

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

<hr/>)	
In the Case of:)	
)	
Arcadia Acres, Inc.)	Date: June 26, 1996
)	
Petitioner,)	
)	
- v. -)	Docket No. C-96-160
)	Decision No. CR424
Health Care Financing)	
Administration.)	
<hr/>)	

DECISION

The threshold issue before me is whether Arcadia Acres, Inc. (Arcadia) has a right to an evidentiary hearing on the merits of the Health Care Financing Administration's (HCFA) March 4, 1996 determination that Arcadia was not in substantial compliance with federal requirements for nursing homes participating in the Medicare and Medicaid programs when it was surveyed on November 21, 1995 and January 18, 1996.

HCFA moved to dismiss Arcadia's hearing request¹ on the basis that, as Arcadia was apprised in a separate notice issued by HCFA, no remedy was in fact imposed against Arcadia based on those survey results. Even though HCFA had notified Arcadia of

¹ The parties filed their submissions in accordance with the schedule I established. Order and Schedule for Filing Briefs and Documentary Evidence (April 25, 1996). Herein, I will refer to HCFA's Motion to Dismiss as "HCFA Motion," to Arcadia's Memorandum in Opposition to Respondent's Motion to Dismiss as "Arcadia Response," and to HCFA's Reply to Petitioner's Memorandum in Opposition to HCFA's Motion to Dismiss as "HCFA Reply."

I have accepted into the record all of the supporting evidence submitted by each party for the limited purpose of ruling on HCFA's Motion. However, I have re-marked the exhibits to conform to the requirements referenced in my Order of April 25, 1996. Therefore, I have redesignated what was previously marked by Arcadia as its Exhibits A through E as Arcadia's Exhibits (Ex.) 1 through 5. I have redesignated what was previously marked by HCFA as its Attachments I through V as HCFA Ex. 1 through 5.

the imposition of remedies by letter dated March 4, 1996, HCFA later changed its mind and informed Arcadia by letter dated April 1, 1996, that HCFA was not imposing any remedy against Arcadia. Citing 42 C.F.R. § 498.3(b)(12), HCFA argued that, as a matter of law, Arcadia has no right to an administrative hearing because a hearing to contest HCFA's findings of deficiencies is available only if HCFA has actually taken at least one of the enforcement actions specified by regulation. HCFA Reply, at 8 - 11.

In its opposition to HCFA's motion, Arcadia contended that HCFA's findings of deficiencies will have prospective consequences for the facility, such as impacting on the amount of future penalties HCFA might impose. Arcadia contended also that there are current consequences of HCFA's findings, such as forcing Arcadia to make HCFA's findings of deficiencies available to its residents. According to Arcadia: 1) a regulatory equivalent of a "hit and run" has occurred (Arcadia Response, at 1); 2) HCFA is seeking to "wash its hands" of the matter after the surveying agency has "done wrong" (*id.* at 7); 3) the procedural due process rights of Arcadia will be left "without a guardian" if HCFA's motion is granted (*id.* at 9); 4) Arcadia has been subjected to "administrative arrest" and "punishment" in having had to undergo surveys and take follow-up actions "to free itself of absurd deficiencies" (*id.* at 9 - 10); and 5) Arcadia has been "buffeted by the winds of . . . surveys without the shelter of a hearing" (*id.* at 10). Arcadia asked that we proceed to a hearing on the findings of deficiencies in order to protect against "injustice" resulting from unjust and inadequate survey results (*id.* at 1) and because, "[i]f not in the instant appeal, where else will Arcadia Acres have a forum?" (*id.* at 9).²

DISCUSSION

I have analyzed the parties' arguments, legal authorities, and supporting evidence under two issues:

- a) whether HCFA's March 4, 1996 notice letter, if considered alone, contained a determination which entitled Arcadia to a hearing before me;
- and

² Under the facts of this case, I do not find it necessary to decide the hypothetical question of whether Arcadia will become entitled to a hearing under the regulations on the issue of its noncompliance if, in the future, remedies are actually imposed by HCFA in reliance upon the prior unadjudicated findings of noncompliance issued by HCFA. However, I note that my legal interpretations applicable to the present facts would permit Arcadia to obtain a hearing in this forum on the merits of any past unadjudicated findings of noncompliance if and when HCFA relies on them in the future to impose specified remedies against Arcadia.

b) whether Arcadia has a right to a hearing based on HCFA's March 4, 1996 notice letter, notwithstanding HCFA's subsequent decision contained in its April 1, 1996 notice letter that no remedy would be imposed against Arcadia.

Having concluded that the first issue must be answered in the affirmative and the second issue must be answered in the negative, I grant HCFA's Motion.

I agree with HCFA that a health care provider's right to a hearing arises solely under HCFA's regulations. I find that the regulation codified at 42 C.F.R. § 498.3(b)(12) is dispositive of the issues before me. As relevant to the facts of this case, the regulation makes applicable the administrative hearing procedures only if HCFA has made an initial determination on the following matters:

the finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406 of this chapter....

42 C.F.R. § 498.3(b)(12).

Arcadia is not entitled to a hearing in this case because, according to the April 1, 1996 notice letter, HCFA has decided to impose no enforcement action specified in 42 C.F.R. § 488.406. The regulation at 42 C.F.R. § 498.3(b)(12) states in unambiguous terms that, absent a finding of noncompliance leading to the imposition of enforcement actions, HCFA's determination is not subject to review under 42 C.F.R. Part 498.

Even if the meaning of "leading to" might appear ambiguous if read in isolation, the Secretary's comments in promulgating 42 C.F.R. § 498.3(b)(12) give clear meaning to the phrase "leading to." Specifically, in response to public comments on the enforcement regulations as proposed, the Secretary explicitly disavowed the intent to make every finding of noncompliance appealable:

Comment: Several commenters wanted a right to appeal all deficiencies even if no remedy was imposed.

Response: We are not accepting this suggestion because if no remedy is imposed the provider has suffered no injury calling for an appeal....

59 Fed. Reg. 56158 (1994) (emphasis added).

Moreover, the limitation on hearing rights imposed by 42 C.F.R. § 498.3(b)(12) is entirely consistent with the prohibition against an appeal of "the finding that a provider . . . determined to be in compliance with the conditions of participation . . . has

deficiencies." 42 C.F.R. § 498.3(d)(1).³ There is no dispute that Arcadia has continued to participate in the Medicare and Medicaid programs as a provider of health care services notwithstanding HCFA's finding of deficiencies. By letter dated April 1, 1996, HCFA notified Arcadia of the determination that Arcadia had come into substantial compliance with program requirements as of February 27, 1996. HCFA Ex. 5.

I am issuing the following findings of fact and conclusions of law to explain my reasoning that, even though HCFA's March 4, 1996 notice letter conferred hearing rights upon Arcadia to challenge the noncompliance determined by HCFA, Arcadia's hearing rights were extinguished by HCFA's subsequent issuance of its April 1, 1996 notice letter. Moreover, as I find below, Arcadia has been accorded all rights and process to which it was due under the governing regulations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of background facts and procedural history

1. Based on a survey completed on November 21, 1995, the Ohio Department of Health (ODH) notified Arcadia, by letter dated December 12, 1995, of the following information:
 - a. that Arcadia was not in substantial compliance with federal requirements for nursing homes participating in the Medicare and Medicaid programs;
 - b. that Arcadia must submit to ODH a plan of correction addressing each cited deficiency;
 - c. that ODH would recommend to HCFA that the remedy of denial of payment for new admissions (DPNA) be imposed effective January 30, 1996, if Arcadia failed to correct its deficiencies and come into substantial compliance with federal requirements by January 10, 1996; and

³ 42 C.F.R. § 498.3(d) lists examples of those administrative actions which are not subject to the appeals procedures of 42 C.F.R. Part 498.

d. that Arcadia had the right to challenge the cited deficiencies through the "informal dispute resolution process" (IDR) under 42 C.F.R. § 488.331 and rule 3701-63-02 of the Ohio Administrative Code.

HCFA Ex. 1.

2. By letter dated January 29, 1996, ODH notified Arcadia of the following information:

a. that despite Arcadia's allegation of substantial compliance by January 9, 1996, a survey conducted on January 18, 1996, found that Arcadia was not in substantial compliance with certification requirements;

b. that Arcadia must submit to ODH a plan of correction addressing each cited deficiency;

c. that ODH was recommending to HCFA that the remedies of DPNA and termination of Arcadia's Medicare and Medicaid provider agreements be imposed by HCFA, effective February 21, 1996 and May 21, 1996, respectively; and

d. that Arcadia had the right to challenge any newly cited deficiencies through the IDR process provided by 42 C.F.R. § 488.331 and rule 371-63-02 of the Ohio Administrative Code.

HCFA Ex. 2.

3. By letter dated March 4, 1996, HCFA notified Arcadia of the following information:

a. that, in accordance with ODH's recommendation, HCFA was imposing the remedy of DPNA under the Medicare and Medicaid programs, effective March 24, 1996 and continuing until either Arcadia was determined to be in substantial compliance or its provider agreement was terminated;

b. that, if Arcadia did not attain substantial compliance by May 21, 1996, HCFA would terminate Arcadia's participation in the Medicare and Medicaid programs;

c. that HCFA was in receipt of Arcadia's allegation of compliance and plan of correction and found these to be acceptable;

d. that HCFA had asked ODH to conduct a revisit survey in order to verify Arcadia's compliance;

e. that, if Arcadia disagreed with HCFA's determination, Arcadia had a right to request a hearing before an administrative law judge (ALJ) of the Departmental Appeals Board (DAB) within 60 days of receiving HCFA's March 4, 1996 notice letter; and

f. that the procedures governing Arcadia's hearing rights are set out at 42 C.F.R. § 498.40 et seq.

HCFA Ex. 3.

4. On March 15, 1996, prior to the effective dates of the remedies identified in HCFA's March 4, 1996 notice letter (HCFA Ex. 3, Finding 3), Arcadia requested a hearing before an ALJ of the DAB for the following reasons:

a. to dispute the deficiencies found during the surveys conducted on November 21, 1995 and January 18, 1996; and

b. to request "an evidentiary hearing on the remedies imposed."

HCFA Ex. 4, at 2.

5. By letter dated April 1, 1996, HCFA notified Arcadia that, as a result of the revisit survey conducted by ODH on February 27, 1996:

a. Arcadia was found to be in substantial compliance with program participation requirements; and

b. HCFA had determined that the remedies of DPNA and termination of Arcadia's participation agreement would not be imposed.

HCFA Ex. 5.

6. Arcadia refused to withdraw its hearing request after receiving HCFA's April 1, 1996 notice letter.

See, e.g., Order and Schedule for Filing Briefs and Documentary Evidence (April 25, 1996).

Findings and conclusions on the issue of whether HCFA's March 4, 1996 notice letter, if considered alone, contained an initial determination which entitled Arcadia to a hearing before me

7. The issues raised by Arcadia's request for hearing are limited to those matters contained in HCFA's March 4, 1996 notice letter. Findings 4, 5.

8. Arcadia's hearing request was timely filed with respect to HCFA's March 4, 1996 notice letter. See 42 C.F.R. § 498.40(a).

9. Arcadia is a nursing home voluntarily participating in the Medicare and Medicaid programs. See HCFA Ex. 3, 4.

10. In exchange for the right to receive Medicare and Medicaid payments for providing health care services under the Medicare and Medicaid programs, Arcadia subjected itself to the relevant obligations and limitations enumerated in regulations promulgated by the Secretary of the Department of Health and Human Services (Secretary). Finding 9; see generally, 42 C.F.R. § 498.1 ("Statutory basis").

11. Part 498 of volume 42 of the Code of Federal Regulations specifies the appeals procedures for determinations that affect providers participation in the Medicare and Medicaid programs. 42 C.F.R. Part 498.

12. Unless a disputed administrative action taken by HCFA is among those listed in 42 C.F.R. § 498.3(b), the action cannot be considered an "initial determination" by HCFA and is not subject to the appeals process of 42 C.F.R. Part 498. 42 C.F.R. § 498.3(d).

13. As relevant to the facts of this case, an "initial determination" is defined as a finding by HCFA of "noncompliance leading to the imposition of enforcement actions specified in 42 C.F.R. § 488.406 of this chapter" 42 C.F.R. § 498.3(b)(12); Findings 3, 4.

14. The other regulatory definitions of "initial determination" contained in 42 C.F.R. § 498.3 are not relevant to the facts of this case. See Findings 3 - 5, 7.

15. DPNA and termination of a provider agreement are among the remedies listed in 42 C.F.R. § 488.406. 42 C.F.R. § 488.406(a).
16. The procedural rights accorded by 42 C.F.R. § 498.3(b)(12) are consistent with the regulation codified at 42 C.F.R. § 498.5(b), which specifies also that any provider dissatisfied with an "initial determination" to terminate its provider agreement is entitled to a hearing before an ALJ. Findings 12, 13, 15.
17. When imposing a remedy, HCFA is required to notify the provider of: 1) the nature of noncompliance; 2) which remedy is imposed; 3) the effective date of the remedy; and 4) the provider's right to appeal the determination leading to the remedy. 42 C.F.R. § 488.402(f); see 42 C.F.R. § 488.456(c)(2) (before terminating a provider agreement based on deficiencies which do not pose immediate jeopardy to patients, HCFA must provide notice to the facility at least 15 calendar days before the effective date of termination).
18. HCFA's March 4, 1996 notice letter, entitled "Notice of Imposition of Remedies," conforms to the requirements for notice HCFA must provide when it is imposing remedies against a provider. HCFA Ex. 3; Findings 3, 17.
19. On March 4, 1996, HCFA imposed remedies against Arcadia as a result of the noncompliance found during the November 21, 1995 and January 18, 1996 surveys. Findings 3, 18.
20. HCFA's March 4, 1996 notice letter contained an appealable initial determination within the meaning of 42 C.F.R. § 498.3(b)(12). Findings 3, 11 - 19.
21. Based only on the contents of HCFA's March 4, 1996 notice letter, Arcadia had the right to file its March 15, 1996 hearing request contesting the findings of noncompliance that resulted in HCFA's imposition of remedies. Findings 3, 11 - 20; 42 C.F.R. § 498.40(a).
22. A provider may not appeal HCFA's determination as to which remedy to impose. 42 C.F.R. § 498.3(b)(12), 488.408(g)(2).
23. Arcadia did not have the right to a hearing to contest the remedies imposed by HCFA in the March 4, 1996 notice letter. HCFA Ex. 4 at 2; Findings 4, 22.

Findings and conclusions on the issue of whether Arcadia has a right to a hearing based on HCFA's March 4, 1996 notice letter, notwithstanding HCFA's subsequent decision and April 1, 1996 notice letter that no remedy would be imposed against Arcadia

24. Arcadia has not disputed HCFA's conclusion that, in issuing its March 4, 1996 "Notice of Imposition of Remedies," HCFA was unaware of ODH's February 27, 1996 revisit and finding of substantial compliance. HCFA Reply, at 7.

25. Because ODH had conducted a revisit survey on February 27, 1996, and found Arcadia in substantial compliance, HCFA notified Arcadia by notice letter dated April 1, 1996, that HCFA had rescinded the remedies previously imposed against Arcadia. HCFA Ex. 5.

26. Arcadia was in substantial compliance prior to the dates on which the remedies of DPNA and termination were scheduled to take effect (March 24, 1996 and May 21, 1996, respectively). Findings 3, 25.

27. According to HCFA's March 4, 1996 notice letter, termination of Arcadia's provider agreement would not take effect if Arcadia achieved substantial compliance by May 21, 1996. HCFA Ex. 3, at 2.

28. According to HCFA's March 4, 1996 notice letter, DPNA (if it took effect on March 24, 1996, as scheduled) would end either when Arcadia was found to have achieved substantial compliance or when its provider agreement had been terminated. HCFA Ex. 3, at 2.

29. Whether or not HCFA provided Arcadia with formal notice that DPNA and termination would not be imposed, the February 27, 1996 determination that Arcadia had achieved substantial compliance satisfied the requirement specified by HCFA for Arcadia to avoid the imposition of the remedies. Findings 24 - 28.

30. There is no evidence or allegation that HCFA actually implemented any remedy against Arcadia prior to notifying Arcadia by letter dated April 1, 1996, that the remedies had been rescinded.

31. HCFA's April 1, 1996 notice letter corrected the consequences of HCFA's oversight with respect to the results of the February 27, 1996 survey, and it formally confirmed for Arcadia the fact that neither the DPNA nor the termination remedy would go into effect under the conditions specified in HCFA's March 4, 1996 notice letter. Findings 24 - 30.

32. In response to public comments regarding the regulations governing this case, the Secretary specifically rejected the suggestion that there should be a right to appeal all findings of deficiencies even if no remedy is imposed because, "[i]f no remedy is imposed, the provider has suffered no injury calling for an appeal." 59 Fed. Reg. 56158 (1994).

33. The language of 42 C.F.R. § 498.3(b)(12), which requires a "finding of noncompliance leading to the imposition of enforcement action specified in § 488.406 of this chapter . . .," does not mean that Arcadia may receive an evidentiary hearing on HCFA's findings of deficiencies after HCFA has decided to rescind all remedies without having ever implemented them. Finding 32.

34. The appeals procedures of 42 C.F.R. Part 498 do not apply to any finding by HCFA that a provider is in compliance with the conditions of participation but has deficiencies. 42 C.F.R. 498.3(d)(1).

35. 42 C.F.R. § 498.4 states that a nursing facility is "subject" to the appeals process of 42 C.F.R. Part 498 if it has in effect an agreement to participate in both Medicare and Medicaid and is a non State-operated nursing facility that is subject to compliance action as a result of HCFA's review of the State's survey finding.

36. 42 C.F.R. § 498.4 does not mean that Arcadia may receive a hearing on HCFA's findings of deficiencies after HCFA has decided to rescind all remedies without having ever implemented them. Findings 32 - 34.

37. HCFA has the authority to reopen and revise an initial determination on its own initiative, within 12 months after the notice date of the initial determination. 42 C.F.R. §§ 498.30, 498.32.

38. An initial determination issued by HCFA is not binding if it has been revised in accordance with 42 C.F.R. § 498.32. 42 C.F.R. § 498.20(b)(3).

39. The regulations contain no criteria to which HCFA's notices of reopenings and revisions of initial determinations must conform.

40. HCFA's April 1, 1996 notice letter indicates that HCFA had reassessed its initial determination on its own initiative and had decided to rescind the remedies specified in its March 4, 1996 notice letter. Findings 5, 31.

41. Whether or not a notice of reopening and revising a determination must meet specific requirements of form, HCFA's April 1, 1996 notice letter was issued within 12 months of its March 4, 1996 initial determination and served the same purpose as a notice of reopening and revising a determination. Findings 3, 5, 37, 39, 40.

42. The entirety of HCFA's March 4, 1996 notice letter had no legal force or effect after HCFA issued its April 1, 1996 notice letter. Findings 24 - 29, 37 - 40.

43. Read in combination, HCFA's notice letters of March 4, 1996 and April 1, 1996, mean that while HCFA has made findings of noncompliance based on the surveys of November 21, 1995 and January 18, 1996, HCFA has not imposed against Arcadia any remedy within the meaning of 42 C.F.R. § 488.406. HCFA Ex. 3, 5; Findings 3, 5, 33 - 36, 42.

44. As of April 1, 1996, there was no determination issued by HCFA to Arcadia that was subject to the hearing rights specified under 42 C.F.R. Part 498. 42 C.F.R. § 498.3(b)(12); Findings 31 - 43.

45. After HCFA issued its April 1, 1996 notice letter, Arcadia was without a right to a hearing to contest the noncompliance found during the November 21, 1995 and January 18, 1996 surveys. Findings 21, 44.

46. The possibility that HCFA might impose remedies against Arcadia in the future, based on the results of the November 21, 1995 and January 18, 1996 surveys, is speculative at best and outside any definition of an initial determination entitling Arcadia to a hearing under 42 C.F.R. Part 498. 42 C.F.R. § 498.3.

47. Neither the current nor the potential prospective harm alleged by Arcadia based on the findings of noncompliance entitles Arcadia to a hearing under the regulations. See Arcadia Response, 1 - 12; 42 C.F.R. § 488.406, 498.3.

48. Dismissal of Arcadia's hearing request in its entirety is appropriate under 42 C.F.R. § 498.70(b), due to the absence of Arcadia's right to a hearing on any of the issues raised in its hearing request. Findings 4, 22, 23, 45 - 47.

49. Arcadia has been accorded all rights and process due it under the regulations. Findings 1 - 48.

CONCLUSION

For the foregoing reasons, I grant HCFA's Motion to Dismiss. This case, which is based on Arcadia's March 15, 1996 hearing request, is hereby DISMISSED.

/s/

Mimi Hwang Leahy

Administrative Law Judge