Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Villa Northwest Restorative Care Center,	)	DATE: February 17, 1995
	)	
Petitioner,	)	
	)	Docket No. C-94-372
- v. -	)	Decision No. CR362
	)	
Health Care Financing Administration.	)	
	)	

DECISION

Petitioner requested a hearing to contest the termination of Petitioner's Medicare provider agreement (subsequently rescinded) by the Health Care Financing Administration (HCFA). HCFA rescinded its termination of Petitioner's agreement prior to the date on which it was to take effect. Petitioner contends that 1) it was harmed by the proposed termination, 2) such harm was not cured by the recession of the termination action prior to its effective date, and 3) it is entitled to a hearing to address the issues raised by HCFA's actions and to exonerate itself. I do not agree that Petitioner is entitled in this forum to address either HCFA's rescinded termination or the collateral State effects arising from such termination. For the following reasons, I **DISMISS** Petitioner's request for hearing.

BACKGROUND

In response to a complaint, the Texas Department of Human Services (State survey agency) conducted an investigational survey of Petitioner (a skilled nursing facility participating in the Medicare program). The State survey agency found Petitioner to be out of compliance with two Level A requirements and identified four Level B deficiencies. Based upon the violations found to exist, the State survey agency recommended that HCFA terminate Petitioner's participation in the Medicare program. HCFA adopted the recommendation of the State survey agency and notified Petitioner that its Medicare provider agreement would be terminated.

In an undated letter received by HCFA on June 13, 1994, Petitioner alleged correction of the deficiencies that had been identified by the State survey agency. HCFA Ex. 3. Prior to the termination of Petitioner's provider agreement, HCFA determined that Petitioner had either corrected or ameliorated the deficiencies. Based on Petitioner's actions to correct or ameliorate the deficiencies, HCFA rescinded the termination action prior to its effective date.[1] In a letter dated June 15, 1994, Petitioner requested a hearing to contest HCFA's proposed termination and the case was assigned to me.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The State survey agency conducted an investigational survey of Petitioner from May 24, 1994 through June 6, 1994. HCFA Ex. 3.

2. The State survey agency found Petitioner to be out of compliance with Level A requirements for quality of care (42 C.F.R. § 483.25) and for administration (42 C.F.R. § 483.75). HCFA Ex. 2.

3. The State survey agency found Petitioner to be out of compliance with the following four Level B requirements: resident rights (42 C.F.R. § 483.10), quality of care (42 C.F.R. § 483.25), pharmacy services (42 C.F.R. § 483.60) and administration (42 C.F.R. § 483.75). HCFA Ex. 2, 5.

4. On June 8, 1994, the State survey agency recommended that HCFA terminate Petitioner's provider agreement. HCFA Ex. 2.

5. In a letter dated June 13, 1994, HCFA informed Petitioner that it agreed with the recommendation of the State survey agency and that Petitioner's Medicare provider agreement would be terminated effective June 29, 1994. HCFA Ex. 1, 2.

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[1] HCFA submitted six exhibits in conjunction with its October 5, 1994 motion to dismiss. Petitioner did not object to any of these exhibits. Accordingly, I admit HCFA exhibits 1 - 6. Petitioner submitted three exhibits, marked as P. Ex. 1, P. Ex. A, and P. Ex. B. I have remarked these exhibits as P. Ex. 1, P. Ex. 2, and P. Ex. 3. P. Ex. 1 is a four page exhibit, that duplicates HCFA Ex. 1. I reject P. Ex. 1 because it is duplicative. One exhibit will suffice. I admit P. Ex. 2 and P. Ex. 3 into evidence.

6. HCFA's June 13, 1994 notice of termination informed Petitioner that it was not in compliance with two Level A requirements and further informed Petitioner that its noncompliance with these two Level A requirements posed an immediate threat to patient health and safety. HCFA Ex. 1.

7. HCFA is required to terminate a skilled nursing facility which no longer meets a Level A requirement and such deficiency poses immediate jeopardy to patient's health and safety. 42 C.F.R. § 489.53(b),

8. HCFA's June 13, 1994 notice of termination to Petitioner was accompanied by a detailed listing of each deficiency that had been identified by the State survey agency and specifically identified each Level A requirement that Petitioner was allegedly not in compliance with, and identified the standards and elements within the requirement and the basis for Petitioner's alleged noncompliance with each Level A requirement. HCFA Ex. 1, 2.

9. On June 13, 1994, HCFA received an undated letter from Petitioner alleging correction of each of the deficiencies that had been identified by the State survey agency. HCFA Ex. 3, 4.

10. HCFA determined Petitioner's allegations of correction to be credible and authorized the State survey agency to conduct a follow-up survey. HCFA Ex. 4, 5.

11. On June 21, 1994, the State survey agency conducted a follow-up survey and found Petitioner had corrected or ameliorated its deficiencies such that they no longer posed an immediate threat to patients' health and safety. HCFA Ex. 5.

12. HCFA rescinded its termination of Petitioner's provider agreement on June 24, 1994, five days prior to the date the termination was to become effective (June 29, 1994). HCFA Ex. 1 - 5.

13. Petitioner's provider agreement was never terminated. Finding 12.

14. HCFA's June 13, 1994 determination that Petitioner would be terminated as of June 29, 1994, subsequently rescinded by HCFA's June 24 letter is not an "initial determination." 42 C.F.R. § 489.53, 42 C.F.R. § 498.3(b)(1) - (11), 42 C.F.R. § 498.5; Pages 4 - 5.

15. Petitioner has no right to appeal HCFA's June 13, 1994 determination to terminate Petitioner's Medicare provider agreement effective June 29, 1994. Pages 4 - 6.

16. HCFA's determination that patients' health and safety were at risk based on Level A violations is not appealable in any event. Finding 6; Pages 7 - 8.

17. All but two of the collateral harms alleged by Petitioner are prospective, and not ripe for determination in any event. Pages 8 - 12.

18. In this forum, I do not have the authority to address or provide Petitioner relief from the collateral harms, including those collateral harms that subsequently may become ripe, Petitioner alleges resulted from HCFA's rescinded termination. Pages 8 - 12.

19. Petitioner's request for hearing has been rendered moot by HCFA's rescission of Petitioner's termination prior to the date such termination was to have gone into effect. Pages 8 - 12; Findings 12 - 18.

20. Petitioner has not offered any persuasive evidence or argument from which I can conclude that I have the authority to hear and decide any of the issues related to HCFA's rescinded termination of Petitioner. Pages 8 - 12; Findings 12 - 19.

21. I do not have the authority to hear and decide any of the issues presented by Petitioner in this case. Pages 4 - 12; Findings 12 - 20.

22. Petitioner's request for hearing in this matter must be dismissed. Findings 1 - 21.

DISCUSSION

HCFA's rescinded termination of Petitioner's provider agreement is not an "initial determination" within the meaning of the regulations.

Although HCFA rescinded its termination of Petitioner's Medicare provider agreement prior to the date it was to become effective, Petitioner seeks an opportunity to challenge HCFA's determination in an effort to repair the damage Petitioner alleges was caused by HCFA's actions. HCFA contends that Petitioner is not entitled to a hearing in this matter because HCFA's determination was not an "initial determination" within the meaning of 42 C.F.R. § 498.5(b), which states that a provider

dissatisfied with an initial determination to terminate its provider agreement is entitled to a hearing before an administrative law judge (ALJ). Moreover, HCFA contends that, because the termination was merely proposed and never finalized, it does not confer upon Petitioner the right to have a hearing to contest the determination.

HCFA argues that the term "initial determination" as defined by the regulations does not encompass the situation at issue in this case, where HCFA's termination was rescinded prior to the date on which it was to take effect. HCFA contends that since the rescinded termination is not an "initial determination" within the meaning of the regulations, Petitioner has no right to a hearing.

Petitioner does not dispute that HCFA rescinded its termination prior to the date on which it was to take effect. Nonetheless, Petitioner contends that HCFA's rescinded termination is an initial determination, within the meaning of 42 C.F.R. § 498.5(b), from which Petitioner has a right to appeal.

The regulations contain no definition of the term "initial determination". However, the regulations at 42 C.F.R. § 498.3(b)(1) - (11) specify a list of determinations by HCFA that are considered to be initial determinations. This list includes "the termination of a provider agreement in accordance with § 489.53 of this chapter . . . ." 42 C.F.R. § 498.3(b)(7).[2]

Petitioner's position is that HCFA made an "initial determination" when it informed Petitioner that it would be terminated as of June 29, 1994. According to Petitioner, the fact that HCFA acted to terminate Petitioner in accordance with 42 C.F.R. § 489.53 is dispositive of HCFA making an "initial determination" pursuant to 42 C.F.R. § 498.3(b)(7). Petitioner contends this is true even though the termination was rescinded prior to the date it was to become effective.

Because Petitioner interprets HCFA's actions in this case as an initial determination, Petitioner contends that it is entitled to a hearing to contest such determination in accordance with 42 C.F.R. § 498.5(b).

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[2] Pursuant to 42 C.F.R. § 489.53(a)(1), HCFA may terminate an agreement with any provider who is not complying with the provisions and regulations of the Medicare program.

The regulations at 42 C.F.R. § 489.53(b) provide that "HCFA will terminate a SNF's provider agreement if it determines that -- (1) The SNF no longer meets a level A requirement specified in part 483, subpart B of this chapter; and (2) The SNF's deficiencies pose immediate jeopardy to patients' health and safety."

HCFA's position is that its action against Petitioner is a "proposed termination" that is not an "initial determination" within the meaning of 42 C.F.R. § 498.3(b)(7). HCFA's argument is that, because a "proposed termination" is not specifically listed in the regulations as an "initial determination" which gives Petitioner appeal rights, such proposed termination gives Petitioner no right to appeal. Moreover, HCFA argues that, because the termination was rescinded prior to the date it was to go into effect, even if it could be construed as an initial determination, it was never finalized, nor has there been any final agency action from which Petitioner has the right to appeal.

HCFA made no final determination that would entitle Petitioner to appeal under 42 C.F.R. § 498.3(b)(7).

Although I do not find support for HCFA's characterization of its actions in this case as a "proposed termination", I do agree that HCFA never terminated Petitioner's provider agreement. The regulation at 42 C.F.R. § 498.3(b)(7) does specify that HCFA's termination of a provider agreement is an action which gives rise to a right to appeal. However, in this case, the termination was never effectuated. My conclusion is that 42 C.F.R. § 498.3(b)(7) mandates that the agency action to terminate Petitioner's provider agreement must go into effect before Petitioner has the right to appeal in this forum.

The State survey agency found Petitioner to be out of compliance with several important requirements. By letter dated June 13, 1994, HCFA sent written notice to Petitioner of the alleged deficiencies found by the State survey agency and informed Petitioner that its Medicare provider agreement would be terminated on June 29, 1994. However, prior to the date the termination was to have taken place, Petitioner claimed to have corrected the alleged deficiencies and requested that HCFA conduct another survey. The regulations do not require that HCFA resurvey an entity prior to the date of termination of its provider agreement. However, HCFA provided Petitioner the opportunity to be resurveyed prior to June 29, 1994, the date of termination. HCFA resurveyed Petitioner on June 21, 1994 and found that Petitioner had

either corrected all alleged deficiencies or that the deficiencies no longer posed a threat to resident health or safety. HCFA Ex. 5. Based on the results of the re-survey, in a letter dated June 24, 1994, HCFA rescinded its termination before it was to take effect (June 29, 1994).

Accordingly, because HCFA rescinded its termination of Petitioner before it ever took effect, such rescinded termination does not qualify as an initial determination within the meaning of 42 C.F.R. § 498.3. Simply, HCFA took no final action against Petitioner. By the very words of the regulation, it is the actual termination that gives a provider the right to appeal, not the decision to terminate. However, in this case, Petitioner's provider agreement was never terminated because HCFA's determination to terminate as reflected in its letter of June 13, 1994 was rescinded on June 24, 1994, five days prior to the date it was to take effect. Because Petitioner's right to a hearing is based on the presence of an actual termination, not merely a proposed termination that is never effectuated, Petitioner has no right to a hearing in this case.

HCFA's determination that the health and safety of patients were at risk based on Level A violations is not appealable in any event.

The regulations at 42 C.F.R. § 489.53 provide bases for HCFA to terminate a provider.[3] The regulation at 42 C.F.R. § 489.53(b) mandates that HCFA will terminate the provider agreement of any SNF that HCFA determines no longer meets a level A requirement and whose deficiencies pose an immediate risk to patients' health and safety.

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[3] The regulations at 42 C.F.R. § 489.53(a) provide:

> HCFA may terminate the agreement with any provider if HCFA finds that any of the following failings is attributable to that provider:
>
> (1) It is not complying with the provisions of title XVIII and the applicable regulations of this chapter or with the provisions of the agreement. . .
>
> (3) It no longer meets the appropriate conditions of participation or requirements (for SNFs and NFs) set forth elsewhere in this chapter.

The wording of this regulation indicates that HCFA must act to terminate a facility found to meet the enumerated regulatory requirements.

The regulation at 42 C.F.R. § 498.5(b) gives providers who are dissatisfied with initial determinations the right to appeal. However, the regulation at 42 C.F.R. § 498.3(d)(1) explicitly provides that any administrative action other than specifically enumerated at 42 C.F.R. § 498.3(b) is not an initial determination. This regulation further provides a list of determinations that are not to be construed as initial determinations.[4] Specifically, 42 C.F.R. § 498.3(d)(10) provides that with respect to an SNF that is not in compliance with a condition of participation or a level A requirement, HCFA's finding that an SNF's deficiencies pose immediate jeopardy to patients' health and safety is not an initial determination. Accordingly, in this forum, Petitioner has no right to contest HCFA's finding that Petitioner's level A violations posed immediate jeopardy to patients' health and safety. Nor does this finding, which is the basis for HCFA's mandatory determination to terminate Petitioner, provide an additional basis for my affording Petitioner a hearing.

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[4] Among these is 42 C.F.R. § 498.3(d)(10), which provides as follows:

> Administrative actions that are not initial determinations. Administrative actions other than those specified in paragraphs (b) and (c) of this section are not initial determinations and thus are not subject to this part. Administrative actions that are not initial determinations include, but are not limited to, the following:
>
> . . . (10) With respect to a SNF that is not in compliance with a condition of participation or a level A requirement (for SNFs and NFs) -
>
> > (i) The finding that the SNF's deficiencies pose immediate jeopardy to patients' health and safety; and
> >
> > (ii) When the SNF's deficiencies do not pose immediate jeopardy, the decision to deny payment for new admissions.

Even assuming that Petitioner has the right to appeal HCFA's rescinded determination, I do not have the authority to address in this forum the harm alleged by Petitioner.

Petitioner contends that it is entitled to challenge the validity of HCFA's decision to terminate because, although HCFA's decision to terminate was rescinded, it nonetheless set in motion a chain of events which caused real and potential harm to Petitioner's business.

Petitioner contends that, even though it was rescinded, HCFA's determination caused a series of actions that either were or will be detrimental to Petitioner. These adverse consequences include the publication by HCFA of allegedly erroneous State survey agency findings to physicians and the general public.[5] Petitioner contends that it has been harmed because, in order to obtain renewal of its license, it is required to disclose that it was subject to a termination. Petitioner avers that, even though the termination was rescinded, once it has been disclosed to State officials, it can potentially result in the State denying a license to Petitioner or result in the State refusing to renew Petitioner's license.

Petitioner asserts that it has a stake in the ownership of nine other facilities in Texas and alleges that this proposed termination is a "black mark" against this facility which will apply also to each of the other nine facilities. In support of this argument, Petitioner cites Texas regulations which specify that "failure to maintain compliance on a continuous basis" is a criterion for denying a license renewal. See Texas Administrative Code § 90.17(a)(1)(B). According to Petitioner, failure to maintain continuous compliance could serve as a ground for the State denying Petitioner a license should it seek to operate additional facilities in the future.

Petitioner alleges also that HCFA's rescinded termination has a negative effect on the day to day business activities of financing, mortgaging, and structuring

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[5] Petitioner points to the publication by HCFA in the Houston Chronicle of its determination to terminate Petitioner's provider agreement. According to Petitioner, the Houston Chronicle is one of two major newspapers published in Houston. Petitioner further states that these notices resulted in further dissemination by television and other media, which, in turn, repeated the allegations.

ownership as all of these matters require a provider to disclose proposed terminations of Medicare agreements even if the termination is subsequently rescinded. Petitioner asserts that it is currently in the process of attempting to obtain approval from the Texas Department of Human Services for a restructuring of its ownership and alleges that it has had difficulty in doing so in large part because of HCFA's rescinded determination.

Finally, Petitioner alleges that its participation in the Nurse Aide Training and Competency Evaluation Program (NATCEP) will be terminated by HCFA's determination. According to Petitioner, this program is critical to Petitioner's ability to have adequately trained staff at its facility. Citing 42 C.F.R. § 483.151, Petitioner contends that it will be terminated from participation in the NATCEP program if it has been terminated as a Medicare provider. Petitioner contends that this termination is compelled by the regulations even though HCFA rescinded its termination prior to the date upon which it was to become effective.

I am delegated by the Secretary to hear and decide appeals of HCFA provider terminations. 58 Fed. Reg. 58,170 (1993). The remedy which I am able to provide within this framework is relief from an improper, irregular or otherwise deficient termination of a facility's provider agreement. 58 Fed. Reg. 58,170 (1993). The Secretary has not delegated to me the authority to hear, decide, or provide redress for any of the collateral harms that Petitioner has alleged. Furthermore, the authority delegated to me by the Secretary is not so broad as to encompass having a hearing on a sanction that HCFA never put into effect. 58 Fed. Reg. 58,170 (1993).

HCFA has argued that Petitioner's request for hearing should be denied as moot. I agree. A tribunal has no jurisdiction over matters which are moot. Tennessee Gas Pipeline Co. v. Federal Power Commission, 606 F. 2d 1373 (CADC 1979). Since my authority here is limited to hearing and deciding issues arising from of HCFA terminations, the fact that HCFA rescinded its termination of Petitioner prior to the imposition of the sanction is a serious jurisdictional defect which Petitioner has failed to overcome. The relief that I can provide Petitioner is no more than it has already received from HCFA when it rescinded the determination to terminate Petitioner's provider agreement. Since Petitioner has already been granted all the relief that I have the authority to grant, the request for hearing is moot.

Even assuming I had the authority to examine each specific harm that Petitioner alleges resulted from HCFA's determination to terminate prior to the recession of that decision, most of the harms which Petitioner has alleged are prospective. Petitioner has contended that only two are occurring at the present time. These are Petitioner's loss of part or all of its NATCEP funding and Petitioner's difficulty in obtaining business financing and in restructuring its business ownership.

With regard to Petitioner's loss of NATCEP funding, I have no authority to hear and decide that issue. As I have stated above, my authority is limited to deciding whether a HCFA termination is appropriate. Moreover, HCFA's assertion that there is an avenue of appeal at the State level from which Petitioner could have challenged the NATCEP reduction is unchallenged by Petitioner, as is HCFA's assertion that it informed Petitioner of this appeal right.[6] HCFA Reply at 6.

With regard to the alleged adverse impact HCFA's actions have had upon Petitioner's ability to obtain financing and restructure its ownership, I find that, again, there is no remedy before me. The harm Petitioner alleges stems from the actions of a State agency fulfilling its statutory role. Petitioner does not dispute that these notices were required by regulation. P. Br. at 3. Moreover, Petitioner has failed to state with any specificity what these adverse consequences are and how they are related to HCFA's rescinded termination. Most importantly, Petitioner concedes that HCFA was required by regulation to make the State survey agency's findings of immediate jeopardy and Petitioner's alleged noncompliance public. 42 C.F.R. § 489.53(c)(4). To the extent that Petitioner is arguably adversely affected by such notice, Petitioner has the ability to remedy such ill effects by simply advising any interested party that HCFA rescinded the termination prior to its effective date.

Petitioner has failed to present to me any issue which either the Secretary's delegation or the regulations gives me the authority to hear. In any event,

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[6] Indeed, HCFA's counsel has been informed that Petitioner has appealed the State survey agency's finding of immediate jeopardy and its effect on the Medicaid program and NATCEP. Petitioner is scheduled to go to hearing on these issues before a State administrative law judge in Villa Northwest Restorative Care Center v. TDHS on May 9, 1995.

Petitioner's concerns are moot since HCFA rescinded its termination prior to the effective date. Additionally, in all but two instances, Petitioner has failed to allege anything but prospective harm, making all but two of the issues raised by Petitioner not ripe for my consideration.

In one of the instances where Petitioner has alleged he has been harmed, he has a remedy in a hearing before a State administrative law judge. Moreover, in addition to being mooted by HCFA's rescission, Petitioner has failed to show any authority for me to hear and decide issues related to his loss of NATCEP funding. With regard to Petitioner's contention that HCFA's rescinded termination has harmed Petitioner's business, again, I find no basis on which I have the authority to hear and decide these issues.

CONCLUSION

Petitioner has placed no issue before me which I have the authority to hear and decide, or which has not been mooted by HCFA's rescission. Accordingly, I DISMISS Petitioner's request for hearing.

/s/

Edward D. Steinman
Administrative Law Judge

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