DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Maryland Department of Health and Mental Hygiene
Docket No. 79-157-MD-HC
Decision No. 107

DATE: July 2, 1980

DECISION

I. Procedural Background

The Maryland Department of Health and Mental Hygiene (State), by letter dated July 19, 1979, sought review of a June 22, 1979 determination by the Director of the Medicaid Bureau, Health Care Financing Administration (Agency), to disallow $226,796 in Federal financial participation (FFP) claimed by the State under Title XIX of the Social Security Act. The notification of disallowance stated that FFP was being denied for intermediate care facility (ICF) services provided by eight nursing facilities for the quarter ended December 31, 1978, because the facilities did not have valid provider agreements in effect with the State. In its August 30, 1979 response to the State's appeal, the Agency reduced the amount of the disallowance to $162,304.95, stating that the Agency had erroneously computed the amount of FFP which must be disallowed under the governing Federal regulations for four of the facilities. Disallowances for three of the facilities were eliminated entirely, and the disallowance for a fourth was significantly reduced. On February 27, 1980, an Order setting forth the facts and issues as they appeared from the record and directing the State to show cause why the appeal should not be denied on certain grounds (set forth below) was issued by the Board Chairman. The Order was based on the application for review and attachments and the Agency response thereto. The Order also asked the Agency to explain its method of calculating the amount of the disallowance for one of the facilities involved. In its March 17, 1980 response to the Order, the Agency explained its method of determining the amount of the disallowance to the Board's satisfaction. The State in a March 27, 1980 response to the Order raised several issues which were deemed to require further elaboration. On April 21, 1980 the Board's Executive Secretary issued a letter to the parties requesting additional information. The Agency, in a response dated May 22, 1980, withdrew the disallowance for one facility in the amount of $14,426, but maintained that the remaining disallowance ($147,878) should be sustained. The Board did not receive a response from the State to the April 21, 1980 letter.

II. Statement of the Case

The disallowances for services provided at four nursing facilities remain in dispute: Potomac Valley Nursing Home, University Nursing Home, Salisbury Nursing Home, and Manor Care-Towson. The record indicates that in 1977 the

State had executed written provider agreements with these facilities which expired on October 30, 1978 for Potomac Valley and on September 30, 1978 for the other three facilities. The State then executed new provider agreements with the facilities on March 14, 1979, March 15, 1979, February 26, 1979, and March 5, 1979 respectively. Each of these agreements was for a term of twelve months. The agreements with University, Salisbury, and Manor Care commenced on October 1, 1978; the term of the agreement with Potomac Valley began on November 1, 1978. The State claimed FFP for services provided at the facilities during the last three months of 1978.

The State is asserting that the provider agreements had retroactive effect to an earlier date than the date of the actual written execution of the agreements. The Agency has agreed that a provider agreement can have retroactive effect. The Agency has insisted, however, that the controlling date for approving the validity of a provider agreement is the date when a facility has been certified (discussed below) to have met the health and safety standards prescribed by Federal regulations. The facilities whose disallowances were withdrawn by the Agency in the course of this case all had provider agreements executed at a date later than the beginning of their year-long duration, but these facilities had been certified prior to the commencement of the terms of their provider agreements. Potomac Valley, University, Salisbury, and Manor Care, however, had been certified on November 10, 1978, December 6, 1978, January 5, 1979, and January 12, 1979 respectively, all after the purported provider agreements had commenced to run. It is the Agency's position that a provider agreement can be effective retroactively, but only to the date upon which the facility has been certified as evidenced by the approval of the survey agency on a completed HCFA Form 1539. The State argues that the applicable regulations also permit the backdating of the certification of a facility to the date of the expiration of the previous provider agreement, and therefore the disallowances should be reversed.

III. Regulations

The nursing facilities that were the subjects of disallowances in this case all provided ICF services. To obtain FFP for payments made to an ICF, the State must, in accordance with 42 CFR 440.150 (1978), ensure that the facility has been certified to have met the requirements of Subpart C of 42 CFR 442 as evidenced by a valid agreement between the State medicaid agency (the single State agency) and the facility to provide ICF services. The regulations require that prior to the execution of the provider agreement and the making of payments, the agency designated pursuant to § 442.101(c) (the survey agency) must certify that the facility is in full compliance with the standards prescribed in the regulations at § 442.101(d)(1). 42 CFR 442.12(a). The survey agency may certify a facility for up to 12 months if it meets applicable requirements. 42 CFR 442.110(a).

The effective date of a provider agreement may not be earlier than the date of certification (42 CFR 442.12(b)), and the duration of the agreement must be for the same duration as the certification period set by the survey agency (42 CFR 442.15(b)).

IV. Discussion

The central issue in this case is whether valid provider agreements were in effect with the four remaining facilities during the last quarter of 1978. The State contends such agreements were in effect, while the Agency maintains they were not.

In an Order to Show Cause dated February 27, 1980, the State was asked why the disallowances for the facilities should not be sustained on the ground that 42 CFR 442.12(a) and (b), requiring that a provider agreement may not be executed with a facility before the facility is certified by the State survey agency and that the effective date of the agreement may not be earlier than the date of certification, are controlling in this case.

In its response to the Order, the State has argued that it has complied with all the applicable regulations and that, therefore, the provider agreements are valid. The State contends that the provider agreements were in fact not executed until after the certification forms had been signed, thus meeting the requirements of § 442.12(a). The State then asserts the Agency's interpretation of § 442.12(b) as meaning that a provider agreement cannot take effect prior to the date on which the certification form (HCFA Form 1539) is signed is erroneous. Rather, the State looks to § 442.15(b), which states that the term of a provider agreement must be for the same duration as the certification period, as justification for its interpretation of § 442.12(b) that a provider agreement may not be effective earlier than the effective date of the certification. The State points out that when its survey agency signed the certification forms for the facilities, the survey agency backdated the terms of the certification periods to the date the prior provider agreements expired. Thus, according to the State, any time differential between the expiration of the prior provider agreements and the actual signing of the certification forms is covered by the backdating of the start of the certification period for the facilities. The new provider agreements therefore had the same duration as the certification periods set by the survey agency, satisfying § 442.15(b). In support of this line of reasoning the State refers to 42 CFR 442.20(a)(2) which requires that any Medicaid provider agreement with a skilled nursing facility (SNF) participating in both the Medicaid and Medicare programs must be for the same duration as the Medicare certification. The State has supplied documents showing that the facilities in question participate in both programs and that the Agency has approved backdated certifications of the facilities for the Medicare program.

While it is true, as the State contends, that provider agreements were not executed for the four facilities until after they had been certified, the fact remains that for a period of time after the expiration of its prior provider agreement, each of the four facilities involved was not certified by the single State agency as meeting the standards required for participation in the Medicaid program. Throughout the time period between the

expiration of the prior provider agreements and the recertification of the facilities patients remained in the facilities. If the State's interpretation of 42 CFR 442.12(a) and (b) were to be accepted, a facility, in the interval between its prior provider agreement's expiration and subsequent recertification, could provide substandard care to patients but still receive a backdated certification from the single State agency qualifying the facility for Medicaid participation based on a subsequent survey showing that, at the time of the survey, the facility complied with Federal requirements.

The Agency's interpretation of 42 CFR 442.12(a) and (b) as meaning that a provider agreement can only be effective from the date of a facility's certification as meeting certain requirements is not arbitrary in view of the Medicaid program's aim to ensure quality care in sanitary and safe conditions. Under the Agency's interpretation, a facility is unable to participate in the Medicaid program until it has shown it has met basic requirements as evidenced by certification by the single State agency. This certification becomes effective on the date the survey agency indicates its approval by completing a HCFA Form 1539. No interval where the facility could fall below these standards is permitted under this interpretation, while under the State's reasoning such a possibility could occur. Even though the State has supplied documents purporting to show that the four facilities were surveyed prior to the intervals between the expiration of their prior provider agreements and their recertification, that does not excuse the State from adherence to the regulations that were in effect during the period in question. A recent HCFA regulation announcement (45 FR 22933, April 4, 1980) would appear to allow a provider agreement to become effective on the date of the onsite health and safety survey, but that rule will not become effective until July 3, 1980. Nevertheless, we find that the Agency's interpretation of the regulations in effect during the period of the disallowance represents a valid exercise of its administrative responsibilities. The fact that the Agency has now decided to change its policy does not invalidate its prior actions.

The State's reliance on 42 CFR 442.20(a)(2) in support of its position is also misplaced. The State's argument that the Medicaid provider agreements executed with the four facilities must be considered valid because the agreements were for the same duration as Medicare agreements executed with the facilities as required by § 442.20(a)(2) overlooks one decisive factor. The disallowances in this case were for ICF services provided at the facilities. The scope of § 442.20 is limited to SNFs which participate in both the Medicare and Medicaid programs.

It is apparent from the record that the facilities involved in this disallowance provided both ICF and SNF services. The State's argument is deficient in that it fails to take cognizance of the regulatory distinctions that exist between ICFs and SNFs. Different standards are imposed for each type of facility reflecting the different services provided at each type of

facility. The responsibility for certifying an ICF for Medicaid certification lies solely with the single State agency. 42 CFR 442.101(c). For a SNF participating in both the Medicare and Medicaid programs, however, Agency approval of the State's certification of the facility is required. 42 CFR 442.101(b)(2). The Agency allows a SNF provider agreement for a Medicare/Medicaid facility to be backdated to the date of Medicare certification to protect a state from permanent loss of FFP where, for some reason, there is a delay in the Agency approval of the SNF for Medicaid participation. None of these regulations pertaining to SNFs, however, are applicable to this case in which the disallowance was for ICF services only.

Federal regulations require that for a state to receive FFP for services provided by a facility a valid provider agreement must be in effect with that facility. Under 42 CFR 442.12 a provider agreement cannot be effective prior to the date of the facility's certification. In this case all four facilities lacked valid provider agreements for some period of time during the quarter ended December 31, 1978. For this reason the disallowance of FFP for services provided at the facilities prior to their certifications is sustained.

IV. Conclusion

For the reasons stated above, we conclude that 42 CFR 442.12 is controlling in this case and sustain the disallowance in the amount of $147,878.

/s/ Donald G. Przybylinski

/s/ Robert R. Woodruff

/s/ Frank L. Dell'Acqua, Panel Chairman