Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Somers Manor Nursing Home, Inc.,	)	DATE: June 4, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-054
	)	Decision No. CR420
Health Care Financing Administration.	)	
	)	

DECISION

I sustain the determination of the Health Care Financing Administration (HCFA) to suspend payments for new admissions by Petitioner for the period beginning November 1, 1995 and ending November 9, 1995. HCFA is not estopped from imposing a remedy. Furthermore, I do not have the authority to decide that HCFA's choice of remedy, denial of payment for new admissions, is incorrect.

I. Background

Petitioner is a skilled nursing facility (SNF). On October 16, 1995, Petitioner was notified by HCFA that HCFA had determined that Petitioner was not complying substantially with federal participation requirements for nursing homes participating in the Medicare and Medicaid programs. HCFA advised Petitioner that it had determined to impose remedies against Petitioner, including denial of payment for new admissions, effective November 1, 1995.[1] The denial of payment for new admissions remained

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[1] HCFA advised Petitioner additionally that Petitioner's participation in Medicare would be terminated effective January 17, 1996, if Petitioner did not achieve substantial compliance by that date. Petitioner achieved substantial compliance, effective November 9, 1995, and Petitioner's participation was not terminated.

in effect until November 9, 1995, when it ended, as a result of a determination that Petitioner had attained substantial compliance with participation requirements.

Petitioner requested a hearing. Petitioner asserted that the determination to impose a denial of payment was unreasonable. The parties agreed that the case could be heard and decided based on written submissions and briefs, without an in-person hearing. HCFA submitted five exhibits (HCFA Ex. 1 - 5) and an affidavit. Petitioner submitted an affidavit and three exhibits, which I have designated as P. Ex. 1 - 4.[2] Neither party objected to my admitting any of the exhibits into evidence. I have received into evidence HCFA Ex. 1 - 6, and P. Ex. 1 - 4.

II. Issues, findings of fact and conclusions of law

Petitioner characterizes this case as being about whether HCFA's determination to deny Petitioner payments for new admissions is reasonable in light of the fact that, acting on behalf of HCFA, the State of New York Department of Health (New York State Agency) incorrectly informed Petitioner on September 21, 1995, that Petitioner had corrected a deficiency which had been identified at the July 21, 1995 compliance survey of Petitioner. Petitioner contends that had it been notified that the deficiency had not been corrected, Petitioner would have promptly corrected the deficiency and there never would have been a need for HCFA to impose a remedy.

Petitioner does not dispute that a deficiency existed as of September 21, 1995, nor does Petitioner assert that it corrected that deficiency before November 9, 1995, the

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[1](...continued)
November 9, 1995, and Petitioner's participation was not terminated.

[2] HCFA did not assign an exhibit number to the affidavit of Philip G. Labasi. I have designated that exhibit as HCFA Ex. 6. Petitioner did not assign an exhibit number to the affidavit of Janice Depp. I have designated that exhibit as P. Ex. 1. Petitioner designated its three exhibits as "P. Ex. A," "P. Ex. B," and "P. Ex. C." In order to maintain a uniform record, I have redesignated P. Ex. A as P. Ex. 2, P. Ex. B as P. Ex. 3, and P. Ex. C as P. Ex. 4. I would note also that P. Ex. 3 is identical to HCFA Ex. 2.

date that the New York State Agency concluded that the deficiency was corrected. Petitioner's framing of the case in this way raises two issues. These are whether:

1. HCFA may be estopped from imposing a remedy against Petitioner by virtue of the New York State Agency's failure to correctly notify Petitioner of the deficiency in Petitioner's operations; and

2. I have authority to hear and decide the question of whether HCFA's choice of remedy--denial of payment for new admissions by Petitioner--is reasonable.

In sustaining HCFA's imposition of denial of payment for new admissions by Petitioner, I make the following findings of fact and conclusions of law (Findings). I discuss each of my findings in detail, at part III of this decision.

1. On September 21, 1995, Petitioner was advised, incorrectly, by the New York State Agency that Petitioner had corrected a deficiency in its compliance with Medicare participation requirements when, in fact, Petitioner had not corrected the deficiency.

2. Petitioner was unable to correct the deficiency prior to an October 3, 1995 resurvey of Petitioner, after being notified by the New York State Agency on September 29, 1995 of that agency's erroneous finding.

3. Based on the October 3, 1995 resurvey of Petitioner, HCFA determined that Petitioner was not in substantial compliance with Medicare participation requirements and, as a remedy, imposed on Petitioner a denial of payment for new admissions, effective November 1, 1995.

4. HCFA subsequently determined that Petitioner had corrected its deficiency on November 9, 1995 and ended the denial of payment for new admissions, effective that date.

5. HCFA is not estopped from imposing a remedy by the incorrect notification of Petitioner by the New York State Agency that Petitioner had corrected a deficiency when, in fact, Petitioner had not corrected the deficiency.

6. I do not have authority to hear Petitioner's request for a hearing concerning HCFA's choice of remedy.

III. Discussion

A. The facts (Findings 1 - 4)

The facts are not in dispute. On July 21, 1995, acting on HCFA's behalf, the New York State Agency conducted a compliance survey of Petitioner. On August 1, 1995, the New York State Agency notified Petitioner that Petitioner was not complying with all applicable Medicare participation requirements. HCFA Ex. 1. The deficiencies identified by the New York State Agency included a failure by Petitioner to comply with the participation requirement governing the use of restraints. HCFA Ex. 1 at 3 - 5. This finding is identified in the New York State Agency's survey report by ID Prefix Tag F 221. Id.

After the September 21, 1995 compliance survey of Petitioner, the New York State Agency found, incorrectly, that Petitioner had corrected its failure to comply substantially with the participation requirement governing the use of restraints. HCFA Ex. 2; P. Ex. 3. The New York State Agency advised Petitioner's administrator, incorrectly, that Petitioner had achieved substantial compliance with the participation requirement governing the use of restraints. P. Ex. 1 at 1. Additionally, the New York State Agency advised Petitioner, incorrectly, that Petitioner was not complying with the participation requirement governing plans of care. P. Ex. 1 at 1. In fact, Petitioner was complying with the participation requirement for plans of care.

On September 29, 1995, the New York State Agency advised Petitioner that it had erred in advising Petitioner that Petitioner was not complying with the participation requirement governing plans of care, and had erred also in advising Petitioner that Petitioner had achieved substantial compliance with the participation requirement governing the use of restraints. P. Ex. 1 at 1. The New York State Agency told Petitioner's administrator that another survey would be conducted. Id.

On October 3, 1995, the New York State Agency conducted a resurvey of Petitioner. Although, in the days between September 29, 1995 and October 3, 1995 Petitioner had attempted to comply with the participation requirements

governing the use of restraints, it was unable to achieve compliance by October 3, 1995. HCFA Ex. 4; P. Ex. 1 at 2.

Although the incorrect information that the New York State Agency imparted to Petitioner on September 21, 1995 may have hindered Petitioner's efforts to correct its failure to comply with the requirement governing the use of restraints in the period between September 29, 1995 and October 3, 1995, the incorrect information would not in any way have prevented Petitioner from attaining compliance in the two months between the July 21, 1995 survey and the September 21, 1995 survey. The New York State Agency correctly notified Petitioner of the deficiency after the July 21, 1995 survey.

Based on the October 3, 1995 resurvey of Petitioner, HCFA determined that Petitioner was not complying substantially with the participation requirement governing the use of restraints. HCFA determined to impose a remedy against Petitioner, consisting of a denial of payment for new admissions. This remedy went into effect on November 1, 1995.

On November 9, 1995, the New York State Agency conducted another resurvey of Petitioner. HCFA Ex. 5. The New York State Agency found that, as of that date, Petitioner had attained substantial compliance with participation requirements, including the requirement governing the use of restraints. Id. at 1. Based on this finding, HCFA ended the denial of payment for new admissions, effective November 9, 1995. Id.

Petitioner does not deny that, prior to November 9, 1995, it was not complying substantially with the participation requirement governing the use of restraints. Nor does Petitioner deny that the date on which it finally attained compliance with this requirement was November 9, 1995.

B. Estoppel (Finding 5)

The gravamen of Petitioner's case is that, but for the incorrect notification that it received from the New York State Agency on September 21, 1995, it would have attained compliance with the participation requirement governing the use of restraints prior to the October 3, 1995 resurvey. According to Petitioner, it was misled into believing that it had attained compliance with the requirement governing the use of restraints and, therefore, devoted no resources to correcting its deficiency prior to being notified by the New York State

Agency on September 29, 1995 that the findings of that agency had been communicated erroneously to Petitioner.

Petitioner asserts also that, between September 21, 1995 and September 29, 1995, it devoted its resources to addressing alleged deficiencies in its compliance with plan of care participation requirements. This effort was counterproductive, because Petitioner was not, in fact, failing to comply with the plan of care participation requirements. Petitioner contends that, by diverting its resources to addressing the alleged deficiency in the plan of care requirement, Petitioner was without adequate resources to address the deficiency in the requirement governing the use of restraints.

Petitioner argues, essentially, that HCFA is estopped from imposing a remedy against Petitioner by virtue of the error of HCFA's agent, the New York State Agency. For purposes of this decision, I accept as true Petitioner's representation that, but for the incorrect notification by the New York State Agency, Petitioner would have been able, between September 21, 1995, and October 3, 1995, to correct its failure to comply with the participation requirement governing the use of restraints.

Petitioner's argument on the issue of estoppel does not address HCFA's choice of the remedy it imposed against Petitioner (denial of payment for new admissions). Petitioner argues, in effect, that HCFA is precluded by principles of estoppel from imposing any remedy, because of the incorrect and misleading communication made on September 21, 1995. HCFA responds to this argument by asserting that, as a matter of law, it may never be estopped from imposing a remedy. HCFA argues also that, to order that its remedy be rescinded would be an impermissible retroactive finding that Petitioner had complied with participation requirements at a date earlier than HCFA determined Petitioner to have complied with those requirements.

I am not persuaded by HCFA's assertion that Petitioner is seeking an impermissible retroactive finding that it complied with participation requirements at a date earlier than HCFA found Petitioner to have complied with those requirements. In fact, Petitioner concedes that it did not comply with those requirements prior to November 9, 1995, the date when HCFA determined that Petitioner was in compliance. What Petitioner is actually arguing is that it ought not to be the subject of a remedy based on Petitioner's failure to comply with participation

requirements because, ostensibly, some of the fault for Petitioner's failure to comply should be borne by HCFA.[3]

It is not necessary for me to resolve the issue of whether HCFA could ever be estopped from imposing a remedy against a provider. I conclude that, based on the facts of this case, there exists no basis for me to find that HCFA is estopped from imposing a remedy against Petitioner.

It is true that the New York State Agency imparted inaccurate and misleading information to Petitioner on September 21, 1995. Put simply, the New York State Agency told Petitioner that Petitioner had rectified a deficiency which, in fact, Petitioner had not rectified. That incorrect communication may have hindered Petitioner in its efforts to correct the deficiency between September 29, 1995, when the New York State Agency corrected its error, and October 3, 1995, when Petitioner was resurveyed. Certainly, it would have caused Petitioner to believe, between September 21, 1995 and September 29, 1995 that it need not take remedial steps concerning its compliance with the participation requirement governing use of restraints. However, the incorrect communication did not preclude Petitioner from rectifying the deficiency at an earlier date, when it had accurate notice of the deficiency.

Petitioner has not shown that it was harmed by the incorrect communication that was made to it by the New York State Agency. In a very real sense, that incorrect communication redounded to Petitioner's advantage. Petitioner was on notice from July 21, 1995 until September 21, 1995 that it was not complying with the participation requirement governing the use of restraints. Petitioner had ample time during this two-month period to correct the deficiency. HCFA could have imposed a remedy against Petitioner, effective September 21, 1995, based on Petitioner's failure to have rectified its deficiency by that date. Petitioner actually had more time within which to correct its failure to comply with the participation requirement governing the use of restraints prior to a remedy being imposed than

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[3] Although not an issue in this case, providers have contended in some cases that they complied with participation requirements at an earlier date than HCFA certified them to be in compliance. In such a case, I have afforded the provider a hearing so that it could attempt to prove its contention. National Hospital for Kids in Crisis, DAB CR413 (1996).

Petitioner would have had if the New York State Agency had accurately recorded its findings and communicated them to Petitioner.

Not only am I not persuaded that Petitioner was actually harmed by the incorrect communication, but I am also unconvinced that it would be in the interests of program beneficiaries to bar HCFA from imposing a remedy against Petitioner, given what happened here. A purpose of imposing a remedy for a provider's failure to comply with participation requirements is to provide incentive for that provider to correct its failure. HCFA had every reason to conclude that such an incentive was necessary here, given the long period of time during which Petitioner was not complying with the requirement governing the use of restraints.

C. Choice of remedy (Finding 6)

Neither HCFA nor Petitioner addressed the issue of whether I have authority to review HCFA's choice of remedy, denial of payment for new admissions. However, implicit in Petitioner's request for hearing is the assertion that, given the facts of this case, HCFA elected to impose the wrong remedy.

I do not have authority to decide that HCFA elected to impose the wrong remedy or whether, despite Petitioner's admitted failure to comply with participation requirements, HCFA should not have imposed a remedy. The regulations which govern extended care facilities, including SNFs, make it plain that I do not have such authority.

This case is brought pursuant to regulations which govern long-term care facilities, including SNFs, which went into effect in July 1995. 59 Fed. Reg. 56,116 - 56,252 (1994). These regulations include revised regulations, at 42 C.F.R. Part 488, which govern surveys and certification of long-term care facilities. 42 C.F.R. §§ 488.11 - 488.456.

Among these revised regulations are regulations which govern the remedies that HCFA may impose to address any deficiency that HCFA determines may exist in the operation of an extended care facility. 42 C.F.R. §§ 488.406, 488.408. The remedies available to HCFA include denial of payment for new admissions. 42 C.F.R. § 488.406(a)(2)(ii). The revised regulations state that a provider may request a hearing from a determination that it is not complying with a participation requirement. 42 C.F.R. § 488.408(g)(1). The revised regulations state

also, however, that a provider may not request a hearing concerning HCFA's choice of remedy, assuming that HCFA determines correctly that the provider is not complying with participation requirements. 42 C.F.R. § 488.408(g)(2).

The intent of the regulations is plain. While the existence or nonexistence of a deficiency in a given case is an issue about which a provider has hearing and appeal rights, the provider does not have such rights to challenge HCFA's discretion to decide which remedy to impose if a deficiency does exist. This means that I may not decide that HCFA's choice of a remedy, including its choice to impose a remedy as opposed to not imposing one, is incorrect in a case involving a long-term care facility where, as in this case, it is undisputed that the provider is not complying with participation requirements.

IV. Conclusion

I conclude that HCFA is not estopped from imposing a remedy against Petitioner. I have no authority to decide that HCFA should have exercised discretion to not impose a remedy, or to decide that HCFA's choice of remedy was wrong. Therefore, I sustain HCFA's determination to deny Petitioner payment for new admissions from November 1, 1995 until November 9, 1995.

/s/

Steven T. Kessel
Administrative Law Judge