

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
GranCare Home Health)	Date: March 3, 1997
Service & Hospice,)	
)	
Petitioner,)	
)	Docket No. C-96-406
- v. -)	Decision No. CR464
)	
Health Care Financing Administration))	
)	

DECISION

I sustain the determinations of the Health Care Financing Administration (HCFA) to certify Petitioner, GranCare Home Health Service & Hospice, to participate in Medicare, as a home health agency and hospice, effective November 28, 1995.

I. Background

On February 7, 1996, HCFA sent notices to Petitioner advising it that HCFA had determined to certify Petitioner to participate in Medicare, both as a hospice and as a home health agency, effective November 28, 1995. HCFA Ex. 3; HCFA Ex. 4.¹ Petitioner requested reconsideration of these determinations. HCFA Ex. 5; HCFA Ex. 6. By letters of May 24 and 28, 1996, HCFA denied Petitioner's requests.²

¹ HCFA submitted six proposed exhibits (HCFA Ex. 1 - 6). Petitioner submitted nine proposed exhibits (P. Ex. 1 - 4, 4a, 5 - 8). Neither party objected to my receiving into evidence any of these proposed exhibits. I receive into evidence HCFA Ex. 1 - 6 and P. Ex. 1 - 4, 4a, 5 - 8.

² Neither HCFA nor Petitioner offered into evidence HCFA's notice of denial of Petitioner's requests for reconsideration. However, that document was provided by HCFA as part of the documentation of Petitioner's hearing request and is, therefore, part of the record of this case.

Petitioner requested a hearing and the case was assigned to me. I held a prehearing conference at which HCFA advised me that it intended to move for disposition of the case, based on undisputed facts and the law. I established a schedule for the parties to submit proposed exhibits, briefs, and reply briefs. The parties complied with this schedule. I base my decision in this case on the undisputed facts, the law, and the parties' arguments.

II. Issue, findings of fact and conclusions of law

The issue in this case is whether HCFA properly certified Petitioner to participate in Medicare, as a home health agency and as a hospice, effective November 28, 1995. This issue involves the question of whether I may direct HCFA to certify a provider to participate in Medicare on a date earlier than the date of completion of an on-site survey of that provider which has been conducted to determine whether the provider complies with Medicare participation requirements. In deciding that HCFA properly determined to certify Petitioner to participate in Medicare, as a home health agency and as a hospice, effective November 28, 1995, I make the following findings of fact and conclusions of law (Findings). I discuss these Findings below.

1. On December 24, 1994, Petitioner applied to HCFA for certification to participate in the Medicare program as a home health agency.
2. On February 21, 1995, Petitioner applied to HCFA for certification to participate in the Medicare program as a hospice.
3. On April 6, 1995, the California Department of Health Services (California State survey agency) surveyed Petitioner to determine whether Petitioner complied with applicable State licensing requirements. Based on this survey, the California State survey agency concluded that Petitioner complied with all applicable State licensing requirements.
4. On November 28, 1995, the California State survey agency, acting on behalf of HCFA, surveyed Petitioner to determine whether Petitioner complied with Medicare participation requirements which govern home health agencies and hospices. Based on these surveys, the California State survey agency concluded that Petitioner complied with all applicable Medicare participation requirements which govern home health agencies and hospices.
5. HCFA determined to certify Petitioner to participate in Medicare, effective November 28, 1995.
6. In order to be certified to participate in Medicare, a provider must apply to HCFA to participate, and then must be surveyed, in order to determine whether it complies with applicable Medicare participation requirements.

7. The first date on which a provider may participate in Medicare is the date of completion of an initial survey of that provider which finds that the provider complies with all applicable Medicare participation requirements.

8. November 28, 1995, is the date when surveys were completed of Petitioner which established that Petitioner complied with all Medicare participation requirements which apply to home health agencies and hospices.

9. November 28, 1995, is the first date on which Petitioner qualified to be certified to participate in Medicare.

10. I am without authority to direct HCFA to certify Petitioner to participate in Medicare on the date when Petitioner met State license requirements, even assuming that State license requirements impose on Petitioner the same obligations and duties as do Medicare participation requirements.

11. I am without authority to decide that HCFA is estopped from certifying Petitioner to participate in Medicare, as a home health agency and a hospice, effective November 28, 1995.

12. I am without authority to decide that Petitioner is entitled, as the beneficiary of a contract between HCFA and the California State survey agency, to be certified to participate in Medicare at any date prior to November 28, 1995.

III. Discussion

A. The relevant facts (Findings 1 - 5)

The following facts are not in dispute. On December 24, 1994, Petitioner applied to participate in the Medicare program as a home health agency. P. Ex. 1 at 2; Petitioner's Brief (P. Br.) at 3. On February 21, 1995, Petitioner applied to participate in the Medicare program as a hospice. P. Ex. 1 at 1; P. Br. at 3.

Petitioner applied also to the State of California for a license to operate as a home health agency and as a hospice. On April 6, 1995, the California State survey agency conducted a survey of Petitioner in order to determine whether Petitioner complied with applicable State licensing requirements. It determined that, as of the date of the survey, Petitioner was complying with State licensing requirements. P. Ex. 2.

Although Petitioner applied to participate in Medicare in December 1994 and February 1995, HCFA did not have Petitioner surveyed for compliance with Medicare participation requirements until November 28, 1995. On that date, the California State survey agency conducted surveys on behalf of HCFA to determine whether Petitioner complied with Medicare requirements which govern home health agencies and

hospices. P. Ex. 7 at 1 - 4. The California State survey agency concluded, on the basis of the November 28, 1995 surveys, that Petitioner complied with all Medicare participation requirements governing home health agencies and hospices. Id. On February 7, 1996, HCFA determined to accept the California State survey agency's conclusions, and certified Petitioner to participate in Medicare, as a home health agency and a hospice, effective November 28, 1995, the date that the California State survey agency conducted and completed its Medicare certification surveys of Petitioner. P. Ex. 8.

B. Governing law (Findings 6 - 7)

A provider may participate in Medicare if it enters into participation agreement with the Secretary of the United States Department of Health and Human Services (Secretary). Social Security Act (Act), section 1866(a)(1). However, the Secretary is not required to enter into a participation agreement with a provider if the Secretary determines that the provider is not complying substantially with Medicare participation requirements. Act, section 1866(b)(2).

The Secretary has published regulations which establish a process by which HCFA, acting on behalf of the Secretary, determines whether an applicant for participation in Medicare is complying with Medicare participation requirements. 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 behalf of HCFA. Id. HCFA will accept an applicant's participation agreement and certify that applicant to participate in Medicare 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).

The regulations plainly state that the earliest date that an applicant may participate in Medicare is the date of completion of the initial certification survey, assuming that the applicant satisfies all Medicare participation requirements as of that date. 42 C.F.R. § 489.13(a). An applicant for participation may not be certified to participate in Medicare at a date that is earlier than the date the initial survey is completed, even assuming that the applicant might have been able to satisfy HCFA that it met participation requirements at an earlier date, had the survey been conducted on that earlier date. See Id.

C. Application of the law to the undisputed facts (Findings 8 - 12)

It is evident from application of the law to the undisputed facts that HCFA certified Petitioner to participate in Medicare, as a home health agency and as a hospice, on the earliest date on which Petitioner

qualified to participate. That date was November 28, 1995, the date when the California State survey agency, acting on HCFA's behalf, completed initial surveys of Petitioner and concluded that Petitioner complied with all Medicare participation requirements, both as a home health agency and as a hospice. There is no provision in the regulations which would enable Petitioner to be certified at any date earlier than November 28, 1995. Consequently, I conclude that HCFA properly certified Petitioner to participate in Medicare, effective November 28, 1995.

Petitioner's arguments that it ought to have been certified to participate at an earlier date all devolve from the fact that many months transpired from the dates when Petitioner first applied to HCFA to participate as a home health agency and as a hospice, and the date of the initial surveys of Petitioner. Eleven months transpired from the date that Petitioner first applied to participate in HCFA as a home health agency and the initial certification survey that was conducted of Petitioner by the California State survey agency; about nine months transpired from the date that Petitioner first applied to HCFA to participate as a hospice and the initial certification survey.

Petitioner essentially concedes that the regulations do not, on their face, permit it to have been certified prior to the date of completion of the initial certification surveys of Petitioner by the California State survey agency. Petitioner argues that the delays were contrary to HCFA's policies concerning the timeliness of initial certification surveys and were unfair to Petitioner. Petitioner argues that, in light of the asserted unreasonable delays between the dates of Petitioner's applications and the date of the initial surveys, I should direct HCFA to certify Petitioner at an earlier date than November 28, 1995. The date advocated by Petitioner is April 6, 1995, the date on which Petitioner was found to qualify for a State license by the California State survey agency.

Petitioner makes three arguments to support its assertion that it should be certified to participate effective April 6, 1995. First, Petitioner argues that the license survey which was completed by the California State survey agency on April 6, 1995, constituted a survey by the same agency as performed the initial certification surveys of Petitioner on November 28, 1995. Petitioner asserts, furthermore, that the criteria used by the California State survey agency to determine whether Petitioner qualified for a State license are identical to those used by HCFA to assess compliance with Medicare participation requirements. From this, Petitioner argues that I ought to accept the finding by the California State survey agency that Petitioner met State license requirements as the functional equivalent of findings that Petitioner met Medicare participation requirements, and order HCFA to certify Petitioner to participate, as a home health agency and as a hospice, effective April 6, 1995.

Second, Petitioner asserts that the delays in conducting Medicare certification surveys of Petitioner contravene HCFA's policies

concerning the timeliness of such surveys. Petitioner argues that it was harmed by these delays. From this, Petitioner asserts that HCFA is estopped from certifying Petitioner to participate effective November 28, 1995, and must be directed to certify Petitioner to participate effective April 5, 1995.

Third, Petitioner argues that the agreement between HCFA and the California State survey agency, pursuant to which the California State survey agency conducts Medicare participation surveys, is intended to benefit applicants for participation in Medicare. Petitioner argues that one requirement of this agreement is that surveys be conducted in a timely manner. Petitioner asserts that, in this case, the California State survey agency failed to comply with this requirement, to Petitioner's loss. Petitioner argues that, as a third-party beneficiary of the agreement between HCFA and the California State survey agency, it should be granted relief in the form of an earlier date of certification to participate in Medicare.

I am without authority to grant the relief which Petitioner requests. In evaluating Petitioner's arguments, I must apply to the evidence the letter of the regulations which govern initial certification. These regulations give me no authority to direct HCFA to accept the results of a State license survey as a substitute for initial certification surveys, even if the license survey was performed by the same agency as performed the later certification surveys, and even assuming that the criteria for licensure are identical with the criteria which govern participation in Medicare. I have no authority to find that HCFA is estopped from certifying Petitioner, effective November 28, 1995, on the grounds that the delays in surveying Petitioner harmed Petitioner, contravene HCFA's policies, and are unreasonable. Finally, I have no authority to direct that HCFA certify Petitioner prior to November 28, 1995, on the ground that Petitioner, as the third-party beneficiary of a contract between HCFA and the California State survey agency, had a right to be surveyed timely and was damaged by the alleged failure of the California State survey agency to fulfill its obligations under the agreement.

That is not to say that I am unsympathetic to Petitioner. A great deal of time transpired between Petitioner's initial applications for participation and the certification surveys. Delays of eleven and nine months occurred between the dates when Petitioner applied to participate in Medicare as a home health agency and as a hospice and completion of the initial surveys of Petitioner by the California State survey agency. It is at least possible that Petitioner would have been able to demonstrate that it complied with applicable participation requirements months prior to November 28, 1995, had the California State survey agency conducted participation surveys of Petitioner in a more timely manner. Petitioner may well have been damaged financially by the delayed surveys.

1. Petitioner's argument that the results of the State license survey must be accepted by HCFA as proof of

**compliance with Medicare participation requirements
(Finding 10)**

Petitioner argues that there is nothing in the regulations which prohibits HCFA from using the results of a State license survey of Petitioner to determine whether Petitioner meets Medicare participation requirements. Petitioner observes that the regulations which govern certification do not specifically define what an on-site survey for certification purposes constitutes, nor do they contain any language precluding HCFA from using the results of a license survey as a basis for determining whether a provider qualifies to participate in Medicare.

Petitioner's characterization of what the regulations contain may be true, but it begs the question of whether HCFA may be directed to use the results of a State license survey to determine whether a provider qualifies to participate in Medicare. The regulations give HCFA authority to decide what it will accept from a State survey agency as a basis for certifying an applicant to participate in Medicare. 42 C.F.R. §§ 488.10; 488.11(c); 488.12; 488.18. It is apparent from the record of this case that HCFA has chosen not to consider the State license survey as being equivalent to the provider certification surveys that were conducted subsequently. The regulations do not require HCFA to accept any substitute for a provider certification survey. I have no authority to direct that HCFA do so. Thus, it is not relevant that the agency which performed the State license survey is the same agency as that which performed the Medicare certification surveys, nor is it relevant that the criteria for attaining a license in California to operate as a home health agency and as a hospice arguably may be the same as those which govern participation in Medicare of home health agencies and hospices.³

In its reply to Petitioner's brief, HCFA asserts that the issues in this case do not include the issue of whether California State license requirements and Medicare participation requirements are the same. From this, HCFA seems to be asserting that I should preclude Petitioner even from arguing that it should be certified based on the results of the California State license survey. Petitioner responded to this assertion by moving to expand the issues in the case.

I deny Petitioner's motion as moot. Deciding the issue of whether State license and Medicare participation requirements are identical would have no affect on the outcome of this case, inasmuch as the regulations which govern participation of providers do not compel HCFA to accept the results of a State license survey as proof of compliance with participation requirements. However, I would have permitted Petitioner to argue and offer evidence that is relevant to its assertion that State license requirements and Medicare participation

³ I make no finding as to whether the criteria are the same, because it is not necessary that I do so.

requirements are identical, had I concluded that the regulations did provide HCFA's acceptance of the results of a State license survey as a substitute for the results of a Medicare certification survey.

2. Petitioner's estoppel argument (Finding 11)

I do not have authority to direct HCFA to certify Petitioner to participate in Medicare on a date prior to November 28, 1995, on the grounds that the delay in surveying Petitioner was unfair to Petitioner, or that the delay is contrary to HCFA's policy that applicants for participation be surveyed promptly. My authority thus is limited to deciding whether HCFA certified Petitioner to participate in accordance with applicable regulations governing participation. The regulations which govern certification neither state nor suggest that HCFA may be estopped from certifying a provider to participate on the date when an initial survey of that provider is completed, even where the survey has been delayed through no fault of the provider. See 42 C.F.R. § 489.13(a).

Petitioner notes that I have held in other cases that HCFA may not be estopped from certifying a provider pursuant to 42 C.F.R. § 489.13, but it attempts to distinguish the facts of those cases from the facts of the present case. I have held that, where an applicant for participation in Medicare fails at the initial survey to demonstrate that it meets all participation requirements, HCFA may not be estopped from certifying the applicant to participate as of the date that it establishes that it has corrected outstanding deficiencies, on the ground that HCFA or a State survey agency delayed unreasonably in conducting a resurvey of the applicant. SRA Inc., D/B/A St. Mary Parish Dialysis Center, DAB CR341 (1994); The Rivers HealthCare Resources, Inc., DAB CR446 (1996).

Petitioner argues that, in every other case where I have declined to find that HCFA is estopped, the provider bore some responsibility for the delays in its certification, because it was found to be deficient in complying with participation requirements at the initial survey. Petitioner asserts that it bears no responsibility for the delay in certification, because there is no evidence that it was deficient at any time prior to November 28, 1995.

I agree with Petitioner that this case differs from those cases in which I have held that HCFA may not be estopped, in that, here, there is no evidence that Petitioner bears responsibility for the lapse of time between the date it applied to be certified and the effective date of its certification. However, I am, nevertheless, without authority to find that HCFA is estopped from certifying Petitioner to participate in Medicare, effective November 28, 1995. The regulations which govern certification do not authorize me to supersede their explicit requirements based on principles of equity, including estoppel.

I would not find that Petitioner established the factual predicate for its equitable argument (that HCFA failed to comply with a policy which required that Petitioner be surveyed within three weeks of the dates of its applications for participation) even if I were to conclude that I had the authority to grant the equitable relief that Petitioner seeks. It is not clear that the California State survey agency contravened HCFA's policy concerning the timing of participation surveys.

Petitioner proved that HCFA's general policy concerning the timing of certification surveys is to require that an initial certification survey be performed of an applicant for participation within three weeks of the date when the applicant submits an application for participation which recites that the applicant is operational. An excerpt from the State Operations Manual, a document which HCFA provides to State survey agencies as policy guidance, states:

When the provider notifies . . . [the State survey agency] of full operation, document the file with the date of notification and conduct the survey within 3 weeks of that date.

P. Ex. 4. This excerpt is corroborated by the affidavit of Petitioner's counsel. P. Ex. 4a. Petitioner's counsel recites being present at a "special training session," which he asserts that HCFA held for administrative law judges, on January 14, 1997. He recites that, at that session, Ms. Mavis Connolly, a representative of HCFA, advised the participants that the State survey agency conducts an initial survey within three weeks of its receipt of an application by a provider which indicates that the provider is operational. Id.⁴

However, in February 1995, HCFA felt it necessary to advise State survey agencies that, due to budget constraints, it might be necessary for them to waive the requirement that a survey of an applicant for participation be conducted within three weeks of the date of the application for certification "if the State budget does not permit all initial surveys to be done." P. Ex. 6 at 2. It is unclear from the evidence in this case whether the California State survey agency delayed surveying Petitioner consistent with HCFA's 1995 exception to the overall policy concerning the timing of initial surveys.

⁴As Petitioner's counsel recites in his affidavit, I was present at this meeting (I would not characterize it as a "special training session"), along with other administrative law judges, members of the Departmental Appeals Board, representatives of the Departmental Appeals Board Appellate Division and Civil Remedies Division staffs, and representatives of the public. I make no findings as to what was said at that meeting, based on my memory of what occurred. My findings are based solely on the un rebutted statement of Petitioner's counsel.

3. Petitioner's argument that, as the beneficiary of a contract between HCFA and the California State survey agency, it should be certified to participate in Medicare earlier than November 28, 1995 (Finding 12)

I am without authority to direct HCFA to certify Petitioner to participate in Medicare prior to November 28, 1995, as relief for an alleged breach of what Petitioner characterizes to be a third-party beneficiary contract between HCFA and the California State survey agency. My authority, again, is limited to deciding whether HCFA's certification of Petitioner complied with the requirements of applicable regulations. I make no finding as to whether any agreement between HCFA and the California State survey agency is a third-party beneficiary agreement which operates to Petitioner's benefit, inasmuch as I have no authority to direct any relief based on an asserted breach of that agreement.

For the same reason, I make no finding that the California State survey agency failed to comply with its obligations under any contract it had with HCFA.

IV. Conclusion

I conclude that HCFA properly certified Petitioner to participate in Medicare, as a home health agency and as a hospice, effective November 28, 1995. Therefore, I sustain HCFA's determinations.

_____/s/_____
Steven T. Kessel
Administrative Law Judge