DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Virginia Department of Health
Docket No. 81-16-VA-HC
Decision No. 208

DATE: August 28, 1981

DECISION

The State of Virginia Department of Health (State) appealed from an estimated penalty disallowance of $19,022.14 made by the Health Care Financing Administration (Agency) pursuant to Section 1903(g) of the Social Security Act (the Act) for the quarter ending March 31, 1980. The Agency determined that the records for three Medicaid patients in two facilities did not meet the utilization control requirements for physician recertification and updating of the plans of care under Sections 1903(g)(1)(A) and (B) of the Act. We conclude that the disallowance must be upheld.

This decision is based on the State's application for review, the Agency's response, an Order to Show Cause issued by this Board on June 17, 1981, and the parties' responses to that Order. We have determined that there are no material facts in dispute, and that a conference or hearing would not assist the development of the issues.

Pertinent Statutes and Regulations

Section 1903(g) of the Act requires that the State agency responsible for the administration of the State's Medicaid plan under Title XIX of the Act show to the satisfaction of the Secretary that there is an "effective program of control over utilization of" long-term inpatient services in certain types of facilities, for each quarter that federal medical assistance is requested for such services, or the federal medical assistance percentage (FMAP) must be decreased by an amount determined pursuant to the formula set out in Section 1903(g)(5). The State "must" show that --

> (A) in each case for which payment is made under the State plan, a physician certifies ... (and recertifies, where such services are furnished over a period of time, in such cases, at least every 60 days, ...) that such services are or were required to be given on an inpatient basis because the individual needs or needed such services; and
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> (B) in each such case, such services were furnished under a plan established and periodically reviewed and evaluated by a physician.
>
> [Sections 1903(g)(1)(A) and (B)]

The Agency has implemented these statutory provisions for skilled nursing facilities (SNFs) at 42 CFR 456.260 and 456.280. Section 456.260(c) requires that recertification "must be made at least every 60 days after certification." Section 456.280(c) requires that "the attending or staff physician and other personnel involved in the recipient's care must review each plan of care at least every 60 days."

An Agency Action Transmittal, SRS-AT-75-122, dated November 13, 1975, defined "what is required in order for States to be considered in adherence" with these statutory and regulatory requirements. The recertification must occur at least every 60 days. The basic elements of the recertification were that it must be in writing, signed by a physician, and dated at the time of signature.

Discussion

Federal reviewers conducted a validation survey in July 1980 of ten SNFs to verify that the requirements of Sections 1903(g)(1)(A) and (B) were met. The Agency determined that one patient in one facility (Patient A) did not have a plan of care which had been updated in a timely fashion and that two patients in another facility (Patients B and C) did not have physician recertifications and plans of care which had been updated in a timely fashion.

The State concurred in the finding that Patient A's plan of care was not updated within the required time; however, the State submitted documentation allegedly representing an acceptable recertification and plan of care for Patient B and argued that, since the documentation submitted for Patient C showed that the patient was recertified within 63 days, the Agency should reasonably find that, for Patients B and C, the State had complied with the requirements.

The Agency refused to evaluate the documentation submitted by the State for Patient B because a reversal of the finding for that patient would not change the penalty computation under the formula set out in Section 1903(g)(5) as long as another violation was present in the same facility. The Agency maintained that the State clearly violated the requirements for Patient C because the physician did not recertify within 60 days.

It appears to this Board that, on its face, the documentation for Patient B meets the Agency's requirements for a valid and timely recertification and plan of care. We agree, however, with the Agency's assertion that such a finding would not affect the amount of the disallowance if the State violated the requirements with regard to Patient C.

The record shows, and the State does not deny, that the records for Patient C were not recertified and updated until 63 days after the previous recertification and update. The State argued, in its response to the Order to Show Cause (pages 3 and 4) that the physician "probably" was attempting to comply with the 60-day requirement by equating it with two months, since one review had been conducted on December 3 and the next had been conducted on February 4, the first business day after February 3. The State argued that a strict interpretation of the "at least every 60 days" language does not need to be made to carry out the purpose of the law, which in the State's words "is to insure that a plan of care for Medicaid patients is periodically reviewed" (page 5). The State argued that construing the language of the statute to mean "every two months" is reasonable and that the Agency should not find the State out of compliance.

The legislative history of Section 1903(g) does not suggest that the statutory language should be construed in any way except as the plain words provide, i.e., "at least every 60 days." The Agency has consistently interpreted the statute in this strict fashion and, in fact, the legislative history of the 1977 amendments to Section 1903(g) shows that Congress intended the Agency to strictly enforce utilization control requirements, saying, "The committee is encouraged that the Department has begun to aggressively implement the Congressional mandate." (H. Rep. 95-393, Part II, page 84, July 12, 1977.) This Board gives deference to the Agency's interpretation of a statute administered by the Agency, in accordance with principles established by the courts. New York Department of Social Services, Decision No. 101, May 23, 1980, page 6; California Department of Health Services, Decision No. 158, March 31, 1981, page 7. The primary rationale for this practice is the deference accorded to agency expertise. Southern Mutual Help Assoc.,Inc. v. Califano, 574 F.2d 518, 526 (D.C. Cir. 1977). The statute expressly states several requirements in terms of exact numbers. The entire tenor of the statute, and of the legislative history, connotes strictness. The Agency has not unreasonably interpreted its duty under the statute, even though such a strict interpretation may burden the States.

The State argued that such a strict interpretation of the statute is arbitrary and capricious, and referred to the U.S. District Court's decision in Maryland v. Mathews, 415 F. Supp. 1206 (D.D.C. 1976). The State argued (Response, page 8) that the court required the agency to define a tolerance level, and further, that the tolerance level set must be reasonable, supported by a factual basis, and not established in an arbitrary and capricious manner. The State has misinterpreted the discussion in Maryland to some degree, however. The court recognized that "under the existing administrative structure, the elimination of all erroneous payments is totally unrealistic" and that "a regulation establishing a withholding of federal financial participation in a specified amount set by a tolerance level is consistent

with the Act" (415 F. Supp. at 1212) under the Secretary's rulemaking power to assure the efficient administration of the Act. However, the court did not require the Agency to set a tolerance level. The court's holding indicated that, where the Agency determined to set a tolerance level, the level must be supported by a factual basis. The court held that the figures set by the Agency in its regulation had been established arbitrarily because the Agency did not perform an empirical study and failed to articulate factors and findings pointing to the substantive basis for the selected tolerance levels (415 F. Supp. 1213-1214).

We do not view the situation presented in Maryland as analogous to the Agency's implementation of Section 1903(g). In Maryland, the statute was much more general in its language, and did not set a specific standard. In Section 1903(g), Congress specifically provided a standard of 60 days.

In a recent case before the U.S. Court of Appeals for the District of Columbia, the Secretary of Interior's rejection of an entry card for an oil and gas lease lottery was challenged as arbitrary and capricious (Brick v. Andrus, 628 F.2d 213, D.C. Cir. 1980). The court stated:

> [T]he Secretary can properly adopt per se rules if he deems them useful in the administration of the program - even rules the application of which may at times yield results that appear unnecessarily harsh. 628 F. 2d at 216.

The court indicated that an agency must give notice of its intention to strictly enforce a requirement and must be consistent in its enforcement; otherwise, a court would find an agency action arbitrary and capricious. Other factors which the courts have found to make agency action arbitrary and capricious are: willful exercise of power, erroneous and extraneous considerations, erroneous legal or factual foundations, failure to consider relevant factors, or a decision otherwise lacking in a rational basis. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); First National Bank of Fayetteville v. Smith, 508 F.2d 1371 (8th Cir. 1974); Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974); Texaco, Inc. v. FEA, 531 F.2d 1071, 1076-1077 (Temp. Emer. Ct. App., 1976), cert. denied, 96 S. Ct. 2662 (1976). We have no evidence of the existence of any of these factors. In fact, this Board notes that several appeals are before it where the Agency has issued disallowances for violations based on the Agency's apparently consistent interpretation of the 60-day requirement. The Agency's position, that it is merely enforcing the standard set forth in the statute and that the legislative history of the 1977 amendments indicates

Congressional intention that the Agency strictly enforce the statutory requirements, certainly has a rational basis. We cannot conclude that the Agency has acted in an arbitrary and capricious manner by consistently enforcing the plain language of the statute, implemented by equally clear language in regulations, and interpreted in an Agency Action Transmittal. Therefore, we cannot conclude that recertification on the 63rd day is sufficient to meet the requirements of Section 1903(g), as interpreted by the Agency.

The State alleged that such a low percentage of noncompliance is not an indication that the State does not have an effective program of utilization control. This Board has previously concluded, on the basis of the statutory language and the legislative history, that the Secretary does not have discretion to waive or reduce a penalty if there is a finding that violations of Section 1903(g) occurred (Tennessee Department of Social Services, and Colorado Department of Social Services, Decisions No. 167 and No. 169, April 30, 1981). An Opinion of the Comptroller General (#B-164031(3).154, March 4, 1980) also supports this conclusion.

This Board has before it at the present time a number of appeals from penalty disallowances taken pursuant to Section 1903(g). The States have alleged that the Agency's strict interpretation of the standards set forth in the statute produces some counterproductive results and that the Agency's requirements create practical problems and administrative burdens on the States. Since the Agency, for the most part, is implementing the plain language of the statute in a manner which the legislative history shows was urged by the Congress at the time of the 1977 amendments to Section 1903(g), it seems that the statute itself is a source of the burdens the States bear.

Since this Board concludes that the violation for Patient C is clear, the Board must uphold the disallowance of $19,022.14, on the basis of a violation of Section 1903(g)(1)(A) and (B) in each of two facilities.

The State raised issues with regard to the penalty calculation in its Application for Review (page 3). The Board addressed those issues in its Order to Show Cause dated June 17, 1981. The first issue was that the formula for computing the penalty was not based on a valid statistical sample. The Board found that the formula is not based on a sample and that further amplification by the State of its allegation would be necessary in order for the Board to address such an issue. The State did not amplify the arguments in its response to the Order; therefore, we conclude that the State has presented no basis for Board modification of the penalty amount.

The State also argued that the Agency must use exact patient data to calculate the penalty. The Board concluded preliminarily that the Agency regulation (42 CFR 456.647(b)) implementing the penalty provision of the Act (Section 1903(g)(5)) allowed the Agency to use facility data for calculating the penalty in the absence of exact data acceptable to the Agency. Furthermore, the Board has previously held that such a policy is reasonable (Ohio Department of Public Welfare, Decisions No. 66, October 10, 1979, and No. 191, June 24, 1981). Therefore, in the absence of any further evidence or arguments made by the State, we find that the Agency's position with regard to the calculation of the disallowance is reasonable and we sustain the amount of the disallowance.

Conclusion

We conclude that this disallowance must be upheld on the basis of violations of the requirements of Sections 1903(g)(1)(A) and (B) in the records of one patient in each of two facilities (Patients A and C). We conclude that the Agency did not act in an arbitrary and capricious manner by interpreting and enforcing the statutory language regarding recertifications "at least every 60 days" in a strict fashion. Furthermore, we conclude that the Secretary has no discretion to waive the penalty for a small number of violations. Therefore, we sustain the disallowance in the amount of $19 022.14.

/s/ Norval D. (John) Settle, Panel Chair

/s/ Cecilia Sparks Ford

/s/ Alexander G. Teitz