DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Louisiana Department of Health and Human Resources
Docket Nos.: 78-127-LA-HC
79-156-LA-HC
Decision No. 188

DATE: May 31, 1981

DECISION

The Health Care Financing Administration (HCFA or Agency) disallowed $3,295.84 in Federal financial participation (FFP) claimed under Title XIX of the Social Security Act (Act) for the period from May 6 through May 11, 1976. The State of Louisiana (State) appealed the decision pursuant to 45 CFR Part 16 (Docket No. 78-127-LA-HC). The Agency issued a subsequent decision which denied FFP in the amount of $54,916 for the period from February 1, 1976 through May 5, 1976. The State also appealed this disallowance under 45 CFR Part 16 (Docket No. 79-156-LA-HC). Inasmuch as both appeals involve the same parties, the same basic issues, and the same facts, the cases have been considered jointly for purposes of the Board's decision.

This decision is based on the State's appeals, the Agency's responses, the Board's January 2, 1981 Order to Show Cause, the parties' responses to that Order, and informal conferences (on issues related to this case) held by the Board on October 9, 1979 and February 11 and 12, 1981. 1/

Background

From January 19 through January 21, 1976, the Licensing Section of Louisiana's Department of Health and Human Resources conducted a survey of Summerlin Lane Nursing Home, an intermediate care facility (ICF), to determine whether the facility was in compliance with State

1/ The Board invited Louisiana and 11 other States to the February conference--Colorado, Georgia, Illinois, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, Pennsylvania, and Wisconsin. These 12 states had 50 cases pending before the Board with provider appeal issues common to disallowances totalling approximately $20 million and involving over 300 facilities. Louisiana attended only the October 1979 conference but was sent transcripts of and given an opportunity to comment on both conferences.

and Federal standards for providers of ICF services. The State survey team's finding was that the facility was in substantial compliance although the team noted certain deficiencies. A plan of correction was formulated and agreed to by the facility's administrator. The State renewed the provider agreement with the ICF on February 11, 1976 for the period February 1, 1976 through January 31, 1977.

On March 16, 1976, the Agency, as authorized by the "look behind" provision at 45 CFR 249.10(b)(15)(vi), conducted a survey of Summerlin Lane to determine whether the ICF was in compliance with the Federal requirements for such facilities as set forth in Title XIX and implementing regulations. The Federal survey team found that there were many deficiencies. In the opinion of the team, some of the deficiencies constituted a hazard to the health and safety of the residents of the facility. Based upon a comparison of the findings of the State and Federal survey teams, the Agency concluded that the State had failed to apply Federal standards for ICFs when it conducted its survey.

On March 24, 1976, the Regional Commissioner of the Social and Rehabilitation Service (SRS) notified the State that SRS would not consider the provider agreement with Summerlin Lane valid after April 5, 1976, but would continue FFP for 30 days after that date to allow for an orderly transfer of the Medicaid patients to other facilities. (SRS was responsible for administering Title XIX programs at that time.)

Officials of Summerlin Lane apparently stated that the facility expected to have all the deficiencies corrected by April 8-9, 1976. Federal officials agreed to resurvey the facility on those dates to determine whether certification requirements were met. The Federal survey team found, on April 9, 1976, that there were still deficiencies which presented a hazard to the health and safety of the patients. The survey team concluded that the facility had not demonstrated the ability to maintain compliance with Federal standards.

In view of the Federal findings and proposed action, Summerlin Lane filed a civil action naming the State as defendant. On April 19, 1976, the United States District Court for the Western District of Louisiana issued a preliminary injunction (Civil Action No. 76-0392) enjoining the State from decertifying the facility or notifying the patients of the decertification or the need to move, "... until such time as the State has petitioned for and been granted an administrative hearing before the proper agency, which hearing and any judicial review thereof shall establish whether the H.E.W. action in cutting off funds provided to the State is legally correct."

The State, on April 22, 1976, requested reconsideration of the Regional Commissioner's March 24 decision before the Administrator of SRS, under the provisions of 45 CFR 201.14, on the grounds that the surveys conducted by the Federal survey team did not establish that the State was in violation of applicable Federal standards.

The State resurveyed the facility on May 3-4, 1976. The survey revealed that the ICF was still not in compliance with Federal standards and could not be certified. On May 12, 1976, however, representatives of Summerlin Lane, the State, and the Agency met and agreed upon a plan of correction for the deficiencies reported during the May 3-4, 1976 survey. Accordingly, a three month certification was issued for the period from May 12, 1976 to August 31, 1976.

On September 28, 1976, the Acting Regional Commissioner of SRS amended the March 24 disallowance decision by stipulating the specific amount disallowed ($3,295.84). In all other respects the Regional Commissioner's March 24 decision was unchanged.

On March 9, 1977, SRS was abolished and responsibility for administering the Medicaid program was transferred to the then newly created Health Care Financing Administration. Responsibility for reconsidering Title XIX disallowances under 45 CFR 201.14 was transferred to the Administrator of HCFA. On March 6, 1978, amendments to 45 CFR 201.14 (43 FR 9266) gave the State the option of continuing with reconsideration under 201.14 before the Chairman of the Departmental Grant Appeals Board or his designee, or of electing to have the reconsideration proceed under 45 CFR Part 16 before the Board. The preamble to the March 6, 1978 amendments stated the requirement that before reconsideration could proceed, the Administrator of HCFA or his designee must first issue a determination upholding the disallowance.

The Administrator of HCFA, on October 16, 1978, issued a decision upholding the Regional Commissioner's March 24, 1976 disallowance of FFP for the period from May 6, 1976 through May 11, 1976 on the grounds that the State failed to apply the Federal standards for certification of an ICF when it certified Summerlin Lane Nursing Home. The Administrator also stated in the October 16 decision that, inasmuch as the provider agreement executed by the State on February 11, 1976 could not be considered evidence that the facility met all requirements for certification, the State was not entitled to FFP for any payment made under the terms of that agreement. The decision directed appropriate Federal officials to determine whether Federal funds were claimed for the period February 1, 1976 through May 5, 1976 so that action could be taken if necessary to recover those funds.

On December 15, 1978 the Regional Medicaid Director requested documentation regarding Federal funding to Summerlin Lane for that period, and Agency review of quarterly statements of expenditures for the quarters ending March 31, June 30, and September 30, 1976 revealed claims for FFP for ICF services provided at Summerlin Lane during the period February 1 through May 5, 1976. By disallowance letter dated June 21, 1979, the Director of the Medicaid Bureau notified the State that its claim for FFP for services provided at Summerlin Lane during the period from February 1 through May 5, 1976 was disallowed.

Improper Certification

The regulations in effect during the relevant period (45 CFR Part 249) governing medical assistance under Title XIX are specific as to State plan requirements, standards for ICFs, and conditions under which FFP is available. FFP in payments to a facility providing intermediate care services is available only if the facility is certified as having met all the requirements for participation in the Medicaid program as shown by an agreement (provider agreement) between the single state agency and the facility. (45 CFR 249.10(b)(15)(i)(E).) The regulations permit states to enter into a provider agreement with a facility which fails to meet Federal standards, so long as there is a plan of correction at the time of the execution of such agreement that provides for the correction of all such deficiencies or for waiver of certain deficiencies. (45 CFR 249.33(a)(2); 45 CFR 249.12(a)(5).) While the states have primary responsibility for determining whether ICFs are in compliance with all pertinent standards, the Federal agency retains the right to assure that such standards are met. Section 249.10(b)(15)(vi) is commonly referred to as the "look behind" provision because it allows the Federal agency to disregard the provider agreement, usually accepted as an indication that the facility is in compliance with all requirements for FFP. If on the basis of on-site validation surveys or other Federal reviews the Agency finds that the State survey agency failed to apply Federal standards or to follow applicable rules and procedures, the Agency may determine that at the time of certification the facility was not in compliance with Federal standards and therefore was not eligible for FFP.

The State does not dispute the findings of the Federal surveys conducted in March and April 1976. The State argues, however, that those surveys do not constitute proof that Federal standards were not applied in January by the State survey team or that the facility was not at that time in compliance with the Federal standards. We conclude that the record does not support this argument. In January the State found the facility to be in violation of various requirements and approved a plan of correction. In March the Federal survey team found numerous other

deficiencies not listed in the plan of correction. Those deficiencies included such things as failure to have a written and rehearsed plan to deal with disasters (such as fires), insufficient space and room for patient activities, and structural Life Safety Code violations. (Response of the Health Care Financing Administration, February 23, 1979, pages 14-15, hereafter referred to as HCFA Response.) These deficiencies are of a nature such that if they existed in March, they necessarily would have existed in January. Nevertheless, neither the State survey nor the January plan of correction noted these deficiencies. Had they been noted and made the subject of the January plan of correction or waived, Federal standards might have been met and the deficiencies would not necessarily be a basis for finding the provider agreement invalid for purposes of FFP. (HCFA Response, pages 11, 12, 15.) Since the deficiencies were not noted and were not made part of the January plan of correction or waived, the Board finds that the provider agreement entered into in February is invalid in that the survey upon which it was based failed to apply Federal standards. The Agency properly determined that the facility was not in compliance with Federal standards as of February 1, 1976, the effective date of the provider agreement executed by the State on February 11, 1976.

The Agency has stated that 30 days of additional FFP would have been available under 45 CFR 249.10(b)(15)(v) if the State had made a showing satisfactory to the Secretary that it was attempting to relocate qualifying residents of the facility during the 30 days after the termination of the provider agreement. (HCFA Response to Board's Order to Show Cause, January 22, 1981, pp. 1, 3-4.) There is no indication in the record that the State ever made such a showing and, therefore, it is not entitled to FFP under 249.10(b)(15)(v).

The Agency's Determinations

As previously noted, the Regional Commissioner of SRS initially notified the State on March 24, 1976 that the provider agreement for the ICF would not be considered valid after April 5, 1976, but FFP would continue for 30 days after that date to "allow for orderly transfer of Medicaid patients to other facilities." (Reconsideration Record, Tab 2.)

On October 16, 1978, the Administrator of HCFA upheld the Regional Commissioner's disallowance of FFP beginning after May 5, while informing the State that it was not entitled to FFP from February 1, 1976 (the effective date of the provider agreement executed on February 11), and on July 21, 1979, the Director of the Medicaid Bureau disallowed FFP claimed for the period from February 1 through May 5, 1976.

The State has argued that it was inappropriate for the Agency to reverse its position for the period from February 1 through May 5 in subsequent decisions. The State suggested that the Agency's action was not in accordance with existing procedures for reconsideration of disallowances (45 CFR 201.14). The Agency argued that it was not prevented from correcting errors made at a lower level and issuing a determination that was less favorable than the initial determination.

The State views the Agency's procedures as defective because the disallowance was made over three years after the period involved. The regulations, however, place no time limits on when disallowances can be made except to say that they are to be issued promptly upon a determination that a State's claim is unallowable. (See 45 CFR 201.14(b)(1).) The State points to a letter dated April 22, 1977 from an Associate Regional Commissioner as evidence that the June 21, 1979 disallowance for the period February 1 through May 5, 1976 should have been made more promptly. (See State's Response to Order to Show Cause, February 11, 1981, p. 2.) The April 22, 1977 letter indicates that the Agency at that time had access to the June 30 and September 30, 1976 quarterly expenditure reports, but does not show that the Agency had then made a determination with respect to the State's claim for the period February 1 through May 5, 1976.

The record shows that a determination on the State's claim was not made until sometime after December 15, 1978 and that a disallowance followed on June 21, 1979. The State has not presented any evidence or argument as to why we should not consider this sequence to be "prompt" issuance. Accordingly, we find that the Agency fulfilled the regulatory requirement.

The State views the Agency's procedures as defective because the June 21, 1979 disallowance changed the Regional Commissioner's earlier position that FFP would be available through May 5, 1976. The regulations do not restrict the Administrator from changing a position taken by the Region in an initial disallowance. Nevertheless, the State has raised an issue of estoppel, discussed below.

Estoppel

The State contends that the Regional Commissioner's March 24, 1976 letter (indicating that FFP would be available from Feburary 1 through May 5) estops the Agency from later disallowing FFP for that period. 2/

2/ The Agency has conceded in this case that it may be bound by a prior Regional opinion where the State has relied upon the opinion. (Agency Response to Order to Show Cause, January 22, 1981, p. 5.)

The Board need address the estoppel issue only for the period February 1 to March 24, 1976, however, since the Board finds on other grounds that FFP is available to the State for the period March 24 to May 12, 1976. See discussion of court order, infra.

It is well established that a case of estoppel consists of specific elements, including injury to one party caused by reliance on the conduct of the other. Hampton v. Paramount Pictures, Corp., 279 F.2d 100, 104 (9th Cir. 1960); United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). It is also well established that whether estoppel applies turns on facts which the party asserting estoppel has the burden of proving. See, Choat v. Rome Industries, Inc., 462 F. Supp. 728, 730 (N.D. Ga. 1978). The State has made only broad allegations of estoppel without articulating the basis for the argument or the reasoning behind it. Accordingly, the Board rejects the State's estoppel argument. The Board notes, moreover, that the March 24 letter clearly caused no injury to the State with respect to the period February 1 to March 24, 1976. Any loss of FFP to the State during that period was caused by the State's own actions in failing to follow Federal requirements, not by reliance on statements contained in the March 24 letter.

Court Order

The question remains whether the April 19, 1976 injunction operates to require the Federal government to provide FFP during any portion of the period February 1 through May 11, 1976.

The Agency's regulations at 45 CFR 205.10(b)(3) make FFP available for "payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order."

The Board has previously applied § 205.10(b)(3), in the context of continued FFP during provider appeals. Ohio Department of Public Health, Decision No. 173, April 30, 1981, p. 11-12. Ohio concerned the effect of a court order which required the State to continue making payments to a facility pending a hearing on whether the State's decision to cut off payments was correct. In Ohio the Board stated that:

> [i]n the instance of a provider appeal, the State's action would have denied the facility the provider agreement needed for participation in the Medicaid program. The court order overcomes the limiting effect of that action but does not overcome other limits. If the State had made a new agreement with the facility, we assume that the new term could not have been longer than 12 months from that date because of other

> regulations calling for the annual survey/certification cycle. In ordering continued payments under the court-revived old agreement, the court could not give that agreement greater effect than if the State had approved the facility and made a new agreement. The "within the scope" language thus limits FFP in court-ordered payments to a period of 12 months or completion of the next survey certification cycle, whichever is sooner.

In this case, it appears to be Federal rather than State action which denies the facility the provider agreement needed for Medicaid participation. It is clear, however, that when the Federal government invokes its "look behind" authority, it is making a determination which the State should have made but did not. Accordingly, we conclude that the Ohio rationale applies in a "look behind" case such as this.

Underlying §205.10(b)(3) is a recognition that FFP should be made available in the situation where the State, through no fault of its own, is forced to pay for costs which would not normally meet program requirements. The usual situation is that the State has taken some action to deny payment to a recipient (or, in some instances, a provider) because it has determined that a program requirement has not been met. A court order, however, acts to overcome the program limitation and to make FFP available, so long as payments are otherwise within the scope of the program. Here, on the other hand, we have the situation where the State failed to act in accordance with its responsibility to ensure that Medicaid services are provided only in a facility which meets Medicaid standards. The payments which the State made to the facility between February 1 and March 24, were unallowable under the regulations not only because the facility did not meet certification requirements but also because the State had failed to meet its responsibilities for certifying only facilities which met the standards. Thus, even if we were to view the court order as giving validity to the provider agreement as of February 1, we could not find payments between February 1 and March 24 to be within the scope of the program because the State failed during that period to take appropriate action to decertify (or possibly enter into a plan of correction) as Congress and clear program policy intended. On March 24, however, the Federal government intervened and acted to, in effect, decertify the facility. The subsequent court order operated to stay the decertification action so that the State could not have denied payment based on the program requirement calling for certification. We see no basis, therefore, for not giving the same effect to the court order, from March 24 to May 12, which the order would have had if the State itself had acted on March 24 to decertify the facility.

The Board considers this result to be reasonable in that, if the State had acted to decertify the facility on its own, presumably a chain of events would have occurred similar to that which occurred after the Federal action, and the period for which FFP would have been available under the court order would have been approximately the same. Our result also denies the State the benefit of FFP for the time period in which its own failure to decertify potentially placed the patients' safety at risk. We note here that our conclusion is based on the factual finding that the State certified a facility improperly. If the State had shown that the "look behind" provision had been incorrectly invoked by the Agency, FFP would have been available for the entire time period.

The record reveals that the State surveyed Summerlin Lane on January 19-21, 1976, prior to entering into a provider agreement on February 11, 1976 for the period February 1, 1976 through January 31, 1977; that the court order was issued on April 19, 1976; that the next survey took place on May 3-4, 1976; and that the determination on the findings of the May 3-4 survey took place on May 12, 1976 when a three month certification was issued pursuant to a plan of correction for deficiencies found during the survey. Accordingly, pursuant to the provisions of the April 19, 1976 court order, §205.10(b)(3), and application of the Ohio rationale to the facts of this case, the Board concludes that FFP is not available for the period February 1 through March 23, 1976 but is available for the period March 24 through May 11, 1976.

Conclusion

The Board upholds the disallowance for the period February 1 through March 23, 1976 and reverses the disallowance for the period March 24 through May 11, 1976.

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Alexander G. Teitz, Panel Chair