

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Maryland Department of Health  
and Mental Hygiene  
Docket No. 79-40-MD-HC  
Decision No. 179

DATE: May 28, 1981

DECISION

The Maryland Department of Health and Mental Hygiene (State), by letter dated March 7, 1979, sought review of a February 5, 1979 determination by the Director of the Medicaid Bureau, Health Care Financing Administration (HCFA, Agency), to disallow \$82,188 in Federal financial participation (FFP) claimed by the State under Title XIX of the Social Security Act. The notification of disallowance stated that FFP in the amounts of \$75,613 and \$6,575 was being denied for, respectively, intermediate care facility (ICF) services and skilled nursing facility (SNF) services provided by the Wildwood Health Care Center (Wildwood) during February and March 1978. The basis of the disallowance was the alleged failure by Wildwood to have valid ICF and SNF provider agreements in effect with the State during that period. The notification of disallowance stated that the Title XIX provider agreements with Wildwood expired January 31, 1978 and that Wildwood had not been recertified to provide care under the Medicaid program.

There are no material issues of fact in dispute. We have, therefore, determined to proceed to decision based on the written record and briefs, the parties' responses to an Order to Show Cause issued on January 19, 1981, and a March 25, 1981 telephone conference with the parties.

I. Applicable Laws and Regulations

The Medicaid regulations have been recodified several times in recent years, but for the period in question (February and March 1978) the applicable regulations are set forth in 42 CFR Part 449 (1977), "Services and Payment in Medical Assistance Programs."

FFP was denied for both SNF and ICF services provided by Wildwood during this period. To obtain FFP for payments made to a SNF and an ICF, the State must comply, respectively, with the provisions of 42 CFR 449.10(b)(4)(i)(C) and 42 CFR 449.10(b)(15)(i)(E) requiring the single State agency and the provider facility to execute an agreement which the single State agency determines is in accordance with 42 CFR 449.33. The regulations require that prior to the execution of a provider agreement and the making of payments, the agency

designated pursuant to §450.100(c) (the survey agency) must certify that the facility is in full compliance with standards prescribed in the regulations. 42 CFR 449.33(a)(1) and (2).

In the situation where a facility providing SNF services participates in both the Medicare and Medicaid programs, §1902(a)(28) of the Social Security Act (Act) provides that the requirements and standards for a SNF participating in Medicare set forth in §1861(j) of the Social Security Act shall also be applied to a SNF participating in Medicaid. Similarly, §1910(a)(1) of the Act provides that any SNF certified to be qualified for Medicare shall be deemed to meet the standards for certification as a Medicaid SNF.

## II. Statement of the Case

The State does not contest the fact that no valid ICF and SNF provider agreements for Wildwood were in effect during the period in question. The State does argue, however, that it was not responsible for the failure of Wildwood to have provider agreements, but rather that it was the dilatory actions of HCFA's Health Standards and Quality Bureau (HSQB) that ultimately caused the provider agreements not to be issued.

Wildwood's provider agreements expired on January 31, 1978. Without indicating when it sent the survey reports of Wildwood to the HSQB for review, the State claims that it was not until September 14, 1978 that its Division of Licensing and Certification (State survey agency) received the §1866 (Medicare) HSQB certification for Wildwood for the period February 1, 1978 through October 31, 1978. The State survey agency thereupon notified the State's Medical Assistance Program (single State agency) of Wildwood's certification. The State argues that it was impossible for it to execute provider agreements with Wildwood prior to September 14, 1978. Furthermore, the single State agency was then unable to locate or contact the owners of Wildwood to execute Title XIX agreements for the period approved by the HSQB. The State declares that provider agreements have not subsequently been executed to cover the period of the disallowance because the owners of Wildwood have left the State and it has been impossible to contact them.

Wildwood was experiencing financial difficulties in 1978 and negotiations were in process to sell the facility. Wildwood's administrator disclosed to the State on June 16, 1978 that she did not know who the current owners of Wildwood were. Throughout the summer of 1978, the State sought explanations of the ownership status of Wildwood, but, despite repeated attempts, was unable to contact the owners. Eventually on October 1, 1978, the facility was relicensed under new ownership as the Bethesda Health Care Center.

The State reasons, based on its view of the facts, "i.e., that the Federal government was solely responsible for the absence of an executed contract

covering the period in question, and that the Maryland Program has acted as expeditiously as possible to execute a provider agreement covering that period, we feel that the State is entitled to FFP for the cost of care rendered in the Wildwood Health Care Center from February 1, 1978 through March 31, 1978." (State's request for reconsideration, March 7, 1979, p. 2.)

In its response to the State's appeal the Agency argues that the State was solely responsible for the certification of Wildwood for ICF Medicaid participation with the HSQB having no role in the process. As for the SNF services, while admitting that a delay by the HSQB in certifying a facility could prevent the State from executing a timely provider agreement for SNF Medicaid participation, the Agency contends that the fact that a provider agreement was never ultimately executed with Wildwood for SNF services precludes the State, under the Medicaid regulations, from receiving FFP. The Agency does not dispute the fact that the State was unable to locate the owners of Wildwood to execute a provider agreement, but argues that the Agency "should not be held responsible for strange happenings which are totally beyond its control and which are not reasonably foreseeable." (Agency's April 13, 1979 Response, p. 7.)

### III. Discussion

The central issues in this appeal are whether the State's claim that the Agency's HSQB, by delaying its certification of the facility, was responsible for the failure to have ICF and SNF provider agreements in effect with Wildwood during the period in question is valid, and, if so, whether that provides a basis for the Board to reverse the disallowance.

In addition to participating in the Medicaid program as a provider of ICF and SNF services, Wildwood also participated in the Medicare program. This is relevant because the Agency's HSQB only becomes involved in the Medicaid program through its role in the Medicare program.

The HSQB was established by the Health Care Financing Administration to monitor the quality of care provided to Medicare beneficiaries. The HSQB requires that facilities providing care to Medicare beneficiaries are structurally safe, provide for a sanitary environment, are well staffed, and have needed services available. The HSQB also requires that the actual care provided to beneficiaries is of high quality and ensures that medical services are necessary and are provided in the most appropriate setting. The HSQB's Office of Standards and Certification monitors standards enforcement and the State's survey and certification of health care facilities.

Medicare is a federally administered program, while Medicaid is a cooperative federal-state program administered by the individual states.

The two major types of services provided by nursing facilities participating in the Medicaid program are intermediate care facility (ICF) services and skilled nursing facility (SNF) services. Different standards are imposed for each type of facility, reflecting the different services provided in each type of facility.

It is through the common standard enunciated in §1902(a)(28) of the Social Security Act for SNFs participating in both the Medicare and Medicaid programs that the HSQB becomes involved in the Medicaid program. A SNF participating in Medicare must receive HSQB approval. Since the SNF standards for Medicare and Medicaid participation are identical, if the same SNF wishes to participate as a SNF in the Medicaid program, the HSQB has the responsibility for the ultimate certification of the facility as a Medicare/ Medicaid SNF provider. Under such circumstances, a state may not execute a provider agreement with that SNF for Medicaid unless the facility is approved by the HSQB for participating in Medicare. Thus a delay by the HSQB in approving requests for waivers, for example, may well prevent a state from executing a SNF provider agreement with a facility. In order not to penalize a state for delays by the HSQB in certifying a Medicare/ Medicaid SNF facility, the Agency permits a SNF Medicaid provider agreement to be backdated to the expiration date of the previous provider agreement, where such delay has occurred. (Agency's April 13, 1979 Response, p. 4.)

On July 31, 1980 the Board issued its decision in the case of the Maryland Department of Health and Mental Hygiene, Decision No. 113. In that case, involving the same parties as this appeal, the Board addressed the question whether a delay by the HSQB in certifying a facility for Medicare/Medicaid participation as a SNF was responsible for the State's failure to execute an ICF provider agreement with the facility. In sustaining the disallowance for ICF services in that case, the Board held, at page 4:

[T]he responsibility for certifying an ICF for Medicaid participation lies solely with the states. 42 CFR 449.33(a)(2)...

The HSQB has no responsibility in the process of the certification of a facility for ICF services. Thus, if a facility wished to participate as a SNF in the Medicare and Medicaid programs and as an ICF in the Medicaid program, the HSQB would have to approve the SNF certification. The state, however, would not have to await any HSQB action before it could enter into an ICF provider agreement with the facility.

In a January 19, 1981 Order, the Board noted that the State could have surveyed Wildwood, granted whatever waivers were needed, or agreed to a plan of correction, and certified Wildwood for ICF participation in the Medicaid program prior to the expiration of Wildwood's former ICF provider agreement on January 31, 1978.

The Order directed the State to show cause why the Board should not sustain the disallowance of \$75,613 of FFP for ICF services provided by Wildwood on the basis of Decision No. 113.

In its February 10, 1981 response to the Order, the State did not address this issue. In the March 25, 1981 telephone conference, the Board asked the State to provide documentation as to when the State sent its surveys of Wildwood to the HSQB, what those survey reports contained, and whether the State had ever certified Wildwood. On April 27, 1981, after the due date for the submission of the documentation, the Board received certain documents from the State. Despite their untimeliness, the Board reviewed these documents, which consisted solely of the survey reports for Wildwood. The State did not submit any documentation concerning the State's certification of Wildwood or when the State submitted the survey reports to the HSQB. Thus, not only did the State not have a provider agreement with Wildwood as required by the regulations, the State has failed to produce documentation that the State survey agency ever certified Wildwood as an ICF provider as was also required by the regulations.

On the basis on Decision No. 113 and the State's failure to supply the Board with any arguments or documents that would cause that decision not to apply to this case, we sustain the disallowance for ICF services in the full amount of \$75,613.

As for the disallowance for SNF services, the Order noted that the Agency had stated that if the State and Wildwood had executed a SNF provider agreement, it could have been backdated to encompass the period of the disallowance, but since no agreement was ever executed, the disallowance must stand. In the Order the Board, noting the confusion the State was confronted with over the ownership of Wildwood and its good faith efforts to locate the owners and the fact that Wildwood's patients did not receive substandard care during the period in question, asked the Agency whether a provider agreement could now be executed between the State and the successors in interest to Wildwood to satisfy the regulatory requirements. The Order also directed the State to show cause why the disallowance should not be sustained because of the absence of a provider agreement.

In its January 30, 1981 response, the Agency agreed, with certain reservations, that the State could now execute a provider agreement for the SNF services only. The State, however, declared it would be impossible to execute a provider agreement with the current owner because the current owner is a different corporation and there is no privity of interest between the previous and current owners.

This case represents a unique situation. The State is faced with a disallowance of \$6,575 for SNF services. It is possible that the Agency's HSQB was late in its certification of Wildwood as a

Medicare/Medicaid SNF provider; yet the Agency provides for a SNF Medicaid provider agreement to be backdated under circumstances where the HSQB may have been dilatory. The problem arises because, when the State went to execute the provider agreement, it was unable to locate Wildwood's owners to do so. In the March 25, 1981 telephone conference the Agency said that it was willing to give the State the opportunity to show that it had submitted the survey reports to the HSQB before the State first became aware of the absence of Wildwood's owners, but the State has not provided that information.

Thus, after January 31, 1978, Wildwood was without a SNF provider agreement. The Board has previously held that as a general rule FFP is not available for a facility with an expired provider agreement. Delaware Department of Health and Social Services, Decision No. 87, February 29, 1980, p. 9. The regulations are explicit in requiring a provider agreement for FFP to be paid. 42 CFR 449.10(b)(4)(i)(C). Furthermore, the State's assertion that the HSQB was ultimately responsible for the lack of a SNF provider agreement because of its dilatory actions has been weakened by the State's failure to produce documentation showing when it sent the survey reports to the HSQB. We do not know for a fact that there was a delay at the HSQB or the extent of the delay if one occurred, or if the delay actually resulted in the inability of the State to execute an agreement.

We conclude that the disallowance for SNF services must be sustained on the basis of the explicit requirement for a provider agreement set forth in the regulations. Unusual situations may arise, but there is no basis here to compel the Agency to carve out an exception to express regulatory requirements.

#### IV. Conclusion

For the reasons stated above, we sustain the disallowance of FFP for ICF and SNF services rendered at the Wildwood Health Care Center in the full amount of \$82,188.

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Donald F. Garrett, Panel Chair