post-hearing arguments. I conclude that Petitioners supplied attachments "D" through "J" for my convenience and not as evidence. Therefore, it is unnecessary for me to rule as to their admissibility. Petitioners submitted also some additional pages to P. Ex. 1. which had been missing. During the hearing, I indicated that I received these additional pages into evidence.

The preliminary issues which I addressed in my Ruling were: whether Petitioner Snowden or Petitioner MWH had a right to a hearing; whether Petitioner Snowden or Petitioner MWH made timely requests for hearings; and, if not, whether Petitioner Snowden or Petitioner MWH had demonstrated good cause for not making timely requests for hearings and, therefore, ought to be given hearings. I made seven specific rulings which address these issues. Ruling at 8. I hereby adopt as findings of fact and conclusions of law (Findings) my rulings 1 - 5, and 7. I state them here as Findings 1 - 6. Additionally, I incorporate into this decision the background facts and rationale of my Ruling. Ruling at 2 - 7, 8 - 19. In the interest of efficiency, I do not repeat these background facts or rationale here.

My Findings 1 - 6 are as follows:

> *1. HCFA's determination of the date when Petitioner Snowden first became eligible to participate in Medicare is an initial determination by HCFA from which Petitioner Snowden would have had a right to seek review. (ruling 1).*
>
> *2. Petitioners did not timely request review of HCFA's initial determination of the date when Petitioner Snowden first became eligible to participate in Medicare. (ruling 2).*
>
> *3. Petitioners have established good cause for their failure to timely request review of HCFA's initial determination of the date when Petitioner Snowden first became eligible to participate in Medicare. (ruling 3).*
>
> *4. HCFA's determination that, between June 1, 1992 and December 28, 1992, the 40 beds which Petitioner MWH assigned to Petitioner Snowden were not a component of Petitioner MWH is an initial determination by HCFA from which Petitioners may request review. (ruling 4).*
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> *5. Petitioners timely requested a hearing from HCFA's determination that, between June 1, 1992 and December 28, 1992, the 40 beds which Petitioner MWH assigned to Petitioner Snowden were not a component of Petitioner MWH. (ruling 5).*

6. The request for a hearing of Petitioners Snowden and MWH from HCFA's determination that, between June 1, 1992 and December 28, 1992, the beds which Petitioner MWH assigned to Petitioner Snowden were not a component of Petitioner MWH, does not rest on facts that are administratively final and is not moot. (ruling 7).

I do not adopt as a Finding my ruling 6. That ruling stated:

> ***If the 40 beds were a component of Petitioner MWH between June 1, 1992 and December 28, 1992, they would not have to meet the special requirements for participation of a psychiatric hospital.***

I am not adopting ruling 6 as a Finding because, although it is literally correct, it is confusing as it is stated. As I explain below, a facility whose primary purpose is to provide psychiatric hospital care must be certified to participate in Medicare as a psychiatric hospital in order to participate in Medicare. Petitioner Snowden could be classified as a component of Petitioner MWH during the period from June 1, 1992 until December 28, 1992, and would not have to meet the special requirements for participation of a psychiatric hospital only if its primary purpose was not to provide psychiatric hospital care.

There are two substantive issues in these cases. They are: (1) whether HCFA properly certified Petitioner Snowden to participate in Medicare as a psychiatric hospital, effective December 28, 1992; and (2) whether HCFA properly determined that, effective June 1, 1992 and thereafter, Petitioner Snowden was not a component of Petitioner MWH for Medicare reimbursement purposes.

My Findings which address these substantive issues begin with Finding 7. I set forth each of my Findings below, as a separately numbered heading. I discuss each Finding in detail.

7. In order to be certified to participate in Medicare, a provider must apply to HCFA to participate, and then must be surveyed in order to determine whether it complies with applicable Medicare participation requirements.

A provider may participate in Medicare if it enters into a participation agreement with the Secretary of the United States Department of Health and Human Services (Secretary). Social Security Act (Act), section 1866(a)(1). The Secretary is not required to enter into a participation agreement with a provider if the Secretary determines that the provider is not complying substantially with Medicare participation requirements. Act, section 1866(b)(2).

The requirements for participation are stated in both the Act and in implementing regulations published by the Secretary. For providers such as hospitals and psychiatric hospitals, the regulations state broad conditions of participation and, within those conditions, standards of participation. See, e.g., 42 C.F.R. §§ 482.1 - 482.62. As an example of a condition of participation, 42 C.F.R. § 482.61, which governs medical records that are maintained by a psychiatric hospital, states that a psychiatric hospital must maintain medical records which permit determination of the degree and intensity of the treatment provided to psychiatric patients. As an example of a standard of participation that is stated within a condition, 42 C.F.R. § 482.61(a) states that a patient's medical record that is maintained by a psychiatric hospital must stress the psychiatric component of a patient's record, including the history of findings and treatment provided for the psychiatric condition for which the patient is hospitalized.

The Secretary has published regulations which establish a process by which HCFA, acting on behalf of the Secretary, determines whether an applicant for participation in Medicare is complying with Medicare participation requirements. An entity which desires to participate in Medicare must apply to HCFA to be certified to participate. 42 C.F.R. § 489.10(a). Generally, as a prerequisite to certification, an applicant for participation first must be surveyed by or on behalf of HCFA in order that HCFA may determine whether that applicant meets all Medicare participation requirements, including conditions and standards of participation. 42 C.F.R. §§ 488.10, 489.10(d). HCFA has delegated to State survey agencies the authority to conduct surveys on behalf of HCFA. Id.

An exception to the survey requirement exists in the case of a hospital that is accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) or by the American Osteopathic Association (AOA). Where such an accredited hospital applies for participation in Medicare, HCFA will deem the hospital to meet all Medicare participation requirements without conducting a pre-certification survey, except for: the requirements for utilization review as specified in section 1861(e)(6) of the Act, and in 42 C.F.R. § 482.30; the additional special staffing and medical records requirements that apply in the case of a psychiatric hospital that seeks to be certified to participate in Medicare; and any requirements under the Act or regulations that HCFA, after consultation with JCAHO and AOA, determines to be more stringent than are the requirements for JCAHO or AOA accreditation. 42 C.F.R. § 488.5(a)(1) - (3).

8. A provider will be certified to participate in Medicare as of the date of completion of a pre-certification survey if the provider is found to have met all Medicare participation requirements as of that date. Where a provider is found to have met all Medicare conditions of participation as of the date of completion of an initial survey of that provider, but where the provider is found not to have complied with other requirements of participation, such as a standard of participation, then the provider will be certified to participate on the earlier of the following dates:

a. The date on which the provider actually meets all participation requirements; or

b. The date on which the provider submits a plan of correction that HCFA finds to be acceptable.

HCFA will accept an applicant's participation agreement and certify that applicant to participate in Medicare on the date that a survey of that applicant is completed, assuming that the applicant meets all participation requirements on that date. 42 C.F.R. § 489.13(a). Where, as a result of a survey, an applicant for participation (other than a skilled nursing facility) is found to meet all conditions of participation, but where that applicant is found not to meet other participation requirements, such as a standard of participation, then the applicant will be certified to participate on the earlier of the following dates: the date when the applicant actually meets all of the participation requirements; or, the date on which the applicant submits a plan of correction which HCFA finds to be acceptable. 42 C.F.R. § 489.13(b).

9. I am without authority to direct HCFA to certify a provider to participate on a date earlier than the date when that provider satisfies all applicable participation requirements or submits a plan of correction that is acceptable to HCFA.

The regulations which govern the survey and certification process state categorically the circumstances under which a provider may be certified to participate in Medicare. I do not have the authority to order HCFA to certify a provider to participate on a date earlier than the date when the provider satisfies all participation requirements, as is prescribed in 42 C.F.R. § 489.13.

I have no authority to find that HCFA must certify a provider to participate on a date earlier than that which is allowed by 42 C.F.R. § 489.13, even where HCFA has contributed to a delay in the certification process and where the provider might be able to prove that, but for the delays, it would have met participation

requirements at the earlier date. GranCare Home Health Service & Hospice, DAB CR464 at 7 (1997). Nor, generally, do I have the authority to direct HCFA to accept, in lieu of a survey, some other proof that a provider meets certification requirements, such as proof that a provider meets State licensing requirements. Id. at 8.

> ***10. The Act defines a "psychiatric hospital" differently than it defines a "hospital" for purposes of participation in Medicare. In order to participate in Medicare, a psychiatric hospital must comply with participation requirements that are in addition to those which apply to a hospital.***

The Act establishes that, for purposes of Medicare participation, a hospital and a psychiatric hospital are different types of institutions that are organized to provide different types of services. Act, sections 1861(e), 1861(f). And, both the Act and implementing regulations provide that there are certification requirements that apply to a psychiatric hospital in addition to those which apply to a hospital. Act, sections 1861(e), 1861(f); 42 C.F.R. §§ 482.1 - 482.62.

The statutory definition of a hospital includes the criterion that it be engaged primarily in providing:

> by or under the supervision of physicians, to inpatients (A) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons; . . . .

Act, section 1861(e)(1).

By contrast, the statutory definition of a psychiatric hospital includes the criterion that it be engaged primarily in providing:

> by or under the supervision of a physician, *psychiatric services* for the diagnosis and treatment of *mentally ill* persons; . . . .

Act, section 1861(f)(1) (emphasis added). The Act authorizes the Secretary to establish clinical record-keeping and staff requirements which apply only to psychiatric hospitals, and not to other hospitals. Act, sections 1861(f)(3),(4). The Secretary has implemented these special participation requirements by regulations, at 42 C.F.R. §§ 482.61 - 482.62. Section 1861(f) of the Act and 42 C.F.R. § 482.1(a)(2) provide additionally that, where an institution maintains a

distinct part that satisfies the statutory definition of a psychiatric hospital, then that distinct part shall, in and of itself, be considered to be a psychiatric hospital for Medicare purposes. However, that distinct part must comply with the participation requirements which govern a psychiatric hospital. Id.

11. In order to participate in Medicare, a facility whose primary purpose is to provide psychiatric care to hospital patients must be surveyed for, and be found in compliance with, the Medicare participation requirements which govern a psychiatric hospital.

Where a facility is organized primarily for providing psychiatric services to hospital patients, that facility must be surveyed for, and must satisfy, the special participation requirements that apply to a psychiatric hospital, in order to be certified to participate in Medicare. Act, section 1861(f); 42 C.F.R. §§ 482.61, 482.62. Accreditation of a hospital by JCAHO or AOA will not suffice as a basis for certification of that hospital as a psychiatric hospital, in lieu of a survey to determine whether that hospital meets the participation requirements that apply only to psychiatric hospitals. See 42 C.F.R. § 488.5(a)(1) - (3).

12. A distinct facility whose primary purpose is to provide psychiatric hospital care may not participate in Medicare as a component of a hospital if the facility is not complying with all Medicare participation requirements that govern a psychiatric hospital.

Neither the Act nor regulations permit a distinct facility whose primary purpose is to provide psychiatric services to hospital patients to be classified as a component of a hospital without the psychiatric facility satisfying all of the Medicare participation requirements that govern a psychiatric hospital. See Act, sections 1861(e), 1861(f); 42 C.F.R. §§ 482.1 - 482.62. I am not persuaded by Petitioners' arguments that Petitioner Snowden might be classified as a component of Petitioner MWH without considering Petitioner Snowden's primary purpose, and without regard to whether Petitioner Snowden met the participation requirements that govern a psychiatric hospital, assuming that its primary purpose was to function as a psychiatric hospital.

Petitioners assert that, between June 1, 1992 and December 28, 1992, Petitioner MWH could claim reimbursement from Medicare for the Medicare services that Petitioner Snowden provided, as a component of Petitioner MWH. In effect, Petitioners are asserting that Petitioner MWH's certification by HCFA to participate in Medicare as an acute care hospital, for the period from June 1, 1992 until December 28, 1992, includes a certification of all of the psychiatric hospital services that were provided by Petitioner Snowden during that period.

Under Petitioners' theory, reimbursement for Petitioner Snowden's services could be claimed by Petitioner MWH, despite the fact that Petitioner Snowden did not satisfy all Medicare participation requirements that govern a psychiatric hospital between June 1, 1992 and December 28, 1992.

Petitioners predicate their component status argument on a section of the State Operations Manual (SOM), SOM § 2024, which, they contend, contains the sole and exclusive criteria for determining whether a facility is a component of a hospital. HCFA Ex. 20. I take notice that the SOM is a document published by HCFA which instructs surveyors how to conduct Medicare certification and compliance surveys. SOM § 2024 advises surveyors of the circumstances when two or more hospitals may be considered to be part of a single hospital and, therefore, subject only to a single certification or compliance survey. It provides that:

> When two or more hospitals merge, you must ascertain whether to continue to certify these hospitals separately or whether to certify the complex as a single hospital. Also, when a hospital establishes an additional hospital facility, geographically separated but in the same metropolitan area, ascertain whether the added facility is a separate hospital or a component of a single hospital. A hospital may establish an additional facility so organizationally or . . . geographically separate as to make it impossible to operate as a component of [a] single hospital.

HCFA Ex. 20. It provides that surveyors are to certify two or more facilities as part of a single hospital, if all of the following tests are satisfied:

> A. Ownership. — All components included are subject to the control and direction of one common owner (i.e., governing body) responsible for the operational decisions of the entire hospital enterprise.
>
> B. Chief Medical Officer. — There is a single Chief Medical Officer who reports directly to the governing body and who is responsible for all medical staff activities of all components.
>
> C. Totally Integrated Medical Staff. — There is total integration of the organized medical staff as evidenced by these factors:
>
> > o All medical staff members have privileges at all components.

o All medical staff committees are responsible for their respective areas of responsibility in all components of the hospital. (This factor does not preclude the establishment of subcommittees in other components which are under the authority of and must report back to the primary committees).

D. Chief Executive Officer. — There is a single Chief Executive Officer through whom all administrative authority flows and who exercises control and surveillance over all administrative activities of all components. (This criterion does not preclude the establishment of deputy or assistant executive officer positions in any component as long as the individuals are under the authority of and report to the single Chief Executive Officer.)

HCFA Ex. 20.

Implicit in Petitioners' argument about the alleged component status of Petitioner Snowden is an assertion that the primary purpose of Petitioner Snowden, and hence, its compliance or noncompliance with Medicare participation requirements which govern a psychiatric hospital, is irrelevant to deciding Petitioner Snowden's status. Petitioners argue, in effect, that the issue of Petitioner Snowden's component status must be decided based solely on whether the ownership, management, and staff of Petitioners Snowden and MWH are combined, in accord with SOM § 2024, without regard to the primary purpose of Petitioner Snowden, and without regard to whether or not Petitioner Snowden was complying with the participation requirements which govern a psychiatric hospital, assuming its primary purpose was to function as a distinct psychiatric hospital.

The unique certification requirements which apply to a psychiatric hospital are intended to assure that the facility maintain staffing and records that protect the welfare of beneficiaries who suffer from mental illnesses. Act, section 1861(f)(3), (4); 42 C.F.R. §§ 482.61, 482.62. However, under Petitioner's component theory, a facility having the primary purpose to provide psychiatric care to hospital patients that satisfies the integrated ownership, management and staff test of SOM § 2024 would not have to satisfy the participation requirements which apply to a psychiatric hospital as a prerequisite for the hospital to claim reimbursement from Medicare for the psychiatric services that the component facility provides. Indeed, Petitioner Snowden did not comply with the special certification requirements for a psychiatric hospital prior to December 28, 1992.

Petitioners' reliance on SOM § 2024 as establishing the exclusive test for deciding whether Petitioner Snowden is a component of Petitioner MWH is misplaced. Contrary to Petitioners' assertions, if Petitioner Snowden's primary purpose is to provide psychiatric hospital care, then Petitioner Snowden may not be classified as a component of Petitioner MWH without first having complied with the participation requirements which govern a psychiatric hospital. The special participation requirements which govern psychiatric hospitals apply not just to independent psychiatric hospitals, but to psychiatric facilities that are adjuncts of acute care hospitals. Both the Act and regulations specify that, where a hospital operates a psychiatric facility as a distinct part (which, arguably, could be a component of the hospital) that distinct part must satisfy the participation requirements which govern a psychiatric hospital. Act, section 1861(f); 42 C.F.R. § 482.1(a)(2)

Congress and the Secretary did not intend that Medicare beneficiaries who suffer from mental illnesses should lose the special guarantees of protection embodied in the Act and regulations in the circumstance where a facility that provides the care provided by a psychiatric hospital is merged administratively with a hospital. The special certification requirements which govern the participation in Medicare of a psychiatric hospital would be eviscerated if a hospital could evade these requirements by operating as a component, and claiming Medicare reimbursement for the services of an uncertified and noncompliant psychiatric facility. See Act, section 1861(f); 42 C.F.R. § 482.1(a)(2).

The SOM does not contain regulations, nor does it rise to the level of regulations. It consists of interpretive guidelines that are published by HCFA to assist surveyors in conducting surveys of facilities. The SOM has not been published pursuant to the notice and comment requirements of the Administrative Procedures Act. In order to make sense of the SOM, I must interpret and apply it in a manner that is consistent with the Act and regulations. And, to the extent that I find that the SOM conflicts with the Act or with regulations that are published by the Secretary, then the Act and regulations must prevail.

However, I do not find SOM § 2024 to conflict with the Act or with the regulations which govern hospitals and psychiatric hospitals. There is no language in SOM § 2024 which either states or suggests that an uncertified facility which provides the care that is provided by a psychiatric hospital may be classified as a component of a hospital in a way that would allow the uncertified psychiatric facility to avoid having to prove that it satisfies the certification requirements which govern a psychiatric hospital.

SOM § 2024 does not, on its face, even apply to the circumstance where a hospital merges with or operates an uncertified psychiatric facility. SOM § 2024 addresses the circumstance where two *hospitals* — and not a hospital and an uncertified psychiatric facility — are operated as a single entity.

Every reference to a facility in SOM § 2024 is to a "hospital." HCFA Ex. 20. HCFA must be presumed to have understood the difference between a hospital and an uncertified psychiatric facility when it drafted and circulated SOM § 2024. The failure of SOM § 2024 even to mention an uncertified psychiatric facility means that SOM § 2024 is intended only to address a union of hospitals, and is not intended to address a union between a hospital and an uncertified psychiatric facility. At the very least, the language of SOM § 2024 which refers only to a "hospital" suggests that HCFA did not contemplate that a hospital could merge with or operate an uncertified psychiatric facility in a way that would avoid the uncertified psychiatric facility having to satisfy the special certification requirements that apply to psychiatric hospitals.

I am not suggesting that, necessarily, it would be inappropriate for HCFA to classify a psychiatric facility that complies with Medicare participation requirements which govern a psychiatric hospital as a component of an acute care hospital. Indeed, the Act implies that a psychiatric facility may operate as a component of an acute care hospital, so long as it complies with the special participation requirements which govern a psychiatric hospital. Act, section 1861(f). However, it is evident that SOM § 2024 does not specifically address such a classification, even where both the hospital and the psychiatric hospital satisfy Medicare participation requirements. And, under no circumstances does SOM § 2024 suggest that an uncertified psychiatric facility may be classified as a component of a hospital where the psychiatric facility has not first satisfied all Medicare participation requirements that apply to a psychiatric hospital.

Petitioners assert that HCFA interpreted the Act, regulations, and SOM § 2024, consistent with Petitioners' argument that SOM § 2024 establishes the exclusive criteria for deciding whether Petitioner Snowden is a component of Petitioner MWH. Petitioners observe that HCFA, in fact, invited Petitioner MWH to attempt to prove that Petitioner Snowden was a component of it, pursuant only to the criteria of SOM § 2024, and without regard to Petitioner Snowden's primary purpose.

There is no question that HCFA's regional office staff invited Petitioners to assert that Petitioner Snowden was a component of Petitioner MWH. HCFA Ex. 19; Ruling at 3 - 4. The staff told Petitioners that HCFA would employ the criteria in SOM § 2024 to determine whether Petitioner Snowden was a component of

Petitioner MWH during the period from June 1, 1992 through December 28, 1992, even though Petitioner Snowden had not satisfied all Medicare participation requirements during this period. Id. As a consequence, Petitioners strenuously attempted to prove that Petitioner Snowden was a component of Petitioner MWH, based on the criteria contained in SOM § 2024. HCFA Ex. 6, 23, 35, 37; P. Ex. 1, 4; Ruling at 4 - 7. But, this history proves only that HCFA's regional office staff may have misinterpreted the Act, regulations, and SOM § 2024, and in so doing, might have misled Petitioners into believing that Petitioner Snowden might be classified as a component of Petitioner MWH based solely on the criteria of SOM § 2024. See HCFA Ex. 19.

In any event, I do not find that HCFA's regional office staff had the authority to interpret the law on behalf of HCFA or the Secretary. There is nothing of record to establish that the Secretary or HCFA delegated to HCFA's regional office staff the authority to make such an interpretation.

Petitioners argue that SOM § 2024 has been interpreted on behalf of the Secretary in other contexts which supports their advocated interpretation of SOM § 2024. I have reviewed the authorities relied on by Petitioners. I am not persuaded that they support Petitioners' argument concerning the meaning and application of SOM § 2024.

Petitioners first cite two Departmental Appeals Board (Board) decisions — New York State Department of Social Services, DAB No. 1313 (1992) (Attachment "D" to Petitioners' posthearing brief), and New York State Department of Social Services, DAB No. 1528 (1995) (Attachment "E" to Petitioners' posthearing brief) — and assert that these decisions each are decisions in which the Board "applied the criteria in SOM § 2024" to decide whether psychiatric hospitals were components of hospitals. Petitioners' posthearing brief at 22. In fact, in neither of these cases did the Board rely strictly on the provisions of SOM § 2024 to decide that the psychiatric hospitals at issue were not components of other hospitals. Furthermore, each of these cases is distinguishable in a critical respect from this case.

In both DAB No. 1313 and DAB No. 1528, the Board concluded that the psychiatric hospitals at issue were not components of other hospitals, largely because they were organized and operated to provide psychiatric care that was separate from that which was being provided by the hospitals of which they allegedly were components. In each of these cases, the Board placed great weight on the fact that the State had certified the alleged component hospitals as psychiatric hospitals and had regarded them as free-standing facilities. The Board found that such evidence outweighed any evidence of integration of management

and staff that was offered by the State to prove that the psychiatric hospitals were "components" within the meaning of SOM § 2024.

Both DAB No. 1313 and DAB No. 1529 are plainly distinguishable from this case in that each of the psychiatric hospitals at issue in those cases was certified to participate in Medicare as a *psychiatric hospital*. Thus, there was no question in either case that the psychiatric hospitals that were alleged to be components satisfied all Medicare participation requirements. In neither DAB No. 1313 nor in DAB No. 1528 did the State argue that a psychiatric facility could avoid complying with the special participation requirements which govern a psychiatric hospital by being classified as a component of a hospital.

Petitioners cite to another Board decision, Oklahoma Department of Human Services, DAB No. 799 (1986) (Attachment "F" to Petitioners' posthearing brief) as additional support for their argument that SOM § 2024 establishes the exclusive criteria for deciding whether Petitioner Snowden was a component of Petitioner MWH. I find this decision not to offer meaningful support for Petitioner's argument.

In DAB No. 799, the Board held that HCFA had determined incorrectly that a juvenile treatment facility was not a component of a hospital, for Medicaid reimbursement purposes. In part, the Board relied on provisions of the SOM to decide the case. However, the Board does not address the issue of whether a juvenile treatment facility could avoid complying with participation requirements by being classified as a component of a hospital.

Petitioners cite to a 1993 advisory opinion issued by the Attorney Office of the General Counsel, Inspector General Division, as support for their argument concerning SOM 2024 (Attachment "G" to Petitioners' posthearing brief). It dealt with the issue of whether a State might lawfully issue more than one Medicaid provider number to skilled nursing facilities which functioned as institutions for mental diseases, as well as skilled nursing facilities. The opinion was not conclusive, but it suggested that SOM § 2024 might serve as appropriate guidance for determining whether components of nursing homes might be reimbursed separately.

I do not find this opinion to be persuasive authority. The opinion does not provide any basis for deciding the issue of whether an uncertified facility providing psychiatric hospital care can operate as a component of a hospital.

Petitioners argue additionally that, even if SOM § 2024 does not contain the exclusive criteria for determining whether a psychiatric facility may be classified as a component of a hospital, there exist other, analogous criteria in regulations which govern the Medicare program that suggest that the criteria in SOM § 2024 describe HCFA's general policy as to when to classify a facility as a component of another facility. Petitioners point to the provisions of 42 C.F.R. § 412.23, which identifies circumstances under which hospitals may be excluded from the prospective payment Medicare reimbursement system (PPS). I do not find that this regulation provides any meaningful guidance. What is at issue here is whether a psychiatric facility may avoid Medicare certification requirements by being classified as a component of a hospital. The PPS exclusion provisions are not intended to address issues of certification. For this reason, it is unnecessary for me to address the specific provisions of 42 C.F.R. § 412.23.

13. During the period between June 1, 1992 and December 28, 1992, Petitioners MWH and Snowden had overlapping ownership and had a close management and operating relationship.

Petitioner MWH is a 340-bed Medicare-certified acute care hospital that is located in Fredericksburg, Virginia. HCFA Ex. 2; HCFA Ex. 25. Petitioner Snowden is a 40-bed facility, also located in Fredericksburg, Virginia, in close proximity to Petitioner MWH. Petitioner Snowden opened in the spring of 1992 and became certified to participate in Medicare as a psychiatric hospital effective December 28, 1992. HCFA Ex. 3, HCFA Ex. 9. Prior to the inception of Petitioner Snowden, Petitioner MWH operated a 15-bed psychiatric unit and a separate chemical dependency unit. See HCFA Ex. 5; Transcript (Tr.) at 38 - 39. However, Petitioner MWH was not certified to participate in Medicare as a psychiatric hospital.

There was overlapping, but not identical, ownership of Petitioners Snowden and MWH. During the period beginning June, 1, 1992 and ending December, 28, 1992, Petitioner Snowden was owned jointly by two entities, MWH Medicorp, and Diamond Health Care of Fredericksburg. HCFA Ex. 1; Tr. at 36 - 37. MWH Medicorp owned 55 percent of Petitioner Snowden, and Diamond Health Care of Fredericksburg owned the remaining 45 percent. HCFA Ex. 5; Tr. at 36 - 37. MWH Medicorp was the sole owner of Petitioner MWH. HCFA Ex. 1.

During the period between June 1, 1992 and December 28, 1992, there was a close management and operating relationship between Petitioner Snowden and Petitioner MWH. The chairman of Petitioner Snowden reported to the chairman of Petitioner MWH's department of medicine. P. Ex. 2. The chairman of Petitioner MWH's department of medicine reported to the president of Petitioner

MWH's medical staff. Id. The president of Petitioner MWH's medical staff reported to the board of directors of Petitioner MWH. Id.

The close operating relationship between Petitioner Snowden and Petitioner MWH is established by facts which include the following. Petitioner Snowden's initial patients included patients who were transferred to it from Petitioner MWH. See HCFA Ex. 5. Members of the medical staff of Petitioner Snowden had privileges to practice at Petitioner MWH, and members of the medical staff of Petitioner MWH had privileges to practice at Petitioner Snowden. HCFA Ex. 6 at 2.

14. The overlapping ownership of Petitioners Snowden and MWH, and the close management and operating relationship between Petitioner Snowden and Petitioner MWH does not detract from my Findings that, during the period between June 1, 1992 and December 28, 1992, Petitioner Snowden's primary purpose was to offer psychiatric care to hospital patients.

Evidence as to shared ownership, management, and staff privileges begs the question of a facility's primary purpose. There may be complete integration of ownership, management, staff privileges, and ancillary services between two facilities and, notwithstanding, one of them may have as its primary purpose the delivery of psychiatric hospital care.

As I discuss below, the evidence plainly establishes that Petitioner Snowden had as its primary purpose the offering of psychiatric hospital care that was distinct and separate from the acute hospital care that was offered by Petitioner MWH. The evidence offered by Petitioners concerning the integration of Petitioners Snowden and MWH does not detract from the fact that Petitioner Snowden's primary purpose was to offer the care that is provided by a psychiatric hospital.

15. During the period between June 1, 1992 and December 28, 1992, Petitioner Snowden's primary purpose was to offer psychiatric care to hospital patients.

Petitioner Snowden's primary purpose was to offer psychiatric care to hospital patients that was distinct from the acute care offered by Petitioner MWH. Thus, Petitioner Snowden's primary purpose was that of a psychiatric hospital. Act, section 1861(f). Petitioner Snowden's primary purpose is proved by evidence that I discuss in Findings 16 - 22 which establishes: the purpose of creating Petitioner Snowden; the types of services that Petitioner Snowden offered; the staffing of Petitioner Snowden; the license and certification that Petitioner Snowden applied

for and was granted; and the reasons why Petitioners now assert that Petitioner Snowden was a component of Petitioner MWH as compared with Petitioners' original characterization of the purpose of Petitioner Snowden.

16. The purpose of creating Petitioner Snowden was to develop and operate a psychiatric hospital which offered more distinct services than had been offered by Petitioner MWH and which the community would identify as a distinct psychiatric hospital.

Petitioner Snowden's owners discerned a need to develop a mental health service that was separate from that which had been offered by Petitioner MWH so that it could be better identified for marketing and promotion. Tr. at 38 - 39. The psychiatric and chemical dependency services that Petitioner MWH offered were not well known. Id. Patients in the Fredericksburg area who needed psychiatric hospitalization were going elsewhere for care. Tr. at 39. Petitioner Snowden's owners concluded, additionally, that there was a need to attract psychiatrists to the Fredericksburg area in order to care for local patients who were in need of psychiatric care. Id.

17. Petitioner Snowden was designed and created to specialize in providing psychiatric hospital care to patients.

From the outset, Petitioner Snowden specialized in providing psychiatric hospital care, and not acute hospital care. P. Ex. 21 at 3; HCFA Ex. 4 at 2.

18. Petitioner Snowden was created with a capacity to care for psychiatric hospital patients which exceeded that of Petitioner MWH.

From the outset, Petitioner Snowden's capacity to provide psychiatric hospital care was substantially greater than that which was offered by Petitioner MWH. Petitioner Snowden's owners conceived of a psychiatric hospital having a total of 40 beds, as compared to the 15 psychiatric beds operated by Petitioner MWH. Tr. at 127 - 128.

Originally, Petitioner Snowden's 40 beds were comprised in part of 31 beds that were donated to it by Petitioner MWH. Tr. at 127 - 128. 15 of these donated beds had been psychiatric beds at Petitioner MWH, and 16 of these beds had been used to provide chemical dependency services at Petitioner MWH. P. Ex. 1 at 279, 281, P. Ex. 19; Tr. at 127, 128, 148. Petitioner Snowden was granted authority by the State of Virginia to operate an additional nine psychiatric beds, thereby bringing the total authorized beds at Petitioner Snowden to 40 beds. Tr. at 128. These additional nine beds were all of the beds remaining in the

inventory that the State of Virginia had determined was needed to serve the psychiatric hospital needs of the population in the Fredericksburg area. Id.

19. Petitioner Snowden started operations with a staff that had more mental health care professionals affiliated with it than had been affiliated with Petitioner MWH.

Just prior to the opening of Petitioner Snowden, in May, 1992, Petitioners Snowden and MWH recruited a child psychiatrist to provide child and adolescent services at Petitioner Snowden. Tr. at 71 - 72. Also prior to the opening of Petitioner Snowden, Petitioner Snowden hired a Master's level nursing director. Id.

20. One of the reasons that Petitioner Snowden was located in a facility that was separate from that which was occupied by Petitioner MWH was to attract the public's attention to the psychiatric hospital services offered by Petitioner Snowden .

From its inception, Petitioner Snowden was located in a separate building from Petitioner MWH. A reason for physically separating Petitioner Snowden from Petitioner MWH was to bring to the public's attention the psychiatric hospital services that were being offered by Petitioner Snowden. See Tr. at 38 - 40. Another reason for locating Petitioner Snowden in a building that was separate from that which was occupied by Petitioner MWH was that building and fire and safety codes were less strict for a psychiatric hospital than for an acute care hospital. Tr. at 132 - 133.

21. Petitioner Snowden's owners intended that Petitioner Snowden be licensed, accredited, and certified separately from Petitioner MWH as a psychiatric hospital.

Petitioner Snowden's owners intended that Petitioner Snowden be licensed, accredited, and certified to participate in Medicare as a psychiatric hospital that was separate from Petitioner MWH. On March 12, 1992, Diamond Healthcare Corporation, acting on Petitioner Snowden's behalf, notified the Virginia Department of Health, Department of Licensure and Certification, that Petitioner Snowden sought approval to participate in Medicare. HCFA Ex. 7. On April 3, 1992, the Virginia Department of Health responded to the March 12, 1992 letter. HCFA Ex. 8. In its response, the Virginia Department of Health advised Diamond Healthcare Corporation of the requirements that had to be met by Petitioner Snowden prior to it being certified. Id. The response made it plain that the pre-certification requirements depended in some measure on the type of

certification that Petitioner Snowden sought to attain. Id. The implicit premise of the response, however, was that Petitioner Snowden would be seeking to be certified to participate in Medicare as a psychiatric hospital. That is apparent from a paragraph which, in relevant part stated:

> [P]lease submit evidence of the hospital's licensure by the Department of Mental Health, Mental Retardation and Substance Abuse Services once the facility is licensed. I would also encourage you to obtain a copy of the [C]ode of Federal [Regulations] (42 C.F.R., Part 400 to 429) which contains the regulations that govern psychiatric hospital certification.

Id. at 2. The intent to certify Petitioner Snowden as a psychiatric hospital is also apparent from the attachments that were supplied with the letter, which contain excerpts from the SOM governing the certification of psychiatric hospitals. Id. at 3 - 5.

On June 15, 1992, Petitioner Snowden wrote directly to the Virginia Division of Licensure and Certification. HCFA Ex. 9. In this letter, Petitioner Snowden advised the Division of Licensure and Certification that it had opened on June 1, 1992 as a "40 bed psychiatric and chemical dependency facility, . . ." Id. It averred that it planned to obtain JCAHO certification "and, subsequently, Medicare certification." Id.

On August 10, 1992, the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services provided Petitioner Snowden with a conditional license to operate. HCFA Ex. 10. The license was effective from June 1, 1992 until August 29, 1992. Id.

The Virginia Division of Licensure and Certification corresponded with Petitioner Snowden on August 21, 1992. HCFA Ex. 11. It advised Petitioner Snowden that its request to participate in Medicare "as a psychiatric hospital" had been forwarded to HCFA's Region III office. Id. In addition, it requested Petitioner to forward to it a copy of its permanent license to operate, as well as proof of accreditation by JCAHO. The Virginia Division of Licensure and Certification advised Petitioner Snowden that, once it received these items, then it would request, through HCFA, that Petitioner Snowden be surveyed in order to determine whether Petitioner Snowden satisfied the special conditions of participation governing psychiatric hospitals. Id.

On August 24, 1992, JCAHO advised Petitioner Snowden that Petitioner Snowden was accredited. HCFA Ex. 12. The JCAHO survey report of Petitioner Snowden referred to the "type of hospital . . . that most accurately describes" Petitioner Snowden as being a psychiatric unit and a alcohol/drug unit. P. Ex. 21 at 3.

Effective August 30, 1992, Petitioner Snowden received a permanent State license to operate as a psychiatric hospital. HCFA Ex. 14 at 2. The license described Petitioner Snowden as:

> A FORTY (40) BED PSYCHIATRIC HOSPITAL PROVIDING CARE AND TREATMENT TO MENTALLY ILL AND SUBSTANCE ABUSING PATIENTS.

HCFA Ex. 14 (capitalization in original).

Petitioners now assert that the Commonwealth of Virginia failed to advise Petitioner Snowden that it might have been classified as a component of Petitioner MWH. Petitioners' reply brief at 5. Petitioners imply that Petitioner Snowden would not have applied to be certified as a psychiatric hospital, had the Commonwealth of Virginia told Petitioners that Petitioner Snowden could have been classified as a component of Petitioner MWH. I am not persuaded by this argument. It is evident that Petitioner Snowden's owners correctly and accurately conceived of Petitioner Snowden as being a distinct psychiatric hospital until HCFA's regional office staff suggested to them that Petitioner MWH might be able to claim reimbursement for Petitioner Snowden's Medicare services, if Petitioner Snowden was a component of Petitioner MWH. Had the Commonwealth of Virginia suggested to Petitioners that Petitioner Snowden might be considered to be a component of Petitioner MWH, for Medicare participation purposes, without first complying with the participation requirements which govern psychiatric hospitals, then the Commonwealth of Virginia would have interpreted the law incorrectly in the case of Petitioner Snowden.

22. Petitioners asserted that Petitioner Snowden was a component of Petitioner MWH, and not a separate psychiatric hospital, only after HCFA's regional office staff suggested that Petitioner MWH would be able to claim reimbursement for the Medicare services that Petitioner Snowden provided, if Petitioner Snowden was a component of Petitioner MWH.

It was not until HCFA's regional office staff suggested to Petitioners, on January 15, 1993, that Petitioner MWH might claim reimbursement for the psychiatric services provided by Petitioner Snowden, if Petitioner Snowden was a component of Petitioner MWH, that Petitioners changed their description of Petitioner Snowden's purpose and status. See HCFA Ex. 19; HCFA Ex. 6. Up until that date, every submission from Petitioners to HCFA, and to other authorities as well, described Petitioner Snowden as a free-standing psychiatric hospital. Finding 21. After January 15, 1993, Petitioners persistently described Petitioner Snowden as being, essentially, a division of Petitioner MWH that offers psychiatric services.

Petitioner's changing characterization of Petitioner Snowden is understandable, if not accurate. HCFA invited Petitioners to argue that Petitioner Snowden was something other than what Petitioners originally conceived it to be. HCFA Ex. 19. Evidently, a large amount of Medicare reimbursement dollars hinges on whether Petitioner Snowden is decided to be a component of Petitioner MWH. But, changing the characterization of Petitioner Snowden from a distinct psychiatric hospital to a component of Petitioner MWH does not derogate or detract from the strong evidence of Petitioner Snowden's primary purpose, or from the characterization of its primary purpose made by its owners when Medicare reimbursement for Petitioner Snowden's services did not appear to hinge on characterizing it as a component of Petitioner MWH.

23. Petitioner Snowden became certified to participate in Medicare effective with the date that it submitted to HCFA a plan of correction which addressed deficiencies which had been identified in the pre-certification survey of Petitioner Snowden.

On October 29 and 30, 1992, a pre-certification survey of Petitioner Snowden was conducted in order to determine whether Petitioner Snowden met all Medicare participation requirements which govern a psychiatric hospital. HCFA Ex. 16. The surveyors determined that Petitioner Snowden satisfied all conditions of participation. However, they determined as well that Petitioner Snowden had failed to comply with some Medicare requirements, of less than a condition-level, which state special record-keeping obligations for psychiatric hospitals. HCFA

Ex. 17 at 2 - 11; 42 C.F.R. § 482.61(a)(4), (5); (b)(6); (b)(7); (c)(1); (c)(1)(ii); (c)(1)(iii). On December 11, 1992, HCFA advised Petitioner Snowden that it must submit a plan of correction explaining how it would correct the deficiencies that the surveyors had identified. HCFA Ex. 16.

Petitioner Snowden submitted its plan of correction to HCFA on December 28, 1992. HCFA Ex. 17. On December 30, 1992, HCFA advised Petitioner Snowden that it had been certified to participate in Medicare, effective December 28, 1992. HCFA Ex. 3.

> ***24. HCFA correctly determined to certify Petitioner Snowden to participate in Medicare as a psychiatric hospital effective December 28, 1992.***

HCFA correctly determined that the earliest date when Petitioner Snowden could be certified to participate as a psychiatric hospital was December 28, 1992. 42 C.F.R. § 489.13. Deficiencies of less than a condition level were identified at the October 29 - 30, 1992 survey of Petitioner Snowden. The date of Petitioner Snowden's plan of correction, which HCFA accepted, was December 28, 1992. Petitioner Snowden has not challenged the accuracy of the pre-certification survey that was conducted of it. Ruling at 15 - 16. There is nothing of record in this case to suggest that the surveyors' findings were erroneous, or that Petitioner Snowden corrected the deficiencies identified by the surveyors at any date prior to December 28, 1992, the date when Petitioner Snowden submitted its plan of correction to HCFA.

As I discuss at Finding 8, where deficiencies of less than a condition level are identified at a pre-certification survey of a provider, HCFA will certify that provider to participate in Medicare on the earlier of the following dates: the date when the provider actually corrects all of the deficiencies; or, the date on which the provider submits a plan of correction that is acceptable to HCFA. 42 C.F.R. § 489.13. The regulations do not state any exceptions to this rule.

Petitioner Snowden makes several arguments to assert that it should have been certified to participate in Medicare as a psychiatric hospital prior to December 28, 1992. I find these arguments to be without merit.

Petitioners assert that HCFA delayed unreasonably in having the pre-certification survey of Petitioner Snowden conducted. Petitioners' posthearing brief at 40 - 41. This argument is in the nature of an estoppel argument. Petitioners assert, in effect, that certification delays were HCFA's fault, and that Petitioner Snowden should not be made to suffer as a consequence. As I hold at Finding 9, I do not

have authority to order HCFA to certify a provider to participate on the date that is before the date when the provider complies with participation requirements, as stated in 42 C.F.R. § 489.13. I would not order HCFA to certify Petitioner to participate in Medicare at a date earlier than December 28, 1992, even were I to find that HCFA had caused the survey and certification of Petitioner Snowden to be delayed unreasonably.

Moreover, I am not persuaded that the December 28, 1992 certification date is due entirely to the way in which HCFA processed Petitioner Snowden's application for participation. Although, arguably, HCFA might have been more expeditious in having Petitioner Snowden surveyed, there is no escaping the fact that Petitioner Snowden was not complying with all Medicare participation requirements as of the date of the survey. Thus, Petitioner Snowden bears at least some responsibility for the amount of time it took for it to be certified to participate in Medicare.

Petitioners assert that, in one other instance which they claim is analogous to this case, HCFA changed a certification date of a facility to a date earlier than the date when the provider was found to be in compliance with all Medicare participation requirements. Petitioners' posthearing brief at 36 - 39; See P. Ex. 14. Petitioners argue that this instance proves that HCFA has interpreted its authority to establish a date of certification to permit certification of a provider at a date that is before the date when the provider is in compliance with all participation requirements. Petitioners argue that it would be inconsistent with this alleged official interpretation not to afford the same treatment to Petitioner Snowden.

The evidence which Petitioners offer to support this argument does not explain why HCFA changed the certification date in the instance at issue. See P. Ex. 14. It is unnecessary to speculate as to HCFA's reasons for doing so. The instance cited by Petitioners is not an authoritative interpretation of the law. However, assuming for argument's sake that, in one or more instances, HCFA may not have followed strictly the requirements of regulations, it does not follow that these acts or omissions by HCFA are an official "interpretation" of those regulations. Evidence of such an act or omission suggests only the possibility that HCFA's staff may have erred in the way that it applied the regulations in a given case. Incorrect application of regulations by HCFA's staff is not a basis for me to conclude that the regulations should be read to mean anything other than what they plainly state.

Petitioners have not argued specifically that HCFA must accept Petitioner Snowden's license to operate a psychiatric hospital or its JCAHO accreditation as a sufficient basis to certify Petitioner Snowden to participate in Medicare. However, I have considered this possible argument, and I conclude that neither proof of a license nor proof of JCAHO certification would be a basis for compelling HCFA to certify Petitioner Snowden at any date before December 28, 1992. In GranCare, I held that HCFA may not be compelled to accept proof of a State operating license in lieu of survey results. DAB CR464 at 7 - 9. Furthermore, the regulations which govern certification provide that, in the case of a psychiatric hospital, HCFA may not accept JCAHO certification in lieu of conducting a pre-certification survey and establishing compliance with all participation requirements. 42 C.F.R. § 488.5(a)(2).

25. Petitioner Snowden was not a component of Petitioner MWH for Medicare reimbursement purposes between June 1, 1992 and December 28, 1992.

A facility whose primary purpose is to provide psychiatric hospital care may not participate in Medicare unless it has first been certified to participate in Medicare as a psychiatric hospital. Finding 11. The special certification requirements that apply to a psychiatric hospital would have no meaning if a facility which provides psychiatric hospital care could find a way to participate in Medicare without having to comply with those requirements. Thus, a facility that provides psychiatric hospital care may not be classified as a component of a hospital for Medicare reimbursement if the facility is not certified to participate in Medicare as a psychiatric hospital. Finding 12.

Petitioner Snowden was not a component of Petitioner MWH for Medicare reimbursement purposes between June 1, 1992 and December 28, 1992. Petitioner Snowden's primary purpose was to provide psychiatric hospital care. Petitioner Snowden was not certified to participate in Medicare as a psychiatric hospital at any time prior to December 28, 1992.

/s/

Steven T. Kessel
Administrative Law Judge