

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Therapeutic Rehabilitation)	Date: May 13, 1998
Centers, Inc.,)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-98-063
)	Decision No. CR531
Health Care Financing)	
Administration.)	
)	

DECISION

I decide that the Health Care Financing Administration (HCFA) properly determined to certify Petitioner, Therapeutic Rehabilitation Centers, Inc., to participate in the Medicare program effective April 7, 1997. Under applicable regulations, Petitioner may not be certified to participate in Medicare on a date that is earlier than April 7, 1997. That date is the date when a initial survey was completed of Petitioner for compliance with applicable participation requirements.

I. Background

Petitioner filed a request for a hearing from HCFA's determination to certify it to participate in Medicare, effective April 7, 1997. Petitioner asserted that it ought to have been certified to participate in Medicare on a date that is earlier than April 7, 1997. The case was assigned to me for a hearing and a decision. I held a prehearing conference at which the parties advised me that the case could be heard and decided based on their written submissions. I established a schedule whereby Petitioner could explain in writing why it believed that HCFA erroneously certified it to participate in Medicare effective April 7, 1997 and why Petitioner believed it ought to have been certified to participate at an earlier date. I gave HCFA the opportunity to file a response.

Petitioner filed a written statement in which it explained why it believed the April 7, 1997 certification date to be erroneous. HCFA filed a response. HCFA filed eight exhibits with its response (HCFA Ex. 1 - HCFA Ex. 8). Petitioner has not objected to my receiving these exhibits into evidence. I hereby admit into evidence HCFA Ex. 1 - HCFA Ex. 8.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether HCFA properly certified Petitioner to participate in Medicare effective April 7, 1997.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision that HCFA properly certified Petitioner to participate in Medicare effective April 7, 1997. I set forth each Finding below, as a separate heading. I discuss each Finding in detail.

1. Generally, the earliest date on which HCFA may certify a provider to participate in Medicare is the date of a compliance survey which establishes the provider to be complying with all Medicare participation requirements.

The process by which a provider may qualify to participate in the Medicare program is established by regulations contained at 42 C.F.R. Parts 488 and 489. In order to be approved to participate in Medicare, a provider must comply with applicable provisions of the Social Security Act (Act) and regulations. 42 C.F.R. § 488.3(a)(1). (2). HCFA contracts with State survey agencies. Among the functions which a State survey agency may perform under its contract with HCFA is to conduct a survey of a provider who applies to participate in Medicare. 42 C.F.R. § 488.10(a)(1). A State survey agency will advise HCFA if, based on the results of a certification survey, a provider meets Medicare participation criteria. 42 C.F.R. § 488.12.

Regulations which were in effect as of the date that Petitioner was certified to participate in Medicare provide that, generally, the *earliest* date on which HCFA will certify a provider to participate in Medicare is the date of completion of a certification survey by a State survey agency. 42 C.F.R. § 489.13(b), (c). The regulations generally do not permit HCFA to certify a provider to participate in Medicare on a date that is earlier than the date of completion of the initial certification survey. *Id.* There is no exception in the regulations which would permit HCFA to certify a provider at a date that is earlier than the date of completion of an initial survey in the circumstance

where completion of the survey has been delayed for reasons that are beyond the ability of the provider to control. Renal Services Group of El Centro, DAB CR482 (1997); GranCare Home Health Service & Hospice, DAB CR464 (1997).

2. The certification date of April 7, 1997 was the earliest date on which Petitioner qualified to participate in the Medicare program.

The undisputed facts of this case are that an initial Medicare compliance survey of Petitioner was not completed until April 7, 1997. HCFA certified Petitioner to participate in Medicare as of that date. Thus, April 7, 1997 is the earliest date on which HCFA could have certified Petitioner to participate in Medicare.

Petitioner is a comprehensive outpatient rehabilitation facility that is located in Lake Worth, Florida. HCFA Ex. 3. Petitioner applied to participate in Medicare on August 20, 1996. Id. In Florida, the State survey agency that performs initial Medicare certification surveys on behalf of HCFA is the State of Florida Agency for Health Care Administration (Florida State survey agency). See HCFA Ex. 6 at 1. The Florida State survey agency did not complete a certification survey of Petitioner until April 7, 1997. Id. As of that date, the Florida State survey agency found Petitioner to be in compliance with all Medicare participation requirements. Id. On May 5, 1997, HCFA certified Petitioner to participate in Medicare effective April 7, 1997, based on the results of the survey that was completed on April 7, 1997 by the Florida State survey agency. HCFA Ex. 7.

Petitioner asserts that the initial compliance survey of Petitioner was delayed and that Petitioner bears no fault for this delay. The facts recited by Petitioner are that a survey was initially scheduled to be conducted on October 7, 1996. Petitioner's memorandum at 1. The surveyor arrived at Petitioner's facility on that date but ascertained that Petitioner was not ready to be surveyed. Id. As of that date, Petitioner did not have a record of patient care for a sufficient period of time that enabled the surveyor to measure Petitioner's compliance with applicable participation requirements. Id.

Petitioner avers that, on November 30, 1996, it informed the Florida State survey agency that it had completed the necessary patient records. Petitioner's memorandum at 1. However, it was not until January 22, 1997 that a surveyor returned to Petitioner's facility to perform an initial survey. Id. On that date, the surveyor found some minor deficiencies, which Petitioner avers that it corrected within two days. Id. Petitioner asserts that it informed the Florida State survey agency promptly that the deficiencies had been corrected. Id. However, according to Petitioner, the Florida State survey agency delayed surveying Petitioner until April, 1997.

For purposes of this decision, I am accepting as true all of Petitioner's assertions. They establish that Petitioner experienced considerable delay in getting surveyed for compliance with Medicare participation requirements. Some part of this delay was the consequence of Petitioner's failure to have acquired the necessary patient treatment histories to enable it to be surveyed. Some part of the delay may also have been the consequence of Petitioner not complying with all participation requirements as of the date of the January 22, 1997 survey. However, it appears also that the Florida State survey agency was less than expeditious in finally surveying Petitioner for compliance with Medicare participation requirements. Petitioner does not bear all of the responsibility for the delay in its certification to participate in Medicare. It certainly is possible that Petitioner might have been certified at an earlier date than April 7, 1997 had it been surveyed for compliance on some date between January 22, 1997 and April 7, 1997.

Petitioner's argument that it should be certified at a date that is earlier than April 7, 1997 is, in effect, an assertion that under principles of estoppel, HCFA should be compelled to certify Petitioner at a date that is prior to the April 7, 1997 survey date. I have no authority to order this requested relief. As I discuss above, at Finding 1, the regulations do not generally permit a provider to be certified at a date that is earlier than the date of completion of the initial survey of that provider, assuming that the provider complies with all participation requirements as of that date. 42 C.F.R. § 498.13. I have no authority to direct HCFA to take an action that is not permitted under applicable regulations. Renal Services of El Centro at 7; GranCare at 9 - 11.

/s/

Steven T. Kessel
Administrative Law Judge