

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
| |) | |
| Hospicio en el Hogar |) | |
| Mayaguez, Inc., |) | DATE: April 17, 1995 |
| |) | |
| Petitioner, |) | |
| |) | |
| - v. - |) | Docket No. C-94-366 |
| |) | Decision No. CR370 |
| Health Care Financing |) | |
| Administration. |) | |

DECISION

Petitioner requested a hearing from a determination by the Health Care Financing Administration (HCFA) to terminate Petitioner's participation in Medicare. The case was assigned to me for a hearing and a decision. I scheduled a hearing to be held in San Juan, Puerto Rico, beginning on November 2, 1994. However, prior to the commencement of the hearing, the parties advised me that neither of them intended to offer in-person testimony. I received exhibits into evidence and provided the parties with the opportunity to submit briefs. The parties submitted briefs. I concluded after reading the parties' briefs and the exhibits that there was an issue in the case that had not been briefed in detail by either party. I invited the parties to submit supplemental briefs. On March 1, 1995, each party submitted a supplemental brief.¹

I have considered the evidence, the applicable law and regulations, and the parties' arguments. I conclude that, by ceasing to do business by June 10, 1994, Petitioner terminated its participation in the Medicare program as of that date. The issue of whether HCFA was

¹ The issue which the parties had not briefed in detail is whether Petitioner terminated its Medicare participation agreement by ceasing its business operations.

authorized to terminate Petitioner's participation in Medicare is moot.

I. Issues, findings of fact, and conclusions of law

The issue in this case is whether Petitioner terminated its participation in Medicare on a date prior to the date that HCFA might have effectuated its determination to terminate Petitioner's participation in Medicare. In deciding that Petitioner terminated its participation in Medicare prior to HCFA implementing its determination to terminate Petitioner's participation, I make the following findings of fact and conclusions of law. After each finding or conclusion I cite to the page or pages of the decision at which I discuss the finding or conclusion.

1. A provider who participates in the Medicare program terminates its participation in Medicare by ceasing doing business, effective on the date when it stops providing services to the community. Pages 3 - 4.
2. Petitioner stopped providing services to the community by June 10, 1994, thus terminating its participation in Medicare. Pages 4 - 7.
3. Petitioner terminated its participation in Medicare on a date prior to the date that HCFA might have effectuated its determination to terminate Petitioner's participation in Medicare. Pages 8 - 10.
4. The question of whether HCFA was authorized to terminate Petitioner's participation in Medicare is made moot by Petitioner's termination of its participation in Medicare. Page 10.

II. Discussion

A. Background

Petitioner has participated in the Medicare program as a hospice, operating in Mayaguez, Puerto Rico. A hospice is described under section 1861(dd)(1) of the Social Security Act (Act) as a Medicare provider which offers care and services to a terminally ill beneficiary pursuant to a written plan of care established and periodically reviewed by the beneficiary's attending

physician, the hospice's medical director, and its interdisciplinary group.²

A hospice provides its care and services in the beneficiary's home, on an outpatient basis, and, in some instances, on a short-term inpatient basis. Act, section 1861(dd)(2)(A)(ii). Hospice services include: nursing care, physical and other therapy, medical social services, home health aide services, medical supplies, physicians' services, short-term inpatient care, and counseling. Id., section 1861(dd)(1)(A) - (H). In addition, a hospice provides bereavement counseling for the immediate family of a terminally ill beneficiary. Id., section 1861(dd)(2)(A)(i).

B. Circumstances under which a provider's participation in Medicare may be terminated

A health care provider may participate in the Medicare program where it has been certified by HCFA to participate and where it has executed a participation agreement. The circumstances under which a provider's participation in Medicare may be terminated are established by the Act and by implementing regulations. Act, section 1866(b)(2)(A) - (C); 42 C.F.R. §§ 489.52, 489.53.

The Act authorizes the Secretary of the United States Department of Health and Human Services (Secretary) to terminate a provider's participation in Medicare for reasons which include a determination by the Secretary that a provider has failed to comply substantially with the provisions of its participation agreement or with requirements contained in the Act and regulations. Act, section 1866(b)(2)(A). Regulations authorize HCFA to terminate a provider's participation in Medicare for failure to comply with the requirements of the Act and regulations, the conditions for participation, and the terms of the provider agreement. 42 C.F.R. § 489.53(a)(1), (3). The regulations state additional circumstances under which HCFA may terminate a provider's participation in Medicare. 42 C.F.R. § 489.53(a)(2), (4) - (9).

The Act states that a provider may terminate an agreement to participate in Medicare at such time and upon such

² Under the Medicare program, an individual is considered to be "terminally ill" if that individual has a medical prognosis that he or she is expected to live six months or less. Act, section 1861(dd)(3)(A).

notice to the Secretary and the public as may be provided in regulations. Act, section 1866(b)(1). Under the regulations, a provider that wishes to terminate its participation in Medicare generally must send HCFA written notice of its intent to do so. 42 C.F.R. § 489.52(a)(1). However, this regulation provides also that:

A cessation of business [by the provider] is deemed to be a termination by the provider effective with the date on which it stopped providing services to the community.

42 C.F.R. § 489.52(a)(3).

The term "cessation of business" is not defined specifically by the regulation. However a reasonable reading of the regulation is that a "cessation of business" occurs when a provider stops providing services to the community which it serves. That is evident from the regulation's linkage of the term "cessation of business" with a provider's ceasing to provide services to the community.

C. Relevant facts

On March 24, 1994, Petitioner was surveyed on behalf of HCFA by the Puerto Rico Department of Health. HCFA Ex. 15 at 1. On April 20, 1994, HCFA notified Petitioner that, based on the survey, HCFA had determined that Petitioner was not in compliance with conditions for participation as a hospice in the Medicare program. Id. HCFA advised Petitioner that HCFA intended to terminate Petitioner's participation in Medicare effective June 22, 1994. Id. HCFA stated that, on June 7, 1994, it would publish notice of its determination to terminate Petitioner's participation in a Puerto Rico newspaper. Id. at 2.

HCFA urged Petitioner to discontinue admitting new Medicare patients until such time as HCFA determined that Petitioner met all Medicare conditions of participation. Id. at 2. However, HCFA did not prohibit Petitioner from admitting new patients, nor did HCFA prohibit Petitioner from treating patients or requesting reimbursement from Medicare for their treatment pending the effectuation of termination.

HCFA advised Petitioner that, if it wished to continue to participate in Medicare, it would be required to submit a plan of correction to address the deficiencies that had been identified. Id. at 2. HCFA told Petitioner that, if the plan of correction provided reasonable assurance that compliance with conditions of participation would be attained, a follow-up survey of Petitioner would be conducted within 45 days or shortly thereafter. Id.

Petitioner submitted a plan of correction to HCFA. HCFA Ex. 17.³ On May 13, 1994, HCFA advised Petitioner that the plan of correction was not fully acceptable to HCFA. HCFA Ex. 18. HCFA attached to its May 13th letter a form which recited the part of Petitioner's plan of correction which HCFA determined to be unacceptable, and the reason for this determination. Id. at 2. HCFA requested Petitioner to make appropriate revisions on the form and to resubmit them within 10 days of Petitioner's receipt of HCFA's May 13, 1994 letter. Id.

On May 18, 1994, Petitioner submitted a revision of its plan of correction to HCFA which addressed the part of the original plan of correction which HCFA determined to be unacceptable. HCFA Ex. 19. HCFA appears to have accepted this revision on May 20, 1994. Id. at 2.⁴ There is no evidence to establish whether HCFA told Petitioner that it found the revised plan of correction to be acceptable. Absent such evidence, I do not find that HCFA communicated its acceptance of the revised plan of correction to Petitioner.

On June 7, 1994, HCFA published a notice in the San Juan Star of its intent to terminate Petitioner's participation in Medicare. On June 10, 1994, surveyors employed by the Puerto Rico Department of Health went to

³ Neither party offered evidence to show the date that Petitioner submitted its plan of correction. However, from handwritten notations on the plan, evidently made by a reviewer at HCFA, it appears that it was submitted prior to May 2, 1994. HCFA Ex. 16 at 2, 6 - 13.

⁴ The evidence which supports this finding is a handwritten notation on the form that Petitioner submitted to HCFA which reads "accepted M Stephens 5/20/94." The signature appears to be by the same individual who made the reviewer's notes and signatures which appear on HCFA Ex. 17. See HCFA Ex. 17 at 2, 6 - 13.

Petitioner's office in order to resurvey Petitioner. HCFA Ex. 20.⁵ They interviewed Petitioner's administrator. Id. at 1. The administrator stated that, as of that date, Petitioner was not providing services to any patients. Id. More than 60 patients had been discharged by Petitioner in the month of May 1994. Id. The administrator stated further that, on May 31, 1994, Petitioner had discharged 31 of its employees from their employment with Petitioner. Id. at 2. The administrator stated also that on, June 10, 1994, 12 additional employees would be discharged. Id. The administrator stated also that, by June 10, 1994, the date of the resurvey, Petitioner had discontinued its telephone service and had moved its facilities to another location. Id.

The surveyors obtained the minutes of a meeting held by Petitioner's management on June 7, 1994. HCFA Ex. 20 at 2, 4 - 5.⁶ The minutes stated that Petitioner would be discharging or transferring its employees due to the fact that it was ceasing its operations. Id. at 4. The minutes reported that Mr. Perez had advised Petitioner's employees that the reason for Petitioner ceasing its operations was that, according to a newspaper announcement, Medicare had closed Petitioner. Id.

⁵ In my request that the parties submit supplemental briefs, I specifically asked them to address whether they disputed the accuracy of the contents or the truth of the facts stated in HCFA Ex. 20. Petitioner advised me, with one exception, that it did not dispute the accuracy or the truth of the contents of HCFA Ex. 20. Petitioner's Supplemental Brief at 1 - 2. The exception is to a portion of a statement made on page three of the exhibit in which one of the surveyors relates that she spoke to Petitioner's President, Alejandro Perez, by telephone. The portion of the statement which Petitioner objects to is the surveyor's statement that, during this conversation, she overheard Mr. Perez' wife stating that Petitioner had withdrawn voluntarily from Medicare due to not having received reimbursement from HCFA since March 1994. It is unnecessary for me to make findings based on this asserted statement in order for me to decide this case. Therefore, I make no findings as to the statement by Ms. Perez which the surveyor allegedly overheard.

⁶ The minutes which I refer to are an English translation of a document which was prepared in Spanish and which is part of HCFA Ex. 20 at 6 - 7. Petitioner has not objected to the accuracy or completeness of the translation.

The surveyors reported a telephone conversation with Mr. Perez. HCFA Ex. 20 at 3. During that conversation, Mr. Perez asserted that Petitioner had not ceased its operations. Id.

As I note above, Petitioner does not dispute the accuracy of the surveyors' account of their visit to Petitioner's facility on June 10, 1994. From that account, I conclude that, as of June 10, 1994, Petitioner had:

- ceased admitting and treating patients.
- discharged many members of its professional staff and had advised its employees that it was ceasing its operations.
- closed its facility and discontinued its telephone service.

D. The parties' arguments

HCFA asserts that, as of June 10, 1994, Petitioner had stopped providing services to the community. From this, HCFA asserts that Petitioner had ceased doing business within the meaning of 42 C.F.R. § 489.52(b)(3) and, consequently, had terminated its provider agreement with HCFA. HCFA argues that Petitioner's asserted termination of its provider agreement prior to the date when HCFA had announced it would terminate Petitioner's participation in Medicare moots any question as to the propriety of HCFA's determination. HCFA asserts that Petitioner's motive for ceasing doing business is not relevant, because 42 C.F.R. § 489.52(b)(3) does not permit consideration of a provider's motive for ceasing doing business as an element of the issue of whether a provider has terminated its participation in Medicare.

Petitioner argues that it did not cease doing business within the meaning of 42 C.F.R. § 489.52(b)(3). It argues that, in fact, HCFA had "cancelled" its participation agreement with Petitioner effective with the notice it sent to Petitioner on April 29, 1994. Petitioner's supplemental memorandum at 2 - 4. According to Petitioner, HCFA's cancellation of Petitioner's participation in Medicare forced Petitioner to discharge its patients and its employees. Id.⁷ Thus, according to

⁷ I have no record of either party offering a copy of a notice from HCFA to Petitioner dated April 29, 1994. Thus, there is no such document in evidence.

(continued...)

Petitioner, it did not voluntarily cease doing business and did not terminate its participation agreement with HCFA. Id.

E. Analysis of the facts, the law, and the parties' arguments

The uncontroverted facts establish that, as of June 10, 1994, Petitioner had ceased providing services to the community within the meaning of 42 C.F.R. § 489.52(b)(3). Petitioner was no longer treating patients and had discharged many, if not all, of its employees. Petitioner had moved from its previous facility, and had discontinued its telephone service.

Petitioner terminated its participation in Medicare no later than June 10, 1994. Petitioner's discontinuation of services constitutes a cessation of business within the meaning of 42 C.F.R. § 489.52(b)(3). As I conclude at Part II B of this decision, a discontinuation of services by a provider meets the test for cessation of business. The regulation provides unequivocally that a cessation of business by a provider is deemed to be a termination by that provider of its participation agreement.

In reaching this conclusion, I have considered Petitioner's argument that it could not have terminated its participation because HCFA terminated Petitioner's participation previously. This argument is not supported by the facts. The evidence establishes that HCFA did not terminate Petitioner's participation in Medicare prior to June 10, 1994. The notice which HCFA sent to Petitioner on April 20, 1994 announces HCFA's intent to terminate Petitioner's participation effective June 22, 1994. HCFA Ex. 15 at 1. HCFA did not prohibit Petitioner from participating in Medicare between April 20, 1994 and June 22, 1994. While the notice suggested that Petitioner not admit new patients after April 20, 1994, it did not prohibit Petitioner from doing so. Id. at 2.

Moreover, I do not conclude from the notice that Petitioner could infer reasonably that HCFA terminated Petitioner's participation in Medicare at any date prior to June 22, 1994. The notice plainly states that Petitioner may continue to admit and to treat patients

⁷(...continued)

Evidently, Petitioner is referring to the notice which HCFA sent to Petitioner on April 20, 1994. See HCFA Ex. 15.

through June 22, 1994. HCFA Ex. 15 at 1. The notice affords Petitioner the opportunity to avoid termination, by submitting a plan of correction to HCFA and correcting the deficiencies that were identified in the notice. Id. at 2. The notice thus conditions HCFA's determination to terminate Petitioner's participation in Medicare on Petitioner not correcting outstanding deficiencies by June 22, 1994.

I find from Petitioner's conduct after April 20, 1994 that Petitioner understood that HCFA's determination to terminate Petitioner's participation in Medicare was conditional. Petitioner submitted a plan of correction to HCFA to address the deficiencies that were identified in the April 20, 1994 notice. Petitioner submitted also a revised plan to address HCFA's determination to not accept in its entirety the original plan of correction. HCFA Exs. 17, 19. I infer from this course of conduct that Petitioner knew that it had the opportunity to avoid termination of its participation in Medicare.

As I find above, the evidence establishes that HCFA accepted Petitioner's revised plan of correction. However, there is no evidence in the record to show whether HCFA communicated its acceptance to Petitioner. I can understand how a possible failure by HCFA to communicate its acceptance of Petitioner's revised plan of correction to Petitioner might have caused Petitioner's managers to experience uncertainty and anxiety. However, I do not find that a failure by HCFA to communicate its acceptance would be a legitimate basis for those individuals to conclude that the revised plan had been rejected. Although HCFA may not have told Petitioner that the revised plan had been accepted, neither is there evidence to show that it told Petitioner that the plan was being rejected. Petitioner's managers could have resolved any uncertainty or anxiety they experienced by corresponding with HCFA.

I am not persuaded that Petitioner could have concluded reasonably from the notice which HCFA published on June 7, 1994 of its intent to terminate Petitioner's participation in Medicare that HCFA had advanced the termination date to a date earlier than June 22, 1994. Although the notice is not in evidence, it appears to be uncontroverted that it did no more than announce HCFA's intent to terminate Petitioner's participation effective June 22, 1994. HCFA thus did no more than announce publicly what HCFA had told Petitioner previously. Furthermore, the evidence shows that HCFA had begun closing its operations in May 1994, well in advance of the date of publication of the notice. Indeed, it

appears that Petitioner discharged most of its patients and employees before June 1, 1994. HCFA Ex. 20 at 1.

Furthermore, I agree with HCFA that Petitioner's motives for ceasing doing business are not relevant under 42 C.F.R. § 489.52(b)(3). The regulation states only that a cessation of business by a provider will be deemed to be a termination by that provider of its participation agreement. Under the regulation, a provider's motive for ceasing doing business is not a factor which is to be considered in deciding that the provider has terminated its participation in Medicare.

I conclude that Petitioner's termination of its participation in Medicare prior to the date HCFA was to terminate Petitioner makes moot the question of whether HCFA's determination to terminate Petitioner's participation was authorized under the Act and regulations. Petitioner had, on its own initiative, terminated its participation in Medicare prior to the date when HCFA's determination would have become effective. HCFA's determination thus was never effectuated. No adverse consequences accrued to Petitioner from HCFA's determination, inasmuch as Petitioner ceased participating in Medicare before HCFA could effectuate its determination.⁸

⁸ In the April 20, 1994 notice to Petitioner, HCFA advised it that, for patients receiving hospice care from Petitioner under plans of care established before June 22, 1994, Petitioner would remain eligible to receive payment for services provided for a maximum of 30 days after June 22, 1994. HCFA Ex. 15 at 1. HCFA's notice thus advised Petitioner that, not only was Petitioner not prohibited from admitting and treating patients prior to June 22, 1994, but that HCFA would pay for services to patients admitted by Petitioner prior to June 22, 1994 that were provided through July 21, 1994. Id.

III. Conclusion

I conclude that, on or before June 10, 1994, Petitioner ceased doing business, thus terminating its participation in Medicare. Petitioner's termination of its participation in Medicare makes moot the question of whether HCFA's determination to terminate Petitioner's participation in Medicare effective June 22, 1994 was authorized under the Act and regulations.

/s/

Steven T. Kessel
Administrative Law Judge