

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
The Rivers HealthCare	)	
Resources, Inc.,	)	DATE: November 26, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-326
	)	Decision No. CR446
Health Care Financing	)	
Administration.	)	

DECISION

I decide that the Health Care Financing Administration (HCFA) determined correctly to certify Petitioner, The Rivers HealthCare Resources, Inc., to participate in the Medicare program, effective January 23, 1996.

**I. Background**

The following background facts are undisputed. On June 1, 1995, Petitioner applied to participate in the Medicare program as a home health agency. Petitioner's Brief. On February 22, 1996, HCFA notified Petitioner that Petitioner was certified to participate in Medicare as a home health agency, effective January 25, 1996. HCFA Ex. 12.<sup>1</sup> On April

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<sup>1</sup> HCFA offered as evidence 16 exhibits (HCFA Exs. 1 - 16). Petitioner offered as evidence with its initial brief six exhibits (P. Exs. 1 - 6) and two documents which Petitioner designated as "supporting documents." The first "supporting document" is a letter to Petitioner's President, dated March 11, 1996, from the Joint Commission on Accreditation of Healthcare Organizations, with attachments. I have designated this document as P. Ex. 7. The second "supporting document" is a nine-page policy and procedure manual prepared by Petitioner. I have designated this document as P. Ex. 8. Additionally, Petitioner has offered P. Exs. 9 and 10. Neither party has objected to my receiving into evidence

25, 1996, Petitioner requested HCFA to change the effective date of Petitioner's certification to participate in Medicare to December 15, 1995. HCFA Ex. 13. On May 3, 1996, HCFA notified Petitioner that it would not change the effective date of Petitioner's participation to December 15, 1995. HCFA Ex. 14.<sup>2</sup>

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. The parties agreed that the case could be heard and decided without an in-person hearing. The parties each submitted exhibits and written arguments. I base my decision in this case on the law and on the parties' submissions.

## **II. Issue, findings of fact, and conclusions of law**

The issue in this case is whether HCFA determined correctly to certify Petitioner to participate in Medicare, effective January 23, 1996. I make the following findings of fact and conclusions of law (Findings) to support my decision that HCFA correctly determined to certify Petitioner to participate in Medicare effective January 23, 1996. I discuss each of these Findings in detail, below.

1. A home health agency that applies for participation in the Medicare program may not participate until HCFA determines that the home health agency meets Medicare participation requirements.

2. A home health agency that applies for participation in the Medicare program will be surveyed on behalf of HCFA to determine whether the home health agency meets Medicare participation requirements. The home health agency will be certified to participate in Medicare effective the date that the survey is completed, if the home health agency meets all conditions of participation in Medicare, and any other requirements imposed by HCFA.

3. Where a home health agency complies with all conditions of participation in Medicare on the date that the survey is completed, but fails to comply with one or more standards of participation or any other participation requirements, HCFA will certify the home

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the other party's exhibits. I admit into evidence HCFA Exs. 1 - 16 and P. Exs. 1 - 10.

<sup>2</sup> However, HCFA has now agreed to change the effective date of Petitioner's participation in Medicare to January 23, 1996. HCFA's Brief at 1.

health agency to participate in Medicare on the earlier of the following dates: the date on which the home health agency complies with all participation requirements; or, the date on which the home health agency submits to HCFA a plan of correction which HCFA accepts.

4. A pre-certification survey was completed of Petitioner on December 15, 1995. On that date, Petitioner complied with all conditions of participation for home health agencies, but did not comply with several standards of participation.

5. Petitioner did not prove that it complied with all participation requirements before January 23, 1996, the date on which it submitted to HCFA a plan of correction which HCFA accepted.

6. HCFA properly determined to certify Petitioner's participation in Medicare as a home health agency, effective January 23, 1996.

### III. Discussion

#### A. Governing law (Findings 1 - 3)

An entity must apply to HCFA to be certified to participate in Medicare. 42 C.F.R. § 489.10(a). In order to be certified, an applicant for participation first must be surveyed in order to determine whether that applicant meets all Medicare participation requirements. 42 C.F.R. §§ 488.10, 489.10(d). HCFA has delegated to State survey agencies the authority to conduct surveys on HCFA's behalf. Id. HCFA will accept an applicant's participation agreement on the date that a survey of that applicant is completed, assuming that the applicant meets all participation requirements on that date. 42 C.F.R. § 489.13(a).

If an applicant for participation in Medicare fails to satisfy all participation requirements as of the date of completion of the survey, then HCFA will not certify that applicant to participate in Medicare until HCFA is satisfied that the applicant meets participation requirements. See 42 C.F.R. § 489.13(b). If HCFA finds, on the basis of a survey, that an applicant (other than a skilled nursing facility) complies with all conditions of participation, but fails to comply with a lesser requirement or requirements, such as a standard of participation, then HCFA will certify the applicant to participate on the earlier of the following dates: the date that the applicant actually complies with all participation requirements; or, the date on which the

applicant submits a plan of correction which addresses the outstanding deficiencies and which HCFA accepts. 42 C.F.R. § 489.13(b)(1), (2).<sup>3</sup>

Petitioner notes in its brief that approximately 28 weeks transpired between the date that Petitioner applied to participate in Medicare and the date that it became certified to participate in Medicare. I infer that Petitioner is arguing that it might have met Medicare participation requirements sooner than the date of its certification, had HCFA been more expeditious in processing Petitioner's application.

That may be so, but the delay in processing Petitioner's application does not entitle Petitioner to be certified at an earlier date than the date that it actually satisfies the criteria for participation. The earliest date that an applicant for participation will be certified is the date on which a survey of that applicant is completed, assuming that the applicant meets all participation requirements as of that date. 42 C.F.R. § 489.13(a). An applicant may not be certified to participate at a date earlier than the date the initial survey is completed, even assuming that the applicant might have been able to satisfy HCFA that it met participation requirements at an earlier date, had the survey been conducted on that earlier date. See id. Where an applicant is deficient in complying with participation requirements, that applicant may not be certified at a date earlier than the date that it satisfies HCFA that the deficiencies have been corrected. 42 C.F.R. § 489.13(b). An earlier certification date may not be established, based on the applicant's argument that the applicant would have corrected its deficiencies earlier, had HCFA apprised the applicant of those deficiencies at an earlier date. See Id.

**B. The facts of this case and the application of the law to the facts (Findings 4 - 6)**

It is evident from application of the law to the facts of this case that the earliest date that Petitioner established that it met Medicare participation requirements is January 23, 1996. Consequently, HCFA correctly certified Petitioner to participate in Medicare, effective January 23, 1996.

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<sup>3</sup> The criteria for establishing compliance are not the same for skilled nursing facilities as they are for other applicants for participation. 42 C.F.R. § 489.13(b)(2). Petitioner is not a skilled nursing facility, so those different criteria are not at issue here.

**1. The facts (Findings 4 - 5)**

A pre-certification survey of Petitioner was completed by the Commonwealth of Virginia Department of Health (Virginia State survey agency), acting on behalf of HCFA, on December 15, 1995. HCFA Ex. 4 at 1. On December 27, 1995, the Virginia State survey agency notified Petitioner that Petitioner had been found to be deficient in complying with standards under the following regulations: 42 C.F.R. § 484.14(g), 42 C.F.R. § 484.18, and 42 C.F.R. § 484.18(c). HCFA Ex. 4 at 1, 3 - 9. Petitioner was not found to be deficient in complying with any conditions of participation. See Id. The Virginia State survey agency advised Petitioner that Petitioner must submit a plan of correction which addressed the specific deficiencies that had been identified. HCFA Ex. 4 at 1.

Petitioner submitted its first plan of correction on December 31, 1995. HCFA Ex. 5. The Virginia State survey agency found the first plan of correction to be unacceptable. HCFA Ex. 6.

The Virginia State survey agency found Petitioner's first plan of correction to be deficient in several respects. With respect to the standard of participation contained in 42 C.F.R. § 484.14(g), which requires a home health agency to coordinate its delivery of patient services and to maintain liaison among the individuals who provide services, the Virginia State survey agency found that Petitioner had failed to explain how it would provide prompt notification to a physician of any delay in providing care to a patient pursuant to a plan of care. HCFA Ex. 6 at 5; see HCFA Ex. 5 at 3 - 4.

With respect to the standard of participation contained in 42 C.F.R. § 484.18, which requires that care provided by a home agency follow a written plan of care that is established and is periodically reviewed by a physician, the Virginia State survey agency found that Petitioner did not explain how it would document a verbal order for treatment issued by a physician. HCFA Ex. 6 at 5 - 6; see HCFA Ex. 5 at 4 - 5. Additionally, with respect to this standard of participation, the Virginia State survey agency found that Petitioner did not explain how it would document a corrective action undertaken to redress an error in following a physician's plan of care. HCFA Ex. 6 at 6; see HCFA Ex. 5 at 5.

With respect to the standard of participation contained in 42 C.F.R. § 484.18(c), which requires that oral orders by a physician be signed by a nurse or therapist, and that the physician's signature be obtained, the Virginia State survey agency found that Petitioner had not explained adequately how it would redress any failure to do what the standard

required. Specifically, the Virginia State survey agency found that Petitioner did not explain how it would assure that a verbal physician's order would be signed and dated immediately. HCFA Ex. 6 at 6 - 7; see HCFA Ex. 5 at 6 - 8. Also with respect to the standard of participation contained in 42 C.F.R. § 484.18(c), the Virginia State survey agency found that Petitioner did not explain how it would document the date that it received a verbal order from a physician. HCFA Ex. 6 at 7; see HCFA Ex. 5 at 8. Finally, the Virginia State survey agency found that Petitioner's first plan of correction did not address a failure by Petitioner's staff to follow Petitioner's policy concerning assuring that a physician sign a verbal order for care. HCFA Ex. 6 at 7; see HCFA Ex. 5 at 9.

On January 19, 1996, the Virginia State survey agency communicated by telephone to Petitioner some, but not all, of its conclusions that Petitioner's first plan of correction was unacceptable. HCFA Ex. 2 at 5. On January 22, 1996, the Virginia State survey agency attempted to fax its written findings to Petitioner. Id.; see HCFA Ex. 6. However, the fax machine at Petitioner's office would not receive the transmission. HCFA Ex. 2 at 5.

On January 22, 1996, Petitioner submitted to the Virginia State agency a second plan of correction. HCFA Ex. 7. Petitioner submitted this second plan of correction to the Virginia State survey agency prior to receiving the Virginia State survey agency's written findings that Petitioner's first plan of correction was unacceptable. HCFA Ex. 2 at 5; HCFA Ex. 7 at 1.

On January 23, 1996, the Virginia State survey agency notified Petitioner, by telephone, that the second plan of correction had not addressed all of the problems that had been found with the first plan of correction. HCFA Ex. 2 at 6.

On January 23, 1996, Petitioner submitted a third plan of correction to the Virginia State survey agency. HCFA Ex. 8. In this plan, Petitioner made revisions to address the outstanding problems with the first plan of correction that Petitioner had not addressed in its second plan of correction. Id.; see HCFA Ex. 6. The Virginia State survey agency found the third plan of correction to be deficient only in that it had not been signed and dated and in that it did not contain completion dates for proposed corrections. HCFA Ex. 9. On January 25, 1996, Petitioner submitted a fourth plan of correction which addressed these remaining deficiencies. HCFA Ex. 10. HCFA has now agreed to certify Petitioner to participate in Medicare effective January 23, 1996, based on Petitioner's fourth plan of correction.

Petitioner does not dispute that it was obligated to comply with Medicare participation requirements, as described by the Virginia State survey agency. However, Petitioner asserts that it was in compliance with all Medicare conditions of participation on December 18, 1995, and ought to have been certified to participate effective that date. Petitioner's Brief. It is possible that the reference to "December 18" in Petitioner's Brief is a typographical error, and that Petitioner intends to say that it was in compliance with all Medicare conditions of participation on December 15, 1995, the date that the pre-certification survey was completed.

It also may be that Petitioner is asserting that, as of December 15, 1995, it was in compliance with all Medicare participation requirements, and not just conditions of participation in Medicare. As I discuss above, at Part III.A. of this decision, an applicant for participation may not be certified to participate as of the completion date of the pre-certification survey on the basis that it complied with all conditions of participation if, in fact, it was not complying with standards of participation on that date. HCFA's determination in this case in part is that Petitioner was complying with all conditions of participation as of December 15, 1995, but that Petitioner was not complying with standards of participation on that date. To be fair to Petitioner, I have examined the evidence offered by Petitioner to decide if, in fact, Petitioner was complying with all standards of participation, as well as conditions of participation, at any time prior to January 23, 1996.

Petitioner has offered an exhibit which arguably is relevant to deciding this question. The exhibit consists of Petitioner's policy and procedure manual, which describes the policies and procedures in effect in Petitioner's operations as of December 15, 1995. P. Ex. 8. I have looked closely at the policies and procedures described in the manual, in order to decide whether they establish that Petitioner was complying with all standards of participation on December 15, 1995, or thereafter. I conclude that the policy and procedures manual does not answer all of the concerns raised by the Virginia State survey agency.

The deficiencies that the surveyors identified in the report of the pre-certification survey, completed on December 15, in many respects were based on review of Petitioner's care of individual patients. HCFA Ex. 5 at 4 - 9. Petitioner has not denied that it failed, in these individual cases, to provide care that met standards of participation. Thus, even if Petitioner did have policies in effect on December 15, 1995 that may have comported with the requirements of the standards of participation governing home health agencies, it was not complying with those policies, and the standards, in

individual cases. Petitioner has not offered any evidence that it corrected its failures to comply prior to January 23, 1996.

Furthermore, the policies stated in the policy and procedure manual do not completely address the concerns raised by HCFA as of December 15, 1995, or thereafter. Thus, Petitioner would not have been in full compliance with applicable participation requirements, even if it had carried out to the letter the policies contained in its policy and procedure manual. As I describe above, one deficiency noted by the Virginia State survey agency under 42 C.F.R. § 484.14(g) was that Petitioner did not explain how it would assure that a physician would be notified of any delay experienced in following the physician's plan of care for a patient. The policy and procedure manual states that a patient's case manager will determine the frequency of communication with a patient's physician. P. Ex. 8 at 3. Among the communications which are to be made are communications concerning delays in implementing a patient's plan of care. Id. I do not find that these statements in the policy and procedure manual address fully the concern raised by the Virginia State survey agency. Although these statements in the policy and procedure manual identify the individual who has the duty to notify a physician of a delay in implementing a patient's plan of care, they do not define a mechanism for assuring that such notification will take place.

Another deficiency identified by the Virginia State survey agency, pursuant to 42 C.F.R. § 484.18(c), which I have discussed above, was a failure by Petitioner to explain how it would address a failure by Petitioner's staff to assure that Petitioner followed its internal policies concerning documentation of a physician's verbal order. The policy and procedure manual does establish a policy for documenting a verbal order by a physician. P. Ex. 8 at 3. However, it does not explain what Petitioner would do in the event that its staff was remiss in executing the policy. See id.

## **2. Application of the law to the facts (Finding 6)**

As I discuss at Part III.A. of this decision, HCFA will not certify an applicant to participate in Medicare effective the completion date of a pre-certification survey if the applicant is not complying with all Medicare participation requirements as of that date. In the event that an applicant is not complying with a participation requirement other than a condition of participation, the applicant may not participate until it satisfies HCFA that it is complying with all participation requirements. HCFA will certify an applicant to participate on the earlier of the following



events: when the applicant attains compliance, or when the applicant submits an acceptable plan of correction.

The evidence in this case establishes that Petitioner was not complying with all Medicare participation requirements on December 15, 1995. HCFA determined correctly that Petitioner could not be certified to participate effective that date. Petitioner has not proved that it complied with all Medicare participation requirements prior to January 23, 1996, the date when it submitted an acceptable plan of correction. Therefore, HCFA correctly determined that the earliest date that it could certify Petitioner to participate in Medicare was January 23, 1996.

#### **IV. Conclusion**

I conclude that HCFA determined correctly to certify Petitioner as a Medicare participant, effective January 23, 1996.

/s/

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Steven T. Kessel  
Administrative Law Judge