Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Fort Tryon Nursing Home,	)	DATE: July 3, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-173
	)	Decision No. CR425
Health Care Financing Administration.	)	
	)	

DECISION

I decide that, where the Health Care Financing Administration (HCFA) has imposed no remedy against Petitioner, Petitioner does not have a right to a hearing from HCFA's determination that Petitioner failed to comply with a Medicare participation requirement.

I. Background and undisputed material facts

The background and the material facts of this case are not disputed.[1] Petitioner is a skilled nursing facility (SNF) and a participating provider in Medicare. The conditions for participation in Medicare of SNFs are set forth in regulations contained in 42 C.F.R. Part 483. As a SNF, Petitioner is subject to the survey, certification, and remedies provisions of 42 C.F.R. Part 488. Petitioner's rights to a hearing from an adverse determination by HCFA, made pursuant to 42 C.F.R. Parts 483 and 488, are established by 42 C.F.R. Part 498.

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[1] HCFA submitted nine exhibits in support of its motion for summary disposition (HCFA Exs. 1 - 9). Petitioner did not object to my admitting these exhibits into evidence. Therefore, I am admitting into evidence HCFA Exs. 1 - 9. However, inasmuch as the material facts are not disputed, I do not cite exhaustively to the exhibits in my recitation of the undisputed facts.

On September 29, 1995, the New York State Department of Health (New York State Agency), acting on behalf of HCFA, conducted a survey of Petitioner. On October 17, 1995, the New York State Agency advised Petitioner that it had found Petitioner not to be in substantial compliance with Medicare participation requirements. HCFA Ex. 1. On October 27, 1995, Petitioner responded to this notice by submitting a plan of correction to the New York State Agency, and by asserting that it was complying with Medicare participation requirements. HCFA Ex. 2.

On December 7, 1995, the New York State Agency conducted a resurvey of Petitioner to determine whether Petitioner had achieved substantial compliance with Medicare participation requirements. HCFA Ex. 6. On December 22, 1995, the New York State Agency advised Petitioner that it had determined that Petitioner had not achieved substantial compliance with participation requirements. Id. The New York State Agency advised Petitioner that it would recommend to HCFA that remedies be imposed against Petitioner, consisting of a denial of payment for new admissions, and termination of Petitioner's participation in Medicare. Id.

On January 22, 1996, HCFA advised Petitioner that it had accepted the New York State Agency's recommendation. HCFA Ex. 7. HCFA advised Petitioner that it would impose against Petitioner the remedy of denial of payment for new admissions, effective February 7, 1996. Additionally, HCFA informed Petitioner that it would terminate Petitioner's participation in Medicare on March 27, 1996, if Petitioner had not achieved substantial compliance with Medicare participation requirements by that date. Id. In this notice, HCFA told Petitioner that, if Petitioner disagreed with HCFA's determination, Petitioner could request a hearing before an administrative law judge. Id.

However, HCFA never imposed a remedy against Petitioner. On December 29, 1995, Petitioner submitted a plan of correction to the New York State Agency. HCFA Ex. 8. On January 29, 1996, the New York State Agency advised Petitioner that it had accepted Petitioner's plan of correction. Id. The New York State Agency advised Petitioner also that it accepted Petitioner's assertion that, as of January 24, 1996, Petitioner was complying with Medicare participation requirements. Id. The New York State Agency advised Petitioner that it would notify HCFA that Petitioner had achieved substantial compliance with Medicare participation requirements. The New York State Agency told Petitioner that any recommendations made previously for the imposition of remedies against

Petitioner would be withdrawn, and that any remedies imposed previously would be lifted, effective January 24, 1996. Id.

Additionally, on January 29, 1996, HCFA notified Petitioner that it would not be imposing a denial of payment for new admissions against Petitioner. HCFA Ex. 9.[2] HCFA advised Petitioner that the remedy would not be imposed, because, based on a revisit to Petitioner, the New York State Agency found that Petitioner had attained substantial compliance with Medicare participation requirements, effective January 24, 1996. Id.[3]

On March 18, 1996, Petitioner requested a hearing. In its request, Petitioner noted that it had received the January 29, 1996 letter from the New York State Agency. See HCFA Ex. 8. However, Petitioner asserted that it wished to have a hearing from the New York State Agency's September 29, 1995 conclusion that Petitioner was not complying substantially with Medicare participation requirements, because Petitioner allegedly faced a threat of future adverse actions by either HCFA or the New York State Agency, based on the conclusion that Petitioner was deficient.

HCFA moved for summary disposition. In its motion, HCFA asserted that Petitioner had no right to a hearing because HCFA had not imposed a remedy against Petitioner. HCFA argued additionally that the case was moot. Petitioner opposed the motion. HCFA requested the opportunity to reply to Petitioner's opposition to the motion. I granted that opportunity to HCFA and also gave Petitioner the opportunity to respond to HCFA's reply. HCFA filed a reply and Petitioner responded to it.

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[2] The notice characterizes the proposed remedy as a "ban on new admissions." HCFA Ex. 9.

[3] Although HCFA's notice refers to a revisit by the New York State Agency, it is unclear that a revisit occurred. The New York State Agency recommendation to HCFA, as described in the January 29, 1996 New York State Agency notice to Petitioner, appears to have been based on Petitioner's plan of correction and allegation of compliance with participation requirements, and not on a revisit. HCFA Ex. 8. However, it is not necessary for me to decide whether a revisit occurred in order for me to decide this case.

II. Issue, findings of fact and conclusions of law

The issue in this case is whether Petitioner has a right to a hearing from a determination by HCFA that it did not comply substantially with Medicare participation requirements, where HCFA imposed no remedy against Petitioner.

I base my decision on the following findings of fact and conclusions of law (Findings). I discuss my Findings in detail, below.

> 1. Where HCFA has not imposed a remedy against Petitioner, Petitioner does not have a right to a hearing from HCFA's determination that Petitioner did not comply substantially with Medicare participation requirements.
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> 2. HCFA's argument that the case is moot is irrelevant, inasmuch as Petitioner has no right to a hearing.

III. Discussion

A. Whether Petitioner has a right to a hearing (Finding 1)

There are two regulations which define the circumstances under which a SNF is entitled to a hearing from a determination by HCFA that it is not complying with participation requirements. Pursuant to 42 C.F.R. § 498.3(b)(12), a SNF is entitled to a hearing from:

> the finding of non-compliance leading to the imposition of enforcement actions specified in § 488.406 of this chapter, ...

Similar, but not identical, language is in 42 C.F.R. § 488.408(g)(1), which states that:

> A facility may appeal a certification of noncompliance leading to an enforcement remedy.

The language of the two regulations is not precise. When read in isolation, the phrase "enforcement actions" in 42 C.F.R. § 498.3(b)(12) might mean remedies. Or, it might mean the institution of an action by HCFA intended to compel compliance with Medicare participation requirements, including the threat to impose a remedy. Additionally, the phrase "leading to" in 42 C.F.R. § 488.408(g)(1) and in 42 C.F.R. § 498.3(b)(12) could refer

to a determination by HCFA to impose a remedy. Alternatively, the phrase might mean a determination by HCFA to threaten to impose a remedy against a SNF unless the SNF complies with participation requirements.

I conclude that the more reasonable reading of 42 C.F.R. §§ 488.408(g)(1) and 498.3(b)(12) is that a SNF has a right to a hearing only where HCFA finds that the SNF is not complying substantially with Medicare participation requirements and imposes a remedy against the SNF. A SNF does not have a right to a hearing from a determination by HCFA where HCFA does not actually impose a remedy. I base my decision on the following considerations.

First, I interpret the phrase "enforcement actions" in 42 C.F.R. § 498.3(b)(12) to mean remedies. My interpretation therefore makes the term "imposition of enforcement actions" in 42 C.F.R. 498.3(b)(12) parallel with the term "enforcement remedy" in 42 C.F.R. § 488.408(g)(1). I base my interpretation on the fact that, in 42 C.F.R. § 498.3(b)(12), the term "imposition of enforcement actions" is qualified by the term "specified in § 488.406 of this chapter." The referenced regulation, 42 C.F.R. § 488.406, does not refer to "enforcement actions," but instead, enumerates remedies. Thus, it is remedies that are "specified in 42 C.F.R. § 488.406," and not something else.

Furthermore, it would make no sense for the Secretary to write two regulations addressing the same issue which confer different rights on a SNF. However, if I were to interpret the term "enforcement actions" in 42 C.F.R. § 498.3(b)(12) to mean something other than remedies, the consequence would be that 42 C.F.R. §§ 488.408(g)(1) and 498.3(b)(12) would have different meanings, and would confer different rights on a SNF.

Second, I conclude that the ambiguous phrase "leading to" in 42 C.F.R. §§ 488.408(g)(1) and 498.3(b)(12) is best interpreted to mean a determination resulting in the imposition of a remedy. I do not find that it describes an action by HCFA -- such as the threat to impose a remedy -- which falls short of imposition of a remedy.

One definition of the word "lead" is "to tend toward or have a result." Webster's Ninth New Collegiate Dictionary 679 (1990). The phrase "leading to" therefore means "resulting in." When read in this way, the regulations may be interpreted, reasonably, to mean that a SNF would have a right to a hearing from a determination by HCFA that results in the imposition of a remedy against the SNF.

In order to agree with Petitioner's interpretation of the regulations, I would have to construe the phrase "leading to" to mean "possibly resulting in." Using this construction, the regulations would then mean that a SNF would have a right to a hearing from a determination by HCFA that may result in, but which does not necessarily result in, the imposition of a remedy against the SNF. I find this construction of the phrase "leading to" to be a more strained and unnatural interpretation of the phrase than "resulting in," and, for that reason, I do not find it to be the correct interpretation.

I find support for my conclusion in a comment to the revised Parts 488 and 498 regulations, published at 59 Fed. Reg. 56,116, 56,158 (1994). This comment makes it plain that the Secretary intended to confer on a SNF the right to a hearing only in the circumstance where HCFA finds that the SNF is not complying substantially with Medicare participation requirements and where HCFA imposes a remedy:

> *Comment:* Several commenters wanted a right to appeal all deficiencies, even if no remedy was imposed.
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> *Response:* We are not accepting this suggestion because if no remedy is imposed, the provider has suffered no injury calling for an appeal. We agree that deficiencies that constitute noncompliance and that result in a remedy imposed are appealable (except for minor remedies such as State monitoring).

I would not rely on a comment to a regulation to interpret that regulation where the meaning of the regulation is plain. Here, however, the language of 42 C.F.R. §§ 488.408(g)(1) and 498.3(b)(12) is ambiguous, and is, arguably, susceptible to more than one interpretation. Given that, I find the comment to be persuasive evidence of the Secretary's intent.

Petitioner asserts that this comment does not mean that it is without a right to a hearing. According to Petitioner, HCFA imposed a remedy against it. Petitioner premises this assertion on its characterization of HCFA's determination to impose a remedy against Petitioner as being tantamount to actual imposition of the remedy. I do not agree with Petitioner's characterization of HCFA's determination. A determination to impose a remedy is not in fact, imposition of that remedy, if the remedy is never put into effect.

HCFA asserts that added support for its argument that Petitioner is without a right to a hearing may be found in Administrative Law Judge Edward Steinman's decision in Villa Northwest Restorative Care Center, DAB CR362 (1995). In that case, Administrative Law Judge Steinman found that a provider did not have a right to a hearing from a determination by HCFA to terminate the provider's participation in Medicare, in view of the fact that HCFA never effectuated the remedy. I do not find the Villa Northwest decision to constitute persuasive authority because it addresses a section of the regulations which is different from those under consideration here. In Villa Northwest, the regulation at issue was 42 C.F.R. § 498.3(b)(7), which gives a right to a hearing to a provider, other than a SNF or a nursing facility, whose participation in Medicare has been terminated by HCFA.

Petitioner argues that to interpret 42 C.F.R. § 498.3(b)(12) as conferring a right to a hearing on a SNF only where HCFA finds that the SNF is not complying substantially with participation requirements and imposes a remedy against the SNF would deprive Petitioner of due process. Petitioner argues that it might be harmed if it is deprived of the opportunity for a hearing because, at some future date, either HCFA or the New York State Agency might impose remedies against Petitioner based on the determination of noncompliance on which Petitioner bases its current hearing request.

I am not persuaded that Petitioner will be harmed if it is not given a right to a hearing at this time. Although Petitioner does not now have a right to a hearing, Petitioner would have that right if HCFA ever determined in the future to impose a remedy against Petitioner based on the finding of deficiency that is at issue here. Therefore, Petitioner will not be denied due process should HCFA ever use the finding as a basis for imposing a remedy against Petitioner.

Neither 42 C.F.R. §§ 488.408(g)(1) nor 498.3(b)(12) suggests that a SNF would be deprived of its right to a hearing from HCFA's imposition of a remedy based on a lapse of time between the finding of deficiency on which the remedy is premised, and the imposition of the remedy. All that these two regulations require, as a basis for a valid hearing request, is a finding of a deficiency by HCFA and imposition of a remedy by HCFA based on that finding. Therefore, Petitioner would have a right to a hearing from the finding of noncompliance which is at issue here whenever HCFA determines to impose a remedy based on that finding.

The Part 488 regulations provide that HCFA may impose a remedy against a SNF, based not only on a current finding of a deficiency, but also on a previous finding of a deficiency by the SNF. 42 C.F.R. § 488.404(c)(2). It is possible that, after a future compliance survey of Petitioner, HCFA might find that Petitioner is not complying substantially with a Medicare participation requirement. If HCFA then determined to impose a remedy based on the finding of a new deficiency coupled with Petitioner's past compliance record, including the finding of deficiency on which Petitioner bases its current hearing request, then Petitioner would have a right to a hearing, both as to the existence of the new deficiency, and as to the existence of the deficiency which is at issue here.

My conclusion that Petitioner may at some future date have a right to a hearing is premised on the fact that HCFA has not at this time imposed any remedy against Petitioner from the finding of deficiency on which Petitioner bases its current hearing request. I am not suggesting that a SNF would have a right to a second hearing as to the existence of a deficiency in the event that HCFA, after imposing a remedy based on that deficiency, later opts to impose an additional remedy based on a finding of a new deficiency, coupled with its earlier finding of the first deficiency. In that event, the SNF's right to a hearing as to the first deficiency would depend on whether HCFA notified the SNF that that first deficiency was a basis for the imposition of the remedy. The SNF would then have 60 days from its receipt of that notification within which to request a hearing. 42 C.F.R. § 498.40(a)(2).

I am not persuaded that Petitioner is denied due process because of the possibility that the New York State Agency may yet impose a remedy against Petitioner from the finding of noncompliance on which Petitioner bases its hearing request. Petitioner has no right to a hearing in this Department where a State imposes a remedy and HCFA does not impose a remedy. The regulations which define providers' hearing rights apply only to remedies imposed by HCFA. See 42 C.F.R. §§ 498.3(a).[4] Furthermore, if the New York State Agency at some date in the future determines to impose a remedy against Petitioner,

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[4] There may be circumstances where a State imposes a remedy and HCFA subsequently ratifies the State's determination. In that event, I would likely find that the affected provider has a right to a hearing.

Petitioner may have a right to a hearing from that determination in an appropriate State forum.

The notice which HCFA sent to Petitioner on January 22, 1996, in which HCFA stated its intent to impose a remedy against Petitioner, is misleading in that it advises Petitioner that Petitioner has a right to a hearing from HCFA's determination. HCFA Ex. 7. However, Petitioner does not have a right to a hearing inasmuch as HCFA never imposed the remedies that were described in the notice. HCFA cannot confer a right to a hearing on a provider where that provider has no right to a hearing under applicable regulations.

I would note, however, that the notice which HCFA sent to Petitioner in this case is not unique. HCFA's practice is to send a notice to a provider informing the provider of HCFA's determination to impose a remedy and to advise the provider of its right to a hearing from that determination, in advance -- at times, weeks or even months in advance -- of the date that the remedy is to become effective. Under regulations which govern hearings from determinations made by HCFA, the time within which a provider may request a hearing begins to run as of the date that the provider receives notice of HCFA's determination to impose a remedy. 42 C.F.R. § 498.40. Thus, a provider that receives a notice from HCFA in which HCFA announces that it will be imposing a remedy against the provider may have no choice, if it wishes to protect its right to a hearing, other than to request a hearing prior to the date that the remedy is to become effective.[5] The consequence is that I and the other administrative law judges who are associated with the Departmental Appeals Board receive many premature hearing requests.

B. Mootness (Finding 2)

HCFA argues that this case is moot because no remedy was imposed against Petitioner and, therefore, Petitioner was not affected adversely by HCFA's determination that Petitioner was deficient. HCFA's brief at 9. HCFA's assertion that the case is moot is irrelevant because Petitioner does not have a right to a hearing.

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[5] In this case, however, Petitioner requested a hearing on March 18, 1996, after the date when it was told by the New York State Agency and by HCFA that proposed remedies would not be imposed against it. HCFA Exs. 8, 9.

IV. Conclusion

I conclude that Petitioner does not have a right to a hearing. I dismiss Petitioner's request for a hearing.

/s/

Steven T. Kessel
Administrative Law Judge