Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Temple Community Hospital,	)	Date: Aug 7, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-297
	)	Decision No. CR385
Health Care Financing Administration.	)	
	)	

DECISION

In this case, I conclude that I am without authority to hear and decide Petitioner's assertion that the Health Care Financing Administration (HCFA) improperly refused to waive a requirement for participation in the Medicare program. I conclude also that I do not have the discretion to provide Petitioner with a hearing on this issue. Finally, I conclude that Petitioner withdrew its request for a hearing on the issue of whether HCFA improperly declined to certify Petitioner as a skilled nursing facility (SNF) prior to December 6, 1991. I am, therefore, without authority to hear this issue. Based on these conclusions, I dismiss Petitioner's request for a hearing.

I. Undisputed material facts, summary of arguments and procedural history

A. Facts

These facts are material and are undisputed.[1] In 1991, Petitioner applied to HCFA to become certified to participate in the Medicare program as an SNF.

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[1] In reciting the undisputed material facts, I make no citations to exhibits, as I have received none into evidence. My recitation of the facts is based entirely on the parties' representations, contained in their respective briefs. I do not consider it necessary to burden the parties with the obligation to offer exhibits to support the facts which they aver to be relevant where, as in this case, none of the facts are disputed.

Petitioner applied to participate as a 20-bed SNF. In April 1991, Petitioner was surveyed on behalf of HCFA by the Los Angeles County Department of Health Services (State survey agency) in order to determine whether Petitioner met the applicable requirements to participate as an SNF in the Medicare program.

The State survey agency concluded that Petitioner did not comply with Medicare participation requirements. The deficiencies identified by the State survey agency included failures to comply with certain requirements that an SNF must meet in order to be certified for participation in Medicare (level A requirements). The deficiencies that were identified by the State survey agency included the finding that Petitioner failed to comply with the requirements of 42 C.F.R. § 483.70, which governs the physical environment of a participating SNF. Specifically, the State survey agency found that several of the rooms which Petitioner proposed to utilize as residential facilities for its patients failed to meet the minimum square footage requirements contained in 42 C.F.R. § 483.70. On May 30, 1991, HCFA determined that Petitioner was not eligible to participate in Medicare, based on the findings made by the State survey agency.

Petitioner then submitted to HCFA a plan of correction which addressed most of the deficiencies that the State survey agency had identified. However, HCFA concluded that Petitioner was not eligible to submit a plan of correction to HCFA, inasmuch as some of the deficiencies identified by the State survey agency were failures to meet level A requirements.[2] Petitioner requested also that HCFA grant it a waiver or variance from the residential room size requirements. HCFA denied this request. Petitioner filed a request for a hearing on HCFA's determination that Petitioner was not eligible to participate in Medicare and on HCFA's refusal to waive the minimum room size requirement.

Petitioner then submitted to HCFA a new application for certification as an SNF. In its new application, Petitioner applied for certification as an 11-bed SNF, thus eliminating from consideration the issue of whether

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[2] Under applicable regulations, an applicant for certification as an SNF may file a plan of correction to address a failure to meet a level B requirement for participation. 42 C.F.R. § 488.28. A level B requirement is a standard which describes some component or element of a level A requirement. An applicant for certification as an SNF is not afforded the opportunity to file a plan of correction to address a failure to meet a level A requirement. 42 C.F.R. §§ 488.24, 488.28.

certain of its residential rooms failed to meet the minimum square footage requirement.[3] In October 1991, the State survey agency conducted a second survey of Petitioner's facility. The State survey agency concluded that Petitioner continued to be deficient in complying with some level B requirements for participation in Medicare, but that Petitioner had corrected its prior noncompliance with level A requirements.

Petitioner submitted a plan of correction to address the level B deficiencies found in the October 1991 survey. HCFA accepted this plan of correction, and Petitioner was certified to participate in Medicare as an 11-bed SNF, effective December 6, 1991.

B. Summary of arguments and procedural history

Petitioner continues to assert that HCFA improperly denied its waiver request. Petitioner argues that I should afford it a hearing to determine whether the request was denied improperly, and to decide whether the room size requirement should be waived. Petitioner has withdrawn its assertions that HCFA concluded incorrectly that level A deficiencies existed as of the April 1991 survey, and it is not asserting now that it was improperly denied the opportunity to submit a plan of correction to address these deficiencies. In sum, Petitioner accepts the certification date of December 6, 1991, except that it argues that, effective that date, HCFA should have waived the room size requirement and approved it to participate in Medicare as a 20-bed SNF.

HCFA asserts that I am without authority to hear and decide the issue of whether it properly refused to waive the room size requirements. HCFA asserts also that, notwithstanding that Petitioner no longer is challenging HCFA's refusal to certify Petitioner as an SNF on May 30, 1991, the issues of the propriety of HCFA's May 1991 determination to deny Petitioner's first application, and HCFA's subsequent refusal to accept a plan of correction from Petitioner, remain before me and I ought to hear and decide these issues.

This case was originally assigned to an administrative law judge in the Office of Hearings and Appeals of the Social Security Administration. Effective October 1, 1993, the Secretary of the Department of Health and Human

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[3] Petitioner did so by converting several of its residential rooms from proposed two-bed residential rooms to proposed single-bed residential rooms. The reconfigured rooms met the square footage requirement for single-bed residential rooms.

Services (Secretary) redelegated the authority to hear and decide administrative cases involving HCFA to administrative law judges of the Department of Health and Human Services Departmental Appeals Board (DAB). On March 4, 1994, this case was reassigned to Administrative Law Judge Charles E. Stratton of the DAB. At the request of the parties, Judge Stratton stayed the DAB proceedings in the case.

The case was reassigned to me in late 1994, after the death of Judge Stratton. In December 1994, I was advised by Petitioner that it desired that the stay be ended and that the issues in the case be heard and decided. I ended the stay. Shortly thereafter, I directed the parties to file briefs on questions of law. The parties filed briefs and reply briefs. On June 20, 1995, I held an oral argument on the issues by telephone. My decision in this case is based on the relevant law, the undisputed facts, and the parties' arguments.

II. Issues

The issues in this case are whether:

1. Petitioner has a right to a hearing as to whether HCFA improperly refused to waive the minimum room size requirement.

2. I have the discretion to provide Petitioner with a hearing as to whether HCFA improperly refused to waive the minimum room size requirement.

3. I may hear and decide whether HCFA properly declined to certify Petitioner as an SNF in May 1991.

III. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law. My findings of fact are based on the undisputed material facts which I recite at Part I.A. of this decision. After each finding or conclusion, I cite to the page or pages of this decision at which I discuss the finding or conclusion in detail.

1. HCFA's determination not to waive the minimum room size requirement is not an initial determination from which Petitioner has a right to a hearing. Pages 5 - 8.

2. I do not have the discretion to provide Petitioner with a hearing on HCFA's determination not to waive the minimum room size requirement. Pages 7 - 8.

3. Petitioner withdrew its contention that HCFA improperly declined to certify Petitioner as an SNF in May 1991. Petitioner accepts HCFA's determination to certify Petitioner as an SNF effective December 6, 1991, except that Petitioner argues that, as of that date, it should have been certified as a 20-bed SNF and not as an 11-bed SNF. Page 9.

4. I do not have the authority to hear the issue of whether HCFA properly declined to certify Petitioner as an SNF in May 1991. Pages 9 - 10.

IV. Discussion

A. Petitioner's request that I hear the issue of whether HCFA improperly declined to waive the minimum room size requirement

A determination by HCFA not to waive a Medicare participation requirement is not an initial determination from which an applicant for participation in Medicare has a right to a hearing. Petitioner has no right to a hearing on HCFA's determination not to waive the minimum room size requirement applicable to SNFs. I do not have the authority to hear the issue of whether HCFA improperly declined to waive the minimum room size requirement.

An applicant for participation in Medicare does not enjoy a general right to a hearing from every determination by HCFA with which that applicant might not be satisfied. An applicant for participation in Medicare has only limited hearing rights. The Social Security Act (Act) essentially gives an applicant for participation a right to a hearing only on HCFA's determination that the applicant does not meet the participation requirements contained in the Act, regulations, or a participation agreement. See Social Security Act, sections 1861, 1866(b)(2), and 1866(h)(1).

This limited right to a hearing is stated also in regulations. Under the regulations, an applicant for participation as a provider is entitled to a hearing only from an initial determination by HCFA that it does not

meet participation requirements. 42 C.F.R. §§ 498.5(a)(1), (2).[4]

Petitioner argues that it has a right to be heard on its assertion that HCFA improperly declined to waive the room size requirement. It asserts that HCFA's determination not to waive the room size requirement is a determination by HCFA that Petitioner does not meet participation requirements. I am not persuaded by this argument.

A determination by HCFA not to waive a participation requirement is a determination which addresses an issue other than the question of whether a provider meets a participation requirement. It is a discretionary determination by HCFA to permit an applicant to participate in Medicare even though the applicant did not meet a participation requirement.

The dichotomy between a determination by HCFA that a provider does not meet a participation requirement and a determination by HCFA to certify a provider notwithstanding that provider's failure to meet a participation requirement is stated in the regulations governing participation. The regulation which governs the size of residents' rooms in SNFs provides that a determination by HCFA to waive the room size requirement is an act of discretion to allow a provider to participate even though the provider fails to meet a participation requirement, and not a determination by HCFA that the applicant meets the requirement. It states that:

> HCFA . . . may permit variations in requirements . . . relating to rooms in individual cases when the facility demonstrates in writing that the variations --
>
> (i) Are in accordance with the special needs of the residents; and
>
> (ii) Will not adversely affect residents' health and safety.

42 C.F.R. § 483.70(d)(3) (emphasis added).

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[4] As an interim step before being entitled to a hearing, a prospective provider that is dissatisfied with an initial determination by HCFA that it does not qualify as a provider must first request reconsideration of the initial determination from HCFA, and HCFA must issue a reconsidered determination. Id. Thus, technically, a prospective provider's entitlement to a hearing is from a reconsidered determination. Id.

The regulation which generally governs approvals by HCFA of applications for participation in Medicare states also that a waiver determination is a discretionary act to allow an applicant to participate despite that applicant's failure to satisfy a participation requirement, and not a determination as to whether an applicant meets participation requirements. The regulation provides that, where an applicant for participation is found not to have met all participation requirements, HCFA will certify that provider for participation on the earlier of the following dates:

> (1) The date on which the provider meets all requirements.
>
> (2) The date on which the provider submits a correction plan acceptable to HCFA or an approvable waiver request, or both.

42 C.F.R. § 489.13(b).

There is nothing about the use of the term "waiver" in 42 C.F.R. § 489.13(b) to suggest that the Secretary intended that it be given something other than its ordinary meaning. "Waiver" is defined to mean "the act of intentionally relinquishing or abandoning a known right, claim, or privilege." Webster's New Collegiate Dictionary, 1977 Ed. In the context of a certification by HCFA, "waiver" means HCFA's discretionary determination to relinquish its right to disapprove an application.

Petitioner argues that I would be denying it due process by not giving it a hearing as to the propriety of HCFA's determination not to waive the room size requirement. However, Petitioner's due process rights, including its limited hearing rights, are defined by the Act and regulations. I am not denying Petitioner due process in concluding that it has no right to a hearing, inasmuch as neither the Act nor regulations give Petitioner a right to a hearing on HCFA's determination not to waive the room size requirement.

I conclude additionally that I do not have the discretionary authority to give Petitioner a hearing where it has no right to request a hearing on a determination by HCFA. My authority to provide a hearing in any case is delegated to me by the Secretary. I have no authority to conduct a hearing in the absence of a delegation of authority which is either expressly made by the Secretary or implied in the regulations. The regulations which govern hearings by administrative law judges in cases involving determinations by HCFA are in 42 C.F.R. Part 498. As I find above, the regulations

give an applicant for participation as a provider a right to a hearing only on a determination by HCFA that the applicant does not meet participation requirements. The Part 498 regulations neither state nor suggest that I have discretion to give an applicant a hearing on some other issue, including the issue of whether a waiver ought to have been granted.[5]

Petitioner argues that its challenge to HCFA's determination not to waive the room size requirements is supported by a proposed decision rendered by a State administrative law judge in a hearing before the State of California Department of Health Services, Temple Community Hospital, Audit Appeal No. PS2-0791-046 (July 19, 1991).[6] In this decision, the State administrative law judge concluded that Petitioner should have been granted a waiver of the room size requirement by the State survey agency, for purposes of certification under the California Medicaid program (Medi-Cal). Id.

I do not find the proposed decision to be persuasive. The proposed decision does not address the issue of whether an applicant for participation in Medicare is entitled to a hearing on a determination by HCFA not to grant a waiver from a Medicare participation requirement. The administrative law judge who heard the case evidently assumed that he had authority to consider the issue of whether the State survey agency ought to have granted a waiver to Petitioner from the room size requirement as it pertained to Petitioner's certification under Medi-Cal. It appears from that decision that the administrative law judge assumed that he had the authority to hear that issue without analyzing it or making any findings on it. Indeed, it is not clear that the parties to the proceeding even addressed that issue to the State administrative law judge.

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[5] My conclusion on this question of jurisdiction is in accord with that reached by Administrative Law Judge Mimi Hwang Leahy in Piedmont Family Clinic, DAB CR355, at 13 (1995).

[6] The proposed decision is an attachment to Petitioner's initial brief. Although Petitioner apparently did not offer the decision as an exhibit, HCFA objected to its admission into evidence, contending that it contains hearsay. HCFA's reply brief at 1 - 7. The fact that an exhibit might contain hearsay would not preclude me from admitting it into evidence. However, I am not admitting the proposed decision into evidence. It is being offered by Petitioner not as evidence, but as a non-binding precedent on the merits of the waiver issue.

B. HCFA's request that I hear and decide the propriety of its determination in May 1991 not to certify Petitioner as an SNF

HCFA asserts that the issue before me is whether it acted reasonably on May 30, 1991 in denying Petitioner's request for certification. However, Petitioner is no longer asserting that it should have been certified as an SNF prior to December 6, 1991. Transcript of June 20, 1995 oral argument (Tr.) at 4 - 5.[7] In no longer contesting HCFA's determinations, except as to the number of beds that were certified by HCFA effective December 6, 1991, Petitioner has effectively withdrawn its challenge to HCFA's May 1991 determination that Petitioner manifested level A deficiencies.[8] HCFA argues that I should hear and decide the issue of whether it properly declined to certify Petitioner in May 1991 despite the fact that Petitioner has abandoned that issue.

Both the Act and the Part 498 regulations governing administrative hearings concerning determinations by HCFA provide applicants for participation and, in enumerated circumstances, providers and suppliers, hearing rights only if they are dissatisfied with determinations by HCFA. Neither the Act nor regulations provide HCFA with the right to request an administrative hearing. Petitioner's withdrawal of its assertions concerning HCFA's May 1991 determination and HCFA's subsequent refusal to consider Petitioner's plan of correction is tantamount to a withdrawal of its request for a hearing concerning those issues. If Petitioner no longer requests that I hear these issues then the issues are no longer before me. HCFA has no right to insist that I

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[7] However, Petitioner continues to assert that, as of December 6, 1991, HCFA should have waived the requirement for residents' room size and certified Petitioner as a 20-bed SNF, rather than as an 11-bed SNF.

[8] It is unclear that Petitioner requested a hearing concerning HCFA's refusal to consider a plan of correction from Petitioner addressing the level A deficiencies on which HCFA based its May 1991 determination not to certify Petitioner as an SNF. However, by accepting December 6, 1991 as the certification date, Petitioner has effectively abandoned that issue to the extent it raised it. I note, furthermore, that, under applicable regulations, HCFA is not required to afford an applicant the opportunity to submit a plan of correction to address level A or condition-level deficiencies. See 42 C.F.R. § 488.28.

hear these issues if Petitioner no longer requests me to hear them.[9]

V. Conclusion

I conclude that there exists no issue in this case that I have authority to hear and decide. Therefore, I dismiss Petitioner's request for a hearing.

/s/

Steven T. Kessel
Administrative Law Judge

[9] Furthermore, I am at a total loss to explain why HCFA would want me to hear these issues. It would seem that HCFA stands to gain nothing by my hearing these issues. In its initial brief, HCFA seemed to suggest that it wanted the issues heard because it was unclear that Petitioner had abandoned them. However, Petitioner made it clear, both in its reply brief, and at the oral argument which I held on June 20, 1995, that it was no longer pursuing the issues. At the oral argument, HCFA continued to assert that I should hear these issues. Tr. at 5 - 9. But it offered no explanation as to why I should hear them.