Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Professional Nurses Home Health Services,	)	DATE: May 12, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-421
	)	Decision No. CR375
Health Care Financing Administration.	)	
	)	

DECISION

Petitioner requested a hearing to oppose 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 held a prehearing conference by telephone on September 9, 1994. During this conference, the parties agreed that there was no need for an in-person hearing. The parties agreed further that I should hear the case based on an exchange of briefs and exhibits. The parties subsequently filed exhibits, briefs, and reply briefs.

After considering the briefs and exhibits submitted by the parties, I held another telephone prehearing conference on March 9, 1995. During the conference, I advised the parties that they each may have failed to address pertinent issues. In their briefs, the parties treated the case as if it were an appellate review of findings made by the individuals who had surveyed Petitioner on behalf of HCFA. I observed that the parties' arguments seemed to ignore the fact that the hearing, rather than being an appellate review, was a de novo review of HCFA's determination, subject to the requirements of section 205(b) of the Social Security Act (Act).

I advised each party that I would afford it the opportunity to reconsider its submissions to me and to supplement them, either at an in-person hearing or with additional briefs and exhibits. The parties advised me

subsequently that neither of them desired an in-person hearing. HCFA then submitted an additional brief and two additional exhibits. Petitioner submitted an additional brief and no additional exhibits.[1]

I have considered the applicable law and regulations, the exhibits, and the parties' arguments. I conclude that HCFA proved, by a preponderance of the evidence, that Petitioner failed to comply with a condition of participation in Medicare. Therefore, HCFA was authorized to terminate Petitioner's participation in Medicare.

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

The issue in this case is whether HCFA was authorized to terminate Petitioner's participation in Medicare. In deciding that HCFA was authorized to terminate Petitioner's participation, I make specific 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. HCFA has the burden of proving, by the preponderance of the evidence, that it was authorized to terminate Petitioner's participation in Medicare. Pages 5 - 8.

2. For HCFA to meet its burden of persuasion, it had to prove that Petitioner failed to comply with a condition of participation in Medicare. Pages 6 - 8.

3. HCFA proved, by the preponderance of the evidence, that Petitioner failed to comply with the condition of participation in Medicare governing acceptance of patients, plan of care, and medical supervision, set forth in 42 C.F.R. § 484.18. Pages 8 - 12.

4. HCFA was authorized to terminate Petitioner's participation in Medicare. Pages 3 - 14.

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[1] HCFA submitted a total of ten exhibits (HCFA Ex. 1 - 10). HCFA Ex. 1 - 8 were submitted initially, and HCFA Ex. 9 and 10 were submitted with HCFA's supplemental brief. Petitioner submitted a total of 15 exhibits (P. Ex. 1 - 15). I have admitted into evidence HCFA Ex. 1 - 10 and P. Ex. 1 - 15.

II. Discussion

A. Background

Petitioner is a home health agency, located in Baton Rouge, Louisiana. Under the Medicare program, a home health agency is a public agency or private organization which provides health care services to a patient on a visiting basis in a place of residence used by the patient as his or her home. Act, sections 1861(m), (o). A home health agency is primarily engaged in providing skilled nursing services and other therapeutic services. Act, section 1861(o). The services provided by a home health agency include nursing care, physical, occupational, or speech therapy, medical social services under the direction of a physician, medical supplies, and other services. Act, section 1861(m).

A home health agency that participates in Medicare is obligated to comply with the requirements of participation stated in the Act, and with the conditions of participation stated in applicable regulations. Regulations establishing the conditions of participation in Medicare for home health agencies are contained in 42 C.F.R. Part 484.

From January 10, 1994 through January 13, 1994, surveyors employed by the Louisiana Department of Health and Hospitals (Louisiana State agency) conducted an annual compliance survey of Petitioner on behalf of HCFA. The surveyors concluded that Petitioner was not complying with the condition of participation governing clinical records, contained in 42 C.F.R. § 484.48. HCFA Ex. 2. Petitioner submitted a plan of correction.[2]

On February 25, 1994, the Louisiana State agency resurveyed Petitioner. The surveyors found that Petitioner continued not to be in compliance with conditions of participation. The surveyors found that Petitioner was still not complying with the condition of participation governing clinical records. HCFA Ex. 3 at 6 - 8. They found also that Petitioner was not complying with the condition of participation governing home health aide services, contained in 42 C.F.R. § 484.36. Id. at 3 - 5.

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[2] It is unclear whether either the Louisiana State agency or HCFA found this plan of correction to be acceptable. In any event, neither Petitioner nor HCFA argues that Petitioner's relationship with HCFA is governed by the plan of correction.

On April 13, 1994, HCFA notified Petitioner that HCFA agreed with the findings made by the Louisiana State agency surveyors at the February 25, 1994 resurvey of Petitioner. HCFA Ex. 1. HCFA told Petitioner that it would terminate Petitioner's participation in Medicare, effective May 2, 1994. Id. HCFA told Petitioner that, if it was dissatisfied with the determination, it could request a hearing before an administrative law judge. Id. HCFA advised Petitioner that Petitioner might be able to avoid termination by correcting the deficiencies that the Louisiana State agency surveyors found at the February 25, 1994 resurvey. HCFA told Petitioner to notify HCFA immediately if Petitioner was able to attain compliance with all conditions of participation. Id.

On April 15, 1994, Petitioner notified HCFA that it had attained compliance with conditions of participation in Medicare.[3] HCFA Ex. 4. On April 22, 1994, Louisiana State agency surveyors conducted a second follow-up survey of Petitioner. HCFA Ex. 5. The purpose of this survey was to ascertain whether Petitioner had, in fact, attained compliance with conditions of participation.

The surveyors concluded that, notwithstanding Petitioner's assertion of compliance, Petitioner remained out of compliance with Medicare conditions of participation. The surveyors found that Petitioner still was not complying with the condition of participation governing clinical records stated in 42 C.F.R. § 484.48. HCFA Ex. 5 at 6 - 9. The surveyors found also that Petitioner was not complying with the condition of participation governing acceptance of patients, plan of care, and medical supervision stated in 42 C.F.R. § 484.18. Id. at 1 - 4. The surveyors did not find that Petitioner continued to fail to comply with the condition of participation governing home health aide services stated in 42 C.F.R. § 484.36.

B. Analysis of the law and the evidence

In question here is whether, as of April 22, 1994, Petitioner remained noncompliant with conditions of participation in Medicare. HCFA asserts that, as of that date, Petitioner was not complying with two conditions of participation, consisting of the condition of participation governing acceptance of patients, plan of care, and medical supervision stated in 42 C.F.R. § 484.18, and the condition governing clinical records stated in 42 C.F.R. § 484.48. I conclude that HCFA

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[3] Also, Petitioner requested a hearing.

proved, by a preponderance of the evidence, that Petitioner was not complying with the condition of participation governing acceptance of patients, plan of care, and medical supervision. I do not conclude that HCFA proved that Petitioner was not complying with the condition of participation governing clinical records.

I make no findings in this decision as to whether, as of the January 1994 survey, or as of the February 1994 resurvey, Petitioner failed to comply with conditions of participation in Medicare. It is not necessary for me to make findings as to Petitioner's compliance as of the dates of these surveys in order for me to decide this case. It is sufficient here for me to find that, as of April 22, 1994, Petitioner was not complying with a condition of participation in Medicare.

1. HCFA's burden of persuasion

The Secretary of the Department of Health and Human Services (Secretary) is authorized to terminate the participation of any provider, including a home health agency, where that provider has failed to comply substantially with the provisions of its provider agreement, with the provisions of the Act and applicable regulations, or with a mandated plan of corrective action. Act, section 1866(b)(2)(A). The Secretary has delegated to HCFA the authority to terminate a noncompliant provider's participation in Medicare.

A provider that is dissatisfied with a determination to terminate its participation in Medicare is entitled to a hearing. Act, section 1866(h)(1). A provider that requests a hearing is afforded the same hearing rights as are afforded to parties who are entitled to hearings under section 205(b) of the Act. Id.; see Act, section 205(b). Section 205(b) has been interpreted uniformly and often to confer a right to a de novo hearing on any party that is entitled to a hearing under that section.

In a hearing under section 205(b) of the Act as to the propriety of a determination to terminate a provider's participation in Medicare, HCFA has the burdens of coming forward with evidence to justify its determination to terminate, and of proving, by a preponderance of the evidence, that its determination is justified.[4] This conclusion is in accord with my decisions in Hospicio en el Hogar de Utuado, DAB CR371 at 6 - 14 (1995), in

[4] I refer to the burdens of coming forward with evidence and of proof as the burden of persuasion.

Hospicio en el Hogar de Lajas, DAB CR366 (1995), and in Arecibo Medical Hospice Care, DAB CR363 (1995).

HCFA has not asserted in this case that Petitioner has the burden of persuasion. Therefore, it is not necessary for me to reiterate in detail here the analysis I made in Utuado, Lajas, and Arecibo, which supports my conclusion that HCFA has the burden of persuasion. It is sufficient for me to state that both due process requirements and efficiency considerations support the conclusion that HCFA bears the burden of persuasion. Utuado, DAB CR371 at 6 - 7.

2. The elements of HCFA's burden of persuasion

In Utuado, I discussed in detail the elements of HCFA's burden of persuasion. Utuado, DAB CR371 at 10 - 14. In general, HCFA's burden of persuasion consists of three elements. First, HCFA must prove the existence of participation requirements with which a provider whose participation HCFA has terminated allegedly has not complied. Second, HCFA must establish facts showing that the provider has failed to comply with Medicare participation requirements. Finally, HCFA must prove that the provider's failure to comply with participation requirements is so substantial as to justify terminating that provider's participation in Medicare.

HCFA meets the first element of its burden of persuasion by identifying the specific language in the Act or in the regulations with which it alleges the provider is not in compliance. Where HCFA is relying on the plain meaning of language in the Act or a regulation, it only need identify that language. However, where HCFA is relying on an interpretation of language in the Act or a regulation which is not apparent from the face of the enactment, HCFA assumes two additional responsibilities. It must prove that its interpretation is reasonable, and that the provider is aware of its obligation to comply with this interpretation. Utuado, DAB CR371 at 10 - 11.

HCFA meets the second element of its burden of persuasion by establishing by a preponderance of the evidence the facts which HCFA alleges prove a provider's failure to comply with a participation requirement. That evidence may consist of the testimony of surveyors as to the findings that they made when they surveyed the provider. It may consist also of supporting materials, such as patients' records, obtained by the surveyors from the provider. Utuado, DAB CR371 at 12.

HCFA meets the final element of its burden of persuasion by proving, also by a preponderance of the evidence, that a provider's failure to comply with participation requirements is so substantial as to justify terminating the provider's participation in Medicare. The test for substantial noncompliance is established in 42 C.F.R. § 488.24(a). Under that regulation, a provider will be found to have failed to comply with conditions of participation in Medicare where its deficiencies are of such character as to substantially limit its capacity to render adequate care or where they adversely affect the health and safety of patients.

There are circumstances where a substantial failure to comply with participation requirements may be established conclusively by the facts proving noncompliance. Many regulations state explicitly the conditions of participation which govern a provider's participation in Medicare. A regulation's statement of a condition of participation is a finding by the Secretary that a failure by a provider to comply with that condition constitutes substantial noncompliance with Medicare participation requirements.

Where a regulation describes explicitly a condition of participation, it is reasonable to conclude that facts establishing a failure to comply with that condition may be deemed to prove substantial noncompliance within the meaning of 42 C.F.R. § 488.24(a). If HCFA proves that a provider has not complied with an explicitly stated condition of participation, HCFA is not required to offer additional proof of the substantiality of that noncompliance, because the noncompliance is deemed to be substantial.

However, there also may be circumstances where the impact of a deficiency on a provider's ability to provide care or on the health and safety of patients is not evident from the facts establishing the existence of the deficiency. A finding that a provider has not complied with a condition of participation does not always flow automatically from a finding that a provider has not complied with a Medicare participation requirement. For example, a finding of substantial noncompliance is not an automatic consequence of proof that a provider has not complied with a <u>standard</u> of participation set forth in a regulation as a lesser included element of a condition of participation.

In that circumstance, HCFA may have to prove not only the existence of a deficiency, but may have to offer additional evidence to prove that the deficiency is

substantial within the meaning of 42 C.F.R. § 488.24(a) and the Act. Such evidence may consist of evidence which establishes the impact of the deficiency on the provider's ability to provide care or on the health and safety of patients. In proving impact, expert opinion as to the likely impact of the deficiency on the capacity of the provider to provide care may be important. Utuado, DAB CR371 at 13 - 14.

3. Analysis of the parties' contentions, arguments, and the evidence

HCFA asserts that, as of April 22, 1994, Petitioner was not complying with two conditions of participation in Medicare as stated in 42 C.F.R. §§ 484.18 and 484.48. I analyze HCFA's and Petitioner's arguments and the evidence offered by the parties relevant to these two conditions of participation pursuant to the elements of HCFA's burden of persuasion which I described at Part II.B.2. of this decision.

a. Petitioner's alleged failure to comply with the condition of participation governing acceptance of patients, plan of care, and medical supervision stated in 42 C.F.R. § 484.18

The condition of participation contained in 42 C.F.R. § 484.18 includes the requirement that care provided to each patient by a home health agency:

> follows a written plan of care established and periodically reviewed by a doctor of medicine, osteopathy, or podiatric medicine.

The plain requirement of the condition of participation stated in 42 C.F.R § 484.18 is that a home health agency must provide care to each of its patients in accord with the directions established by the plan of care that has been created for that patient.

The preponderance of the evidence in this case is that, as of the April 22, 1994 resurvey, Petitioner was not providing care to patients consistent with this condition. HCFA proved that, in two instances, Petitioner failed to assure that tests and treatments were provided to patients in accord with explicit instructions contained in plans of care which had been created to direct the care to be provided to those patients.

The evidence which HCFA offered to prove that Petitioner failed to comply with the condition consists of the report of the surveyors which was generated at the April 22, 1994 resurvey, along with the affidavit of Erin Rabalais, one of the two surveyors who participated in the resurvey. HCFA Ex. 5, 9.

This evidence establishes that two of the patients whose records the surveyors examined were not receiving treatment according to the plans of care that had been created for those patients. In the case of one patient, designated as patient # 8 in the survey report, the plan of care directed that a SMAC blood test be performed monthly. HCFA Ex. 5 at 1. However, treatment records of patient # 8 contained no documentation that SMAC tests had been administered to that patient. Id. at 1 - 2.

In the case of patient # 4, the plan of care directed that the patient's blood pressure be measured in both arms at each visit by a skilled nurse. HCFA Ex. 5 at 2. The plan of care directed further that the patient's weight be monitored. Id. However, treatment records for patient # 4 contained no documentation that the patient's blood pressure and weight had been recorded. Id.

Petitioner did not rebut this evidence. Petitioner observes that HCFA has not produced supporting documentation from Ms. Rabalais that could be used to test the veracity of her findings. Petitioner argues that, in the absence of such documentation, there remains a serious question as to the truthfulness of the surveyors' findings.[5] However, Petitioner has not denied directly the findings made by the surveyors at the April 22, 1994 resurvey. Furthermore, Petitioner has not offered any evidence that would refute those findings. For example, Petitioner has not offered as evidence any of the treatment records of patients # 4 or # 8, from which Petitioner might have argued that either of the patients had received treatments in accord with his or her plan of care.

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[5] Much of Petitioner's evidence is offered to show that the findings made by the Louisiana State agency surveyors at the first compliance survey of Petitioner, conducted in January 1994, were inconsistent with or not supported by documentation made by the surveyors in conjunction with that survey. See P. Ex. 1 - 15. It is unnecessary for me to address the purportedly unsupported findings or the allegedly inconsistent documentation here, because I make no findings in this decision based on that January 1994 survey.

Petitioner's failure to provide care in accord with the directions contained in patients' plans of care is deemed to be a substantial failure to comply with participation requirements. The conclusion that Petitioner's deficiency is substantial is evident in this case because Petitioner's failure to provide care as directed by its patients' plans of care constitutes a failure to comply with the explicit requirements of the condition of participation stated in 42 C.F.R. § 484.18. It is not necessary for HCFA to offer additional evidence to prove that Petitioner's failure to provide care to its patients in accord with the directions contained in these patients' plans of care substantially limits Petitioner's capacity to render adequate care or adversely affects the health and safety of patients.

HCFA argues also that the facts discovered by the surveyors at the April 22, 1994 resurvey of Petitioner establish a failure to comply with a standard of participation contained in 42 C.F.R. § 484.18(a). This standard requires, among other things, that each patient's plan of care state the frequency of visits that a patient will be receiving by skilled nurses or other personnel. HCFA asserts that the evidence proves that two patients, patient # 8 and patient # 1, received skilled nursing visits more frequently than prescribed by their plans of care. HCFA Ex. 5 at 2 - 3. According to HCFA, one patient, patient # 5, received skilled nursing visits less frequently than prescribed by that patient's plan of care. Id. at 3.

This evidence has not been rebutted by Petitioner. However, I do not find that it establishes a failure by Petitioner to comply with the standard contained in 42 C.F.R. § 484.18(a). That standard addresses only what must be contained within a patient's plan of care. It does not address the issue of compliance by a home health agency with the terms of a plan of care. Thus, Petitioner's failure to provide visits to patients by skilled nurses in accordance with the schedule of visits established by the patients' plans of care is not a failure to comply with the requirement that the plans of care state the frequency of nurses' visits. On the other hand, the evidence does comprise additional evidence of Petitioner's failure to comply with the overall condition stated in 42 C.F.R. § 484.18, inasmuch as it proves additional failures by Petitioner to provide care to patients in accord with the directions contained in these patients' plans of care.

HCFA argues also that Petitioner failed to comply with the standard contained in 42 C.F.R. § 484.18(c). That standard requires, among other things, that a nurse or therapist who provides care on behalf of a home health agency immediately record and sign oral treatment orders that the nurse or therapist receives from a physician and obtain the physician's countersignature. HCFA asserts that the evidence proves that Petitioner's staff failed to obtain a countersignature from a physician for an oral treatment order prescribing that insulin be administered to patient # 2. HCFA Ex. 5 at 3 - 4. HCFA asserts additionally that Petitioner's staff failed to obtain a countersignature from a physician for an oral treatment order from a physician for removal of a catheter from patient # 10. Id. at 4.

This evidence has not been rebutted by Petitioner, and I find that it substantiates HCFA's argument that Petitioner failed to comply with the standard contained in 42 C.F.R. § 484.18(c). However, I do not conclude that this evidence comprises additional proof that Petitioner failed to comply with the condition stated in 42 C.F.R. § 484.18. In this instance, proof that Petitioner failed to comply with a standard contained in a regulation does not lead automatically to a conclusion that Petitioner failed to comply with a condition of participation. In order to prove that Petitioner's failure to comply with the standard comprises also a failure to comply with the overall condition stated in 42 C.F.R. § 484.18, HCFA must prove that the failure to comply is substantial within the meaning of 42 C.F.R. § 488.24(a).

I am not persuaded from the evidence offered by HCFA that it met its burden of persuasion in this instance. To support its assertion that deficiencies manifested by Petitioner, including the failure to comply with the requirements of 42 C.F.R § 484.18(c), were substantial, HCFA offered the affidavit of Andrew Roger Perez. HCFA Ex. 10. Mr. Perez is the Associate Regional Administrator for the Division of Health Standards and Quality in the Dallas Regional Office of HCFA. Id. at 1. I do not find Mr. Perez to be qualified to render expert opinion as to whether Petitioner failed substantially to comply with Medicare participation requirements. Mr. Perez has not been shown by HCFA to possess any training or skills that would qualify him to provide expert opinion as to the impact of deficiencies in Petitioner's operations on its ability to provide care. Indeed, Mr. Perez admits that he formed his opinion from the advice provided to him by unnamed health care professionals. Id. at 1 - 2.

HCFA offers additionally the opinion of Ms. Rabalais that the deficiencies manifested by Petitioner are substantial. HCFA Ex. 9 at 8. Ms. Rabalais is a registered nurse, and she might possess the professional training and expertise to testify authoritatively concerning whether some of the deficiencies manifested by Petitioner are substantial. Id. at 1. However, I am not persuaded by Ms. Rabalais' affidavit that the deficiencies manifested by Petitioner are substantial. Her opinion is stated as a bare conclusion, without foundation. It is unclear from her affidavit how she formed her opinion. Moreover, Ms. Rabalais states her conclusion in such a sweeping fashion that it may encompass areas beyond her professional expertise, including judgments that could be made reasonably only by a physician.

b. Petitioner's alleged failure to comply with the condition of participation governing clinical records stated in 42 C.F.R. § 484.48

The condition of participation which governs the duty of home health agencies to maintain clinical records for their patients states:

> A clinical record containing pertinent past and current findings in accordance with accepted professional standards is maintained for every patient receiving home health services. In addition to the plan of care, the record contains appropriate identifying information; name of physician; drug, dietary, treatment, and activity orders; signed and dated clinical and progress notes; copies of summary reports sent to the attending physician; and a discharge summary.

42 C.F.R. § 484.48.

Central to application of this section is the language in the first sentence which requires that a home health agency maintain its clinical records in accordance with "accepted professional standards." The term "accepted professional standards" is not defined. However, interpretation of this term is critical because the condition of participation governing clinical records in effect states that, in order to evaluate a home health agency's compliance with the condition, that provider's recordkeeping must be measured against "accepted professional standards."

It is evident from the face of the regulation that the Secretary has determined that there exist accepted professional standards which govern recordkeeping by home health agencies. HCFA, as the Secretary's delegate, has the authority to identify those standards and to hold home health agencies accountable to them.

There may be recordkeeping standards that are professionally recognized by home health agencies that are so widely known that HCFA need not publish them in order to put home health agencies on notice that they are required to comply with them. If so, then HCFA's burden of persuasion in a case involving an alleged failure by a home health agency to comply with these standards is to identify them, and to prove, by a preponderance of the evidence, that they are in fact widely known and accepted.

HCFA asserts that Petitioner failed to comply with the condition governing clinical records in several respects. In the case of patient # 1, HCFA contends that Petitioner failed to maintain records which documented the administration of insulin to the patient as prescribed by the patient's physician. HCFA Ex. 5 at 7. In the case of patient # 2, HCFA contends that the patient's records contain an inappropriate diagnosis of "heart trouble." Furthermore, according to HCFA, the medications listed for this patient include a medication whose name does not appear in the standard texts describing medications, nor do the patient's records describe the dosage, frequency, or route of administration of the medication. Id. at 7 - 8.

HCFA asserts that the records of patient # 4 contain reference to a medication whose name cannot be found in standard texts describing medications. HCFA Ex. 5 at 8. With respect to patient # 9, HCFA contends that the patient's record contains erasures and alterations. Id. HCFA asserts that the records of patient # 10 contain an inappropriate diagnosis of "bladder problems." Id. HCFA contends that, as with other records, the record of this patient contains a reference to a medication whose name does not appear in standard texts describing medications. Id. at 8 - 9.

Petitioner has not rebutted the facts alleged by HCFA. I conclude that HCFA proved its fact assertions by the preponderance of the evidence. However, I do not find that these facts prove that Petitioner failed to comply with the condition stated in 42 C.F.R. § 484.48.

HCFA has offered no evidence to establish the accepted professional standards which govern recordkeeping by home health agencies. HCFA assumes the conclusion that the facts identified by the surveyors prove that Petitioner failed to keep records in accord with accepted professional standards without ever identifying those standards. There is, thus, a critical gap in the evidence offered by HCFA concerning Petitioner's alleged failure to comply with 42 C.F.R. § 484.48.

I am not suggesting that the recordkeeping practices manifested by Petitioner may not have constituted a failure to comply with the condition governing clinical records. However, it is HCFA's burden to establish the criteria with which Petitioner is obligated to comply. HCFA has not met that burden here.

4. HCFA's authority to terminate Petitioner's participation in Medicare

HCFA proved by a preponderance of the evidence that, as of April 22, 1994, Petitioner was not complying with the condition of participation in Medicare stated in 42 C.F.R. § 484.18. That noncompliance is sufficient basis for HCFA to terminate Petitioner's participation in Medicare.

The Act provides that HCFA may terminate a provider's participation in Medicare where that provider is not complying substantially with Medicare participation requirements. Act, section 1866(b)(2)(A). As I hold above, failure by a provider to comply with a condition of participation is substantial noncompliance within the meaning of the Act. Furthermore, regulations provide explicitly that HCFA may terminate a provider's participation in Medicare where the provider is not complying with a condition of participation. 42 C.F.R. § 489.53(a)(3).

III. Conclusion

HCFA proved that, as of April 22, 1994, Petitioner was not complying with the condition of participation stated in 42 C.F.R. § 484.18. HCFA was authorized to terminate Petitioner's participation in Medicare. I therefore sustain HCFA's determination to terminate Petitioner's participation in Medicare.

/s/

Steven T. Kessel
Administrative Law Judge