Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Franklin Park Nursing Home,	)	DATE: September 13, 1995
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-94-301
	)	Decision No. CR393
Health Care Financing Administration.	)	
	)	

DECISION

I am issuing my ruling dismissing Petitioner's hearing request for cause under 42 C.F.R. § 498.70(b) and, in the alternative, my decision to resolve the case in full by entering summary judgment in favor of the Health Care Financing Administration (HCFA).

I. Background

This case came before me pursuant to the filing of Petitioner's hearing request (Hearing Request) dated February 18, 1994. The Hearing Request referred to the January 27, 1994 determination by HCFA that Petitioner's participation as a skilled nursing facility in the Medicare program and as a nursing facility in the Medicaid program should terminate effective April 7, 1994. HCFA stated in its notice letter that its determination was based on the results of a "complaint survey" conducted by the New York State Health Department on January 7, 1994. Notice Letter at 1. According to Petitioner, its licensees "disagree that the residents were in 'imminent danger' at the time the New York State Department of Health ordered the evacuation of the Nursing Home's residents." Hearing Request at 1.

After a preliminary prehearing conference, I stayed proceedings in the case at Petitioner's request, based upon Petitioner's representations concerning its pending negotiations with the New York State Department of Health

and other proceedings relevant to this case. See letter to counsel dated May 31, 1994. During a conference call on June 6, 1995, the parties' counsel updated me on the status of this case. June 14, 1995 Order and Summary of Prehearing Conference. At that time, HCFA argued also that all issues in the case have become moot. HCFA stated that: the State of New York had suspended Petitioner's certificate to operate a nursing home even before HCFA had sent the notice of termination dated January 27, 1994; Petitioner had voluntarily terminated doing business; and Petitioner had surrendered its State license. Id. at 3.

Petitioner, by counsel, acknowledged that it has been closed since January of 1994, and Petitioner did not disagree with HCFA's allegations and its assertion that the case is moot. Id. at 3. However, Petitioner refused to withdraw its hearing request, indicating that it would withdraw its hearing request only if HCFA issues a written waiver of remedies, in order to relieve Petitioner's former operators from any personal liability they may have. Id. at 3 - 4. Petitioner held fast to its refusal to withdraw and its demand for a written release from HCFA even after I had made clear that personal liability has never been and cannot become an issue in this case. Id.. Therefore, I invited HCFA to file a motion to dismiss the action or any other motion appropriate to its assertions of mootness. Id. at 4.

In accordance with my scheduling order, HCFA timely filed its brief (HCFA Br.) and supporting evidence for the dismissal of Petitioner's Hearing Request.[1] Petitioner had until August 14, 1995, to file a response under my order. Petitioner has not filed any response or sought an extension of time.

By order dated September 1, 1995, I considered Petitioner to have waived its opportunity to respond and closed the record for the reasons stated therein. With respect to any new facts contained in HCFA's brief and exhibits, I consider them to be uncontested by Petitioner. I note, in addition, that Petitioner had been placed on notice at the outset of this case that failure to follow orders might have serious adverse consequences. See April 6, 1994 Order to Show Cause Why Hearing Request Should Not Be Dismissed, and May 18, 1994 Order and Notice of Second Prehearing Conference.

---

[1] HCFA submitted two exhibits with its brief. I hereby admit into evidence HCFA's Exhibits 1 and 2. They shall be referenced herein as HCFA Ex. 1 and 2.

Having reviewed the contents of the record before me, I agree with HCFA that there exists no real issue of fact or law in controversy. Moreover, Petitioner does not have any legitimate expectation of relief in this forum. Accordingly, I rely on 42 C.F.R. § 498.70(b) and dismiss the action because, for the reasons set forth below in part II of this Decision, Petitioner is not a "proper party or does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b). In the alternative, if I were to assume that Petitioner's filing of a hearing request entitled it to an adjudication on the merits, I would also decide the case in HCFA's favor by entering summary judgment against Petitioner. I set forth in part III, below, my findings and conclusions for entering summary judgment against Petitioner and in favor of HCFA.

II. Ruling and Order Dismissing Petitioner's Hearing Request under 42 C.F.R. § 498.70(b)

I rule that Petitioner's Hearing Request must be dismissed, based on the following findings of fact and conclusions of law (FFCL):

1. Prior to January 7, 1994, Petitioner was participating as a skilled nursing facility in the Medicare program and as a nursing facility in the Medicaid program. See Notice Letter; Hearing Request; HCFA Br. at 4.

2. On January 7, 1994, the New York State Department of Health conducted a survey of Petitioner. See Notice Letter; Hearing Request.

3. On January 7, 1994, the New York State Department of Health ordered Petitioner to complete the removal and transfer of all residents within 96 hours, and it prohibited Petitioner from admitting additional patients until it receives written permission from the New York State Department of Health to return nursing home residents to Petitioner's premises. HCFA Ex. 1 at 4 - 5.

4. There was no event that took place after January 11, 1994 (i.e., 96 hours after the New York State Department of Health issued its January 7, 1994 order) that could have resulted in Petitioner's submission of any legitimate claim for reimbursement of services. HCFA Br. at 12; FFCL 3.

5. On January 27, 1994, HCFA notified Petitioner of its initial determination that, effective April 7, 1994, Petitioner's provider agreement would be terminated, based on the results of the survey conducted on January 7, 1994 by the New York State Department of Health. Notice Letter.

6. Since January 1994, Petitioner has been closed for business. June 14, 1995 Order and Summary of Prehearing Conference at 3; FFCL 3.

7. A provider may, on its own, terminate its provider agreement with HCFA. 42 C.F.R. § 489.52.

8. A provider's cessation of business is deemed to be a termination by the provider, effective with the date on which it stopped providing services to the community. 42 C.F.R. § 489.52 (b)(3).

9. The reasons for a provider's cessation of business are irrelevant under 42 C.F.R. § 489.52(b)(3). Hospicio en el Hogar Mayaguez, Inc., DAB CR370, at 10 (1995).

10. On or about January 11, 1994, Petitioner, on its own, terminated its right to participate in the Medicare program. FFCL 3, 6 - 9.

11. HCFA would not have terminated Petitioner's right to participate in the Medicare program until April 7, 1994, the date specified in HCFA's notice letter. Notice Letter at 2.

12. On February 18, 1994, Petitioner requested a hearing before an administrative law judge. Hearing Request.

13. Any provider dissatisfied with an initial determination by HCFA to terminate its provider agreement is entitled to a hearing before an administrative law judge. 42 C.F.R. §498.5(b).

14. On January 27, 1994, when HCFA issued its determination, Petitioner was not a provider within the meaning of the law. 42 C.F.R. § 498.2; FFCL 10.

15. On February 18, 1994, when Petitioner filed its Hearing Request, Petitioner was not a

provider within the meaning of the law. 42 C.F.R. § 498.2; FFCL 10.

16. On February 18, 1994, Petitioner did not have any hearing rights. 42 C.F.R. § 498.5(b); FFCL 13 - 15.

17. All hearing requests must identify the specific issues and the findings of fact and conclusions of law with which the individual or entity disagrees. 42 C.F.R. § 498.40(b)(1).

18. In its Hearing Request, Petitioner stated that it disagreed that "the residents were in 'imminent danger' at the time the New York State Department of Health ordered the evacuation of the Nursing Home's residents." Hearing Request at 1.

19. HCFA's notice letter dated January 27, 1994 did not make any finding that Petitioner's residents were in "imminent danger." Notice Letter at 2.

20. HCFA's notice letter dated January 27, 1994 stated that the issue of "immediate and serious threat" to patients had been rendered moot by Petitioner's discharge of all patients, even though HCFA had earlier considered this issue as a possible basis for terminating Petitioner's provider agreement. Notice Letter at 2.

21. Even assuming that Petitioner was a provider on February 18, 1994, Petitioner's Hearing Request did not raise any genuine dispute for hearing. 42 C.F.R. § 498.40(b)(1); FFCL 17 - 20.

22. A hearing request must be dismissed for cause when the party requesting the hearing is not a proper party or does not otherwise have a right to a hearing. 42 C.F.R. § 498.70(b).

Accordingly, I dismiss Petitioner's Hearing Request under 42 C.F.R. § 498.70(b).

III. Findings and Decision to enter Summary Judgment against Petitioner and in favor of HCFA

In the alternative, if I were to assume that Petitioner's filing of a Hearing Request entitled it to an adjudication on the merits, I would enter summary judgment against Petitioner and in favor of HCFA. Because there exist no facts of decisional significance genuinely in dispute, the only matters to be decided are the legal implications of the undisputed material facts. I conclude that Petitioner has not had the right to participate in the Medicare program as a provider during any period that may have been placed into controversy by Petitioner's attempt to challenge HCFA's January 27, 1994 determination to end Petitioner's provider agreement on April 7, 1994.

Under this alternative analysis, I hereby incorporate all of the FFCL 1 - 22 in the preceding part of this Decision. In addition, I issue also the following FFCL:

> 23. As a matter of law, HCFA's issuance of a notice of termination dated January 27, 1994 could not have had the effect of altering or negating Petitioner's own prior termination of its provider agreement on or about January 11, 1994. 42 C.F.R. § 489.52(b)(3); FFCL 3, 6 - 10, 14.
>
> 24. For any entity to participate either as a skilled nursing facility in the Medicare program or as a nursing facility in the Medicaid program, it must comply with all State and local licensing requirements. Sections 1819(d)(2)(A) and 1919(d)(2)(A) of the Social Security Act.
>
> 25. By order dated January 7, 1994, the New York State Department of Health suspended Petitioner's operating certificate. HCFA Br. at 9; HCFA Ex. 1.
>
> 26. During October of 1994, Petitioner consented to the State's revocation of its operating certificate, and Petitioner surrendered said certificate to the New York State Department of Health. HCFA Ex. 2 at 3.
>
> 27. As a matter of law, Petitioner has been ineligible to participate as a Medicare or Medicaid provider since January 7, 1994. FFCL 24 - 26.

28. Whatever the merits of Petitioner's disagreement in February of 1994 with the "imminent danger" found by the New York State Department of Health (Hearing Request), Petitioner was not and could not have remained a program provider on or after April 7, 1994, when HCFA would have terminated Petitioner's provider agreement based on the results of the January 7, 1994 survey. FFCL 6 - 11, 14, 18, 23 - 27.

29. Whatever the merits of any fact alleged in HCFA's January 27, 1994 notice letter, Petitioner was not and could not have remained a program provider on or after April 7, 1994, when HCFA would have terminated Petitioner's provider agreement based on the results of the January 7, 1994 survey. FFCL 5 - 11, 14, 23 - 27.

30. The record does not contain any evidence or allegation that Petitioner has been harmed by HCFA's decision to terminate Petitioner's provider agreement effective April 7, 1994. FFCL 4, 6, 10, 11, 27.

31. The record does not contain any evidence which might entitle Petitioner to relief in this action.

Accordingly, summary judgment is hereby entered against Petitioner and in favor of HCFA.

IV. Conclusion

I grant HCFA's motion and dismiss Petitioner's Hearing Request. In the alternative, I enter summary judgment in favor of HCFA and against Petitioner.

/s/

Mimi Hwang Leahy

Administrative Law Judge