Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of: Renaissance Care Center, Inc., Petitioner, - v. - Health Care Financing Administration.	DATE: September 25, 1997 Docket No. C-97-313 Decision No. CR497

DECISION

Below, I explain my reasons for dismissing this case pursuant to 42 C.F.R. § 498.70(c).

This case was originally assigned to Administrative Law Judge Mimi Hwang Leahy and, subsequently, reassigned to me. A prehearing conference was held with counsel for the parties by telephone on June 4, 1997, at which time there was some discussion as to whether this case should be consolidated with a similar case involving the parties (Docket No. C-97-008). It was agreed by the parties at that time that the cases should not be consolidated, as there were different facts, issues, and witnesses involved in the two cases. Counsel for the Health Care Financing Administration (HCFA) indicated at that time that it might be filing a motion with respect to this case which could be dispositive of the issues, and both parties asked that I not set a hearing date until the status of the second case could be clarified. I agreed, but did set a second telephone prehearing conference date of September 5, 1997, with the intention of ruling on the motion which was to be forthcoming at that time, and establishing a hearing date if the case was to go forward. I have since determined, for the reasons set forth below, that a second prehearing conference is not required.

On July 11, 1997, HCFA filed a Motion to Dismiss Petitioner's hearing request, and a memorandum in support thereof, contending that Petitioner's hearing request was not timely filed pursuant to the regulations. Petitioner filed its response in opposition on August 30, 1997. Having carefully considered the record

before me, as well as the arguments of counsel for the parties, I must concur with the argument advanced by HCFA.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCLs)

1. At all times relevant hereto, Petitioner was and is a provider of medical and related services and participates in the Medicare and Medicaid programs. HCFA Ex. 2 at 1.

2. On January 15, 1997, an inspection was conducted at Renaissance Care Center (Petitioner herein) by staff of the Illinois Department of Public Health to determine Petitioner's compliance with federal certification requirements for nursing homes participating in the Medicare and Medicaid programs. HCFA Ex. 1 at 1.

3. By notice dated January 17, 1997, the Illinois Department of Public Health (State agency) advised Petitioner that, as a result of the inspection, it was determined that Petitioner's facility was not in substantial compliance with regulatory requirements. The State agency included a copy of HCFA form 2567-L setting forth those deficiencies with specificity. The State agency found that some of the deficiencies posed "immediate jeopardy" to resident health and safety. The State agency further advised Petitioner that, as a result of its findings, it was recommending to HCFA that HCFA: impose a civil money penalty (CMP) of $3050.00 per day until the "immediate jeopardy" was abated, effective January 3, 1997; deny payment for new admissions, effective January 27, 1997; impose State monitoring, effective January 21, 1997; and terminate Petitioner from the programs, effective February 7, 1997. HCFA Ex. 1.

4. By letter and notice dated January 24, 1997, HCFA advised Petitioner that, based on the State agency's recommendation in response to the survey, it was imposing all of the recommended remedies. HCFA further advised Petitioner that, if it disagreed with HCFA's determination, Petitioner had the right to request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board, but that such request must be filed no later than 60 days from the date of receipt of said notice. HCFA Ex. 2.

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[1] With their briefs, the parties have filed various proposed exhibits, to which there has been no objection. I hereby admit HCFA Exhibits (HCFA Ex.) 1 through 3 into the record. Similarly, I hereby admit Petitioner's Exhibits (P. Ex.) 1 through 4 into the record. References herein to HCFA's brief shall be denoted as (HCFA Br.), and to Petitioner's Brief as (P. Br.).

5. 42 C.F.R. § 498.3(b)(12) provides, in part, that with respect to a nursing facility or skilled nursing facility, a finding of noncompliance that results in the imposition of a remedy specified in 42 C.F.R. § 488.406, except the State monitoring and loss of approval for a nurse-aide training program remedies, is an initial determination.

6. Termination, denial of payment for new admissions, and CMPs, are all remedies listed in 42 C.F.R. § 488.406, and, accordingly, HCFA's letter and notice dated January 24, 1997, was an initial determination within the meaning of the regulations.

7. 42 C.F.R. § 498.40(a) provides, in pertinent part, that the affected party or its authorized representative must file a request for hearing within 60 days from receipt of the notice of initial, reconsidered, or revised determination.

8. As stated aforesaid, HCFA rendered its initial determination on January 24, 1997. The parties agree, and the record indicates, that Petitioner did not file its request for hearing until April 18, 1997, and did not file its request for hearing within 60 days from receipt of the notice of initial determination.

9. Petitioner did not file a request to extend the time for filing its request for hearing pursuant to 42 C.F.R. § 498.42(c).

10. By notice dated February 20, 1997, HCFA advised Petitioner that, as a result of a revisit to the facility on February 5, 1997, the State agency had recommended, and HCFA had concurred with, a revision to the previously imposed enforcement remedies. The remedy of termination was rescinded, and the CMP was reduced from $3,050 per day to $50 per day, effective January 17, 1997. HCFA Ex. 3.

11. By letter dated April 30, 1997, HCFA notified Petitioner that the remedies imposed on January 24, 1997, were discontinued, effective March 12, 1997, and that the total amount of the CMP assessed to Petitioner was $45,400. HCFA Motion to Dismiss; HCFA Br. at 3.

12. Neither the notice of February 20, 1997, nor the letter of April 30, 1997, gave Petitioner appeal rights, as neither document issued new findings of noncompliance. Instead, these documents merely modified the remedies HCFA had decided to impose. HCFA Br. at 6.

13. 42 C.F.R. § 488.408(g) provides that a facility may appeal the finding of noncompliance that results in the imposition of [remedies] but may not appeal the choice of remedy. Since the finding of noncompliance which resulted in the imposition of remedies was issued by HCFA on January 24, 1997, it is from the

date of notice of that finding that the appeal period runs, and not from subsequent amendments and revisions to the remedy, as HCFA's choice of remedy, under the regulations, is not an appealable issue.

14. Petitioner does not contend that HCFA made any new findings of noncompliance subsequent to its initial determination of January 24, 1997, but contends that HCFA's regulation denying it the right to contest HCFA's choice of remedies is an unconstitutional deprivation of its right to due process.

15. An administrative law judge derives his limited authority from the statute and the implementing regulations. In adjudicating claims, he or she is bound by the governing regulations. It is not within the scope of an administrative law judge's authority to declare the regulations through which he or she obtains jurisdiction unconstitutional, and, accordingly, this Administrative Law Judge makes no finding on the issues of constitutionality raised by Petitioner.

16. Petitioner's request for hearing was not timely filed, no extension of the time for filing was either requested or granted, and, accordingly, this matter must be dismissed. 42 C.F.R. § 498.70(c).

DISCUSSION

I. Agreement of the Parties as to the Facts

A reading of the pleadings filed with respect to this matter indicates that the parties are in complete agreement as to those Findings of Fact and Conclusions of Law (FFCLs) set forth as numbers 1 through 12 above. Of primary importance is the fact that HCFA rendered an initial determination on January 24, 1997, finding that Petitioner was not in substantial compliance with participation requirements, and notifying Petitioner of several remedies, including a CMP in the amount of $3050 per day, effective January 3, 1997. P. Br. at 1; HCFA Br. at 2.

The parties further agree that on February 20, 1997, HCFA issued a notice revising and modifying the remedies it had initially imposed, but did not change, revise, or modify the basis upon which those remedies were imposed. HCFA noted that "[It] certified no new findings of noncompliance but instead referenced two repeat findings . . . [and] also indicated that its letter of February 20, 1997 did not toll the time in which the Petitioner had to request a hearing or waive its right to a hearing and still receive a 35 percent reduction of the CMP." HCFA Br. at 3; HCFA Ex. 3. Petitioner does not dispute this fact, and, in fact, indicates its agreement by noting that "On February 20, 1997, based upon [the State agency] recommendations regarding the

February 5, 1997 survey, HCFA **revised its remedies . . .** (Emphasis Added). P. Br. at 2.

HCFA issued an additional notice on April 30, 1997, advising Petitioner that the remedies imposed on January 24, 1997, were being discontinued. HCFA Br. at 3; P. Br. at 3. Neither side contends that this notice did anything except notify Petitioner of HCFA's final decision with respect to the remedies imposed. There was no revision or modification to the initial findings of noncompliance upon which the remedies were based.

Finally, of critical importance herein, both parties agree that Petitioner did not file its request for hearing until April 18, 1997, some 84 days after HCFA's initial determination. HCFA Br. at 3; P. Br. at 3.

II. Applicable Law

42 C.F.R. § 498.70 provides, in pertinent part, that an affected party must file its request for hearing within 60 days from receipt of its notice of an initial, reconsidered, or revised determination, unless that period is extended by the administrative law judge upon written request of the affected party and for good cause shown. In this case, Petitioner did not file a written request seeking an extension of its time to file.

There is no evidence to show that HCFA issued either a reconsidered or revised determination in this case. While HCFA did issue notices revising the remedies it elected to impose, those notices did not constitute reconsidered or revised determinations within the meaning of 42 C.F.R. §§ 498.24 (reconsidered determination) or 498.32 (revised determination).

Pursuant to the aforesaid regulations, a reconsidered determination occurs following a formal request for same, upon which HCFA considers the initial determination, the findings on which it was made, and new evidence the affected party might wish to submit. HCFA then issues a formal reconsidered determination affirming or modifying the initial determination and the findings on which it was based. Here, there is nothing to indicate, and indeed Petitioner does not contend, that a formal request for a reconsidered determination was made, or, indeed, that such a determination was issued.

A revised determination is one in which HCFA gives the affected party notice that it is reopening the initial determination and revising same.

In the instance of either a reconsidered or revised determination, HCFA is obligated under the aforesaid regulations to extend the right of appeal for 60 days following issuance of notice. HCFA did not extend the right of appeal in this case

because there was no request for reconsideration, and HCFA did not on its own reopen and revise its initial determination.

Because there was neither a reconsidered nor revised determination as defined by the regulations, Petitioner could only appeal the initial determination, which in this case was rendered on January 24, 1997. Pursuant to 42 C.F.R. § 498.3(b)(12), an initial determination with respect to a skilled nursing facility (SNF) or nursing facility (NF), such as Petitioner herein, is "a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 of this chapter, except the State monitoring remedy, and the loss of the approval for a nurse-aide training program." In this instance, HCFA made findings of noncompliance (HCFA Ex. 1) and those findings led to the imposition of remedies specified in 42 C.F.R. § 488.406, namely termination, CMP, and denial of payment for new admissions.

It is important to note that 42 C.F.R. § 498.3(b)(12) states that it is the "finding of noncompliance" which is the initial determination, not the remedy which is imposed. It is, accordingly, the "finding of noncompliance" which must be appealed and not HCFA's choice of remedy. The regulations make this conclusion absolutely clear. For example, 42 C.F.R. § 498.3(d)(11) provides that the choice of an alternative sanction or remedy to be imposed on a provider or supplier is an administrative action which is **NOT** an initial determination. Similarly, 42 C.F.R. § 488.408(g) provides that: "(1) A facility may appeal a certification of noncompliance leading to an enforcement remedy. (2) A facility may not appeal the choice of remedy, including the factors considered by HCFA or the State in selecting the remedy, specified in § 488.404." Finally, with respect to civil money penalties, 42 C.F.R. § 488.432 provides that "[a] facility must request a hearing **on the determination of the noncompliance that is the basis for imposition of the civil money penalty . . . .**(emphasis added). In reviewing that penalty, 42 C.F.R. § 488.438 provides that an administrative law judge must determine whether or not the basis for imposition of the penalty exists. Under that regulation, the administrative law judge can review the amount of the penalty with certain qualifications, but he cannot review the selection of that remedy (penalty) itself.

All of the aforesaid regulations are consistent with the conclusion that the Secretary of the Department of Health and Human Services (Secretary) specifically limited facilities to an appeal of the findings of deficiency leading to the imposition of a remedy, and not to an appeal of the remedy itself. Similarly, the Secretary specifically limited an administrative law judge's authority and jurisdiction to a consideration of HCFA's findings of deficiency, leaving the selection of remedy within the discretion of HCFA.

III. Constitutionality of HCFA's Regulations.

It is clear from Petitioner's response to HCFA's motion to dismiss that it does not contend that HCFA failed to follow the regulations. Rather, it contends that those regulations violate the due process clause of the fifth and fourteenth amendments to the United States Constitution. P. Br. at 3. Specifically, Petitioner seeks to challenge the selection of remedies imposed by HCFA in its notice of February 20, 1997, and argues that the regulations discussed above, which prohibit Petitioner from contesting the choice of remedy, or, it argues, from contesting the scope and severity of deficiencies, are unconstitutional.

An administrative law judge, unlike a federal judge in the judicial branch of our government, does not derive his or her authority directly from the Constitution. Instead, the administrative law judge is a creation of Congress, housed in the executive branch of the government, and is vested with only such authority as the Congress by statute, or the Executive by regulation and delegation of authority, chooses to impart. Neither Congress nor the Executive have conferred upon administrative law judges the authority to rule on the Constitutionality of the statutes and regulations under which the administrative law judge presides. Indeed, the administrative law judge is duty bound to uphold and enforce those statutes and regulations while they remain in force and effect. The administrative law judge must assume that the laws and regulations over which he or she presides are lawful. Accordingly, as the arguments advanced by Petitioner are beyond the scope of my authority as an administrative law judge, I decline to rule on them. The Petitioner's right to appeal this decision and to raise his constitutional argument is preserved.

IV. Conclusion

I conclude that, in this case, HCFA rendered its initial determination on January 24, 1997. I conclude further that Petitioner's request for hearing, filed on April 18, 1997, was untimely filed and was beyond the 60 day time limit as provided by 42 C.F.R. § 498.40(a)(2). I conclude finally that no request to extend that time limit was made, nor was any extension granted for good cause shown. Accordingly, this matter should be, and is, **HEREBY DISMISSED** pursuant to 42 C.F.R. § 498.70(c).

/s/

Stephen J. Ahlgren

Administrative Law Judge