Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Kings View Hospital,	)	Date: November 5, 1996
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-233
	)	Decision No. CR442
Health Care Financing Administration.	)	
	)	

DECISION

I decide that Petitioner, Kings View Hospital, terminated its participation in Medicare, effective October 11, 1991. I decide additionally that the Health Care Financing Administration (HCFA) determined correctly to recertify Petitioner to participate in Medicare, effective August 11, 1993.

I. Background

The following background facts are not disputed by the parties. Petitioner is a psychiatric hospital, located in Reedly, California. Prior to October 11, 1991, Petitioner was certified by HCFA to participate in the Medicare program as a psychiatric hospital. By letter dated April 20, 1995, HCFA advised Petitioner that HCFA had determined that, between October 11, 1991 and April 8, 1993, none of Petitioner's beds were licensed by the State of California as acute psychiatric beds. HCFA advised Petitioner that there was no basis for HCFA to have recognized Petitioner as a psychiatric hospital during this period, because of Petitioner's failure to have a license to operate acute psychiatric care beds during the period. HCFA determined that Petitioner had terminated its participation in Medicare beginning October 11, 1991, based on Petitioner's failure to maintain a license to operate as a psychiatric hospital, effective that date.

In a previous letter, dated April 20, 1994, HCFA advised Petitioner that it had accepted Petitioner's agreement to participate as a psychiatric hospital, effective August 11, 1993. When the April 20, 1994 and April 20, 1995 letters from HCFA are read together, it is apparent that HCFA determined that Petitioner should not have been certified to participate in Medicare as a psychiatric hospital between October 11, 1991 and August 11, 1993.

On May 25, 1995, Petitioner requested a hearing from HCFA's determination that, between October 11, 1991 and August 11, 1993, Petitioner was not certified to participate in Medicare as a psychiatric hospital. Petitioner asserted that HCFA should not have decertified Petitioner from participating in Medicare. Petitioner asserted additionally as a secondary position that, if Petitioner was not properly certified by HCFA to participate in Medicare effective October 11, 1991, then it should have been certified to participate in Medicare effective April 8, 1993 and thereafter.

On April 30, 1996, HCFA advised Petitioner that, after review of Petitioner's hearing request by the Department of Health and Human Services Office of Regional Counsel, HCFA had determined to forward Petitioner's hearing request to the Departmental Appeals Board. The case was assigned to me for a hearing and a decision. I held a prehearing conference by telephone, at which HCFA advised me that it was not disputing that Petitioner was entitled to a hearing. The parties eventually agreed that the case could be heard and decided based on written submissions, including exhibits and briefs.

II. Issues, findings of fact, and conclusions of law

The issue in this case is whether Petitioner ought to have been certified to participate in Medicare at any time between October 11, 1991 and August 11, 1993. I make the following findings of fact and conclusions of law (Findings) to support my decision that HCFA correctly determined: that Petitioner terminated its certification effective October 11, 1991; and to recertify Petitioner, effective August 11, 1993. I discuss each Finding below, at Part III of this decision.

> 1. In order to meet the statutory definitions of a hospital and of a psychiatric hospital, for purposes of participation in Medicare, an entity must be licensed as may be required under applicable State law. In lieu of a license, the entity may be approved under applicable State law as meeting the requirements for a license.

2. An entity terminates its participation in Medicare as a hospital if that entity ceases to meet the statutory definition of a hospital.

3. An entity whose participation in Medicare is terminated may not participate in Medicare again until it has been recertified by HCFA as meeting participation requirements.

4. In order to be recertified to participate in Medicare, an entity whose previous participation in Medicare is terminated must apply for participation and must be surveyed by or on behalf of HCFA to determine whether the entity meets Medicare participation requirements.

5. The earliest date that an applicant for certification whose previous participation in Medicare is terminated may participate is the date of completion of the survey, assuming that the applicant meets all participation requirements on that date.

6. Under California law, the effect of placing an inpatient hospital bed in suspension is to place in suspense the license to operate that hospital bed. If all of a facility's inpatient hospital beds are placed in suspense, then the effect is to place in suspense the license of that facility to operate its inpatient hospital beds.

7. Effective October 11, 1991, the State of California, acting at Petitioner's request, placed in suspense all 37 of the inpatient hospital beds operated by Petitioner.

8. The effect of placing all of Petitioner's inpatient beds in suspense was to place in suspense Petitioner's California license to operate its inpatient hospital beds. Petitioner was not permitted to operate as a hospital, under California licensing requirements, from October 11, 1991 to April 8, 1993.

9. By having all of its inpatient hospital beds placed in suspense, Petitioner ceased to meet the statutory definitions of a hospital and of a psychiatric hospital, effective October 11, 1991.

10. Effective April 8, 1993, the State of California granted Petitioner a license to operate eight acute care psychiatric beds. The April 8, 1993 license provided that the license for four of the eight beds would remain in suspense until June 30, 1994.

11. HCFA properly determined that Petitioner terminated its participation in Medicare, effective October 11, 1991.

12. Petitioner applied for recertification by HCFA and, on August 11, 1993, was surveyed on behalf of HCFA to determine whether Petitioner met Medicare participation requirements. Based on the survey results, HCFA determined that Petitioner met Medicare participation requirements, effective August 11, 1993.

13. HCFA properly determined that Petitioner should be recertified to participate in Medicare, effective August 11, 1993.

III. Discussion

A. Governing law (Findings 1 - 6)

1. The requirement that an entity have a State license in order to meet the statutory definitions of a hospital and of a psychiatric hospital (Finding 1)

An entity must either be licensed under State law as a hospital, to the extent that a license is required under State law, or receive authority to operate from a State in lieu of a license, in order to meet the statutory definition of a hospital for purposes of participating in Medicare. Social Security Act (Act), section 1861(e)(7). A "psychiatric hospital" is defined in section 1861(f)(1) and (2) of the Act to be an entity which meets the definition of a "hospital" contained in section 1861(e) of the Act, and which provides psychiatric services primarily.

Thus, the statutory definition of a psychiatric hospital in section 1861(f) of the Act incorporates the State license requirement contained in section 1861(e)(7) of the Act.

2. Termination of participation by an entity that no longer meets the statutory definition of a hospital (Finding 2)

An entity which participates in Medicare as a hospital no longer meets the statutory definition of a hospital where that entity ceases to be authorized under State law to provide inpatient services. In that circumstance, the entity terminates its participation in Medicare. The entity's termination of its participation in Medicare is effective on the date that the entity ceases to meet the statutory definition of a hospital.

As I discuss above, the definitions of a hospital and of a psychiatric hospital under the Act include the requirement that the entity be licensed under State law, to the extent that a license is required. Therefore, when a psychiatric hospital loses its State license, or when that license is placed in a state of suspense, then the psychiatric hospital is no longer a hospital as defined by section 1861(e)(7) of the Act, or a psychiatric hospital, as defined by section 1861(f) of the Act, and it ceases to qualify to participate in Medicare.

Petitioner argues that, even if an entity that participates in Medicare as a hospital ceases to meet the statutory definition of a hospital, that entity's participation may not terminate until HCFA provides the entity with notice of termination as is required by 42 C.F.R. § 489.53(c). I am not persuaded by this argument. HCFA is obligated to give a provider notice in advance of effectuating a determination by HCFA to terminate a provider's participation in Medicare. Id. But the regulation does not require HCFA to hold in abeyance a termination of participation, until the notice requirements of the regulation are met, where the provider no longer meets the definition of a provider under the Act.

The regulation requiring advance notice of a determination by HCFA to terminate a provider's participation lists 14 circumstances which might justify a determination by HCFA to terminate a provider's participation. 42 C.F.R. § 489.53(a)(1) - (14). All of these circumstances comprise situations in which the provider fails to comply with a requirement of participation. None of those circumstances describe instances where the entity no longer meets the definition of a provider. In that latter circumstance, there is no need for HCFA to terminate the provider's participation. By no longer meeting the definition of a provider, the hospital that loses its State authority to operate has ceased to be a hospital within the meaning of the Act.

3. The circumstances under which an entity whose participation in Medicare is terminated may participate again in Medicare (Findings 3 - 5)

An entity whose participation in Medicare is terminated may not participate again unless HCFA finds that: the reason for termination has been removed and there is reasonable assurance that it will not recur; and the entity has fulfilled, or has made satisfactory arrangements to fulfill, all of the statutory and regulatory responsibilities of its previous agreement with HCFA. 42 C.F.R. § 489.57(a), (b).

The regulation which governs reinstatement of an entity whose participation is terminated does not spell out how that entity may satisfy the requirements of the regulation, in order to qualify for reinstatement. See 42 C.F.R § 489.57. It is apparent from the regulation that it vests in HCFA the discretion to determine the manner in which an entity whose participation is terminated may be recertified for participation.

An entity must apply to HCFA to be certified to participate in Medicare. 42 C.F.R. § 489.10(a). In order to be certified, an applicant for participation first must be surveyed in order to determine whether that applicant meets all Medicare participation requirements. 42 C.F.R. §§ 488.10, 489.10(d). HCFA has delegated to State survey agencies the authority to conduct surveys on HCFA's behalf. Id. HCFA will accept an applicant's participation agreement on the date that a survey of that applicant is completed, assuming that the applicant meets all participation requirements on that date. 42 C.F.R. § 489.13(a). There is no provision in the regulations governing applications for participation and surveys which would enable HCFA to accept an application for participation earlier than the date of completion of the survey.

The regulations which govern applications for participation and surveys of applicants do not distinguish between applicants who have not participated previously and applicants who have participated previously, but whose participation is terminated. The regulations do not suggest that a previous participant that applies for recertification will be treated any differently than an applicant for provider status that has not participated previously. Therefore, a previous participant may not qualify to participate at any date earlier than completion of the State agency survey that HCFA has conducted to determine whether the applicant meets participation requirements.

4. The effect under California law of placing either a hospital license or licensed beds in suspense (Finding 6)

The State agency in California which is responsible for the granting of licenses to operate hospitals is the State of California Department of Health Services, Licensing and Certification (California licensing agency). HCFA Ex. 5 at 1.[1] Under California law, a licensed hospital may

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[1] HCFA offered 12 exhibits in support of its arguments (HCFA Exs. 1 - 12). Petitioner offered six designated exhibits in support of its arguments (P. Exs. 1 -

voluntarily request the California licensing agency that its entire license, or licensed beds, be put in a state of suspension. HCFA Ex. 9 at 1 - 2.

The effect under California law of placing a hospital license in suspense is that the hospital loses its authority to operate during the suspension period. HCFA Ex. 5 at 2. The effect under California law of placing licensed hospital beds in suspension is that the hospital loses its authority to operate the beds that are in suspense during the suspension period. Id. A hospital may not operate as an inpatient hospital under California law where all of its licensed beds are placed in suspension. Id. Thus, under California law, if all of a hospital's licensed inpatient beds are in suspense, then the result -- that the hospital may not operate as an inpatient facility -- is the same as if the hospital's license to operate as an inpatient facility is in suspense. Id.

B. The relevant facts (Findings 7, 10, 12)

I find that Petitioner had no license authority to operate acute care psychiatric beds from October 11, 1991 until April 8, 1993. Effective October 11, 1991, Petitioner voluntarily eliminated 38 of its acute care psychiatric beds. It placed the remaining 37 beds in suspense on that date, and did not ask that any of these beds be activated on any date prior to April 8, 1993. Effective April 8, 1993, four of the beds that were in suspense were activated.

On October 16, 1991, Petitioner's Acting Executive Director wrote on behalf of Petitioner to the California licensing agency. HCFA Ex. 1. Petitioner represented that, as of that date, Petitioner was licensed for 77 acute inpatient beds. Id. Petitioner asserted that it was in the process of converting 38 of the 77 beds to residential beds under Community Care licensing and that it wished to drop those 38

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6). In addition, Petitioner submitted a declaration, and a supplemental declaration, of Michael Waters. Petitioner did not designate Mr. Waters' declaration or his supplemental declaration as exhibits, although Petitioner plainly intends that both be received into evidence. I am designating Mr. Waters' declaration as P. Ex. 7 and I am designating Mr. Waters' supplemental declaration as P. Ex. 8. I am receiving into evidence HCFA Exs. 1 - 12 and P. Exs. 1 - 8.

After the parties had completed their submissions, and after I closed the record in this case, HCFA offered an additional exhibit, HCFA Ex. 13. HCFA offered this exhibit untimely and therefore I am not receiving it into evidence.

beds from its acute care bed license. Id. Petitioner asserted also that it wished to request application to suspend its license for the remaining 37 beds for the next year. Id. Petitioner averred that it planned to close its inpatient program effective October 11, 1991. Id.[2]

The California licensing agency issued a license to Petitioner for 37 acute care psychiatric beds, effective on October 11, 1991 through June 30, 1992. HCFA Ex. 2 at 1. However, consistent with what Petitioner had requested, the license recited that the license for the 37 acute care psychiatric beds would be in suspense from October 11, 1991 until October 10, 1992. Id.

On March 11, 1992, the California Department of Health Services wrote to Petitioner, advising it that it had been notified that Petitioner's facility closed on October 11, 1991. HCFA Ex. 8.[3] Petitioner was advised that its certification to participate in the Medi-Cal program terminated effective October 11, 1991. Id. Petitioner was advised additionally that, if it wished to participate in Medi-Cal, it would have to apply for participation and successfully complete the requisite survey process. Id.

The California licensing agency then issued a license to Petitioner, which was effective on July 1, 1992, and until April 7, 1993. HCFA Ex. 2 at 2. This license, again, was for 37 acute care psychiatric beds. Id. However, as with the previously issued license, the license recited that the license for the 37 psychiatric beds would be in suspense effective October 11, 1991 through October 10, 1992. Id.

In one respect, the license that was issued effective July 1, 1992 was incorrect. While the license recited that Petitioner's 37 acute care psychiatric beds would remain in suspense through October 10, 1992, the intent of the California licensing agency was to issue a license that would state that the 37 beds were in suspense through April 7,

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[2] Even though Petitioner was licensed for 77 acute beds, 38 beds were to be dropped from its acute care license and 37 beds were to be suspended. This accounts for 75 beds, not 77. However, it is apparent from Petitioner's communications with the California licensing agency that Petitioner did not intend to maintain any inpatient beds after October 11, 1991. HCFA Ex. 1.

[3] It is evident that the California Department of Health Services operates both as the California licensing agency and as the State agency responsible for certification of participants in Medi-Cal, the California Medicaid program.

1993. HCFA Ex. 2 at 2; HCFA Ex. 5 at 3. However, although there was an error in the license effective July 1, 1992, I do not find that the consequence of that error was to activate any of Petitioner's acute care psychiatric beds. Petitioner did not request a license to activate any of these beds prior to April 8, 1993, nor did it receive a license to do so.

On March 18, 1993, Petitioner filed a license application with the California licensing agency. HCFA Ex. 3. Petitioner applied for a license to operate as a psychiatric acute care unit. Id. at 1. Petitioner averred that the requested capacity of its facility was to be eight beds, four of which would remain in suspense. Id. On May 2, 1993, Petitioner advised the California licensing agency that, effective May 9, 1993, it intended to officially open its acute care unit for any necessary admissions from its residential treatment program. HCFA Ex. 4 at 2. Petitioner stated that its acute care unit would consist of four beds. Id.

Effective April 8, 1993, the California licensing agency issued a new license to Petitioner to operate as an acute psychiatric hospital. HCFA Ex. 2 at 3. This license, which expired on June 30, 1993, was for eight acute care psychiatric beds, four of which would be in suspense. Id. Effective July 1, 1993, the California licensing agency issued an additional license to Petitioner to operate a psychiatric hospital. HCFA Ex. 2 at 4. This license, which expired on June 30, 1994, was for eight acute care psychiatric beds, four of which were to remain in suspense throughout the duration of the license. Id. The California licensing agency issued an additional license to Petitioner, effective July 1, 1994, with an expiration date of June 30, 1995. HCFA Ex. 2 at 5. This license also was for eight acute care psychiatric beds, four of which would remain in suspense through the expiration date of the license. Id.

In August 1993, Petitioner filed an application to participate in Medicare and Medi-Cal as a psychiatric hospital. HCFA Ex. 7. Petitioner was surveyed and, based on the survey, was certified to participate in Medicare and Medi-Cal, effective August 11, 1993. See HCFA Ex. 6.

Although Petitioner had no authority from the State of California to operate inpatient acute care psychiatric beds from October 11, 1991 until April 8, 1993, Petitioner continued to provide some inpatient services to Medicare beneficiaries throughout the period. P. Exs. 3, 4, 7. Petitioner provided outpatient hospital services as well, to Medicare beneficiaries during the period from October 11, 1991 until April 8, 1993. P. Ex. 7 at 3.

C. Application of the law to the facts (Findings 8, 9, 11, 13)

Petitioner ceased to meet the statutory definition of a psychiatric hospital on October 11, 1991. As I find above, the Act's definition of a psychiatric hospital includes the requirement that any such hospital be licensed as may be required under applicable State law. Act, sections 1861(e)(7), 1861(f). In California, the consequence of a hospital placing all of its beds in suspense is that the hospital is not licensed to provide inpatient care for the period when the beds are in suspense. Thus, by placing all 37 of its inpatient beds in suspense from October 11, 1991 until April 8, 1993, Petitioner ceased to be licensed to provide inpatient psychiatric care.[4] And, because Petitioner was not licensed to provide inpatient care, Petitioner no longer met the statutory definition of a psychiatric hospital as of October 11, 1991. Petitioner did not again meet the definition of a psychiatric hospital until April 8, 1993, when the license to operate four of Petitioner's acute care beds was taken out of suspense.

Petitioner terminated its participation in Medicare effective October 11, 1991. It became eligible to participate in Medicare, again effective April 8, 1993, when it regained the authority to operate four inpatient acute care psychiatric beds. However, under applicable HCFA regulations, Petitioner could not be recertified to participate in Medicare until it was surveyed. HCFA certified Petitioner to participate in Medicare effective August 11, 1993, the date that the survey was completed. Under applicable regulations, August 11, 1993 is the earliest date that Petitioner could be recertified to participate in Medicare. 42 C.F.R. § 489.13.

The fact that Petitioner provided inpatient and outpatient hospital services after October 11, 1991 is irrelevant to deciding the question of whether Petitioner terminated its participation as a provider. Petitioner could not have participated as a provider if it no longer met the statutory definition of a provider. That Petitioner may have provided some services that may qualify as hospital services if they are provided by a hospital, does not mean that Petitioner participated in Medicare after it no longer met the statutory definition of a hospital or of a psychiatric hospital.

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[4] Petitioner has not alleged that it received approval from the California licensing agency, in lieu of a license, to operate inpatient beds.

Petitioner asserts that HCFA could not terminate Petitioner's participation in Medicare without first providing Petitioner with notice of the determination to terminate Petitioner's participation, pursuant to 42 C.F.R. § 489.53(c). I have addressed this argument above, at Part III.A.2. of this decision. HCFA had no duty to provide Petitioner with notice of Petitioner's termination of participation because HCFA did not terminate Petitioner's participation in Medicare. Petitioner terminated its participation in Medicare by ceasing to meet the statutory definition of a hospital or of a psychiatric hospital.

Petitioner argues that it is inequitable and unlawful to retroactively terminate Petitioner's participation in Medicare. Petitioner asserts that it incurred substantial expenses for services that it provided to Medicare beneficiaries during the period from October 11, 1991 until the date that it was recertified to participate. Petitioner argues that a termination which is retroactive to October 11, 1991 would operate to cause an unlawful forfeiture by Petitioner of the cost reimbursement that it received for the services it provided to Medicare beneficiaries.

I am not persuaded by Petitioner's arguments. First, there is no retroactive termination by HCFA of Petitioner's participation in Medicare. HCFA did not terminate Petitioner's participation in Medicare. Petitioner terminated its participation in Medicare by requesting the State licensing agency to place in suspense Petitioner's license to operate acute care beds.

Petitioner cannot claim credibly to have been surprised by HCFA's conclusion that Petitioner terminated its participation in Medicare, effective October 11, 1991. Petitioner knew, on or about March 11, 1992, that the State of California considered Petitioner not to be doing business as a hospital, and not a Medi-Cal participant, effective October 11, 1991. HCFA Ex. 8. Petitioner was advised that, in order to be recertified to participate in Medi-Cal, Petitioner would have to reapply and be surveyed. Id. There is nothing in the record of this case which suggests that Petitioner is so naive or unsophisticated as not to realize the implications of this communication. It is true that the March 11, 1992 letter did not specifically mention the Medicare program. On the other hand, Petitioner would have had to know that the criteria which govern participation under State Medicaid programs and Medicare are, in many respects, identical. At the least, the March 11, 1992 letter put Petitioner on notice that, effective October 11, 1991, Petitioner's eligibility to participate in Medicare was open to question.

Nor can Petitioner assert credibly that it is entitled to continue to provide services to Medicare beneficiaries and claim reimbursement for those services as if it is certified to participate in Medicare, where it has, on its own volition, ended its participation in Medicare. That is particularly the case where the services Petitioner provided after October 11, 1991 contravened the terms of Petitioner's California license. Petitioner has not offered any explanation of how it could lawfully supply inpatient hospital services after October 11, 1991, much less claim reimbursement for those services, when it had voluntarily placed in suspense all of the beds that were licensed to provide inpatient services.

I make no findings in this decision as to the validity of the reimbursement claims or cost claims Petitioner made between October 11, 1991 and August 11, 1993. The validity of these claims is not an issue in this case. Nor do I make any finding that Petitioner is obligated to refund the monies it may have received for those claims. I do not have the authority to consider these issues, in any event. The authority to hear and decide cost reimbursement disputes is delegated to the Provider Reimbursement Review Board. The authority to conduct administrative hearings involving specific provider reimbursement claims under either Part A or Part B of Medicare is delegated to the Office of Hearings and Appeals of the Social Security Administration.

Finally, I am not persuaded by Petitioner's argument that HCFA should have recertified it to participate in Medicare effective April 8, 1993, the effective date that Petitioner received a license from the California licensing agency to operate inpatient beds. As I discuss at Part III.A.3. of this decision, the earliest date at which an entity whose participation is terminated may be recertified to participate is the date of completion of a certification survey. In this case, the date of completion of the survey was August 11, 1993.

IV. Conclusion

I conclude that Petitioner terminated its participation in Medicare effective October 11, 1991. I conclude further that HCFA properly determined to recertify Petitioner to participate in Medicare effective August 11, 1993.

/s/

Steven T. Kessel
Administrative Law Judge