Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Country Club Center, II, Petitioner, v. Health Care Financing Administration.	DATE: August 28, 1996 Docket No. C-96-118 Decision No. CR433

DECISION

The parties have briefed for me the issue of whether Petitioner, a Medicare and Medicaid provider, is entitled to an evidentiary hearing for the purpose of challenging the prohibition imposed by the Health Care Financing Administration (HCFA) against Petitioner's conducting nurse aide training and competency evaluations (nurse aide training and testing) for a period of two years.[1]

HCFA has asked for dismissal of the case based on its position that a ban on nurse aide training and testing is not an appealable issue within the definition of the regulations, and because HCFA has rescinded the imposition of those remedies which, if they had been effectuated, would have given Petitioner the right to hearing.[2] HCFA Br., 23 - 24;

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[1] HCFA's brief in chief will be designated as "HCFA Br." herein; Petitioner's response brief will be designated as "P. Br."; and HCFA's reply brief will be designated as "HCFA Reply." I have received into evidence the 12 exhibits submitted by HCFA (HCFA Ex. 1 through 12), a copy of HCFA's February 6, 1996 notice letter, which was attached to Petitioner's hearing request, and Petitioner's hearing request. I have designated said notice letter as "ALJ Ex. 1" and Petitioner's hearing request as "ALJ Ex. 2." Petitioner submitted no exhibits.

[2] Because HCFA has supported its motion to dismiss with documentary evidence, I have treated the motion as a

(continued...)

HCFA Reply, 11 - 12. Therefore, HCFA contends that Petitioner has no hearing rights with respect to any action taken by HCFA.

Petitioner argues that I am not obligated to dismiss Petitioner's hearing request but should, instead, provide a hearing so that Petitioner may have a fair and meaningful opportunity, consistent with its constitutional rights and the ends of justice, to show that HCFA had imposed a ban on nurse aide training and testing based on erroneous survey findings. P. Br., 2 - 7, 13. Petitioner argues also that the regulations which preclude a hearing on the ban on nurse aide training and testing are arbitrary and capricious. P. Br., 7 - 13. Petitioner asks that I schedule an evidentiary hearing to consider the merits of Petitioner's challenge to the ban imposed by HCFA, which is based on certain disputed survey results.

For the reasons that follow, I conclude that I lack jurisdiction to hear and decide Petitioner's challenge to the two-year ban on nurse aide training and testing imposed by HCFA. In addition, I conclude that, as a matter of law, the case presents no issue for review within the purview of 42 C.F.R. § 498.3(b). Based on the survey findings contested by Petitioner, HCFA has made no resultant determination subject to a hearing and adjudication by me; therefore, I cannot reach the merits of the survey findings.

I grant HCFA's motion to dismiss.

Findings of Fact and Conclusions of Law (FCCLs)

Background facts

1. Petitioner, located in Mount Vernon, Ohio, is a 76-bed facility certified as a Nursing Facility (NF) under the Medicaid program and as a Skilled Nursing Facility (SNF) under the Medicare program. HCFA Br., 11.

2. A NF or SNF must not use as a full-time nurse aide for more than four months any individual who has not completed a State approved training and competency evaluation program. Sections 1819(b)(5)(A) and 1919(b)(5)(A) of the Social Security Act (Act).

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[2](...continued)
motion for summary disposition and evaluated it accordingly. See Fed. R. Civ. P. 12(c), 56.

3. Petitioner initially received approval from the State of Ohio on January 10, 1991, to conduct its own nurse aide training and testing program. Most recently, its program was re-approved by the State on January 31, 1994, for a period of two years. HCFA Ex. 10

4. Until HCFA banned Petitioner from providing nurse aide training, Petitioner was among the 573 State approved facilities currently training approximately 1000 nurse aides each month in Ohio. HCFA Ex. 10.

5. Until HCFA banned Petitioner from doing so, Petitioner was among the various facilities in Ohio conducting competency evaluations of nurse aides. HCFA Ex. 10.

6. In Ohio, nurse aide competency evaluations may be conducted at any licensed or certified nursing facility which has not lost its approval to perform such evaluations. In addition, testing is done every month at 10 regional sites located throughout Ohio. HCFA Ex. 10.

7. Under the Medicare and Medicaid programs, a nurse aide training and testing program may be approved for a period of two years only. 42 C.F.R. § 483.151(d).

8. NFs and SNFs which do not conduct their own nurse aide training and testing must either hire nurse aides who are already trained and tested, or send their aides for training at other facilities or at vocational and technical schools with approved programs. HCFA Ex. 10.

9. The Act prohibits approval of a nurse aide training and testing program offered by a NF or SNF which has been subject to an extended or partial extended survey, as defined under section 1819(g)(2)(B)(i) of the Act, within the past two years, unless the survey shows that the facility is in compliance with program requirements. Sections 1819(f)(2)(B)(iii)(I)(b) and 1919(f)(2)(B)(iii)(I)(b) of the Act.

10. On August 14, 1995, the Ohio Department of Health (ODH) completed a survey to evaluate Petitioner's compliance with federal participation requirements under the Medicare and Medicaid programs. HCFA Ex. 3.

11. The initial purpose of the August 14, 1995 survey was to determine whether Petitioner should be recertified for participation in the Medicare and Medicaid programs as a NF and SNF. HCFA Ex. 4.

12. By letter dated August 18, 1995, ODH notified Petitioner of the following information based on the August 14, 1995 survey results:

> a. that Petitioner was not in substantial compliance with participation requirements for the Medicare and Medicaid programs and was being cited for deficiencies which constitute substandard quality of care as defined in 42 C.F.R. § 488.301;
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> b. that, if Petitioner failed to submit an acceptable plan of correction and achieve substantial compliance by the deadlines indicated in the notice letter, ODH would recommend that HCFA impose two specified remedies against Petitioner;
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> c. that, pursuant to 42 C.F.R. § 488.331, Petitioner had the right to use an informal dispute resolution process to question the deficiencies for which it had been cited; and
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> d. that, if Petitioner conducted a nurse aide training and testing program and had been subject to an "extended survey" or a "partial extended survey," Petitioner would not be able to conduct any nurse aide training and testing for a period of two years.

HCFA Ex. 3.

13. Based on the substandard quality of care found during the August 14, 1995 survey, ODH classified said survey as an "extended survey." HCFA Ex. 4; HCFA Br., 11.

14. An "extended survey" means "a survey that evaluates additional participation requirements subsequent to finding substandard quality of care during a standard survey." 42 C.F.R. § 488.301.

15. "Substandard quality of care" means "one or more deficiencies related to participation requirements under 483.13, Resident behavior and facility practices, 483.15, Quality of life, or 483.25, Quality of care of this chapter, which constitute either immediate jeopardy to resident health or safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than

minimal harm, but less than immediate jeopardy, with no actual harm." 42 C.F.R. § 488.301.

16. Petitioner availed itself of the informal dispute resolution process under 42 C.F.R. § 488.331 and submitted information addressing the deficiency citations from the August 14, 1995 survey. HCFA Ex. 5.

17. Pursuant to the informal dispute resolution process, ODH modified some of its findings of deficiencies from the August 14, 1995 survey. HCFA Ex. 6.

18. On September 12, 1995, ODH completed a Life Safety Code survey of Petitioner. HCFA Ex. 8.

19. By letter dated October 2, 1995, ODH notified Petitioner of the following relevant information, which differs from what is contained in ODH's August 18, 1995 letter:

> a. that Petitioner had been cited for deficiencies pursuant to the September 12, 1995 Life Safety Code survey; and
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> b. that, in order to allow Petitioner to include the September 12, 1995 survey citations in its plan of correction, ODH was extending the deadline by which Petitioner was to have achieved substantial compliance.

HCFA Ex. 8.

20. On November 2, 1995, ODH completed a follow-up survey and determined that Petitioner had not corrected the deficiencies from the August 14, 1995 survey. HCFA Ex. 9.

21. By letter dated November 9, 1995, ODH provided Petitioner with the opportunity to submit a plan of correction to address the deficiencies found during the November 2, 1995 follow-up survey. ODH informed Petitioner again that being subjected to an extended or partial extended survey would result in the loss of its nurse aide training and testing program. In addition, ODH notified Petitioner that it had recommended that HCFA impose the two remedies specified in ODH's earlier letters. HCFA Ex. 9.

22. By letter dated February 6, 1996, HCFA notified Petitioner of the following determinations:

> a. that, based on the results of the August 14, 1995 survey and the November 2, 1995 re-visit survey, HCFA was imposing the remedies of
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> > 1. denying Petitioner payments for new admissions under the Medicare and Medicaid programs, effective February 25, 1996, if substantial compliance had not been achieved by then; and
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> > 2. terminating Petitioner's Medicare and Medicaid participation on March 5, 1996, if substantial compliance had not been achieved by then;
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> b. that the August 14, 1995 survey was an "extended standard survey" and that said survey found "the most serious deficiencies in your facility to be a pattern of deficiencies that constitute actual harm that is not immediate jeopardy . . . ";
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> c. that Petitioner was the subject of an extended survey because the deficiencies cited at 42 C.F.R. § 483.13(a)(physical restraints), 42 C.F.R. § 483.25(c) (quality of care), 42 C.F.R. § 483.25(h)(2)(quality of care), and 42 C.F.R. § 483.25(i)(1)(quality of care) constituted "substandard quality of care" as defined at 42 C.F.R. § 488.301;
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> d. in accordance with section 1819(f)(2)(B)(iii)(I)(b) of the Act, Petitioner would be prohibited from conducting a nurse aide training and/or competency evaluation program for two years from August 14, 1995.

ALJ Ex. 1.

23. By letter mailed on February 20, 1996, Petitioner requested a hearing to contest the two remedies imposed by HCFA (FFCL 22a) and the ban against its conducting a nurse aide training and testing program (FFCL 22d). ALJ Ex. 2.

24. After Petitioner submitted its hearing request, HCFA decided not to impose the two remedies specified in its earlier letter (i.e., the denial of payments for new Medicare and Medicaid admissions and the termination of Petitioner's participation in the programs) prior to the dates they would have become effective. Order and Schedule for Filing Briefs and Documentary Evidence (April 24, 1996).

25. Petitioner represented at the prehearing conference that it wished to have an evidentiary hearing to contest the prohibition against its conducting a nurse aide training and testing program for two years, based on the disputed deficiencies found during prior surveys. Order and Schedule for Filing Briefs and Documentary Evidence (April 24, 1996); P. Br., 2 - 3.

26. Petitioner disagrees with the premise relied upon by HCFA to prohibit Petitioner from conducting a nurse aide training and testing program: that Petitioner had been subject to an "extended survey." P. Br., 2 - 3.

Conclusions of law

27. As relevant to the facts of this case, a NF or SNF is entitled to a hearing to challenge HCFA's findings of deficiencies only if HCFA has imposed a remedy or enforcement action listed in 42 C.F.R. § 488.406 as a result of the findings of deficiencies. 42 C.F.R. § 498.3(b)(12); Arcadia Acres, Inc. v. HCFA, CR424 (1996).

28. HCFA's rescission of a previously imposed remedy cancels any previously existing hearing rights to challenge the rescinded remedy or its bases. Id.

29. Having decided previously to impose two remedies listed in 42 C.F.R. § 488.406 against Petitioner (a ban on payment for new Medicare and Medicaid admissions, and the termination of Petitioner's provider agreement), HCFA decided to rescind these remedies after Petitioner filed its hearing request. FFCL 22 - 24.

30. A loss of nurse aide training and testing is not a remedy or enforcement action listed in 42 C.F.R. § 488.406.

31. The regulations specifically provide that, for NFs and SNFs, the loss of nurse aide training and testing is not an administrative determination which is subject to the hearing rights and procedures specified in 42 C.F.R. Part 498. 42 C.F.R. § 498.3(d)(11).

32. There are no appeal rights in this forum where HCFA finds that a provider has deficiencies but is in compliance with the conditions of participation. 42 C.F.R. § 498.3(d)(1).

33. Petitioner is not entitled to an evidentiary hearing to dispute the deficiencies found during the August 14, 1995 or November 2, 1995 surveys. FFCL 27 - 32.

34. Petitioner is not entitled to an evidentiary hearing to dispute the loss of its nurse aide training and testing program for two years. FFCL 30, 31.

35. I do not have the discretion to deviate from the plain language of the regulations, where the plain language of the regulations precludes the possibility of a hearing on the issues raised by Petitioner. See FFCL 33, 34.

Discussion

The findings and conclusions set forth above are self-explanatory and require no detailed discussion.

HCFA's position is based on what the regulations specify with respect to hearing rights. In contrast, Petitioner's argues that I should either set aside the regulations, disregard them, or interpret them differently from what their text connotes in order to provide Petitioner a hearing under the facts of this case. To Petitioner, a hearing would afford meaningful review of HCFA's decision to ban nurse aide training and testing. Petitioner acknowledges the existence of the informal dispute resolution process for addressing the underlying deficiencies which have resulted in the ban, but it lodges several criticisms against said process. P. Br., 5 - 7.

My legal conclusions are based on my reading of the regulations as written. The relevant regulations are not ambiguous. Their words cannot be read to achieve the result urged by Petitioner. The ban on nurse aide training and testing is not a remedy or enforcement action subject to a hearing. 42 C.F.R. §§ 498.3(d)(11), 488.406; FFCL 30. The regulation codified at 42 C.F.R. § 498.3(d) does not leave me with any discretion to grant Petitioner the hearing it requests. The regulation's content is dispositive on the issue of whether Petitioner may challenge, in this forum, HCFA's decision to ban nurse aide training and testing by Petitioner. FFCL 31, 34. Since HCFA has rescinded its earlier imposed enforcement actions, there is no determination by HCFA subject to the hearing rights specified in 42 C.F.R. Part 498. FFCL 27 - 33. Therefore, Petitioner

cannot challenge the survey findings which resulted in the ban on nurse aide training and testing and in HCFA's earlier (but now rescinded) determination to impose two of the enforcement actions specified in 42 C.F.R. § 488.406. FFCL 34.

It is beyond my authority to decide whether or not the regulations cited in this decision are unconstitutional as alleged by Petitioner. Nor am I at liberty to decide whether I agree with Petitioner's arguments that the regulations should have been written differently in order to comport with the Act. Whether or not there is merit to Petitioner's contention that the absence of a hearing in this forum has placed it at high risk of having its nurse aide training and testing program deprived erroneously (P. Br., 5), I cannot disregard the unambiguous limitations imposed by the regulations. I adjudicate cases under a delegation from the Secretary of Health and Human Services. In this capacity, I am required to follow all substantive rules and regulations duly promulgated by the Secretary. See Dyer v. Secretary of Health and Human Services, 889 F.2d 682, 685 (6th Cir. 1989).

Conclusion

For the reasons stated above, this case is hereby DISMISSED.

/s/

Mimi Hwang Leahy

Administrative Law Judge