Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Oak Lawn Pavilion,	)	DATE: July 10, 1996
Petitioner,	)	
v.	)	Docket Nos. C-96-078 C-96-139
Health Care Financing Administration.	)	Decision No. CR426

DECISION

I. Background and Issue

In these two cases filed by Oak Lawn Pavilion (Petitioner) against the Health Care Financing Administration (HCFA), I decide that I do not have jurisdiction to hear and decide the denial by HCFA of Petitioner's participation in the Medicare program. In addition to the above captioned two cases, there is pending before me the case docketed as C-95-155, which resulted from HCFA's having terminated Petitioner's participation in the Medicare program effective May 31, 1995. A hearing on Petitioner's challenges to the termination of Medicare participation has been scheduled for the week of July 15, 1996.

The two more recently filed actions involve determinations made by HCFA after it terminated Petitioner's Medicare participation agreement on May 31, 1995. In the case docketed as C-96-078, Petitioner requested a hearing after having received HCFA's notice dated October 6, 1995, which referenced the results of a survey conducted on August 24, 1995. In the case docketed as C-96-139, Petitioner requested a hearing after having received HCFA's notice dated February 16, 1996, which referenced the results of a survey conducted on October 31, 1995.

In each of its two hearing requests at issue, Petitioner asserted that it was contesting HCFA's denial of Petitioner's "application to participate" in the Medicare

program. Hearing Requests dated November 9, 1995 and February 21, 1996. However, in the two notices underlying Petitioner's hearing requests, HCFA stated its determination that Petitioner did not meet the criteria for "re-entry" into the Medicare program. HCFA Notices dated October 6, 1995 and February 16, 1996 (HCFA Notices). In each of the two notices, HCFA stated also that the relevant survey

> revealed that your facility does not qualify for Medicare certification in accordance with the Federal regulations at 42 C.F.R. 488.330(b)(2), since your facility was determined to not be in substantial compliance, as defined in Federal regulation at 42 C.F.R. 488.301.

HCFA Notices.[1]

During a prehearing conference held on April 9, 1996, I suggested that Petitioner move to dismiss the two 1996 actions without prejudice pending the outcome of the hearing on HCFA's termination of Petitioner's provider agreement. Order Consolidating Hearing Requests and Setting Briefing Schedule (April 17, 1996). However, Petitioner chose not to take this course of action. Both parties asked me to resolve the question of whether HCFA's determinations that are challenged in Docket Nos. C-96-078 and C-96-139 gave rise to hearing rights. Id. I consolidated the proceedings and established briefing schedules in the two 1996 cases for those reasons. Id.

The parties's briefs and supporting documents in the consolidated cases[2] have placed before me the threshold

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[1] The quote is from HCFA's October 6, 1995 notice. The February 16, 1996 notice contains the same language, minus two commas.

[2] Petitioner has filed two briefs: Petitioner's Response to Show Cause and Petitioner's Reply to Response of Health Care Financing Administration to Petitioner's Showing of Cause Against Dismissal. I will refer to these two briefs as "P. Brief" and "P. Reply" respectively. I will refer to the brief filed by HCFA, Response of Health Care Financing Administration to Petitioner's Showing of Cause Against Dismissal, as "HCFA Brief."

(continued...)

legal issue of whether, after HCFA has terminated Petitioner's Medicare provider agreement (and in the absence of any adjudication setting aside said termination), Petitioner is entitled to a hearing to challenge any of the determinations contained in HCFA's Notices.

II. The Parties' Arguments and Relevant Statutory and Regulatory Framework

HCFA contends that Petitioner either has no hearing rights in Docket Nos. C-96-078 and C-96-139 under either the statute or the Secretary's implementing regulations. HCFA correctly notes that neither the statute nor the Secretary has provided hearing rights in all cases where an entity has received an adverse determination from HCFA. Section 1866(h)(1) of the Social Security Act (the Act) states as follows:

> an institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services **or** with a determination described in subsection (b)(2) shall be entitled to a hearing thereon by the Secretary . . . to the same extent as is provided by section 205(b) . . . .

Act, section 1866(h)(1)(emphasis added). For hearings held under section 205(b) of the Act, the Secretary is directed to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same . . . ." Act, section 205(a).

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[2](...continued)
In addition, HCFA has filed various excerpts of publications as Attachments I through III to its brief, and Petitioner has filed two excerpts of survey reports and one letter from the State surveying agency designated as Petitioner's Exhibits A through C. The foregoing documents are in the record only because the parties have attached them to their briefs. The parties appeared to have attached these documents in an effort to help explain the nature of the findings made by HCFA and why HCFA made them. Since my conclusion is that, as a matter of law based on other grounds, Petitioner is without a right to a hearing on any of the findings contained in the two Notices, I have not found it necessary or appropriate to evaluate the contents of these documents.

As relevant to the first category of determinations with hearing rights (the determinations that the institutions or agencies are not providers of services), the Act defines the term "provider of services" as a hospital, rural primary care hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or a fund under the specified sections of the Act.[3] Act, section 1861(u). With respect to the second category of determinations with hearing rights (determinations described in subsection (b)(2)), section 1866(b)(2) specifies that the determinations by the Secretary or her delegate must be one of three types: a refusal to enter into an agreement under section 1866 of the Act, a refusal to renew such an agreement, or a termination of such an agreement. Section 1866(c)(1) of the Act provides also:

> Where the Secretary has terminated or has refused to renew an agreement under this title with a provider of services, such a provider may not file another agreement under this title unless the Secretary finds that the reason for the termination or nonrenewal has been removed and that there is reasonable assurance that it will not recur.

Act, section 1866(c)(1). Even though section 1866(h)(1) of the Act specifically provides hearing rights for those determinations made under section 1866(b)(2), section 1866(h)(1) does not mention findings made under 1866(c)(1) of the Act.

In interpreting and implementing the foregoing sections of the Act, the Secretary has created a multi-layered administrative review process and has issued regulations which preclude appeals of a finding made pursuant to section 1866(c)(1) of the Act. By regulation, the Secretary has designated only certain specified types of determinations made by HCFA as "initial determinations." Only "initial determinations" are subject to the multi-tiered appeals rights and procedures specified in 42

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[3] There does not appear to be any dispute that Petitioner is one of these types of entities or that the determinations in controversy do not pertain to whether Petitioner is a type of entity eligible to participate in the Medicare program if other conditions were met as well.

C.F.R. Part 498.[4] 42 C.F.R. § 498.3(a) and (b). The Secretary specified by regulation that the following is not an "initial determination" subject to the appeals procedures of 42 C.F.R. Part 498:

> The finding that an entity that had its provider agreement terminated may not file another agreement because the reasons for terminating the previous agreement have not been removed or there is insufficient assurance that the reasons for the exclusion will not recur.

42 C.F.R. § 498.3(d)(4). Removing such a finding from the definition of an "initial determination" and the appeals process means that the affected entity is not entitled to request that HCFA reconsider such a finding under 42 C.F.R. Part 498, Subpart B, or to request a hearing before an administrative law judge to contest such a finding under 42 C.F.R. Part 498, Subpart D. Thus, under the Secretary's regulations, findings made pursuant to section 1866(c)(1) of the Act are non-reviewable.

Petitioner acknowledges that the findings described in 42 C.F.R. § 498.3(d)(4) are not subject to review. P. Brief, 3.[5] However, Petitioner alleges that it "did not ask HCFA to administratively conclude whether 'the reasons for terminating the previous agreement [had] been removed,' nor did it merely present HCFA with 'assurances that the reasons for the exclusion will not recur.'" Id. Petitioner states that it chose to "start over" by applying for a completely new Medicare certification. Id. at 3 - 4. Petitioner contends that it is "entitled to a hearing" regarding the August 24 and October 31,

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[4] Part 498 applies to all phases of the administrative appeals process, including requests for reconsidered and revised determinations (Subpart B), requests for hearing (Subpart D), and requests for review of the hearing decision (Subpart E). Part 498 also includes regulations relevant to requests for judicial review of final agency decisions. 42 C.F.R. §§ 498.5, 498.90 and 498.95.

[5] Petitioner states, "The shortcut evaluations described in Section 498.3(d)(4) are understandably not subject to review, because they involve limited fact finding by HCFA based largely upon the findings of earlier surveys which were themselves subject to appeal." P. Brief, 3.

1995 surveys "because these surveys were 'initial determinations' within the meaning of 42 C.F.R. § 498.3(b)(1)." P. Brief, 1.

The regulatory definition of "initial determinations" includes a determination made by HCFA on whether a prospective provider qualifies as a provider. 42 C.F.R. § 498.3(b)(1). Petitioner contends that it satisfied the regulatory definition of a "prospective provider" because, after the termination of its provider agreement on May 31, 1995, it no longer had in effect a Medicare provider agreement and was ' "seek[ing] to participate in Medicare as a provider." ' P. Brief, 2 (citing 42 C.F.R. § 498.2). Also, according to Petitioner, Petitioner was subjected to the same initial certification procedures as other "prospective providers" (P. Brief, 4), and the August 24, 1995 and October 31, 1995 surveys relied upon by HCFA were labeled "initial certification" and "Second Initial Certification Survey," respectively (P. Reply, 1 - 2). Petitioner contends further that, by virtue of its current participation in the Medicaid program, Petitioner should not have been subjected to any initial certification surveys at all to determine whether it could participate in the Medicare program. P. Reply, 5 - 6 (citing State Operations Manual).

III. Findings and Summary of Reasons for Dismissing Hearing Requests

I reject Petitioner's arguments that it is entitled to a hearing and dismiss the hearing requests in the above captioned cases. The following comprise my findings and summary of reasons for dismissing Petitioner's hearing requests:

1. The regulations codified at 42 C.F.R. § 498.3(b)(1) make applicable the review process and procedures described in 42 C.F.R. § 498 to an initial determination by HCFA that a prospective provider does not qualify as a provider under the Medicare program. 42 C.F.R. § 498.3(a).

2. HCFA's finding in each Notice that Petitioner did not qualify for Medicare certification under 42 C.F.R. § 488.330(b) is an initial determination within the meaning of 42 C.F.R. § 498.3(b)(1), which entitled Petitioner to pursue only the appeals procedures specified in the regulations. 42 C.F.R. § 498.3(a), referring to Part 498.

3. In order to obtain a hearing before an administrative law judge on the issue of whether it qualifies as a provider, a prospective provider must satisfy all of the following conditions:

> a) be in receipt of an initial determination that it does not qualify as a provider;
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> b) timely request reconsideration of said initial determination in accordance with 42 C.F.R. § 498.22(a);
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> c) receive a reconsidered determination that it does not qualify as a provider; and
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> d) timely file a hearing request to contest the reconsideration determination that it does not qualify as a provider.

42 C.F.R. §§ 498.3(b)(1), 498.5(a), 498.20(b) 498.22, 498.24, 498.25(b), 498.40.

4. Petitioner does not allege, nor does any evidence show, that Petitioner requested or received a reconsidered determination on its qualification to participate as a provider in the Medicare program.

5. Whether or not Petitioner was correctly assigned the status of a "prospective provider," no prospective provider is entitled to a hearing before an administrative law judge after having received only an initial determination that it is not qualified to participate as a provider in the Medicare program. Id.

6. HCFA included in each of its Notices an additional finding that Petitioner did not meet the criteria specified in

section 1866(c)(1) of the Act for re-entry to the program. HCFA Notices.

7. In the absence of any hearing decision reversing or modifying HCFA's initial determination to terminate Petitioner's provider agreement on May 15, 1995, HCFA had the authority to note Petitioner's termination from the program and to decide whether Petitioner should be re-admitted to the program under the criteria specified in section 1866(c)(1) of the Act. 42 C.F.R. §§ 498.5(b), 498.20(b)(2); HCFA Notices.

8. The findings made by HCFA under section 1866(c)(1) of the Act to deny Petitioner re-entry to the Medicare program are not subject to review. 42 C.F.R. § 498.3(d)(4); HCFA Notices.

9. Petitioner's efforts to circumvent the re-admission requirements of section 1866(c)(1) do not make reviewable HCFA's findings that Petitioner failed to meet the criteria for re-entering the program. 42 C.F.R. § 498.3(d)(4).

10. Petitioner has no right to obtain review of the methods HCFA used to find that Petitioner may not re-enter the program. See 42 C.F.R. § 498.3(d)(4).

11. Petitioner has no right to a hearing on any of the findings or determinations contained in HCFA's Notices. 42 C.F.R. § 498.70(b).

IV. Discussion

A. HCFA set forth two determinations in each notice letter.

Each of HCFA's Notices at issue contains two determinations: one which finds that Petitioner "does not qualify for Medicare certification in accordance with ... 42 C.F.R. 488.330(b)" because, based on the results of a preceding survey, Petitioner "was determined to be not in substantial compliance as defined by ... 42 C.F.R. 488.301"; and another which finds that, based on the results of the same survey, Petitioner "does not meet the criteria for re-entry" into the program under section

1866(c)(1) of the Act. HCFA Notices. These findings are distinct from one another as evidenced by their contents. Moreover, HCFA itself separated the two findings with the phrase "[i]n addition," in each of its Notices.

B. In each notice, HCFA's finding referencing 42 C.F.R. §§ 488.330(b) and 488.301 was appealable.

Each of HCFA's findings referencing 42 C.F.R. §§ 488.330(b) and 488.301 was appealable in accordance with the procedures specified in 42 C.F.R. Part 498. As applicable to the facts of this case, 42 C.F.R. § 488.330(b) specifies that a "certificate of noncompliance requires denial of participation for prospective providers . . . ." 42 C.F.R. § 488.330(b)(2) (emphasis added). The regulation codified at 42 C.F.R. 488.301 contains the definition of "substantial compliance" relied upon by HCFA in deciding that Petitioner "does not qualify for Medicare certification in accordance with 42 C.F.R. 488.330(b) . . . ." HCFA Notices. As relevant to these cases, a "prospective provider" means an entity such as a skilled nursing facility which is seeking to participate in Medicare as a provider. 42 C.F.R. § 498.2. Here, Petitioner did not have a Medicare provider agreement in place at the time of the surveys, and also, according to HCFA's Notices, the surveys were conducted for certification of a unit within Petitioner's facility claimed as a "distinct part skilled nursing facility." HCFA Notices. The appeals rights and procedures specified in 42 C.F.R. Part 498 are applicable to an initial determination by HCFA that a prospective provider does not qualify as a provider. 42 C.F.R. § 498.3(a) and (b)(1).

HCFA contends that the conclusion that it had issued a reviewable initial determination within the meaning of 42 C.F.R. § 498.3(b)(1) "would read subsection 1866(c) and subsection 498.3(d)(4) [which preclude review of HCFA's findings that a terminated provider does not meet the criteria for re-entry into the program] out of the regulations ...." HCFA Brief, 12. I disagree. A facility's right of appeal depends on what determinations were in fact made by HCFA. 42 C.F.R. § 498.3. The fact that HCFA made any given determination does not signify that it is a legally correct or logical one. Here, HCFA chose to set out two findings in each Notice: one which denied Petitioner participation as a prospective provider under 42 C.F.R. §§ 488.301 and 488.330(b), and another which denied Petitioner re-entry to the Medicare program

based on its status as a terminated provider and the criteria contained in section 1866(c) of the Act.[6]

To accept HCFA's argument that its Notices contain only findings on Petitioner's re-admission to the program after termination is to read out of HCFA's Notices complete paragraphs stating the contrary . Even though HCFA may be correct in arguing now that Petitioner should not be treated as a prospective provider, HCFA had done so in fact under 42 C.F.R. §§ 488.301 and 488.330(b). If HCFA had intended to limit its Notices to its re-entry findings but had set forth the other finding due to inadvertence, HCFA had the authority and ample opportunity to issue revisions on its own initiative. 42 C.F.R. Part 498, subpart C. For these reasons, I conclude that Petitioner had appeal rights under 42 C.F.R. § 498.3(b)(1) with respect to HCFA's determination that Petitioner, as a prospective provider, did not qualify as a provider.

Concluding that said determination was appealable does not mean that I find merit in viewing Petitioner as a "prospective provider" after its provider agreement had been terminated by HCFA. Given that I have decided to dismiss Petitioner's hearing request on the procedural grounds detailed below, I do not reach the issue of whether Petitioner properly should be considered a "prospective provider" entitled to apply anew for program participation.

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[6] I recognize that the practical result of the two determinations is the same: Petitioner cannot participate in the Medicare program. Given also that I find HCFA's denial of re-entry to the program is an unreviewable determination, Petitioner would still be barred from participating in the program whether or not HCFA's other determination under 42 C.F.R. § 488.330(b) is reviewable. Nevertheless, whether the latter determination is appealable is an issue of law which must be decided without considering Petitioner's motives for requesting review and without speculating on whether Petitioner will gain any practical advantages from its efforts.

C. Because Petitioner failed to follow the procedures specified by regulation for appealing initial determinations that a prospective provider does not qualify as a provider, Petitioner has no right to a hearing on said issue.

Petitioner has improperly exercised appeal rights conferred by 42 C.F.R. § 498.3(b)(1) by requesting a hearing to challenge an initial determination that it does not qualify as a provider. Petitioner errs in arguing that it is entitled to a hearing because HCFA has made an initial determination within the meaning of 42 C.F.R. § 498.3(b)(1). P. Brief, 1. The fact that a determination by HCFA falls within the definition of an "initial determination" means that the "initial determination" is subject to challenge in accordance with the steps and in the forum specified in 42 C.F.R. Part 498. As explained in the relevant regulation, "This part [i.e., 42 C.F.R. Part 498] sets forth procedures for reviewing initial determinations that HCFA makes with respect to the matters specified in paragraph (b) of this section ...." 42 C.F.R. § 498.3(a) (emphasis added). Nothing in 42 C.F.R. § 498.3 states that all initial determinations should be reviewed by an administrative law judge at the hearing level.

In fact, a prospective provider dissatisfied with HCFA's initial determination that it does not qualify as a provider must file a request for reconsideration with HCFA or the State surveying agency within 60 days of receiving the initial determination. 42 C.F.R. §§ 498.5(a), 498.22. Otherwise, the initial determination becomes binding. 42 C.F.R. § 498.20(b). If a request for reconsideration has been properly filed, HCFA will review relevant new written evidence or statements and, based also on the evidence used to reach the initial determination, make a reconsidered determination which affirms or modifies the initial determination and the findings on which it was based. 42 C.F.R. § 498.24. If the prospective provider receives a reconsidered determination and is dissatisfied with it, only then may the prospective provider obtain a hearing before an administrative law judge by filing a written request within 60 days of receiving the reconsidered determination. 42 C.F.R. § 498.40(a).

Here, on two occasions, HCFA notified Petitioner of its determinations that Petitioner did not qualify as a provider: by letters dated October 6, 1995 and February 15, 1996. Shortly thereafter (on November 9, 1995 and February 21, 1996, respectively), Petitioner requested hearings by attaching and referencing these Notices.

Petitioner's briefs consistently described these Notices as containing "initial determinations." E.g., P. Brief, 1, 2; P. Reply, 2. However, there is no allegation or evidence before me that Petitioner has filed any request for reconsideration to challenge HCFA's initial determinations. Nor is there any indication that HCFA has made a reconsidered determination on whether Petitioner qualifies to participate in the program as a provider. Absent a reconsidered determination from HCFA adverse to Petitioner on this issue, there is no right to any hearing on this issue. Even though an initial determination within the meaning of 42 C.F.R. § 498.3(b)(1) gave rise to appeal rights, Petitioner has failed to exercise such rights properly.

For the foregoing reasons, I dismiss Petitioner's hearing requests under 42 C.F.R. § 498.70(b) as they pertain to HCFA's initial determinations that Petitioner "does not qualify for Medicare certification in accordance with ... 42 C.F.R. 488.330(b)" because Petitioner "was determined to be not in substantial compliance as defined by ... 42 C.F.R. 488.301" HCFA Notices.

D. HCFA's finding that Petitioner failed to meet the statutory criteria for re-entry to the Medicare program is nonreviewable without regard to Petitioner's alleged intent to start over as a new prospective provider applying for initial certification.

As noted previously, each of HCFA's notices contains a clear finding that Petitioner cannot re-enter the Medicare program because it failed to meet the criteria specified by section 1866(c) of the Act. This finding is nonreviewable, as is made especially clear by 42 C.F.R. § 498.3(a) and (d)(4), which implement the statutory authorization for the Secretary to provide hearings in only limited types of cases. Act, section 1866(h)(1). As noted also above, Petitioner does not dispute that such a finding by HCFA is nonreviewable. See P. Brief, 3. Therefore, at best, Petitioner's arguments that it had not asked or intended for HCFA to make a determination on re-entry appear to challenge HCFA's authority to issue a nonreviewable finding under 42 C.F.R. § 498.3(d)(4) in the absence of Petitioner's request to do so. In the present cases, I find Petitioner's intentions immaterial to the issue of whether HCFA had the authority to make a finding within the meaning of 42 C.F.R. § 498.3(d)(4).[7]

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[7] Even if there had existed a duty on the part of HCFA to accede to Petitioner's intent to begin anew as a

(continued...)

HCFA is authorized and required to make certain specified findings under section 1866(c) of the Act whenever a provider previously terminated from the Medicare program seeks to participate again in the program. Act, section 1866(c)(1).

It is a fact that, on May 31, 1995, Petitioner was terminated from participation in the Medicare program. Even though that termination action is pending before me for a hearing in the near future, Petitioner's status remains that of a terminated provider. Terminations of provider agreements are "initial determinations," which remain binding unless they are reversed or modified by a hearing decision. 42 C.F.R. §§ 498.3(b), 498.20(b)(2). How Petitioner would have wished to be treated by HCFA does not negate the fact that Petitioner had the legal status of a terminated provider at all times relevant to these cases.

Therefore, I conclude that HCFA had the authority to make determinations under section 1866(c) of the Act by virtue of Petitioner's status as a terminated provider and the absence of a hearing decision to the contrary.

E. Petitioner's efforts to circumvent the re-admission requirements of section 1866(c)(1) do not make reviewable HCFA's findings that Petitioner failed to meet the criteria for re-entering the program.

Without doubt, Petitioner was attempting to circumvent the requirements of section 1866(c)(2) of the Act, which specifies that, after a provider had been terminated from the program, it may not submit another agreement for the Secretary's approval unless the Secretary has determined that the reasons for the termination have been removed and that there exists reasonable assurances that such reasons will not recur. Act, section 1866(c)(2). Petitioner's assertions that it "chose to 'start over'" like other prospective providers and that it had filed its agreement because HCFA did not bar it from doing so (P. Brief, 3 - 4) constitute acknowledgements that it was attempting to circumvent section 1866(c)(2) of the Act. The law clearly states that a terminated provider "may not file another agreement" unless the Secretary has made the requisite findings. Act, section 1866(c)(2). There

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[7](...continued)
prospective provider seeking to enter the program for the first time, HCFA discharged such a duty by having issued the determination referencing 42 C.F.R. §§ 499.301 and 488.330(b).

is no merit to Petitioner's argument that it "had not been barred from 'filing another agreement' by HCFA" and therefore, after Petitioner "filed its agreement," HCFA's activities in surveying were "removed from the application of section 498.3(d)(4)." P. Brief 3.

The "filing of an agreement" meant only that Petitioner submitted an instrument for HCFA to accept or reject. HCFA was obligated to follow the requirements of section 1866, irrespective of what Petitioner intended to accomplish. HCFA did so in this case by making the findings required by the statute applicable to terminated providers. Petitioner has no valid basis for complaining that HCFA performed its duties under the law.

F. Whether or not HCFA had made its re-admission determinations based on "initial certification surveys" or a survey inapplicable to other Medicaid providers seeking Medicare participation, Petitioner cannot obtain review of the methods used by HCFA in reaching the unreviewable finding on re-entry to Medicare.

Petitioner's arguments concerning the types of surveys conducted by HCFA do not alter the fact that HCFA made findings that are nonreviewable. If HCFA's Notices were unclear on the issue of whether HCFA had denied Petitioner re-entry to the program, Petitioner's arguments on the type of surveys HCFA conducted might be relevant to resolving such ambiguities. However, HCFA's Notices are clear that HCFA made findings denying Petitioner re-entry to the program under section 1866(c). Therefore, it cannot be said that Petitioner's arguments on the type or nature of surveys conducted by HCFA serve the legitimate purpose of helping establish the nature of the findings made by HCFA.

Since the findings made under section 1866(c) are nonreviewable, Petitioner cannot obtain review of HCFA's methods or rationale for reaching those findings. To conclude otherwise would evade the explicit terms of 42 C.F.R. § 498.3(d)(4) and open an avenue for Petitioner to challenge what it is not permitted to challenge. Besides, nothing in 42 C.F.R. Part 498 permits review of the surveys conducted by HCFA when those surveys have not led to any result defined as an "initial determination" in 42 C.F.R. § 498.3(b). Therefore, I do not address the merits of Petitioner's allegations that HCFA had relied on the results of "initial certification surveys" and had subjected Petitioner to a survey no Medicaid provider applying for Medicare participation was required to undergo.

V. Conclusion

For the foregoing reasons, under 42 C.F.R. § 488.70(b), I dismiss Petitioner's hearing requests.

/s/

Mimi Hwang Leahy

Administrative Law Judge