

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Massachusetts Department of Public Welfare DATE: April 15, 1981
Docket Nos. 79-236-MA-HC
 80-55-MA-HC
 80-95-MA-HC
Decision No. 161

DECISION

The Commonwealth of Massachusetts, Department of Public Welfare (Grantee) appealed under 45 CFR Part 16 three disallowances of Federal financial participation (FFP), claimed under Title XIX of the Social Security Act for the calendar quarters ending on March 31, 1979, June 30, 1979, and September 30, 1979, made by the Director, Bureau of Program Operations, Health Care Financing Administration (HCFA or Agency).

The Agency decision was based on a review conducted by officials assigned to HCFA's Regional Office of the Grantee's Quarterly Statements of Expenditures for the periods April 1, 1976 through September 30, 1979. Included in the expenditure reports were claims for inpatient and outpatient hospital services provided by the Washingtonian Center for Addictions (WCA). The reviewers determined that the WCA did not meet the eligibility requirements for participating in the Medicaid program.

The three disallowances are being considered jointly at the request of the parties as the determinations involve common questions of law and fact. The amounts of the disallowances are as follows:

Docket Nos. 79-236-MA-HC	\$ 673,393
80-55-MA-HC	331,900
80-95-MA-HC	<u>141,692</u>
	\$1,146,985

This decision is based on the applications for review, the Agency's response thereto, pertinent correspondence between the parties, an Order to Show Cause issued by the Board, and the Grantee's response to the Order to Show Cause. The Grantee's response did not specifically address the tentative conclusions reached by the Board in the Order, but rested its appeal on prior arguments and factual documentation. The Agency was not required to respond to the Order and did not do so. For the reasons stated in the Order, we conclude that the Agency's decision should be upheld.

Applicable Regulations

The Medicaid regulations pertaining to these cases have been recodified during the period involved (1976 - 1979), but are essentially the same as set out in the 1979 edition of the Code of Federal Regulations. For convenience, citations will be to 42 CFR Part 440 (1979). The earlier codifications may be found in 45 CFR 249.10(b)(1) and (2) (1976); 42 CFR 449.10(b)(1) and (2) (1977); and 42 CFR 440.10 and 440.20 (1978).

FFP is available under Title XIX for costs of inpatient hospital services, 42 CFR 440.10, and for costs of outpatient hospital services, 42 CFR 440.20, only if the services are furnished at an institution that:

- (1) Is licensed or formally approved as a hospital by an officially designated authority for State standard setting; and
- (2) Meets the requirements for participation in Medicare.

The regulatory requirements for FFP are stated in the conjunctive. It is, therefore, necessary for the facility to meet both requirements in order for services provided by the facilities to be eligible for FFP. As is discussed below, we conclude that the WCA failed to meet either requirement.

Discussion

Issue #1. Whether the WCA Was Granted State Approval

The Grantee asserts that during the period in question, the WCA was licensed or formally approved as required under the regulations. The Grantee advances several arguments.

- (1) The WCA was licensed by the Massachusetts Department of Mental Health during the relevant period.
- (2) The WCA was eligible to be licensed as an acute care hospital during the period, and was constructively and equitably licensed.
- (3) The license granted on October 9, 1979 by the Massachusetts Department of Public Health was effective retroactively and nunc pro tunc to January 1, 1975.

Concerning the Grantee's first argument, the regulations state unambiguously that the licensing or approval is to be by a state-designated authority. The Grantee has designated the Department of Public Health (DPH) as responsible for such licensing or approval (Agency's Response to Appeal, Exhibit D). The fact that the WCA may have been licensed by another State agency is insufficient to meet the clear regulatory requirements of the Medicaid program.

The Grantee's second argument is likewise unpersuasive. The regulations specifically require licensing or formal approval by a state-designated authority. The fact that the WCA may have been eligible to be licensed and was constructively and equitably licensed is insufficient to meet the regulatory requirements of the Medicaid program.

The Grantee's third assertion is incorrect. The hospital license issued by the DPH (Agency's Response to Appeal, Exhibit E) states on its face that it is valid "for two years from date issued." The license was issued on October 9, 1979 and, therefore, does not cover the period of the disallowance.

Issue #2. Whether the WCA Meets the Requirements for Medicare Participation

The Grantee advances two arguments relating to the second eligibility requirement for FFP availability for inpatient and outpatient hospital services. Both arguments address one aspect of Medicare eligibility, the certification requirement. (42 CFR 405.1901.) The arguments are treated separately below.

The Grantee first contends that the WCA was granted accreditation by the Joint Commission on Accreditation of Hospitals (JCAH) for the period at issue.

Section 1865(a) of the Social Security Act (Act) provides that:

- (1) an institution is accredited as a hospital by the Joint Commission on Accreditation of Hospitals, and... then, such institution shall be deemed to meet the requirements of the numbered paragraphs of section 1861(e)... (emphasis added).

This statutory provision provides that an institution accredited by the JCAH as a hospital may be "deemed" to meet all Medicare certification requirements pertaining to patient health and safety. The provision is based upon the comparability of JCAH requirements for hospital certification to Medicare requirements for hospital certification, and is further justified by the fact that the JCAH hospital accreditation process is validated by HHS pursuant to Section 1864(c) of the Act.

The WCA's alcoholism program was accredited for a period of two years beginning February 5, 1975 as a result of a survey of the program conducted by the field representative of the JCAH's Division of Alcoholism of the Accreditation Council for Psychiatric Facilities. (Agency's Response to Appeal, Exhibit I.) In response to a request by the WCA for certification for Medicare participation, the State DPH informed the WCA that the JCAH accreditation was limited to the alcoholism program and did not confer "deemed" status upon the WCA for Medicare eligibility and, therefore, a complete survey of the facility would be necessary. (Agency's Response to Appeal, Exhibit G.) In addition, in response to a later inquiry from the State DPH, the Social Security Administration Bureau of Health Insurance, which was then responsible for the Medicare program, stated that the WCA was not "deemed" to meet any Medicare certification requirements. (Agency's Response to Appeal, Exhibit J.)

The statute requires the accreditation of the entire hospital, not just one program for attaining "deemed" status. (Section 1865(a) of the Act.) This insures the quality of inpatient and outpatient care provided to individuals at the hospital. Although the WCA's alcoholism program received JCAH accreditation, this is not sufficient to confer "deemed" status on the hospital for purposes of Medicare, because the statute specifically requires JCAH accreditation of the entire hospital.

The Grantee's second argument is that the WCA submitted and implemented a plan of correction of the deficiencies cited in a State DPH survey conducted in 1977. Grantee has not submitted to the Board a copy of the State survey agency's findings with a plan of correction of deficiencies developed by the WCA.)

The Medicare regulations governing the certification procedure for providers allow for the certification of a provider by the State agency "with deficiencies not adversely affecting the health and safety of patients." In such situations, additional information is to be incorporated in the State survey agency's findings:

- (1) A statement of the deficiencies found, and
- (2) A description of further action which is required to remove the deficiencies, and
- (3) A time-phased plan of correction developed by the provider and supplier and concurred with by the State Agency, and
- (4) A rescheduled time for a resurvey of the institution or agency to be conducted by the State agency within 90 days following the completion of the survey.
(42 CFR 405.1903(b).)

The record contains no evidence that the WCA was certified by the State agency as a result of a 1977 survey. That evidence would include the State survey agency's findings in support of certification, with, in this instance, a description of a time-phased plan of correction. Since the Grantee has presented no evidence that the WCA was certified and there is no evidence that the WCA submitted and implemented a plan of correction, we find the Grantee's argument to be without merit.

Additional Arguments

The Grantee asserts that the disallowances are invalid because the regulations upon which they are based, 42 CFR 440.10 and 440.20, are ultra vires and exceed the regulatory authority granted to the Secretary. The Grantee's assertion is without merit.

The Social Security Act defines "medical assistance" in this instance as inpatient and outpatient hospital services. (Sections 1905(a)(1) and (2) of the Act.) The Secretary has determined that such services must be provided in a facility which is licensed or formally approved by a designated state agency, and meets the requirements of Medicare. (42 CFR 440.10 and 440.20.) In light of the Secretary's duty under the Medicaid program to assure a high quality of care and services to recipients, it was not unreasonable for the Secretary to have determined that this restriction should be placed on those facilities providing the services. Such a restriction might prevent improper care and a misuse of funds and is not inconsistent with the Act and is therefore within the Secretary's authority to provide for the efficient administration of the functions with which he is charged under the Act. (Section 1102 of the Act.) In addition, it should be noted that the Massachusetts State plan for medical assistance expressly incorporates the requirements of then 42 CFR 449.10 (See State plan excerpt, Agency's Response to Appeal, Exhibit C).

The Grantee also claims that the disallowances were based on an incorrect interpretation of 42 CFR 440.10 and 440.20. Those regulations require that a provider be eligible to participate in Medicare. The Grantee asserts that the determination was based upon a finding that the WCA never actually participated in Medicare.

The Grantee's reading of the regulations is correct. However, there is no evidence in the record that the disallowances were based on a finding that WCA did not actually participate in the Medicare program. The disallowances were based on a finding that the WCA had not been licensed or formally approved by an officially designated authority for State standard setting, and did not meet the requirements for participation in Medicare.

Lastly, the Grantee argues that the determination is invalid as Title XIX of the Social Security Act violates the due process clause of the Constitution, in that the statute provides no opportunity to dispute the audit findings and determinations.

The Agency in its response brief indicates two meetings, June 6, 1979 and April 29, 1980, at which the Grantee had ample opportunity to contest the audit findings. In addition, the Grantee has been given an opportunity to appeal the disallowance and has done so before this Board. Therefore, the Grantee has been afforded several opportunities to dispute the audit findings and disallowances.

Conclusion

The Grantee has failed to show that the WCA complied with the Medicaid regulatory requirements for FFP for inpatient and outpatient hospital services. Therefore, the decisions of the Director, Bureau of Program Operations, Health Care Financing Administration, are upheld.

/s/ Alexander G. Teitz

/s/ Norval D. (John) Settle

/s/ Donald F. Garrett, Panel Chair