Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Rafael Convalescent Hospital,	)	DATE: November 19, 1996
	)	
Petitioner,	)	
	)	
v.	)	Docket No. C-96-292
	)	Decision No. CR444
Health Care Financing Administration.	)	
	)	

DECISION

I decide that Rafael Convalescent Hospital (Petitioner) has no right to a hearing. Therefore, I dismiss Petitioner's request for a hearing.

I. Background

On January 26, 1996, Petitioner requested a hearing concerning the results of a survey of Petitioner that Petitioner alleged was conducted jointly by the California Department of Health Services (California survey agency) and by the Health Care Financing Administration (HCFA). Petitioner's hearing request was assigned to me for disposition. HCFA moved to dismiss Petitioner's request for a hearing, on the ground that Petitioner had no right to a hearing. Petitioner opposed HCFA's motion.[1]

II. Issues, findings of fact and conclusions of law

The issue in this case is whether Petitioner has a right to a hearing. I make the following findings of fact and conclusions of law (Findings) to support my decision that Petitioner does not

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[1] HCFA submitted five exhibits (HCFA Ex. 1 - 5) in support of its motion. Petitioner submitted eight exhibits (P. Ex. 1 - 8) in opposition to HCFA's motion. Neither party objected to my receiving into evidence the other party's proposed exhibits. I receive into evidence HCFA Ex. 1 - 5 and P. Ex. 1 - 8.

have a right to a hearing. I discuss each Finding in detail, below.

1. Petitioner participates in the Medicare program as a skilled nursing facility (SNF), and in the California Medicaid program as a nursing facility (NF).

2. On November 14, 1995, the California survey agency informed Petitioner that, based on a survey that it had conducted of Petitioner, it had found that Petitioner was not in substantial compliance with federal requirements for nursing homes participating in the Medicare and Medicaid programs.

3. On November 14, 1995, the California survey agency informed Petitioner that, if Petitioner did not attain substantial compliance with Medicare participation requirements, the California survey agency would recommend to HCFA that HCFA impose the following remedies against Petitioner:

   a. A civil money penalty;

   b. A denial of payment for new admissions; and

   c. Termination of Petitioner's participation in Medicare.

4. On February 13, 1996, the California survey agency informed Petitioner that it had determined that Petitioner had attained substantial compliance with Medicare and Medicaid participation requirements. The California survey agency made no recommendation to HCFA that HCFA impose as a remedy or remedies a civil money penalty, a denial of payment for new admissions, or termination of Petitioner's participation in Medicare.

5. Regulations which govern the participation in Medicare of SNFs and NFs provide that a SNF or a NF is entitled to a hearing from a determination by HCFA which results in the imposition of a remedy against the SNF or NF by HCFA.

6. A SNF or a NF is not entitled to a hearing where HCFA has made no determination concerning whether the SNF or NF is complying with Medicare participation requirements.

7. A SNF or a NF is not entitled to a hearing where HCFA has imposed no remedy against it.

8. HCFA made no determination concerning whether Petitioner was complying with Medicare participation requirements.

9. Neither the California survey agency nor HCFA imposed any remedies against Petitioner.

10. Petitioner has no right to a hearing.

11. I do not have authority to hear and decide Petitioner's argument that surveys conducted of Petitioner did not comply with requirements governing surveys.

12. I do not have authority to hear and decide Petitioner's argument that actions by the California survey agency or HCFA may deny Petitioner its rights under the United States Constitution.

III. Discussion

A. The relevant facts (Findings 1 - 4)

On November 6, 1995, the California survey agency conducted a survey of Petitioner's facility to determine whether Petitioner was complying substantially with federal requirements for nursing homes participating in Medicare and Medicaid. HCFA Ex. 1 at 1. Based on this survey, the California survey agency informed Petitioner on November 14, 1995, that Petitioner was not in substantial compliance with participation requirements. Id. The California survey agency told Petitioner that it must submit to the California survey agency a plan of correction which showed how Petitioner would correct the deficiencies. Id. The California survey agency advised Petitioner that, if Petitioner did not achieve substantial compliance with participation requirements, the California survey agency would recommend to HCFA that HCFA impose remedies, which might include the following:

- A civil money penalty of $300.00 a day, effective November 6, 1995;

- Denial of payment for new admissions, if Petitioner did not achieve substantial compliance within three months from November 6, 1995; and

- Termination of Petitioner's participation in Medicare, effective May 6, 1996, if Petitioner did not achieve substantial compliance by that date.

Id. at 2.

On November 30, 1995, Petitioner submitted a plan of correction to the California survey agency. HCFA Ex. 2 at 2. On January 24, 1996, Petitioner, through its legal counsel, wrote to HCFA. HCFA Ex. 2. Petitioner recited that, on January 3, 1996, it had

participated with the California survey agency in an informal dispute resolution conference. Id. at 2. Petitioner averred that, at the conference, it had produced extensive documentation and several hours of testimony to prove that it had been in substantial compliance with participation requirements. Id. However, the California survey agency had not accepted most of Petitioner's assertions of substantial compliance. Id.

Petitioner asserted that, if HCFA imposed enforcement remedies against Petitioner, then Petitioner would request a hearing to contest the findings of noncompliance that had been made by the California survey agency. HCFA Ex. 2 at 3. Petitioner characterized the potential remedies concerning which it would seek a hearing as including: prohibiting Petitioner's nurse aide training program for two years, and the issuance of a civil money penalty. Id.

On February 13, 1996, the California survey agency notified Petitioner that, based on a resurvey that it had conducted of Petitioner's facility on February 5, 1996, Petitioner had been found to be in substantial compliance with federal participation requirements for nursing homes participating in Medicare or Medicaid. HCFA Ex. 3 at 1. The California survey agency advised Petitioner also that, based on the resurvey, Petitioner continued to manifest some deficiencies which did not establish a failure by Petitioner to comply substantially with participation requirements, but which Petitioner should correct. Id.

I infer from the February 13, 1996 notice that the California survey agency did not recommend to HCFA that HCFA impose any of the possible remedies that the California survey agency enumerated in its November 14, 1995 notice to Petitioner. HCFA Ex. 3; see HCFA Ex. 1. The gist of the November 14, 1995 notice is that the California survey agency would not recommend to HCFA that HCFA impose any of the remedies enumerated in that notice if Petitioner attained substantial compliance with participation requirements. HCFA Ex. 1. The certification in the February 13, 1996 notice that Petitioner had attained substantial compliance therefore must be read consistent with the November 14, 1995 notice as a statement by the California survey agency that it would not recommend that HCFA impose any of the previously enumerated remedies.

I infer also that HCFA made no determination that Petitioner failed to comply with Medicare participation requirements, nor did it impose against Petitioner any of the remedies that were enumerated in the California survey agency's November 14, 1995 notice. There is no evidence that the California survey agency communicated its findings to HCFA. There is no evidence that HCFA reviewed or acted on the findings made by the California survey agency. HCFA never sent to Petitioner any notice

indicating that HCFA had considered, much less accepted, the findings made by the California survey agency.

Petitioner argues, in effect, that the California survey agency and HCFA jointly determined that Petitioner was not complying substantially with participation requirements. Under this theory, a determination by the California survey agency concerning Petitioner's compliance is also a determination by HCFA. However, this theory is not supported by the evidence. It is true that HCFA employees participated in the November 6, 1995 survey of Petitioner. P. Ex. 2. Notwithstanding, there is no evidence that HCFA made a determination about Petitioner's compliance or noncompliance with participation requirements based on the observations made by the survey participants, including HCFA employees.

On March 22, 1996, Petitioner, through its legal counsel, wrote again to HCFA. HCFA Ex. 5. Petitioner advised HCFA that it was revising its request for hearing, in light of the finding by the California survey agency that, effective February 5, 1996, Petitioner was in substantial compliance with participation requirements. Id. at 1. Petitioner asserted that it had been harmed by a finding of the California survey agency that, prior to February 5, 1996, Petitioner had provided care of a substandard quality. Id. Petitioner asserted additionally that it disputed the remedies which Petitioner asserted had been imposed against it and which Petitioner averred were associated with the finding that Petitioner had provided care of a substandard quality. Id. at 1 - 2.

According to Petitioner, it had been harmed particularly by the California survey agency's failure to announce an extended survey of Petitioner, and by the California survey agency's alleged application of arbitrary criteria in its evaluation of Petitioner. HCFA Ex. 5 at 1 - 2. Petitioner asserted that it had been harmed by a wrongful prohibition of its nurse aide training, and, for that reason, it intended to pursue its hearing rights. Id. at 2.

The evidence does not establish that either the California survey agency or HCFA imposed a prohibition on Petitioner from conducting nurse aide training. However, for purposes of this decision, I find that as a consequence of the initial findings of noncompliance made by the California survey agency, Petitioner may have its authorization to conduct nurse aide training suspended.

B. Whether Petitioner is entitled to a hearing (Findings 5 - 10)

Petitioner is not entitled to a hearing, because HCFA made no determination concerning Petitioner's compliance with Medicare participation requirements. Moreover, even if HCFA did make a determination concerning Petitioner's compliance with Medicare participation requirements, it imposed no remedy against Petitioner. In the absence of a remedy, Petitioner is not entitled to a hearing.

The regulations which establish hearing rights for a provider are contained in 42 C.F.R. Parts 488 and 498. The regulations establish that, as a necessary prerequisite to a hearing, there must be an initial determination by HCFA affecting a provider's participation in Medicare. 42 C.F.R. § 498.3(a) and (b). The regulation defines an "initial determination" to be a conclusion by HCFA concerning any of several specifically enumerated circumstances which may affect a provider's eligibility to participate in Medicare. 42 C.F.R. § 498.3(b)(1) - (13). The regulations do not suggest that a finding made by a State survey agency is a determination by HCFA, unless that finding is affirmatively accepted by HCFA or is at least ratified by HCFA after the fact.

There is no evidence that HCFA accepted or ratified the findings made by the California survey agency concerning Petitioner's compliance with Medicare participation requirements. Therefore, HCFA made no initial determination concerning Petitioner's compliance and Petitioner has no right to a hearing.

However, even assuming that HCFA made an initial determination concerning Petitioner's compliance, HCFA imposed no remedy against Petitioner. A SNF or a NF may request a hearing concerning a determination by HCFA that the SNF or NF is not complying substantially with Medicare participation requirements only where HCFA actually imposes a remedy against the SNF or NF. 42 C.F.R. §§ 488.408(g)(1), 498.3(b)(12); Fort Tryon Nursing Home, DAB CR425 (1996); Ruth Taylor Institute, DAB CR430 (1996).

The word "remedy" is defined in 42 C.F.R. § 488.406. An action taken by HCFA is a "remedy" if the action is one of those actions which falls within the definition of a remedy. Remedies are defined to include: termination of participation; appointment of temporary management; denial of payment; denial of payment for new admissions; imposition of a civil money penalty; imposition of State monitoring of performance; directed transfer of residents; directed closure of a facility and transfer of the facility's residents; imposition of a directed plan of correction; directed in-service training; and alternative or additional State remedies that are approved by HCFA. 42 C.F.R. § 488.406(a). If an action taken by HCFA is not one of these

remedies, then it is not a "remedy," and the provider has no right to a hearing from the action.

The record in this case establishes that the California survey agency told Petitioner that it would recommend that HCFA impose any of three actions against Petitioner that are remedies within the meaning of 42 C.F.R. § 488.406, if Petitioner did not attain compliance with Medicare participation requirements. These possible remedies are: termination of Petitioner's participation in Medicare, denial of payments for new admissions by Petitioner, and imposition of a civil money penalty against Petitioner. 42 C.F.R. § 488.406(a), (a)(2), (a)(3). However, the record establishes also that the California survey agency never imposed any of the aforesaid remedies and that it never recommended to HCFA that HCFA impose any of the aforesaid remedies or take any other action defined to be a remedy under 42 C.F.R. § 488.406.[2] Moreover, HCFA never imposed a remedy against Petitioner.

Petitioner asserts that the possible loss of its nurse aide training program, as a consequence of the California survey agency's determination that Petitioner was not complying substantially with participation requirements, is a remedy from which it has a right to a hearing. I do not agree with this assertion. The regulation which defines those initial determinations from which a provider has a right to a hearing specifically states that loss of nurse aide training by a SNF or a NF is not an initial determination by HCFA from which the SNF or NF has a right to a hearing. 42 C.F.R. § 498.3(d)(12); Ruth Taylor Institute, DAB CR430, at 11.

C. Petitioner's other arguments (Findings 11 - 12)

Petitioner asserts that, to the extent that HCFA failed to review and approve the findings made by the California survey agency, it failed to comply with an internal HCFA directive that State

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[2] The regulations appear to provide that, in some circumstances, a State agency may impose one or more of the remedies enumerated in 42 C.F.R. § 488.406 without the approval of HCFA. 42 C.F.R. §§ 488.400, 488.402. Arguably, a provider would not have a right to a federal administrative hearing from a determination by a State agency to impose a remedy which was not reviewed and approved by HCFA, or, at least, ratified by HCFA after the fact. That appears to be the case, because, pursuant to 42 C.F.R. § 498.3, the right to a hearing emanates only from a determination made by HCFA. However, it is unnecessary for me to decide whether Petitioner would have a right to a hearing from a remedy imposed by the California survey agency, absent a determination by HCFA to impose a remedy. In this case, no remedy was imposed against Petitioner, either by the California survey agency or by HCFA.

survey agency findings of substandard care be reviewed and approved by HCFA. Petitioner's opening brief at 7 - 8. I have no authority to hear and decide the merits of this argument. My authority to hear and decide cases is based on a determination made by HCFA which results in the imposition of a remedy. 42 C.F.R. §§ 488.408(g)(1), 498.3(b)(12). Where HCFA makes no determination, I have no authority to find that HCFA ought to have made a determination.

Petitioner argues also that it would be denied a constitutional right to a hearing if it were to lose its nurse aide training program, but not be permitted a hearing as to the loss of that program. Again, I am without authority to hear and decide this assertion. My authority to hear and decide cases involving HCFA is limited to those cases which arise from determinations described in 42 C.F.R. § 498.3, which result in a remedy being imposed against a provider. I have no authority to hear and decide a provider's assertion that it has been denied a hearing in violation of the United States Constitution, where no right to a hearing is provided by the regulations.

IV. Conclusion

I conclude that Petitioner is not entitled to a hearing. Therefore, I dismiss Petitioner's request for a hearing.

/s/

Steven T. Kessel
Administrative Law Judge