

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Tennessee Department of Public Health      DATE: January 26, 1981  
Shady Lawn Health Care Center  
Docket No. 80-96-TN-HC  
Decision No. 143

DECISION

By letter dated May 30, 1980, the Commissioner of the Tennessee Department of Public Health (Tennessee) appealed the May 2, 1980 disallowance by the Director, Bureau of Program Operations, Health Care Financing Administration (HCFA), of \$110,788 claimed by Tennessee as Federal financial participation (FFP) under Title XIX of the Social Security Act. The claim was based on services provided by the Shady Lawn Health Care Center (Center) during the period from April 1, 1979 to September 30, 1979.

Background

At the time that the Center was certified as a Medicaid provider for the period from June 8, 1978 to January 31, 1979, Tennessee executed a Statement of Deficiencies and Plan of Correction noting a number of deficiencies discovered in a May 22, 1978 survey. HCFA Response, Exhibit 1. Following another survey on December 5, 1978, a Statement of Deficiencies and Plan of Correction was again executed which noted "those deficiencies identified by tag numbers T-25, T-64, T-73, T-74, T-80, T-87, T-88, T-89, T-90, T-92, T-103, T-127, T-151, T-152, T-166 which were also cited during last year's survey." Ibid., Exhibit 2, p. 10. A Post-Certification Revisit Report based on a March 5, 1979 visit notes that some of the above identified deficiencies had been corrected, and a Summary of Deficiencies Not Corrected notes those which had not been. Ibid., Exhibits 3 and 4. The Certification and Transmittal (Form 1539) for the period April 1, 1979 to September 30, 1979 "recognized that T25, T73, T74, T80, T90, T92, T152, and T166 are repeating" but apparently recommended recertification because "it is felt that provider has made progress and will act in good faith." Ibid., Exhibit 5.

Subsequently, by letter dated June 1, 1979, the Regional Medicaid Director, Region IV, advised the Tennessee Commissioner of Public Health that the State survey agency had improperly certified the Center "when, according to documents in the survey package, there are four (4) repeat standards which were 'not met.'"

The Commissioner replied on June 28, 1979 that "the [r]epeat standards cited dealt with two principal areas: (1) rehabilitative services, and (2) activity space." The Commissioner alleged that there were no rehabilitation professionals in the rural area in which the Center is located and also that there were no residents identified during the survey that had significant specialized rehabilitation needs. Pointing out that the Center had agreed to construct additional activities and dining space by October 31, 1979, the Commissioner argued that various equitable considerations favored continued certification for an additional six months. Ibid., Exhibit 9.

In its appeal to this Board, Tennessee argued that the notification of disallowance was not detailed enough to enable the State to appeal. Pointing to the statement in the disallowance that "four conditions out of compliance in the prior certification continued to be deficient," Tennessee contended that the notification letter failed (1) to explain the relationship between the standards alluded to in 42 CFR §442.105 and "the alleged deficient conditions;" and (2) to state which standards had been violated.

In a letter dated June 9, 1980, the Board asked HCFA to respond to the appeal, also addressing specific questions to both parties. At the request of both parties, the Board stayed the case from July 10, 1980 to October 22, 1980, at which time Tennessee was given an extension of time to November 10, 1980, in which to reply to the Board's questions of June 9. The stay was to allow the parties requested time to resolve their differences by discussion.

HCFA had responded on October 14, 1980, also moving to amend the notification of disallowance to read "eight" instead of "four" repeat deficiencies. On November 10, 1980, Tennessee moved to strike the notification of disallowance and to dismiss the appeal, on the grounds that it was "unable to determine exactly what HCFA alleges it has done wrong." On November 21, 1980, a telephone conference was held with counsel for both parties and the Health Standards Quality Liaison Contact, Region IV, HHS.

On November 26, 1980, the Board denied all three motions and issued an Order to Show Cause indicating that the disallowance would be upheld unless Tennessee could supply the documentation required by 42 CFR §442.105 (1978). Tennessee responded on January 5, 1981, following an extension of time.

#### Discussion

By Tennessee's own admission, this is a case of certification of a facility with repeat deficiencies listed on the Form 1539 executed by the State survey agency. Tennessee Brief, p. 3; Exhibit 6. In such instances, the State survey agency is required by 42 CFR §442.105 (1978) to document that the facility:

- (1) Did achieve compliance with the standard at some time during the prior certification period;
- (2) Made a good faith effort, as judged by the survey agency, to stay in compliance; and
- (3) Again became out of compliance for reasons beyond its control.

Tennessee does not deny that the Form 1539 Certification and Transmittal signed by Ron E. Gant, the Regional Administrator for the State survey agency, on March 13, 1979 did not contain the documentation required by section 442.105, supra. Instead, the State argues that when Ron E. Gant again signed the Form 1539 on March 23, 1979, the latter signature reflected his decision "that the facility was not violating applicable standards." Brief, p. 3.\*

In support of its position, Tennessee submits the sworn affidavit of Ron E. Gant dated January 5, 1981. In that affidavit Mr. Gant addresses the four areas of compliance at issue as set out in Tennessee's brief at page 4:

1. Rehabilitative services
2. Activities program
3. Resident living areas
4. Dining, recreation, and social rooms

In each instance Mr. Gant now concludes that the facility did meet standards as of the date of certification. Also, Tennessee points to findings by the surveyor under other tag numbers which suggest that the facility may indeed have been free of repeat deficiencies at the time of certification. Brief, pp. 4-8.

Even if we were to accept Tennessee's showing as sufficient to demonstrate that there were no deficiencies, we would not reverse the disallowance, considering the circumstances here. At the time of the notification of disallowance on May 2, 1980, there was no indication that repeat deficiencies did not exist. The June 28, 1979 letter from the Commissioner of Public Health to the (then) HEW Regional Medicaid Director acknowledged that there were repeat deficiencies. HCFA Response of October 14, 1980, Exhibit 9. Mr. Gant's conclusions impeaching his statement on the Form 1539 did not surface even during the three-and-one-half months the case

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\* Tennessee identifies Ron E. Gant signing on March 23, 1979 as the Acting Chief of Quality Assurance. The Form 1539 identifies Ron E. Gant signing on that date as the Regional Administrator. Tennessee Exhibit 6.

was stayed to permit the parties to resolve this case. In other cases the Board has reversed disallowances on the basis of information presented by a grantee for the first time during Board proceedings here. In this instance we have determined that it is more appropriate to sustain HCFA and allow it to reconsider these new developments without the threat of reversal should HCFA find that Tennessee's actions lack credibility.

At the same time, we urge HCFA to reexamine its disallowance in light of the information provided now by Tennessee. HCFA may properly consider not only Mr. Gant's affidavit but also what reasons Tennessee may offer to explain its failure to submit it during the many months this matter was pending. If HCFA agrees that the Shady Lawn Health Care Center was free of repeat deficiencies, then HCFA could allow FFP.

#### Conclusion

We find that there was no error in the decision by HCFA disallowing FFP. This decision does not preclude HCFA from reexamining its decision in light of information recently furnished by Tennessee.

/s/ Cecilia Sparks Ford

/s/ Alexander G. Teitz

/s/ Norval D. (John) Settle, Panel Chair