

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The General Counsel

v.

Winston C. San Agustin, M.D.,
(OCR No. 06-56803).

Docket No. C-12-544

Decision No. CR2580

Date: August 2, 2012

DECISION AND ORDER

The General Counsel of the Department of Health and Human Services brings this action pursuant to section 504 of the Rehabilitation Act of 1973, as amended (Act), and its implementing regulations, 45 C.F.R. Parts 81 and 84.¹ The General Counsel charges that Respondent, Winston C. San Agustin, M.D., who is a practicing physician and surgeon, violated the statute and regulations because he refused to provide medical services to an individual based on that person's disability.²

For the reasons set forth below, I find that Respondent San Agustin has waived his right to a hearing and consents to my making a decision based on the information available. Respondent San Agustin violated section 504 of the Act: he discriminated against an individual by refusing to provide medical services solely because the individual was HIV-positive. Respondent's compliance with the Act and regulations cannot be secured by voluntary means, and his receipt of federal financial assistance shall be terminated until such time as he demonstrates that he will comply with the requirements of the Act and regulations.

¹ The Act, Pub. L. 93-112 (enacted September 26, 1973) is codified at 29 U.S.C. § 701.

² In support of his position, the General Counsel has submitted eight exhibits (HHS Exs. 1-8).

Discussion

1. Respondent San Agustin has waived his right to a hearing and consents to my deciding this case based on the information filed.³

On March 29, 2012, the General Counsel sent to Respondent San Agustin, by first class mail, return receipt requested, a Notice of Opportunity for Hearing. According to the applicable regulations, the respondent may file an answer to this notice within 20 days after service. Failure to answer within the 20-day period following service of the notice “may be deemed an admission of all matters of fact recited in the notice.” 45 C.F.R. § 81.52. Further, within 20 days after service of a notice of opportunity for hearing, the respondent may request a hearing. The respondent’s failure to request a hearing “shall” be deemed a waiver of the right to a hearing and constitutes the respondent’s “consent to the making of a decision on the basis of such information as is available.” 45 C.F.R. §§ 80.9; 81.54.

The regulations provide that the date of service of the notice of opportunity for hearing is “the *date of its delivery, or of its attempted delivery* if refused.” 45 C.F.R. § 81.35 (emphasis added). The General Counsel has submitted a copy of the return receipt and the relevant “Track & Confirm” page from the U.S. Postal Service website, showing an April 11, 2012 delivery. HHS Exs. 2, 3.

The time for responding has long since passed. Because Respondent San Agustin neither filed an answer nor requested a hearing, he has waived his right to a hearing and consented to my deciding the case based on “such information as may be filed as the record.” *See* 45 C.F.R. § 80.9(a). He has also admitted all of the facts set forth in the notice, which is in the record as HHS Ex. 1.

2. Respondent San Agustin violated section 504 of the Act when he denied medical treatment to an individual based on that individual’s handicap.

Respondent San Agustin is a California physician, who practices neurological surgery in Monterey Park, California. He participates in the joint state/federal Medicaid program, referred to in California as Medi-Cal. HHS Ex. 1 at 3-4. Because he participates in the Medi-Cal program, Respondent San Agustin receives federal financial assistance. 45 C.F.R. § 84.3(f) and (h). As a recipient of federal financial assistance, he may not discriminate against any qualified handicapped person. 45 C.F.R. § 84.4. Examples of “prohibited discriminatory actions” include denying an individual a service or other benefit provided under a program that receives federal financial assistance from the Department of Health and Human Services. 45 C.F.R. §§ 80.3(b)(1); 84.4(b).

³ My rulings on each of the findings, conclusions, or exceptions are set forth, in italics and bold, in the discussion captions of this decision. *See* 45 C.F.R. § 80.10(d).

In this case, the injured party is a young man, insured through the Medi-Cal program, who suffers from HIV (human immunodeficiency virus) disease. Because of his condition, he is a handicapped person within the meaning of the Act and regulations. 45 C.F.R. § 84.3(j); *see Bragdon v. Abbott*, 524 U.S. 624, 637 (1998). The injured party also suffered from back and hip pain, and his primary care physician referred him to Respondent San Agustin for treatment. On July 18, 2006, Respondent San Agustin examined the injured party, diagnosed spondylolisthesis, and recommended surgery, a laminectomy. HHS Exs. 5, 6. Respondent agreed to perform the surgery at Garfield Medical Center and to arrange treatment authorization from the Medi-Cal program. HHS Ex. 1 at 5; HHS Ex. 4 at 3; HHS Ex. 6.

But shortly thereafter, Respondent's secretary told him about the injured party's HIV status. HHS Ex. 1 at 5; HHS Ex. 4 at 2-3. Respondent San Agustin immediately stopped the Medi-Cal authorization process and scheduled another appointment with the injured party. HHS Ex. 1 at 5; HHS Ex. 4 at 3. At that second appointment, which occurred on July 21, 2006, he asked the injured party about his HIV status. When the injured party confirmed that he was HIV-positive, Respondent San Agustin refused to perform the surgery and told the injured party to go to the county hospital for treatment. HHS Ex. 1 at 5-6; HHS Ex. 4 at 3; HHS Ex. 7. He discharged the injured party from his practice, and, in correspondence advising the referring physician that he had done so, he specifically mentioned that the young man was HIV-positive. HHS Ex. 7.

The information in the record thus establishes that Respondent San Agustin refused to provide medical services to an individual because of that individual's disability. He therefore violated the Act and regulations and the HHS Office for Civil Rights (OCR) may appropriately act to correct the noncompliance.

3. Respondent San Agustin's compliance with the Act and regulations cannot be secured by voluntary means, so his receipt of federal financial assistance must be terminated, until he shows that he will comply with statutory and regulatory requirements.

To effect compliance with the Act and regulations, the responsible department (in this case, OCR) should, "to the fullest extent practicable," seek the recipient's cooperation. 45 C.F.R. § 80.6(a). However, if noncompliance cannot be corrected by such informal means, the department may suspend or terminate the recipient's federal financial assistance. 45 C.F.R. § 80.8(c).

Here, the record documents that OCR attempted repeatedly but unsuccessfully to secure Respondent San Agustin's agreement to comply voluntarily with the requirements of the Act and regulations:

- In a letter dated September 14, 2009, it advised Respondent San Agustin that, based on the results of its investigation, the department concluded that Respondent had discriminated against the injured party because of his disability, in violation of section 504, by denying him the surgery for which he was otherwise qualified. OCR included a proposed settlement agreement with that letter, and gave Respondent 60 days in which to negotiate a settlement;⁴
- On September 30, 2009, OCR telephoned Respondent's office to discuss settlement, but office staff said that he was not available;
- In a letter dated October 16, 2009, Respondent San Agustin asked for 30 additional days in which to respond to OCR's September 14 letter;
- In a letter dated October 20, 2009, OCR asked Respondent to discuss settlement and warned that, unless settlement was reached by the end of the 60-day negotiating period, it would "undertake appropriate measures to effect Respondent's compliance";
- In a letter dated October 27, 2009, Respondent denied the allegations of discrimination but said that he was interested in resolving the case through a non-attorney representative;
- OCR discussed informal resolution of the case with Respondent's non-attorney representative during telephone conversations held on November 5, 13, and 25, 2009;
- Respondent San Agustin participated in the November 25 conversation, and indicated that he was considering the proposed settlement agreement;
- On November 25, 2009, OCR provided Respondent's representative with a revised settlement agreement that reflected the results of their negotiations;
- On December 4, 2009, OCR telephoned Respondent's representative, who said that Respondent agreed "in principle" with the proposed agreement; the representative promised to respond further by the following week;

⁴ The proposed settlement seems fairly benign. Respondent San Agustin was not required to admit liability; OCR agreed to suspend its administrative action against him and promised not to initiate enforcement proceedings. For his part, Respondent San Agustin essentially had to agree to comply with section 504, i.e., not to deny treatment based on a patient's HIV status. He also had to agree to six hours of AIDs education for himself and his staff. He had to display a notice of nondiscrimination. HHS Ex. 4 at 11-20.

