DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Nebraska Department of Public Welfare DATE: May 31, 1981
Docket No. 79-77-NE-HC
Decision No. 184

DECISION

1. Introduction

By letter dated April 4, 1979, the Administrator of the Health Care Financing Administration (HCFA, Agency) upheld the May 28, 1976 decision by the former Regional Commissioner, Region VII, to disallow $68,408 in Federal financial participation (FFP) claimed under Title XIX of the Social Security Act (Medicaid) for services provided by Orchard Hill Nursing Manor for the period January 1 through September 1975, and Gra-Mar and Linden Manor Nursing Homes for the period May 18 to June 30, 1975. The disallowance was based on a review conducted by the Regional Office of Medical Services and Financial Management and the Office of Long-Term Care Standards Enforcement to determine the validity of intermediate care facility (ICF) and skilled nursing facility (SNF) provider agreements entered into by the State of Nebraska (the State). The dispute in the Orchard Hill portion of the disallowance pertains to a plan of correction subject to an automatic cancellation clause. The dispute in the Gra-Mar and Linden Manor portions of the disallowance pertains to the necessity of conducting a survey based on ICF standards before a facility is certified as an ICF.

This decision is based on the State's application for review dated April 30, 1979, the Agency response, the reconsideration record (SRS Docket No. ME-NE7601), and an Order to Show Cause. The State chose not to respond to the Order; the Agency was not required to respond and did not do so. The State has elected to have its appeal governed by 45 CFR Part 16.

2. Applicable Regulations

The Medicaid regulations have been recodified several times in recent years, but for the period in question the applicable regulations are set forth in 45 CFR Part 249 (1975), "Services and Payment in Medical Assistance Programs." Federal regulations provide that to obtain FFP for payments made to an ICF, a state must comply with §45 CFR 249.10(b)(15)(i)(E) which requires the single State agency and the provider facility to execute an agreement which is evidence the facility meets all of

the conditions of §249.10(b)(15)(i). The regulations require that prior to the execution of the provider agreement and the making of payments, the agency designated pursuant to §250.100(c) (the survey agency) must certify that the facility meets the definition in §249.10(b)(15) and is in full compliance with standards prescribed in the regulations.

Upon certification for ICF services by the survey agency, the single State agency then executes a provider agreement with the facility in accordance with §249.33(a)(6). Facilities which are determined to have deficiencies requiring decertification or termination may enter into a plan of correction with the state agency pursuant to §249.33(a)(4). Certification with a plan of correction may be for a period no longer than 60 days following the end of the correction period (§249.33(a)(4)(iii)(A)) or a conditional term of 12 months, subject to an automatic cancellation clause that the certification will expire at the close of a predetermined date unless the corrections have been satisfactorily completed or the facility has made substantial progress in correcting the deficiencies (§249.33(a)(4)(iii)(B)). Section 249.33(a)(6) sets forth the permissible length of provider agreements and states that the effective date of the provider agreement may not be earlier than the date of the certification by the survey agency. FFP is not available until a valid provider agreement is in effect.

Section 1902(a)(28) of the Social Security Act provides that a SNF participating in Medicaid must meet the standards and requirements set forth in Section 1861(j) of the Act, under Medicare. FFP in payments to a facility providing SNF services is available only if the facility is certified as having met all the requirements for participation in the Medicaid program as evidenced by a provider agreement between the single State agency and the facility (§249.10(b)(4)(i)(C)). The execution of the provider agreement is contingent upon certification of the facility by the designated state survey agency (§249.33(a)(6)).

The single State agency is required to certify that the facility is in compliance with each condition of participation (§249.33(a)(4)(i)). In order for the state to obtain FFP, the execution of the provider agreement must be in accordance with §249.33(a)(6). A facility which does not qualify under §249.33 is not recognized as an SNF for purposes of payment under the Medicaid program (§249.33(a)(10)).

A provider agreement between the single State agency and a facility is not necessarily a sufficient basis to claim FFP, however. The provider agreement may be determined invalid if the Secretary establishes that any of five provisions §449.10(b)(4)(i)(C)(1) - (5) for a skilled nursing facility or in §449.10(b)(15)(vi)(A) - (E) for an intermediate care facility were violated in the certification of the facility.

3. Orchard Hill Nursing Manor (Orchard Hill)

Background

According to the record, on August 19 and 20, 1974, the Nebraska Department of Health, the State survey agency, surveyed Orchard Hill to determine its compliance with state and federal requirements for SNFs. The survey determined "that Orchard Hill did not satisfy one required condition of participation, and did not meet 20 requirements set by federal and State regulations." See Agency Response, p. 6. Having received notice of these deficiencies, Orchard Hill, on September 11, 1974, agreed to a plan of correction for the deficiencies disclosed by the survey. According to the plan, all corrections were to be made by October 31, 1974. See reconsideration record, SRS Docket No. ME-NE7601, N-20. 1/

On September 28, 1974, the Nebraska Department of Health certified Orchard Hill as an SNF. The record indicates that certification was to be effective for 12 months, beginning September 29, 1974, subject to an automatic cancellation clause effective 60 days following the scheduled date of correction. See reconsideration record N-21. We assume that ICF and SNF provider agreements were executed which contained the same provisions.

On December 3, 1974, a post-certification revisit survey conducted at Orchard Hill revealed that 7 out of 20 deficiencies had not been corrected. See reconsideration record, N-22.

On October 8, 1975, the Nebraska Department of Health certified Orchard Hill as an ICF based on a survey completed September 15, 1975. ICF certification based on ICF standards was not required before March 18, 1975 (§249.10(b)(15)(i)(E)). The certification form (Form 1539) showed an "effective date" of October 1, 1975. See reconsideration record, N-26.

On October 28, 1975, Orchard Hill was recertified as an SNF. The certification form showed an "effective date" of October 1, 1975. See reconsideration record, N-26, 27.

The Regional Commissioner determined that the SNF and ICF provider agreements between the State and Orchard Hill were invalid for the period between January 1 and September 30, 1975. The Commissioner based his determination on his finding that Orchard Hill's certification had expired 60 days after the last date for deficiencies to be corrected, as provided by the cancellation

1/ This decision follows the code at p. 6 of the Agency response when referring to documents in the reconsideration record.

clause, and that no new certification had taken place until the certification effective October 1, 1975. FFP was disallowed in the amount of $45,441 relating to payments for SNF and ICF services from January 1 to September 30, 1975. See notification of disallowance, May 28, 1976, pp. 1-2. 2/

Discussion

Plan of Correction

Section 249.33(a)(4)(iii)(B) provides for the automatic cancellation of a conditional term provider agreement no later than sixty (60) days following the end of the time period specified for correction of the deficiencies, unless the state survey agency finds that all required corrections have been made or the state survey agency informs the Title XIX agency that substantial progress has been made and a new plan of correction has been adopted. Indeed, Orchard Hill's provider agreement expressly incorporates the language of §249.33(a)(4)(iii)(B). See reconsideration record, N-21. The record shows that the State survey agency did not find all corrections completed, nor was the single State agency, the Department of Public Welfare (DPW), informed that progress had been made and a new plan of correction signed. Thus, since the time period for correction ended October 31, 1974, Orchard Hill's provider agreement was cancelled automatically on December 31, 1974, and FFP in payments made on or after January 1, 1975, until recertification, was properly disallowed.

The State argues that "no disallowance is justified because Orchard Hill's deficiencies were temporary and did not pose a substantial threat to patient health." See Administrator's decision, April 4, 1979, p. 2. HCFA is correct, however, in stating, "... that deficiencies are temporary and do not threaten patient health and safety is a precondition of certification based on a plan of correction; these factors

2/ The Administrator, HCFA, later determined that Orchard Hill had not been properly recertified until October 8, 1975 (the actual date on line 19 of the certification and transmittal form, Form 1539), and instructed the Regional Medicaid Director to disallow FFP claimed for all services for the period from October 1-7, 1975. HCFA argues that the Administrator further determined that FFP in payments for SNF services should be disallowed for the additional period October 9-27, 1975, because the effective date (October 1, 1975) preceded the actual certification date (October 28, 1975). See Agency Response, p. 16. However, the Administrator's decision of April 4, 1979, which is all that is before us, is the Agency disallowance with respect to the period between January 1 and September 30, 1975 only.

cannot be used to avoid cancellation of the agreement if the deficiencies remain uncorrected." See Agency Response, p. 17 and §249.33(a)(4)(ii)(A) and (B).

In response to the State's allegation that the survey agency never notified DPW of the continuing deficiencies, HCFA argues that "expiration of a conditional certificate is automatic unless corrections have in fact been made or a new plan submitted; notice to the Title XIX agency [single State agency] is not required." See Agency Response, p. 19.

According to HCFA, nowhere in the federal regulations is the survey agency charged with the responsibility of giving notice of deficiencies to the single State agency, and DPW has not asserted that the survey agency is required to do so by any independent agreement or provision of its State plan. See Agency Response, p. 19. Section 249.33(a)(4)(iii)(B) requires notice to the single State agency only if a new plan of correction is tendered and accepted. Furthermore, internal communication problems between the single State agency and the survey agency do not relieve either agency of the obligation to insure that a facility meets the requirements for participation in the Medicaid program. Therefore, the lack of notice from one State agency to another does not provide a basis for overturning the disallowance here.

Retroactivity of Date of Certification

The State asserts that Orchard Hill was certified on October 1, 1975, but there is no issue before us of possible retroactivity of the date of certification. Section 249.33(a)(6) requires that the effective date of the provider agreement may not be earlier than the date of certification. Orchard Hill was certified as an ICF on a Form 1539 signed October 8, 1975 but purporting to have an effective date of October 1, 1975. It was also certified as an SNF on a Form 1539 signed October 28, 1975, but purporting to be effective October 1, 1975. The disallowance here does not cover any part of the month of October 1975, and the certifications do not purport to be effective before October 1, 1975.

4. Gra-Mar Manor and Linden Manor Nursing Homes

Background

Both Linden Manor and Gra-Mar were properly certified as providers of SNF services for the periods in question; the payments in question pertain only to ICF services. From July 28-31, 1975, an SNF survey and an accompanying intermediate care supplemental survey were completed at Linden Manor. Linden Manor was certified as an ICF by a Form 1539 dated

July 30, 1975 for the period July 1, 1975 to June 20, 1976. See reconsideration record, E-1. An ICF provider agreement for the facility was signed by DPW on August 28, 1975, for the period July 1, 1975 to June 30, 1976.

Gra-Mar Manor was certified as an ICF by a Form 1539 dated July 31, 1975 for the period May 17 to December 31, 1975, based on a survey (apparently pertaining to SNF standards) done August 15, 1974, and a follow-up visit February 11, 1975. See reconsideration record, E-2. From August 19-21, 1975, an SNF survey and the accompanying intermediate care supplemental survey were conducted at Gra-Mar Manor. An ICF provider agreement was signed by DPW on August 14, 1975, for the period May 17 to December 31, 1975.3/

The Regional Commissioner determined that no valid agreement for ICF services existed for Gra-Mar and Linden Manor from May 18, 1975 to June 30, 1975. FFP in payments to these two facilities during this period was disallowed in the amount of $22,967. See notification of disallowance, May 28, 1976, p. 2.

The Administrator, HCFA, in his April 4, 1979 decision upheld the Regional Commissioner's decision. 4/

Discussion

The Agency maintains that the regulations required all provider agreements between a single State agency and an ICF to be based upon a determination by the survey agency that the provider met standards as

3/ Gra-Mar and Linden Manor each received a letter from DPW, dated August 5, 1975, which advised "that a 60-day extension from March 18 to May 17, 1975 was granted for your ICF provider agreement." See reconsideration record, D.

4/ The Administrator also determined that neither facility had ICF surveys before March 18, 1975 as required by federal regulations; therefore, the State was not entitled to FFP for ICF services from that date until the first ICF survey and certification in each facility (July 30, 1975 for Linden Manor and July 31, 1975 for Gra-Mar). He instructed the Regional Medicaid Director to determine the amount of FFP paid to the State for ICF services for the periods between March 18 and May 17, 1975 for both facilities and July 1 to July 30, 1975 for Gra-Mar and July 1 to 29, 1975 for Linden Manor, and take appropriate action. However, the Administrator's decision of April 4, 1979 does not indicate that payments for ICF services were disallowed for these periods. Therefore, the issue of FFP in payments for ICF services for the periods March 18, 1975- May 18, 1975 and July 1-30, 1975 is not before the Board.

set out in §§249.33(a)(2), 249.10(b)(15)(i)(E), and 249.10(b)(15)(ii)(A).

HCFA contends, "In order to meet the definition of an intermediate care facility, even though already certified as a skilled nursing facility, a facility must be independently certified by the survey agency as meeting the distinct requirements established for ICFs." See Agency Response, p. 5. The Agency relies on §§249.10(b)(15)(i)(E) and (ii)(A), which were promulgated on January 17, 1974 and provided that a facility must meet the required standards for an ICF no later than 12 months following the effective date of the regulation, or by March 18, 1975. The record indicates that there were no provider agreements in existence that met these standards. Gra-Mar and Linden Manor did not have ICF surveys on or before March 18, 1975 and during the periods in question. The record also indicates that the State concedes this fact. See reconsideration record, N. 14. The State claims that it retroactively certified the facilities as having been in compliance during the May 18 to June 30, 1975 period and that they had been surveyed and found in compliance with SNF standards.

The regulations are clear, however, that the facilities must meet ICF standards by March 18, 1975. Since ICF surveys were not completed until after the disallowance periods, the facilities could not possibly be certified as meeting ICF standards during the periods in question.

Section 1904 of the Social Security Act

The State takes the position that it substantially complied with all the federal requirements pertaining to the provider agreements in question. The State contends that "the Social Security Act, specifically Section 1904, requires only substantial compliance, and incidents of isolated, insubstantial noncompliance are not just cause for a disallowance." See Administrator's decision, April 4, 1979, p. 2.

Section 1904 of the Social Security Act provides in pertinent part:

> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the state plan under this title, finds:
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> * * *
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> (2) that in the administration of the plan there is a failure to comply substantially [with the provisions of section 1902] the Secretary shall notify such State agency that further payments will not be made to the State.

Section 1904 authorizes the Secretary to withhold further Title XIX payments where a state has failed to "comply substantially" with the federal requirements for a state Medicaid plan under Section 1902. Section 1904 provides the drastic remedy of withholding federal funds for an entire state plan (or the affected category). It has nothing to do with the right of the federal government to recover overpayments made to a state where it has not followed a specific statutory or regulatory requirement in a particular instance. The statutory right to stop federal funding completely for substantial noncompliance does not limit the right to recoup the federal share of payments improperly made by a state. Under Section 1903(d)(2) of the Act, the Secretary is obligated to recover the federal share of any Title XIX overpayment he determines to have been made to a state. This section and Section 1116(d) of the Act have consistently been interpreted as authorizing a determination that an item or class of items, such as the payments here, are unallowable. See 45 CFR 201.14; 45 CFR 16.91.

5. Conclusion

For the reasons stated above, we conclude that the disallowances pertaining to Orchard Hill, Gra-Mar, and Linden Manor should be upheld.

/s/ Cecilia Sparks Ford

/s/ Donald F. Garrett

/s/ Alexander G. Teitz, Panel Chair