Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Rolling Acres Care Center,	)	Date: September 26, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-205
	)	Decision No. CR437
Health Care Financing Administration.	)	
	)	

DECISION

Pending before me is the threshold issue of whether Petitioner, a nursing home participating in the Medicare and Medicaid programs, has a right to a hearing on the decision of the Health Care Financing Administration (HCFA), which prohibits Petitioner from participating in any nurse aide training and competency evaluation program.

Petitioner filed a request for hearing after having received HCFA's notice letter dated October 19, 1995, informing Petitioner of HCFA's determination that certain actions adverse to Petitioner would take effect on specified dates due to the results of surveys conducted by the Ohio Department of Health (ODH) for HCFA. Petitioner's hearing request challenged the survey findings and HCFA's conclusion that certain alleged deficiencies constituted substandard quality of care. However, after another survey was conducted, HCFA rescinded all of the earlier specified adverse actions except for the prohibition against Petitioner conducting nurse aide training and competency evaluations for a period of two years, effective the date of the "extended survey." The prohibition resulted from HCFA's determination that Petitioner had provided a substandard quality of care and was, therefore, subjected to an "extended survey."

HCFA filed a motion to dismiss Petitioner's hearing request on the grounds that the ban on nurse aide training and competency evaluations is not appealable, and the rescission of other remedies has eliminated

Petitioner's hearing rights on all other matters.[1] In its brief in opposition to dismissal,[2] Petitioner stated that it seeks a hearing "due to the denial of its ability to participate in any fashion in the nurse aide training/competency evaluation program . . . as the sole and direct result of a unilateral finding of substandard care by a single surveyor from the Ohio Department of Health . . . ." P. Br. at 1. Petitioner alleges also that the survey findings have placed it "on the road to severe and automatic penalty." Id.

Recently, I decided that the regulations prohibit an appeal of a ban on nurse aide training and competency evaluations. Country Club Center, II, DAB CR433 (1996). In said case as well as in Arcadia Acres, Inc., DAB CR424 (1996), and University Towers Medical Pavilion, DAB CR436 (1996), I decided that a provider does not have the right to a hearing where HCFA has found deficiencies but has decided not to impose any enforcement actions or remedies listed in 42 C.F.R. § 488.406. I reach the same conclusion here for the same reasons. Therefore, I grant HCFA's motion to dismiss the hearing request.

Findings of Fact and Conclusions of Law (FFCL)

Background facts and law

1. Petitioner is a 101-bed long-term care facility located in North Lima, Ohio, which is certified as a skilled nursing facility (SNF) under the Medicare program and as a nursing facility (NF) under the Medicaid program. P. Br., 2; P. Ex. 2; HCFA Br., 10; HCFA Ex. 12.

2. A SNF or a NF must not use as a full-time nurse aide for more than four months any individual who has not completed a state approved training and competency evaluation program. Sections 1819(b)(5)(A) and 1919(b)(5)(A) of the Social Security Act (Act).

---

[1] HCFA has filed a supporting brief (HCFA Br.), 13 exhibits (HCFA Ex. 1 through 13), and a reply brief (HCFA Reply). I admit HCFA's exhibits for the purpose of deciding the motion to dismiss.

[2] Petitioner has filed a brief (P. Br.) and five exhibits (P. Ex. 1 through 5). I admit Petitioner's exhibits for the purpose of deciding the motion to dismiss.

3. Under the Medicare and Medicaid programs, a nurse aide training and competency evaluation program may be approved for only a period of two years. 42 C.F.R. § 483.151(d).

4. To participate in the Medicare and Medicaid programs, there is no requirement that a NF or SNF provide its own nurse aide training and competency evaluation program.

5. NFs and SNFs which do not conduct their own nurse aide training and competency evaluations must either hire those nurse aides who are already trained and tested, or send their aides for training at other facilities or at vocational and technical schools with approved programs. HCFA Ex. 10.

6. In the State of Ohio, there are 573 approved nurse aide training programs, which train approximately 1,000 nurse aides each month. HCFA Ex. 10.

7. In the State of Ohio, nurse aide competency evaluations may be conducted at any licensed or certified nursing facility which has not lost its approval to perform such evaluations. HCFA Ex. 10.

8. Nurse aide testing is done every month at 10 regional sites located throughout Ohio. HCFA Ex. 10.

9. If a nurse aide is employed by or has a job offer from a facility, the Medicare and Medicaid programs will issue reimbursement for the cost of training and evaluating the aide, regardless of whether such services were provided by the employing facility. 56 Fed. Reg. 48901, 48916 (1991).

10. In 1995, Petitioner was not approved to offer a nurse aide training and competency evaluation program because Petitioner had not applied for approval. HCFA Ex. 10.

11. Petitioner does not conduct any nurse aide training or competency evaluation program. P. Br., 3; HCFA Br. 20.

12. As a provider under the Medicare and Medicaid programs, Petitioner is subject to three types of surveys by HCFA or its agent:

a. standard surveys, which take place once every 15 months;

b. extended surveys, which are conducted when a facility is found to have provided substandard quality of care under a standard survey; and

c. surveys conducted due to complaints or because HCFA has reasons to question a facility's compliance.

P. Br., 2 (citing 42 U.S.C. §§ 1395i-3(g)(2)(A), 1395i-3(g)(2)(B)(i), 1395i-3(g)(2)(D), 1396r(g)(2)(A), 1396(g)(B)(i), 1396(g)(2)(D)).

13. The Act prohibits approval of a nurse aide training and testing program offered by a NF or SNF if the facility has been subject to an extended or partial extended survey, as defined under section 1819(g)(2)(B)(i) of the Act, within the past two years, unless the surveys find substantial compliance with program requirements. Sections 1819(f)(2)(B)(iii)(I)(b) and 1919(f)(2)(B)(iii)(I)(B) of the Act.

14. On July 24, 1995, ODH completed an annual standard survey of Petitioner. P. Ex. 2; HCFA Ex. 1 at 1.

15. By letter dated August 3, 1995, ODH notified Petitioner of the following information based on the July 24, 1995 survey:

a. that, Petitioner was not in substantial compliance with participation requirements for the Medicare and Medicaid programs and has been cited for four deficiencies which constitute substandard quality of care as defined in 42 C.F.R. § 488.301;

b. that, if Petitioner fails to submit an acceptable plan of correction and achieve substantial compliance by the deadlines indicated in the notice letter, ODH would recommend that HCFA impose two specified remedies against Petitioner;

c. that, pursuant to 42 C.F.R. § 488.331, Petitioner has the right use an informal dispute resolution process to question the deficiencies for which it has been cited; and

d. that, if Petitioner conducted a nurse aide training and competency evaluation program and has been subject to an "extended survey" or a "partial extended survey" or a remedy specified therein, Petitioner would not be able to

> conduct any nurse aide training and competency evaluations for a period of two years.

HCFA Ex. 3.

16. An "extended survey" means "a survey that evaluates additional participation requirements subsequent to finding substandard quality of care during a standard survey." 42 C.F.R. § 488.301.

17. "Substandard quality of care" means "one or more deficiencies related to participation requirements under § 483.13, [r]esident behavior and facility practices, § 483.15, [q]uality of life, or § 483.25, [q]uality of care of this chapter, which constitute either immediate jeopardy to resident health or safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm, but less than immediate jeopardy, with no actual harm." 42 C.F.R. § 488.301.

18. On August 11, 1995, Petitioner requested informal dispute resolution under 42 C.F.R. § 488.331 to address the citations from the July 24, 1995 survey. HCFA Ex. 5.

19. By letter dated August 24, 1995, ODH informed Petitioner that, pursuant to the informal dispute resolution process, ODH had decided not to change the citations for any of the deficiencies found in the July 24, 1995 survey. HCFA Ex. 7.

20. On September 8, 1995, ODH completed a survey of Petitioner due to a complaint of patient neglect and found that one quality of care deficiency had remained uncorrected from the July 24, 1995 survey. HCFA Ex. 4.

21. On September 13, 1995, Petitioner submitted a plan of correction to address the deficiencies cited from the July 24, 1995 survey. HCFA Br., 12.

22. On September 22, 1995, Petitioner submitted a plan of correction to address the citations from the September 8, 1995 survey. HCFA Ex. 4.

23. On September 22, 1995, Petitioner submitted also a request for informal dispute resolution under 42 C.F.R. § 488.331 to address the deficiency cited from the September 8, 1995 complaint survey. HCFA Ex. 5.

24. On September 26, 1995, ODH completed its review of the September 8, 1995 survey findings under the informal dispute resolution process and affirmed the citation of deficiencies from said survey. HCFA Ex. 6 at 4.

25. On September 28, 1995, ODH completed a revisit survey and determined that Petitioner had corrected the quality of care deficiencies from the July 24, 1995 and September 8, 1995 surveys, but Petitioner was not in substantial compliance with certification requirements due to violations of a Life Safety Code Standard. HCFA Ex. 8 at 7 - 8; HCFA Ex. 9; P. Ex. 2; HCFA Br., 12.

26. On or about October 12, 1995, Petitioner timely submitted a plan of correction to address the citations from the September 28, 1995 survey. HCFA Ex. 8 at 7 - 8; HCFA Ex. 9.

27. By letter dated October 19, 1995, HCFA notified Petitioner as follows:

> a. based on the results of the July 24, 1995 and September 28, 1995 surveys, HCFA was imposing the remedies of:
>
> > 1. denying Petitioner payments for new admissions under the Medicare and Medicaid programs effective November 10, 1995. P. Ex. 2; and
> >
> > 2. terminating Petitioner's Medicare and Medicaid participation on January 26, 1996, if substantial compliance has not been achieved by then. Id.;
>
> b. the survey completed on July 24, 1995 had become an "extended survey," because said survey found substandard quality of care. P. Ex. 2; HCFA Br., 10;
>
> c. in accordance with section 1819(f)(2)(B)(iii)(I)(b) of the Act, Petitioner is prohibited from conducting any nurse aide training and/or competency evaluation program for two years from July 24, 1995. P. Ex. 2;
>
> d. HCFA instructed ODH to conduct another revisit survey to ascertain if substantial compliance had been achieved based on Petitioner's allegations. P. Ex. 2.

28. On November 9, 1995, ODH completed a follow-up survey to verify Petitioner's compliance and determined that Petitioner had corrected its deficiencies and come into substantial compliance with program requirements. HCFA Ex. 11.

29. As a consequence of the November 9, 1995 survey results, HCFA accepted ODH's recommendation to rescind the remedies described in FFCL 27a, above. Therefore, neither the denial of payments for new Medicare and Medicaid admissions nor the termination of Petitioner's provider agreements took effect. HCFA Ex. 12.

30. On December 5, 1995, Petitioner submitted a request for hearing, to contest the findings from the July 24, 1995 and September 28, 1995 surveys, and to contest HCFA's October 19, 1995 determination to deny Medicare and Medicaid payments for new admissions effective November 10, 1995, to terminate Petitioner's participation in the programs effective January 26, 1996, and to prohibit Petitioner from conducting nurse aide training and competency evaluations for two years from July 24, 1995. Hearing Request.

Findings on Petitioner's asserted facts

31. HCFA's notice letter did not designate the prohibition against conducting nurse aide training and competency evaluations as one of the remedies for which Petitioner may request a hearing. See P. Br., 7; P. Ex. 2.

32. Petitioner has adduced no support for its contention that a notice dated October 18, 1995 informed Petitioner that it could no longer serve as a testing site for nurse aide evaluation programs. See P. Br., 3.

33. The record contains no fact supporting Petitioner's allegation that it was serving as a test site for other entities' nurse aide evaluation programs prior to HCFA's imposition of the ban against Petitioner or that Petitioner would be serving as a test site for such programs absent the ban imposed by HCFA. See P. Br. 3, 6.

34. The record contains no fact supporting Petitioner's contention that, as a result of the ban against conducting nurse aide training and competency evaluations, Petitioner has had "a valuable business relationship severed, [and] has lost contact with nurse aides whom it might desire to employ . . . ." P. Br., 3; FFCL 4 - 11, 33, 34.

35. The record contains no fact supporting Petitioner's fear that it might be found to have provided substandard quality of care in three consecutive standard surveys, which would then cause HCFA to deny payments under the programs and ODH to impose state monitoring as remedies under 42 C.F.R. § 488.414. P. Br., 10.

36. The two pages of a plan of correction submitted by Petitioner for a June 2, 1996 survey (P. Ex. 5) are part of another action pending before me, DAB Docket Number C-96-350, in which Petitioner challenges the findings from said survey and the resultant determinations by HCFA to impose a civil monetary penalty as well as other remedies.

37. In another action filed by Petitioner, DAB Docket Number C-96-350, Petitioner is entitled to a hearing on the merits of the June 2, 1996 survey and the resultant civil monetary penalty already imposed by HCFA, as well as any other issues specified by the regulations. 42 C.F.R. §§ 498.3(b), 488.438(e); FFCL 38, below.

Conclusions on Petitioner's right to a hearing

38. As relevant to the facts of this case, a NF or SNF is entitled to a hearing to challenge HCFA's findings of deficiencies only if HCFA has imposed a remedy or enforcement action listed in 42 C.F.R. § 488.406 as a result of the findings of deficiencies. 42 C.F.R. § 498.3(b)(12); Arcadia Acres, Inc.; Fort Tryon Nursing Home, DAB CR425 (1996); University Towers Medical Pavilion; Country Club Center, II

39. HCFA's rescission of previously imposed remedies cancels any previously existing hearing rights to challenge the rescinded remedy or its bases. Id.

40. Having previously decided to impose two remedies listed in 42 C.F.R. § 488.406 (ban on payment for new Medicare and Medicaid admissions and termination of Petitioner's provider agreements) against Petitioner, HCFA decided to rescind these two remedies. FFCL 29.

41. A loss of nurse aide training and competency evaluations is not a remedy or enforcement action listed in 42 C.F.R. § 488.406.

42. The regulations specifically state that, for NFs and SNFs, the loss of nurse aide training and competency evaluations programs is not an administrative determination which is subject to the hearing rights or other appeals procedures specified in 42 C.F.R. Part 498. 42 C.F.R. § 498.3(d)(11).

43. The fact that the ban on nurse aide training and competency evaluations is sometimes called a "remedy" (see citations at P. Br., 7) does not give rise to hearing rights under 42 C.F.R. Part 498 of the regulations. FFCL 41, 42.

44. Under the regulations, a provider wishing to question the ban on nurse aide training and competency evaluations only has the right to request participation in the informal dispute resolution process available under 42 C.F.R. § 488.331. FFCL 18, 23; 59 Fed. Reg. 56229 (1994).

45. There is no right to review under 42 C.F.R. Part 498 where HCFA finds that a provider has deficiencies but is in compliance with the conditions of participation. 42 C.F.R. §§ 498.3(a), 498.3(d)(1).

46. Petitioner is not entitled to an evidentiary hearing to dispute the two-year ban on conducting nurse aide training and competency evaluations. FFCL 41 - 45.

47. Petitioner is not entitled to an evidentiary hearing to dispute the deficiencies found during the surveys of July 24, September 8, or September 28, 1995. FFCL 29, 38, 39, 44, 45.

48. I do not have the discretion to deviate from the plain language of the regulations which preclude me from hearing and deciding the merits of issues raised by Petitioner in its request for hearing. See FFCL 30, 38 - 47.

Discussion

I have set forth an explanation of the regulatory framework in Country Club Center, II, Arcadia Acres, Inc., and University Towers Medical Pavilion. I adopt and incorporate the rationale from those cases. I summarize below the most significant legal principles in the context of the arguments submitted by Petitioner.

In this as well as in all of the foregoing cases, the disposition of a motion to dismiss filed by HCFA turned on whether the hearings rights and procedures of 42 C.F.R. Part 498 were applicable to the determinations challenged by the providers. A hearing before an administrative law judge is part of the administrative review and appeals process set forth at 42 C.F.R. Part 498. A provider's right to obtain a hearing or other review under 42 C.F.R. Part 498 depends on whether it is an "affected party" within the meaning of the regulations. 42 C.F.R. §§ 498.20, 498.40. An "affected party" means a provider or other entity that is affected by an "initial determination or by any subsequent determination or decision issued under this part [part 498 of 42 C.F.R.] . . . ." 42 C.F.R. § 498.2.

In this case as well as in the foregoing cases, HCFA had decided to rescind various remedies which were appealable under 42 C.F.R. Part 498 prior to their effectuation. Thus, I reached the same conclusion here as I had in the other cases: when HCFA rescinds previously appealable remedies, the provider loses the status of an "affected party" because it no longer has an "initial determination" or any subsequent determination that is appealable under the regulations. Because the providers in all these cases were attempting to secure hearings on the merits of the survey findings issued by HCFA, I re-emphasize here also that a provider's right to challenge survey findings arises only when the findings have resulted in the imposition of an appealable remedy specified by regulation. This is the same conclusion reached by Administrative Law Judge Steven Kessel in the case of Fort Tryon Nursing Home.

As in the case of Country Club Center, II, HCFA rescinded the previously appealable remedies but decided to use the survey results as a basis for prohibiting Petitioner from conducting any nurse aide training and competency evaluation programs for a period of two years. This prohibition is not a determination subject to review under 42 C.F.R. Part 498. FFCL 41, 42. Therefore, as in Country Club Center, II, Petitioner herein also cannot obtain a hearing on the merits of the survey results which led to the prohibition against providing nurse aide training and competency evaluations.

Petitioner has requested a hearing to contest the prohibition against providing nurse aide training and competency evaluations by alleging that it has suffered detriments or losses as a result of the prohibition. However, Petitioner had not applied for approval to provide nurse aide training and competency evaluations prior to HCFA's imposing the prohibition for two years. Nor is there evidence of record to support Petitioner's contention that it was being used as a testing site for other facilities' nurse aide training and evaluation programs or that HCFA has prohibited Petitioner from serving even as a test site. Nor has Petitioner proved its contention that, due to HCFA's prohibition against Petitioner's conducting a nurse aide training and competency evaluation program, it has lost contact with potential job applicants or has had to sever business deals to serve as a test site. FFCL 4 - 11, 31 - 34. Therefore, even if the loss of property rights or interests were relevant to the issue of whether Petitioner is entitled to a hearing under 42 C.F.R. Part 498, I would conclude that Petitioner has failed to establish such losses.

To provide support for its hearing request, Petitioner has cited certain language from the Federal Register to show that the Department of Health and Human Services considers the ban on nurse aide training and competency evaluations to be a "remedy." P. Br., 7. Petitioner argues that HCFA is playing "legal gymnastics" by arguing against a hearing when the ban on nurse aide training and competency evaluations is a remedy because it "looks like a remedy, acts like a remedy, and walks like a remedy . . . ." Id. However, the issue has never been whether the ban is a "remedy," but whether the ban is a remedy which the regulations has designated as an appealable remedy. See FFCL 38 - 47. Petitioner is well aware, as demonstrated by its quotation from the Federal Register, that the Secretary of Health and Human Services intentionally made the informal dispute resolution process the only means for challenging the denial or withdrawal of the approval for conducting nurse aide training and competency evaluations. P. Br., 8.[3]

Petitioner complains that HCFA is not providing sufficient due process by permitting only an informal dispute resolution proceeding when nurse aide training and competency evaluations have been banned. P. Br., 9. Whatever the merits of Petitioner's complaints on the due process decisions made by the Secretary of Health and Human Services, I am required to give effect to the

---

[3] Petitioner quoted thusly from the Federal Register:

> While the Act does not provide for any formal appeals for denial or withdrawal of a NATCEP [nurse aide training and competency evaluation program], **we believe that providers ought to have some opportunity to challenge this disapproval.** Therefore, we expect providers to appeal their NATCEP disapproval within the timeframe established for dispute resolution . . . **We are limiting the appeals of these matters to the informal dispute resolution process because we do not believe the loss of a NATCEP is a remedy of the same magnitude or type as other statutory remedies for which a more formal appeals mechanism is available.** . . . We believe the informal dispute resolution process satisfies essential elements of due process here since a provider will have notice of the intended denial of its NATCEP and the opportunity to meet with agency officials to challenge the findings that gave rise to the denial.

P. Br., 8 - 9 (quoting from 59 Fed. Reg. 56229 (1994)) (emphasis supplied by Petitioner).

regulations as written. I cannot disregard the unambiguous limitations imposed by the regulations. I adjudicate these cases under a delegation from the Secretary of Health and Human Services. In this capacity, I am required to follow all substantive rules and regulations duly promulgated by the Secretary. See Dyer v. Secretary of Health and Human Services, 889 F.2d 682, 685 (6th Cir. 1989).

There is no regulation which supports Petitioner's legal arguments. The regulations I have considered are dispositive on the issue of whether Petitioner may challenge in this forum the merits of HCFA's decision to ban nurse aide training and testing by Petitioner. For example, the language of the regulation codified at 42 C.F.R. § 498.3(d)(1) does not leave me with any discretion to grant Petitioner the hearing it requests. The critical fact is that the Secretary of Health and Human Services has declined to define the prohibition against nurse aide training and competency evaluations as a remedy or enforcement action subject to a hearing in this forum. 42 C.F.R. §§ 498.3(c)(11), 488.406; FFCL 41, 43, 44, 45. Since HCFA has rescinded the two enforcement actions imposed under 42 C.F.R. § 88.406, there is no determination by HCFA subject to the hearing rights specified in 42 C.F.R. Part 498. FFCL 40, 41, 45. Therefore, Petitioner also cannot challenge the survey findings which resulted in the ban on nurse aide training and testing, and which resulted in HCFA's earlier (but now rescinded) determination to impose two of the enforcement actions specified in 42 C.F.R. § 488.406. FFCL 46 - 48.

Petitioner complains that, without an on-the-merits hearing on the survey findings, Petitioner is at risk for suffering future harm of greater magnitude should HCFA later find that Petitioner has provided substandard quality of care in a total of three consecutive standard surveys. However, Petitioner herein has other hearing requests pending which challenge the substandard quality of care findings from a later survey, a survey which resulted in HCFA imposing a civil monetary penalty and other appealable remedies against Petitioner. FFCL 36, 37. Also pending before me for hearing is another case filed by Petitioner (DAB Docket No. C-96-273), wherein Petitioner challenges, inter alia, the deficiencies found during an "abbreviated standard survey" conducted on February 12, 1996 and HCFA's imposition of a remedy specified in 42 C.F.R. § 488.406. If Petitioner prevails in its other action (DAB Docket No. C-96-350), there would be no findings of substandard quality of care in consecutive standard surveys; in such an event, Petitioner would not need to fear sanctions resulting from three consecutive surveys finding substandard

quality of care. At this time, Petitioner's fears of having three consecutive standard surveys find substandard quality of care are premature at best.

Conclusion

For the foregoing reasons, I conclude that I lack jurisdiction to hear and decide Petitioner's challenge to the two-year ban on nurse aide training and competency evaluations imposed by HCFA. In addition, I conclude that, as a matter of law, the case presents no appealable issue within the purview of 42 C.F.R. § 498.3(b). Based on the survey findings contested by Petitioner, HCFA has made no resultant determination subject to a hearing and adjudication by me; the request for hearing cannot challenge the deficiencies simpliciter. Therefore, I cannot reach the merits of the survey findings.

Accordingly, the case is hereby dismissed pursuant to 42 C.F.R. § 498.70(b) on the basis that Petitioner does not have a right to a hearing.

/s/

Mimi Hwang Leahy

Administrative Law Judge