Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Hillman Rehabilitation Center,	)	Date: October 20, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-227
	)	Decision No. CR500
Health Care Financing Administration.	)	
	)	

DECISION ON REMAND

I decide that the Health Care Financing Administration (HCFA) is without authority to terminate the participation in Medicare of Hillman Rehabilitation Center (Petitioner). Petitioner proved by a preponderance of the evidence that HCFA failed to offer relevant or credible evidence that on April 5, 1995 Petitioner was not complying with conditions of participation in Medicare. The evidence offered by Petitioner rebuts completely HCFA's prima facie case that Petitioner was not complying with conditions of participation as of April 5, 1995. HCFA's case against Petitioner, therefore, is reduced to unsubstantiated allegations.

I decide that Petitioner was under no obligation to prove affirmatively that it was complying with Medicare participation requirements as of April 5, 1995 because Petitioner rebutted completely HCFA's prima facie case. Therefore, I do not base my decision on remand on the exhibits which Petitioner offered at the first hearing of this case or on the affidavit testimony that it offered at the remand hearing. It would be unnecessary for me to make findings from affirmative evidence of compliance such as that which Petitioner introduced in any case where a provider rebuts completely a prima facie case established by HCFA.

However, this case, and my decision on remand, has an unusual dimension in that it is subject to the remand order and directions of an appellate panel of the Departmental Appeals Board (DAB). One way to read that order is to direct me to make conclusions about whether Petitioner proved affirmatively that it was complying with participation

requirements as of April 5, 1995. For that reason, I make conclusions about the weight and quality of Petitioner's affirmative proof, even though I consider my conclusions to be dicta without effect on my decision. I conclude that the evidence of compliance offered by Petitioner would be insufficient to prove that Petitioner was complying with conditions of participation in Medicare as of April 5, 1995 if Petitioner had an obligation to prove by affirmative evidence that it was complying with conditions of participation as of that date.

I. Background

Petitioner is a provider of outpatient physical therapy and rehabilitation services, with a business office in Lakewood, New Jersey. Prior to July 5, 1995, Petitioner was certified by HCFA to participate in the Medicare program as a provider of physical therapy and rehabilitation services.

HCFA determined to terminate Petitioner's participation in Medicare, effective July 5, 1995. HCFA made its determination from findings made by the New Jersey State survey agency that Petitioner was not complying with two conditions of participation in Medicare. These conditions are stated in federal regulations, at 42 C.F.R. §§ 405.1717 (plan of care and physician involvement) and 405.1722 (clinical records), which govern the participation in Medicare of providers of outpatient physical therapy and rehabilitation services, including Petitioner. The New Jersey State survey agency based its conclusions of noncompliance on documents that were obtained from Petitioner on April 5, 1995. On that date, a surveyor employed by the New Jersey State survey agency visited Petitioner's business office in Lakewood, New Jersey, in the company of a representative of Aetna Insurance Company, the Medicare intermediary in the State of New Jersey.

Petitioner requested a hearing from HCFA's determination to terminate Petitioner's participation in Medicare. I held a hearing in Trenton, New Jersey, on February 13, 1996. On May 22, 1996, I issued a decision in which I found that HCFA had failed to establish a basis for terminating Petitioner's participation in Medicare. Hillman Rehabilitation Center, DAB CR419 (1996) (original decision). HCFA appealed this decision to an appellate panel of the DAB. On February 28, 1997, the appellate panel issued a decision which reversed all but one of the findings of fact and conclusions of law (Findings) that I made in my original decision. Hillman Rehabilitation Center, DAB No. 1611 (1997) (appellate panel decision).

The appellate panel held that HCFA had established a prima facie case that Petitioner had not complied with Medicare conditions of participation. It remanded the case back to me for further proceedings consistent with its remand order.

On June 17, 1997, I held an additional hearing in the case in Princeton, New Jersey. The purpose of the additional hearing was to permit Petitioner to offer evidence to rebut HCFA's prima facie case that Petitioner had not complied with conditions of participation in Medicare, and to offer affirmative proof that Petitioner had, in fact, complied with conditions of participation. Petitioner called to testify three witnesses who did not testify at the first hearing. These witnesses are: Mary Reed (Transcript (Tr.) 6/17/97 at 19 - 51); Gerald Livesey (Tr. 6/17/97 at 51 - 87); and Wilma Sidberry (Tr. 6/17/97 at 88 - 108). Petitioner also called as a witness Dr. Benjamin Akinrolabu (Tr. 6/17/97 at 108 - 120), who had testified at the February 13, 1996 hearing. At the June 17, 1997 hearing, Petitioner offered, and I received, exhibits, consisting of P. Ex. 29 - 34. HCFA offered no rebuttal evidence.

I base my decision on remand on the entire record of this case. The record includes the record created at the February 13, 1996 hearing and the record that was created at the June 17, 1997 hearing on remand.

II. Issue on remand

The issue on remand of this case is whether, as of April 5, 1995, Petitioner was not complying with Medicare participation requirements to the extent that it failed to comply with a condition or conditions of participation. I make Findings to support my conclusion that Petitioner proved by a preponderance of the evidence that HCFA's prima facie case was without substance. I make additional Findings in the nature of dicta to satisfy the possible directives that the appellate panel may have issued in its remand order to me. My Findings are set forth below under Part IV of this decision, as italicized headings. I discuss each of my Findings in detail.

III. Summary of my Findings

I base my decision that HCFA does not have authority to terminate Petitioner's participation in Medicare on Findings which I summarize briefly as follows:

- A provider may attempt to rebut HCFA's prima facie case of noncompliance with participation requirements, where HCFA establishes such a case. Rebuttal may consist of a challenge to the relevance or credibility of the evidence on which the prima facie case is based. If a provider proves that HCFA's prima facie case is not based on relevant or credible evidence, then HCFA's case is reduced to unsubstantiated allegations of noncompliance. In that event, the provider prevails. Finding 1.

- A provider may also rebut HCFA's prima facie case by proving affirmatively that, notwithstanding the evidence of noncompliance with conditions of participation on which HCFA bases its prima facie case, the weight of the evidence establishes that the provider was complying with participation requirements. Finding 1.

- If the provider proves by a preponderance of the evidence that HCFA's prima facie case is without substance, then the provider is not obligated to prove affirmatively that it was complying with participation requirements. Finding 1.

- Petitioner proved by a preponderance of the evidence that HCFA's prima facie case is not supported by credible or relevant evidence. The preponderance of the evidence is that, on April 5, 1995, the New Jersey State survey agency failed to conduct a survey of Petitioner. Mr. End, the surveyor, did not request Petitioner to produce clinical records. Indeed, Mr. End made no request on April 5, 1995 that Petitioner produce records of any kind, aside from asking Petitioner to show him where Petitioner stored copies of its clinical records. Finding 2.

- Petitioner proved by a preponderance of the evidence that the records which it produced on April 5, 1995 were produced in response to a request made by Mr. Livesey on behalf of Aetna Insurance Company. These records are billing documents which are not the same as, nor a substitute for, Petitioner's clinical records. No legitimate inferences may be drawn from these billing documents concerning the way in which Petitioner maintained its clinical records. Finding 2.

- Petitioner's proof that HCFA's prima facie case is not supported by credible or relevant evidence reduces HCFA's case against Petitioner to unsubstantiated allegations. HCFA did not adduce credible or relevant evidence to show that, as of April 5, 1995, Petitioner failed to maintain readily available clinical records. Nor did HCFA adduce credible or relevant evidence, that as of April 5, 1995, rehabilitation therapists employed by Petitioner were providing treatments without required supervision by physicians. HCFA did not adduce credible or relevant evidence to show that, as of April 5, 1995, Petitioner's clinical records were lacking requisite physician signatures or treatment authorizations and reviews that were appropriately signed and dated by physicians. Finding 3.

- Petitioner is under no obligation to prove affirmatively that it was complying with relevant conditions of participation on April 5, 1995, given the complete absence of a substantiated case against Petitioner. HCFA is without authority to terminate Petitioner's participation in Medicare because Petitioner proved that the evidence on which HCFA relies to establish its prima facie case is neither credible nor relevant to the issue of Petitioner's compliance with conditions of participation. Finding 4.

I make additional Findings, solely as dicta, to satisfy what the appellate panel may have required in its remand order to me. Briefly summarized, they are as follows.

- Petitioner proved by a preponderance of the evidence that its clinical records were readily accessible on April 5, 1995, and would have been produced to Mr. End, had Mr. End requested them. Finding 5.

- Petitioner did not prove by a preponderance of the evidence that, as of April 5, 1995, a physician approved and reviewed the care provided to each of Petitioner's patients, as is required by standards of participation contained in 42 C.F.R. § 405.1717. Finding 6.

- Petitioner did not prove by a preponderance of the evidence that, as of April 5, 1995, a physician timely completed the clinical records documenting approval and review of care provided to each of Petitioner's patients, as is required by standards of participation contained in 42 C.F.R. § 405.1722. Finding 6.

- Petitioner did not prove that, as of April 5, 1997, it was complying with the conditions of participation stated in 42 C.F.R. §§ 405.1717 and 405.1722. Finding 6.

In its decision, the appellate panel adopted Findings (FFCLs) which, it held, were final and binding on me. FFCLs 1A, 1B, 1C, 1D, 3 - 15; appellate panel decision at 65 - 67. The decision which I issue on remand is based on, and is consistent with FFCLs 1A, 1B, 1C, 1D, 3 - 15. The appellate panel also instructed me to consider whether I should adopt additional Findings, consisting of FFCLs 16 - 23. Appellate panel decision at 67 - 68. I do not adopt FFCLs 16 and 17. See appellate panel decision at 67 - 68. They are inconsistent with Findings 1 - 5 which I make in this decision on remand. I adopt FFCLs 18 - 22, but only as dicta which do not affect my decision that HCFA is without authority to terminate Petitioner's participation in Medicare. See appellate panel decision at 68. FFCLs 18 - 22 are consistent with my Findings and 6, which I make as dicta. I do not adopt FFCL 23. See Id. FFCL 23 is inconsistent with my Findings 1 - 4 in this decision on remand.

IV. Findings of fact and conclusions of law

A. Findings on which I base this decision

1. A provider may rebut HCFA's prima facie case by proving that the prima facie case is not based on relevant or credible evidence. A provider may also rebut HCFA's prima facie case by offering affirmative proof of compliance that outweighs the evidence of noncompliance that HCFA offers to establish a prima facie case. However, a provider is not obligated to prove affirmatively that it was complying with conditions of participation if it proves that HCFA's allegations of noncompliance are unsubstantiated.

I held in my original decision that HCFA had the burden of proving by a preponderance of the evidence that Petitioner was not complying with conditions of participation as of April 5, 1995. Original decision at 4 - 8. The appellate panel rejected this holding. Appellate panel decision at 8 - 24. The appellate panel held that Petitioner bore the ultimate burden of proving that it was complying with applicable conditions of participation, assuming that HCFA first could establish a prima facie case that Petitioner was not complying with these conditions of participation. Appellate panel decision at 11, 23 - 25.

At common law, the term "prima facie case" is used in two ways: (1) as a way of defining a plaintiff's duty to produce evidence that is sufficient to render reasonable a conclusion in favor of the plaintiff on the allegation that the plaintiff asserts, thus making the plaintiff's case sufficient for a jury to consider it; and (2) to mean that the evidence offered by the plaintiff would compel a conclusion favorable to the plaintiff if the defendant offered no evidence to rebut it. Black's Law Dictionary, 5th Ed. at 1071 (1979) (citation omitted). The term "prima facie case" is tied closely to, and is used in conjunction with, the term "prima facie evidence." Prima facie evidence is evidence which, if unexplained or uncontradicted, is sufficient to support a judgment in favor of the moving party, but which may be contradicted by other evidence that is offered by the opposing party in the opposing party's presentation of its case. Id.

HCFA's burden of establishing a prima facie case consists of adducing sufficient evidence to establish a case which, if not rebutted by Petitioner, would enable an administrative law judge to make findings of fact and conclusions of law in HCFA's favor. Every prima facie case potentially may be rebutted. No final conclusion may be made from the evidence which establishes HCFA's prima facie case until after the provider is afforded the chance to rebut that case. If the provider offers evidence to rebut HCFA's prima facie case, then the administrative law judge must weigh all of the relevant evidence and base his or her decision on that evidence.

In my original decision, I expressed a concern that HCFA was asserting that, in order to shift the burden of proof to an allegedly noncompliant provider, it need only make unsubstantiated allegations of noncompliance. Original decision at 5. The appellate panel agreed with my concern to the extent that it found that HCFA could not rest its case against a provider on unsubstantiated allegations. Appellate panel decision at 22, n.17; 23 - 24. The appellate panel held that HCFA must do more in a case than just allege that a provider is deficient without offering credible evidence to show that a provider is deficient. Id. Where HCFA's case against a provider relies only on unsubstantiated allegations that the provider is not complying with conditions of participation, then the provider must prevail. Id.

The provider may rebut HCFA's prima facie case by offering evidence to attack the credibility and relevance of HCFA's evidence. For example, in a case in which HCFA has offered prima facie evidence of noncompliance which HCFA avers was obtained at a survey of the provider, the provider might challenge that evidence by attempting to prove that no survey took place, or that the evidence was fabricated. If the provider succeeds in such an attack, it would effectively prove that HCFA's case constitutes unsubstantiated allegations.

A provider might also offer affirmative proof that, notwithstanding credible and relevant evidence of noncompliance on which HCFA relies to make its prima facie case, other, more probative evidence establishes that the provider was complying with the participation requirements that are at issue. For example, in a case where HCFA offers a provider's patient treatment records as prima facie evidence that the provider did not comply with participation requirements, the provider might offer supplemental treatment records or the testimony of its employees in an attempt to prove that the weight of the evidence proves that the provider was complying with participation requirements. If the provider succeeds, it would overcome the possible findings of noncompliance which otherwise might arise from the prima facie evidence of noncompliance that HCFA offered.

However, a provider is not obligated to pursue multiple theories in opposing a prima facie case that HCFA presents. A provider is not obligated to prove affirmatively that it was complying with participation requirements if it succeeds in establishing that HCFA's allegations of noncompliance are unsubstantiated because they are based on evidence that is not credible or is not relevant.

Successful proof by a provider that HCFA's prima facie case is either not credible or not relevant constitutes a complete defense against allegations that the provider was not complying with participation requirements. If a provider succeeds in proving that HCFA's prima facie evidence is either not credible or not relevant, it will succeed in reducing HCFA's allegations of noncompliance to unsubstantiated allegations. In that

event, the case is reduced to the same footing as if HCFA were unable to present even a prima facie case.

2. Petitioner proved by a preponderance of the evidence that HCFA's prima facie case is not supported by credible or relevant evidence.

a. HCFA's prima facie case

HCFA makes three allegations concerning Petitioner's alleged noncompliance with conditions of participation. These are that: (1) as of April 5, 1995, Petitioner failed to maintain clinical records that were readily accessible to Mr. End, the surveyor from the New Jersey State survey agency who visited Petitioner's facility on that date; (2) documents Mr. End received on April 5, 1995 demonstrate that therapists employed by Petitioner were providing treatment to Medicare beneficiaries without requisite physician authorization and review; and (3) these documents show that Petitioner failed to comply with the clinical records condition of participation in Medicare in that the documents were missing the required physician approvals of care and were also missing signed and dated certifications by physicians to approve the rehabilitation services that Petitioner was providing to Medicare beneficiaries.

HCFA's prima facie case to establish these three allegations consists essentially of Mr. End's testimony and documents that Mr. End obtained at a visit on April 5, 1995 to Petitioner's Lakewood, New Jersey business office. Tr. 2/13/96 at 41 - 159; HCFA Ex. 17 - 35. HCFA relied also on the testimony of Mr. End's supervisor, Henry Kozek, to establish that Mr. End's purpose in visiting Petitioner's office on April 5, 1995 was to conduct a survey to determine whether Petitioner was complying with Medicare conditions of participation. Tr. 2/13/96 at 170 - 171.

Mr. End's testimony is a seamless account of a survey at which Petitioner failed to produce clinical records when requested, and then, after a lengthy delay, faxed in to its Lakewood, New Jersey business office clinical records which manifestly were incomplete. When viewed in isolation, Mr. End's testimony and the records he asserts he obtained on April 5, 1995 are compelling evidence of noncompliance by Petitioner with conditions of participation. In the absence of rebuttal evidence, this evidence would be sufficient to support a judgment in favor of HCFA.

Mr. End asserts that, on April 5, 1995, he conducted a survey at Petitioner's Lakewood, New Jersey business office. Tr. 2/13/96 at 70. According to Mr. End, the specific purpose of his visit on that date was to inspect Petitioner's clinical records. Id. at 71. He avers that, on that occasion, he requested Dr. Akinrolabu, Petitioner's administrator, to produce Petitioner's clinical records for inspection. Id. at 72 - 73. Mr. End asserts that, on April 5, 1995, he presented Dr. Akinrolabu with the names of 20 patients whose clinical records Mr. End demanded to see. Id. asserts that he

requested to go to the files and observe these clinical records being withdrawn from the files. Id.

Mr. End avers that he was told that the clinical records were not available. Id. According to Mr. End, he was made to wait for a period of from two to three hours while Petitioner had copies of clinical records faxed in from the long term care facilities where therapists who were employed by Petitioner provided care. Id. at 73, 85, 93, 97, 151. Mr. End asserts that, eventually, Dr. Akinrolabu gave to him HCFA Ex. 17 - 35, which, according to Mr. End, Dr. Akinrolabu asserted to be the faxed copies of the complete clinical records obtained from long term care facilities. Id. at 93, 151.

Mr. End asserts that, on April 5, 1995 he asked to be shown physicians' signatures to verify that they were on file at Petitioner's Lakewood, New Jersey office. Tr. 2/13/96 at 97, 102 - 103. But, according to Mr. End, Petitioner did not show him the signatures. Id. at 103. Mr. End avers that, at the end of the April 5, 1995 survey, he had an exit conference with Dr. Akinrolabu at which he explicitly advised Dr. Akinrolabu that Petitioner was not complying with two conditions of participation. Tr. 2/13/96 at 137.

The documents which Mr. End asserts that Dr. Akinrolabu gave to him on April 5, 1995, on their face resemble patient treatment records. HCFA Ex. 17 - 35. They are organized as discrete records for 19 different individuals. Id. The records contain requests for evaluation of patients to determine whether the patients would benefit from physical therapy. Id. Some, but not all of the records, contain a physician's order that physical therapy be provided to the patient. Id. Some of the records contain progress reports by a therapist. Most of the records are not signed by the patient's physician. Id. Each of the records contains a worksheet with handwritten notations, consisting of an evaluation of the contents of that record. Id.

b. The lack of credibility and relevance of HCFA's prima facie evidence

The testimony of Mr. End and the exhibits in evidence as HCFA Ex. 17 - 35 lose all credibility and relevance to the issue of Petitioner's compliance with conditions of participation when they are weighed against the more credible opposing evidence introduced by Petitioner at the February 13, 1996 and June 17, 1997 hearings.

I held in my original decision that Mr. End's testimony was refuted by the testimony that Dr. Akinrolabu provided at the February 13, 1996 hearing and by extrinsic evidence. Original decision at 15 - 19. I found Mr. End not to have been a credible witness. Id. The appellate panel rejected this conclusion, finding that it was not supported by substantial evidence. It concluded that HCFA had established a prima

facie case that Petitioner was not complying with Medicare participation requirements as of April 5, 1995.

The appellate panel did not foreclose Petitioner the opportunity to rebut HCFA's prima facie case. Petitioner responded to that opportunity by offering evidence at the June 17, 1997 remand hearing, along with the previously introduced testimony of Dr. Akinrolabu and extrinsic evidence, to attack the credibility and relevance of the evidence offered by HCFA to support its prima facie case. The evidence which Petitioner offered on June 17, 1997 includes additional testimony by Dr. Akinrolabu. It also includes the testimony of Mary Reed, Petitioner's office manager; Wilma Sidberry, Petitioner's billing clerk; and Gerald Livesey, the Aetna Insurance Company representative who was with Mr. End on April 5, 1995.

The evidence which Petitioner offered to rebut HCFA's prima facie case attacks the probative value of that case in two ways. First, it refutes the account of the April 5, 1995 survey delivered by Mr. End. The sum of the evidence which Petitioner presented in response to Mr. End's testimony is that Mr. End did not actually conduct a certification compliance survey on April 5, 1995. Second, it attacks the relevance of HCFA Ex. 17 - 35 as evidence of the state of Petitioner's clinical records on April 5, 1995. The substance of the evidence which Petitioner presented is that HCFA Ex. 17 - 35 comprise excerpts from Petitioner's billing files, and not excerpts from Petitioner's clinical records. According to Petitioner, the two types of records are not interchangeable, and inferences about the state of one type of record may not be drawn from the appearance of the other type of record.

(i). The credibility of HCFA's prima facie case concerning the events which occurred on April 5, 1995

The evidence that Petitioner offered at the February 13, 1996 and June 17, 1997 hearings contradicts in critical respects the testimony of Mr. End. Summarized briefly, the evidence offered by Petitioner is that Mr. End did not actively participate in a survey on April 5, 1995. Mr. End did not request to review copies of Petitioner's clinical records. Mr. Livesey, and not Mr. End, requested to review records. Petitioner's staff presented records to Mr. Livesey, not to Mr. End. No patient records were faxed to Petitioner from long term care facilities on April 5, 1995, and Mr. End was not told that he was receiving faxed documents. Mr. End held no exit conference with Petitioner's staff on April 5, 1995. At no time on April 5, 1995 did Mr. End advise Petitioner's staff that he had concluded that Petitioner maintained inaccessible or incomplete clinical records.

The evidence introduced by Petitioner is as follows:

- Dr. Akinrolabu avers that Mr. Livesey, and not Mr. End, announced to Petitioner's staff the purpose of the April 5, 1995 visit to Petitioner's Lakewood, New Jersey office. Tr. 2/13/96 at 211 - 212. None of Petitioner's witnesses recall Mr. End explaining his reason for being at Petitioner's office with Mr. Livesey.

- None of Petitioner's witnesses recalls Mr. End asking for any documents on April 5, 1995. Dr. Akinrolabu denies that Mr. End asked him for documents. Tr. 2/13/96 at 214. He asserts that Mr. End's sole involvement on April 5, 1995 consisted of asking to see the file cabinets in which Petitioner maintained copies of clinical records. Tr. 6/17/97 at 117; see Tr. 2/13/96 at 214 - 215. Dr. Akinrolabu avers that he showed these cabinets to Mr. End. Id. He asserts that Mr. End looked at the opened file drawers, but did not request to be shown any documents. Id.

- Neither Ms. Reed nor Ms. Sidberry attest to having any conversation with Mr. End in which Mr. End requested to review documents of any kind. Ms. Reed recalls no conversation with Mr. End on April 5, 1995, other than to exchange greetings with him. Tr. 6/17/97 at 29. She avers that Mr. End did not request to see on-file signatures of physicians. Id. at 38 - 39.

- Mr. Livesey had no memory of Mr. End speaking to any individual on April 5, 1997. Tr. 6/17/97 at 58. He could not recall whether Mr. End did or did not ask to review documents on that date. Id. at 61. Mr. Livesey remembers only that Mr. End looked at documents that Mr. Livesey had looked at. Tr. 6/17/97 at 79.

- No witness called by Petitioner recalls Mr. End even asking questions on April 5, 1995, aside from Dr. Akinrolabu recalling that Mr. End asked to look at the files where Petitioner stored its clinical records. Tr. 6/17/97 at 117; see Tr. 2/13/96 at 214 - 215.

- The consistent testimony of every witness, other than Mr. End, is that Mr. Livesey, and not Mr. End, made a request to review documents. Dr. Akinrolabu recalls that Mr. Livesey requested to see documents that related to Petitioner's reimbursement claims. Tr. 2/13/96 at 211 - 212. Mr. Livesey recalls asking that records be produced. Tr. 6/17/97 at 55 - 57, 66. Ms. Reed recalls that Mr. Livesey, and not Mr. End, requested to review billing documents for certain patients. Tr. 6/17/67 at 28 - 29. She remembers that Mr. Livesey, and not Mr. End, gave her a list of

patient names for which Mr. Livesey requested documents. Id. at 27 - 29.

- The testimony of witnesses, other than Mr. End, is that documents that Petitioner produced on April 5, 1995 were produced in response to a request that Mr. Livesey made, either of Dr. Akinrolabu, or of Ms. Reed. No documents were produced in response to a request made by Mr. End. Ms. Reed recalls that the documents that she had copied were copied in response to a list presented to her by Mr. Livesey. Tr. 6/17/97 at 27 - 29.

- Petitioner's witnesses aver that HCFA Ex. 17 - 35 are documents that Petitioner delivered to Mr. Livesey, and not to Mr. End. Ms. Reed avers giving the documents that she copied to Dr. Akinrolabu. Tr. 6/17/97 at 30. Dr. Akinrolabu avers that he gave the documents which Petitioner's staff copied on April 5, 1995 to Mr. Livesey, and not to Mr. End. Tr. 2/13/96 at 214. Mr. Livesey recalls that, on April 5, 1995, he sat in a conference room at Petitioner's Lakewood, New Jersey office, and that copies of the documents he requested were brought to him there. Tr. 6/17/97 at 58.

- As corroboration for this testimony, each of the records in evidence as HCFA Ex. 17 - 35 contains a printed worksheet with handwritten additions. An example of this is the first page of HCFA Ex. 17. Each of these worksheets was prepared by Mr. Livesey, and not by Mr. End. Tr. 6/17/97 at 59, 72 - 74. There are no worksheets or other written analyses in evidence that Mr. End created.

- Petitioner's witnesses deny that any patient records were faxed from long term care facilities to Petitioner's Lakewood, New Jersey office on April 5, 1995. Tr. 2/13/96 at 213; Tr. 6/17/97 at 30, 96 - 97. Ms. Reed and Ms. Sidberry deny telling Mr. End anything that would have led him to believe that patient records were being faxed in on April 5, 1995. Tr. 6/17/97 at 31, 96 - 97.

- The records contained in HCFA Ex. 17 - 35 which HCFA relies on as the records that Mr. End obtained from Petitioner on April 5, 1995, do not contain the imprimatur that a fax machine would make. Dr. Akinrolabu avers that the fax machine at Petitioner's Lakewood, New Jersey office makes an imprimatur on each document that it receives. Tr. 2/13/96 at 216 - 217.

- None of Petitioner's witnesses recall Mr. End participating in an exit conference on April 5, 1995. No witness remembers Mr. End advising any employee of Petitioner on that date that he had identified deficiencies. Dr. Akinrolabu avers that Mr. End did not tell him at the end of the April 5, 1995 visit that there were problems with Petitioner's records. Tr. 2/13/96 at 215. Mr. Livesey recalls that he did not have a detailed or specific discussion with Petitioner's staff at the end of the April 5, 1995 visit concerning any deficiencies that he identified in Petitioner's billing process. Tr. 6/17/97 at 86 - 87.

The credible version of the events which occurred on April 5, 1995 is that which was attested to by Dr. Akinrolabu at the February 13, 1996 hearing, and by Dr. Akinrolabu, Ms. Reed, Ms. Sidberry, and Mr. Livesey at the June 17, 1997 hearing. Mr. End's account of what happened on April 5, 1995 is not credible and I do not accept it. I find to be untrue Mr. End's testimony that he surveyed Petitioner on April 5, 1995 for compliance with conditions of participation at 42 C.F.R. §§ 405.1717 and 405.1722.

From the entire record, it appears that the most reasonable description of Mr. End's involvement at Petitioner's office on April 5, 1995 is that he elected to allow Mr. Livesey to interact with Petitioner's employees and to request documents. Mr. End might have assumed that, whatever Mr. Livesey asked for would be sufficient to satisfy Mr. End's objective to review Petitioner's clinical records on that date. Mr. End may have assumed also, that the documents that Mr. Livesey obtained from Petitioner's employees on April 5, 1995 were, in fact, Petitioner's clinical records. But, what is apparent from the entire record is that Mr. End did not actively seek documents from Petitioner on April 5, 1995, nor did he ask questions of Petitioner's staff in order to verify that what Mr. Livesey got on that date would satisfy the purposes of the New Jersey State survey agency.

Mr. End was only a passive participant in the events of April 5, 1995. His testimony in which he portrays himself as actively conducting a survey on that date is untrue. Mr. End did not request Petitioner to furnish him with copies of its clinical records on April 5, 1995 or to review records apart from those which Petitioner furnished to Mr. Livesey. Mr. End fabricated assertions that Petitioner was unable to show him its clinical records on April 5, 1995 and that Petitioner had excerpts of clinical records faxed in, piecemeal, from long term care facilities, on April 5, 1995. As I discuss below, the documents which Mr. Livesey obtained on April 5, 1995 are not from Petitioner's clinical records and no inferences may be drawn about the state of Petitioner's clinical records from these documents.

In part, I base my conclusion that Mr. End did not conduct a survey on April 5, 1995 on the weight of the testimony which either contradicts or does not corroborate Mr. End's version of events. Mr. End's testimony is contradicted flatly by the testimony of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry. His testimony is not corroborated substantially by the testimony of the one witness who might be expected to give testimony that is favorable to Mr. End's version of the events, Mr. Livesey.

Moreover, the documents that HCFA relies on for its case against Petitioner, and which Mr. End asserts he obtained from Petitioner's staff on April 5, 1995, contradict aspects of Mr. End's testimony. HCFA Ex. 17 - 35. These exhibits plainly were not faxed to Petitioner's facility, as Mr. End asserts. Nor are they documents that Mr. End obtained directly from Petitioner's staff, although it appears that he obtained a copy of them after Mr. Livesey completed his review. The worksheet on each of the exhibits, which contains Mr. Livesey's handwritten notations, corroborates Petitioner's witnesses testimony that HCFA Ex. 17 - 35 were documents that Petitioner gave to Mr. Livesey in response to a request that Mr. Livesey made.

In my original decision, I found that, on the surface, Mr. End and Dr. Akinrolabu gave equally credible testimony concerning what happened on April 5, 1995. In that decision, I based my conclusion that Dr. Akinrolabu's version was the more reliable version on several factors which were extrinsic to the witnesses' testimony. There is now much more in the record of this case which supports my conclusion that Dr. Akinrolabu's testimony is credible, and Mr. End's testimony is not. Dr. Akinrolabu's account of what happened on April 5, 1995 is supported in significant respects by the testimony of Ms. Reed and Ms. Sidberry. It is not undercut by the testimony of Mr. Livesey. By contrast, Mr. End's testimony is contradicted in critical respects by the testimony of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry. It is not supported meaningfully by the testimony of Mr. Livesey.

At the June 17, 1997 hearing, I afforded HCFA the opportunity to rebut facts that are in evidence. Tr. 6/17/97 at 11 - 12. I made it clear to the parties that I would not allow rebuttal simply to restate testimony given previously. Id. But, I made it clear also that HCFA would have the opportunity to rebut facts that were newly presented by Petitioner, which HCFA had not responded to previously.

There are facts at issue about which Mr. End might have testified in rebuttal. At a minimum, Mr. End could have clarified whether the conversations he allegedly had with Dr. Akinrolabu on April 5, 1995 occurred in the presence of any of the other witnesses. Mr. End's testimony of February 13, 1996 does not address that issue. Such rebuttal testimony might have been important in light of Dr. Akinrolabu's denial of Mr. End's assertions of what took place, and in light of the failure of any other witness, including Mr. Livesey, to corroborate Mr. End's testimony.

Mr. End was present for the entire hearing on June 17, 1997. HCFA had the opportunity to recall Mr. End to provide testimony to rebut the testimony that was given at the June 17, 1997 hearing by Ms. Reed, Ms. Sidberry, Mr. Livesey, and Dr. Akinrolabu. HCFA chose not to do so. The inference that I draw from Mr. End's failure to testify in rebuttal is that Mr. End was unable to testify to any facts that undercut or contradicted the testimony that was delivered by the other witnesses.

In its decision the appellate panel speculated that Dr. Akinrolabu might have had a greater motive to deliver untruthful testimony than did Mr. End. The appellate panel based this speculation solely on Dr. Akinrolabu's relationship with Petitioner. I find now that Mr. End had a strong motive to be untruthful.

It is apparent from the testimony of the other witnesses that Mr. End was derelict in performing his duties on April 5, 1995. Mr. End's untruthful testimony on February 13, 1996 may have been motivated by a desire on his part to cover up his failure to conduct a survey on that date; and, his decision to base his determinations that Petitioner was not complying with participation requirements on the records that Mr. Livesey obtained, without first ascertaining what those records actually were. It may also have been motivated by an intent to make HCFA Ex. 17 - 35 look like excerpts from Petitioner's clinical files.

HCFA now argues that Ms. Reed, Ms. Sidberry, and Dr. Akinrolabu all were motivated to give untruthful testimony by virtue of their employment relationship with Petitioner. HCFA's posthearing brief at 15. HCFA offers no evidence to support this assertion other than the fact that these witnesses are employees of Petitioner. Its attack on the credibility of the witnesses relies entirely on the premise that employees of providers are inherently biased witnesses. The logic of HCFA's argument is that, in a case where the evidence reduces to the word of a State employee against the word of a provider's employees, the testimony of the State employee must be assumed to be more credible.

I do not presume that a witness will have a motivation to lie by virtue of his or her employment relationship with a provider. Such a presumption would elevate to an even higher plane the burden of proof that is reposed on providers. I reject HCFA's argument that a provider's employees are inherently less honest than are State agency surveyors. I find it to be, at bottom, an unreasonable attempt to stack the deck against a provider in every case in which HCFA and a provider are adversaries.

It is a rare event in a hearing involving HCFA to hear testimony from an individual who is an innocent bystander to the events which are controverted. In most cases involving HCFA and a provider, the witnesses that are called by the provider will have some employment relationship with the provider. In such cases, I assume that, when

an employee of a provider takes an oath to testify truthfully, the employee will do so. It is the same assumption that I make about every witness that HCFA calls to testify.

In any hearing, what I look for to determine credibility is evidence on the record that either substantiates or undercuts the testimony that the witness delivers. That evidence might include the presence or absence of corroborating or contradictory testimony, evidence that is extrinsic to the testimony of the witness, and the demeanor of the witness.

Petitioner asked that I subpoena the employment records of Mr. End, in order to obtain evidence that might show that he has in the past been found to be dishonest. I denied that request. I advised the parties that I considered such an inquiry to be unnecessary in light of my conclusion that each witness would be presumed to be honest, unless shown otherwise by evidence relating to the testimony that the witness delivered at the hearing. I would have no choice but to revisit this determination in future cases if HCFA prevails in its argument that employees of providers must be presumed to be less honest than HCFA's witnesses. Then, I might find the background and employment records of State survey agency employees to be fair game for a provider to explore, in an effort to level the playing field at the hearing.

I find the testimony of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry to be credible, because it is generally consistent and logical. The testimony that these witnesses delivered constitutes a reasonable explanation for what occurred on April 5, 1995. It is in some measure corroborated by the testimony of Mr. Livesey. It is corroborated also by the appearance and contents of HCFA Ex. 17 - 35.

In particular, I find the testimony of Dr. Akinrolabu and Ms. Reed that their interactions on April 5, 1995 were with Mr. Livesey, and not with Mr. End, to be corroborated by the fact that Mr. Livesey, and not Mr. End, prepared the worksheets that are attached to HCFA Ex. 17 - 35. The fact that Mr. Livesey prepared the worksheets is evidence that Mr. Livesey asked for the documents and the Petitioner's staff gave them to him directly. Furthermore, I infer from the worksheets and the absence of any worksheets prepared by Mr. End that, on April 5, 1995, Mr. Livesey conducted an active review of the exhibits, whereas Mr. End did not.

My holding that the testimony of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry is consistent is not a conclusion that the testimony of each of these witnesses matches perfectly in every respect with the testimony of each other witness. It is possible to find minor inconsistencies in the testimony of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry. But, the testimony of these witnesses is highly consistent, given the more than two-year lapse of time between April 5, 1995 and the June 17, 1997 remand hearing.

I watched closely the demeanor of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry at the June 17, 1997 hearing in order to evaluate the credibility of these witnesses. I find from their appearance and the way that they delivered their testimony that the testimony was delivered honestly and without bias. I was particularly impressed with the demeanor of Ms. Reed and Ms. Sidberry.

HCFA asserts that, notwithstanding the assertions to the contrary of Petitioner's employees, the evidence establishes active participation by Mr. End in a compliance survey on April 5, 1995. HCFA contends that Dr. Akinrolabu admits that Mr. End participated in an exit conference on April 5, 1995 which according to HCFA, shows that Mr. End discharged his duties as a surveyor. HCFA's posthearing reply brief at 8 - 9; see Tr. 2/13/96 at 225 - 226. HCFA places emphasis on a phrase uttered by Dr. Akinrolabu in his testimony: "we talked about every other thing about the survey itself, . . ." to show that, in fact, there was an exit conference. Id. at 226.

I take notice that an "exit conference" is a discussion between a surveyor and a provider's representative, held at the completion of a survey, in which the surveyor discloses his or her preliminary findings to the provider's staff and gives the staff an opportunity to respond to them. An exit conference is an important element of a survey, because it gives the provider a final opportunity to explain its operations to a surveyor. Conceivably, a provider might deliver information to a surveyor at an exit conference which changes the surveyor's impression of what he or she found at the survey.

The outcome of this case might be very different if Mr. End had held an exit conference with Dr. Akinrolabu on April 5, 1995. Had he done so, Mr. End might have realized that the Xeroxed copies of documents that Petitioner's employees gave to Mr. Livesey on April 5, 1995 were not excerpts from Petitioner's treatment records, but were in fact, excerpts from Petitioner's billing files. A properly conducted exit conference would have put Petitioner on notice that Mr. End was looking for something other than the billing records which Petitioner gave to Mr. Livesey on April 5, 1995. If a properly conducted exit conference had been held, Petitioner would not be able to assert credibly, that it was unaware that the New Jersey State survey agency intended to review the state of Petitioner's treatment records on April 5, 1995.

I do not find that the excerpt of testimony in question supports HCFA's assertion that there was an exit conference between Mr. End and Dr. Akinrolabu at the close of the April 5, 1995 visit to Petitioner's office. To the contrary, it refutes HCFA's assertion that Mr. End had an exit conference with Dr. Akinrolabu on April 5, 1995. The substance of this testimony is that Dr. Akinrolabu did not have a conference with Mr. End at which Mr. End discussed any findings of noncompliance with Dr. Akinrolabu. This testimony contrasts starkly with Mr. End's assertion that, at the close of the April 5, 1995 visit, he had an exit conference with Dr. Akinrolabu at which Mr. End told

Dr. Akinrolabu that Petitioner was not complying with two conditions of participation. See Tr. 2/13/96 at 137.

The testimony at issue consists of Dr. Akinrolabu's response to a question concerning whether any of Petitioner's records were Xeroxed on April 5, 1995. Dr. Akinrolabu's answer to the question is as follows:

> [o]h, okay. At the end, when they were leaving or when they finished and they said they wanted copies of these. We had an argument about it, about the propriety of giving documents. We argued for some time that he represents HCFA and he has the right to take--records home with him. So then I gave permission for my secretary to make copies for him. Well, that's--for the copies that you have here. That's how he was waiting for--and we talked about every other thing about the survey itself, because he said he has to take all this paperwork to his office to review it before they can tell me anything.

Tr. 2/13/96 at 225 - 226.

What I infer from this testimony is that, at first, Dr. Akinrolabu objected to giving Mr. End a copy of the documents that he gave to Mr. Livesey on April 5, 1995. Dr. Akinrolabu's objection is understandable in light of Mr. End's failure to have explained the purpose for his presence. The testimony shows that Dr. Akinrolabu acceded to Mr. End's request after Mr. End told Dr. Akinrolabu that he represented HCFA and had a right to take documents with him. I do not infer from that statement that Dr. Akinrolabu knew of the precise purpose of Mr. End's visit to the Petitioner's office. Nor do I find from this testimony, including the phrase which HCFA relies on, that Mr. End, even belatedly, explained to Dr. Akinrolabu in any detail why he was at Petitioner's office on April 5, 1995. Most important, the testimony reinforces Dr. Akinrolabu's assertion that Mr. End did not tell Petitioner on April 5, 1995 that there was anything amiss with Petitioner's compliance with Medicare participation requirements. Rather, Mr. End told Dr. Akinrolabu only that he would take back to his office and review the Xeroxed copies of the documents that Petitioner's employees had given to Mr. Livesey on April 5, 1995.

(ii). The relevance of HCFA Ex. 17 - 35 to the issue of whether Petitioner was complying with conditions of participation on April 5, 1995

The evidence that Petitioner offered at the two hearings attacks explicitly the relevance of HCFA Ex. 17 - 35 to HCFA's allegation that Petitioner was not complying with conditions of participation. Petitioner's employees testified that these exhibits are

billing documents, and not clinical records. They testified that billing documents and clinical records as maintained by Petitioner are not interchangeable documents.

The substance of the testimony offered by Petitioner's witnesses is that Petitioner's employees presented Mr. Livesey with excerpts from Petitioner's billing files. It is these excerpts that HCFA introduced as HCFA Ex. 17 - 35. Petitioner did not give excerpts from its clinical records to Mr. Livesey. Petitioner maintained separate billing files and clinical records. Ms. Sidberry maintained billing files in order to give her easy access to information which she used to generate electronic claims for reimbursement. Billing files resemble Petitioner's clinical records in that they contain copies of some, but not all, of the documents that Petitioner maintains as clinical records. One important difference between billing files and clinical records is that, frequently, billing files lack the signatures of physicians.

Petitioner introduced the following evidence:

- As of April 5, 1995, Petitioner maintained separate billing files and clinical records at its Lakewood, New Jersey office. Tr. 2/13/96 at 212 - 213; Tr. 6/17/97 at 20, 33, 35 - 36, 89, 109. The billing files were maintained in a cabinet that was located near where Petitioner's billing clerk worked. Tr. 6/17/97 at 21. Their purpose was to provide the billing clerk with sufficient information so that the billing clerk could generate electronic claims for reimbursement. Id. at 89.

- As of April 5, 1995, Petitioner maintained copies of its clinical records in separate cabinets in a hallway of Petitioner's Lakewood, New Jersey office. Tr. 6/17/97 at 21.

- There are similarities between the billing files and the clinical records. Both sets of documents contain copies of records that were generated in the course of authorizing care for, and providing care to, patients who received physical therapy at long term care facilities. See Tr. 6/17/97 at 20, 36 - 37. However, there are differences, too. In general, the clinical records contain treatment-related documents that are signed appropriately by the individuals responsible for the care, including the physicians who authorized and supervised the providing of care. Id. at 20, 90. Billing files, on the other hand, do not always contain the requisite signatures. Id. at 90. In general, billing files contain those documents that are necessary to do billing activities. Tr. 2/13/96 at 212 - 213.

- As of April 5, 1995, both billing files and clinical records were updated at 30-day intervals. Tr. 6/17/97 at 22 - 23, 102, 111 - 112.

- Billing files and clinical records are not interchangeable files, despite their similarities. They were generated for different reasons. The sole purpose of billing files is to serve as a convenience for Petitioner's billing clerk. Tr. 6/17/97 at 109.

- On April 5, 1995, Petitioner's staff interpreted Mr. Livesey's request to examine records as a request to review billing files. Tr. 6/17/97 at 28 - 29. Therefore, Petitioner's staff made copies of documents in billing files for Mr. Livesey to review. Id.; Tr. 6/17/97 at 29, 92 - 93. Petitioner's staff did not copy clinical records because Petitioner's staff did not interpret Mr. Livesey's request to be a request for clinical records. Tr. 6/17/97 at 27 - 29.

- The clinical records were available for review at Petitioner's Lakewood, New Jersey office on April 5, 1995. Tr. 6/17/97 at 117.

- Neither Mr. End nor Mr. Livesey told Petitioner's staff on April 5, 1995 that the records that Petitioner's staff produced were deficient. Tr. 2/13/96 at 215; Tr. 6/17/97 at 86 - 87.

The testimony that Petitioner's witnesses, particularly Ms. Reed and Ms. Sidberry, offered concerning Petitioner's maintenance of separate clinical records and billing files is consistent, credible, persuasive, and unrebutted. I find from this evidence that the excerpts from Petitioner's billing files, in evidence as HCFA Ex. 17 - 35, are not relevant evidence as to the state of Petitioner's clinical records on April 5, 1995. Petitioner did not give Mr. Livesey excerpts from its clinical records. Petitioner gave Mr. Livesey excerpts from its billing files. No inference may be drawn about the state of Petitioner's clinical records on April 5, 1995 from the contents of Petitioner's billing files.

Much of the appellate panel's decision addresses the question of what inferences might be drawn about the state of Petitioner's clinical records as of April 5, 1995 from the exhibits that were introduced into evidence at the February 13, 1996 hearing. The appellate panel concluded that a reasonable decision maker could infer from the exhibits introduced by HCFA (HCFA Ex. 17 - 35) that Petitioner's *clinical records* were deficient as of April 5, 1995. The predicate for this analysis is that HCFA Ex. 17 - 35, whether they are characterized as "billing" records or as "clinical" records are at least a subset of Petitioner's actual clinical files. The appellate panel observed that many of the documents that are present in HCFA Ex. 17 - 35 appear to consist of the type of document one might expect to find in a provider's clinical files.

However, the appellate panel did not have the benefit of the evidence that was introduced at the June 17, 1997 hearing. That evidence makes it clear that Petitioner did not maintain billing files as a subset of anything. It maintained its billing files solely as a convenient way for its billing clerk, Ms. Sidberry, to generate claims. The fact that the billing files may in some respects resemble what might appear in clinical records does not permit inferences as to the state of Petitioner's clinical records.

The testimony that Petitioner's witnesses offered concerning the way in which they maintain documents at Petitioner's Lakewood, New Jersey office is not controverted by any evidence offered by HCFA. The testimony of Petitioner's witnesses is credible. I find, based especially on the testimony of Ms. Reed and Ms. Sidberry, that there is a significant difference between what is contained in a billing file maintained by Petitioner and what is contained in a clinical record. The uncontroverted testimony of Ms. Reed and Ms. Sidberry is that clinical records contain signed and completed treatment records, whereas billing files may not contain signed and completed treatment records. Petitioner maintains the two types of records separately, for separate reasons. The two types of records are not fungible.

In its decision, the appellate panel stated: "[t]he obvious question is why [Petitioner] would produce on the date of the survey copies of incomplete patient records (for example, orders for treatment and plans of care lacking physician signatures), if in fact it had completed copies of these documents readily accessible as required." Appellate panel decision at 30. From the entire record of this case, the obvious answer to this question is that Petitioner produced exactly what its staff thought they were being asked to produce. Mr. End made no request for documents on April 5, 1995, except to ask for Xeroxed copies of what Mr. Livesey received. Petitioner's employees interpreted Mr. Livesey's request for documents as being a request to see Petitioner's billing files. Thus, they gave Mr. Livesey billing files. It did not occur to the staff to give Mr. Livesey patient records. The fact that the billing files did not contain complete patient records was not a relevant consideration for Petitioner's staff on April 5, 1995.

I find Mr. Livesey's answers to questions about what it was that he asked for on April 5, 1995 to be evasive and shifting. It was only after considerable prompting that Mr. Livesey recalled what it was that he asked for on April 5, 1995. Tr. 6/17/97 at 55 - 57; see Id. at 60. At bottom, however, I find that the precise nature of Mr. Livesey's request of Petitioner's employees on that date to be irrelevant. Mr. Livesey did not represent the New Jersey State survey agency on April 5, 1995. For that reason, no inferences adverse to Petitioner may be drawn from Petitioner's presentation of billing files to Mr. Livesey on April 5, 1995, even if Petitioner's employees might have responded to Mr. Livesey's request more pertinently by giving him excerpts from Petitioner's clinical records.

It is apparent from the testimony of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry that, whatever Mr. Livesey asked for, Petitioner's employees interpreted his request as a request to produce documents from Petitioner's billing files, and not as a request to produce documents from Petitioner's clinical records. It was not unreasonable for Petitioner's staff to conclude that Mr. Livesey was asking for documents from Petitioner's billing files, given that Mr. Livesey was conducting a claim integrity check. Tr. 2/13/96 at 211. But, even if Petitioner's employees completely misunderstood what Mr. Livesey wanted, their unimpeached testimony is that they construed the request as being a request for billing files.

I base my decision that HCFA Ex. 17 - 35 are not relevant evidence of the state of Petitioner's clinical records on April 5, 1995 on the uncontradicted evidence that: Petitioner maintained separate billing files and clinical records; the contents of the two records differed; and that rightly or not, Petitioner's staff interpreted Mr. Livesey's request as a request to see billing files. It is irrelevant whether Petitioner's staff reasonably construed or misconstrued Mr. Livesey's request for documents. It is irrelevant also whether the staff *ought* to have given Mr. Livesey excerpts from Petitioner's clinical records in response to Mr. Livesey's request.

Petitioner's possible failure to comprehend the extent of Mr. Livesey's request on April 5, 1995 is not a legitimate basis to assert that Petitioner was somehow derelict in giving documents to Mr. End. Mr. Livesey was not at Petitioner's facility on April 5, 1995 as the agent of the State survey agency or as an aide to Mr. End. Mr. End had an independent responsibility to make a request for documents from Petitioner.

Having found that, however, I conclude further that there is not even a suggestion of evidence that Petitioner's staff gave billing documents to Mr. Livesey to evade a request by Mr. Livesey for treatment records. Nor is there any evidence that the staff was trying to evade a request by Mr. End for clinical records. Mr. End made no request to review records on April 5, 1995.

In its decision, the appellate panel scrutinized HCFA Ex. 17 - 35 and found several reasons to conclude that the documents contained in these exhibits did not support the testimony that Dr. Akinrolabu gave at the February 13, 1996 hearing to the effect that these documents are from Petitioner's billing files. But, the appellate panel did not have the benefit of the testimony that Petitioner's employees delivered on June 17, 1997. I conclude that this testimony resolves any reservations that might exist concerning Dr. Akinrolabu's assertion that Petitioner maintains separate billing files and clinical records.

The appellate panel noted that Dr. Akinrolabu testified that Mr. Livesey had requested to see forms known as UB-92s (also referred to as UB-82s), but that no such forms were extant in HCFA Ex. 17 - 35. The appellate panel concluded that an inference

could be drawn from the absent forms that the documents in HCFA Ex. 17 - 35 were abstracted from Petitioner's clinical records. However, at the June 17, 1997 hearing, Ms. Reed testified to the effect that Mr. Livesey did not request to be provided with copies of UB-92s. See Tr. 6/17/97 at 32. Her testimony is that she showed Mr. Livesey a copy of a UB-92 and that he did not request that additional copies be provided to him. Id.

Mr. Livesey was present during Ms. Reed's testimony and, I presume, listened to it. He was the next witness to testify after Ms. Reed testified. He did not contradict Ms. Reed's testimony. HCFA had the opportunity to ask Mr. Livesey specifically whether he requested that Petitioner furnish him with copies of UB-92s. HCFA did not ask that question of Mr. Livesey.

In its decision, the appellate panel criticized as inconsistent Dr. Akinrolabu's account of what Mr. Livesey asked for on April 5, 1995. Dr. Akinrolabu's testimony at the two hearings is not materially inconsistent. It is, furthermore, consistent with the testimony given by Ms. Reed and Ms. Sidberry.

I conclude that, even if there are minor inconsistencies in Dr. Akinrolabu's testimony, Ms. Reed gave accurate and consistent testimony as to what Petitioner's employees believed that Mr. Livesey asked for, and as to what they gave to Mr. Livesey in response to his request. Consequently, any minor inconsistencies in Dr. Akinrolabu's testimony are irrelevant. Ms. Reed personally spoke with Mr. Livesey concerning what he wanted to see. Tr. 6/17/97 at 27 - 28. Ms. Reed personally took charge of producing documents to give Mr. Livesey what she thought he wanted. Id. at 29. Correctly or not, Ms. Reed interpreted Mr. Livesey's request as being a request for excerpts from Petitioner's billing files.

The appellate panel suggested that HCFA Ex. 17 - 35 are prima facie evidence as to the state of Petitioner's clinical records, because there is no distinction in law between clinical records and billing files. It found that "it is difficult to see what sort of billing records would support the legitimacy of a claim without containing most of the same information that would be required in clinical records showing physician involvement . . ." Appellate panel decision at 48. The inferences that the appellate panel drew, for purposes of finding that HCFA established a prima facie case based on these exhibits, is that the absence of a distinction in law between clinical records and billing documents undercuts Petitioner's assertion that it maintained separate billing files and clinical records.

The appellate panel was not in possession of the evidence that is now of record. The evidence establishes that Petitioner's staff generated separate billing files solely for the convenience of Petitioner's clerical employees. Tr. 6/17/97 at 46, 109. The purpose of creating the billing files was to facilitate generating claims.

The purpose of the billing files was not to create evidence that established that claims were legitimate. The billing files were not created for the purpose of complying with any requirement which governs participation in Medicare or for complying with Medicare billing regulations. The possibility that the billing files may not have documented adequately the reimbursement claims that Petitioner was submitting to Aetna Insurance Company is irrelevant to the issue of whether Petitioner maintained separate billing files and clinical records.

3. Petitioner's proof that HCFA's prima facie case is not supported by credible or relevant evidence reduces HCFA's case against Petitioner to unsubstantiated allegations.

The evidence which Petitioner introduced on February 13, 1996 and June 17, 1997 renders wholly without credibility and relevance the evidence on which HCFA based its prima facie case. I reject as a fabrication Mr. End's testimony concerning what happened on April 5, 1995. I find that HCFA Ex. 17 - 35 contains no evidence that is relevant to the state of Petitioner's clinical records on that date.

There is no credible evidence to show that Petitioner failed to maintain treatment records on April 5, 1995 that were readily accessible to Mr. End. Mr. End made no request to review the contents of Petitioner's records. I find to be not credible his testimony that he made such a request and that he was told by Petitioner's staff that the records were unavailable. I find to be a fabrication Mr. End's assertion that, on April 5, 1995, Petitioner's clinical records had to be faxed in to Petitioner's Lakewood, New Jersey office from long term care facilities. I also find to be a fabrication Mr. End's assertion that Petitioner's staff eventually gave him faxed clinical records on April 5, 1995. Mr. End got documents from Mr. Livesey on that date, and not from Petitioner's staff.

There is no relevant evidence adduced by HCFA to support HCFA's assertions that, as of April 5, 1995, Petitioner failed to assure that physicians were authorizing and reviewing care as is required by law, and that Petitioner's treatment records were deficient. In making its prima facie case, HCFA relies entirely on the contents of HCFA Ex. 17 - 35 to support these assertions. As I hold above, these exhibits are not clinical records, but are excerpts from Petitioner's billing files. Therefore, HCFA Ex. 17 - 35 are not relevant evidence of the state of Petitioner's clinical records on April 5, 1995. Nor are they relevant evidence of the degree of authorization and supervision that physicians were providing to physical therapists who worked for Petitioner.

In its posthearing brief, HCFA asserts that it should not be "prejudiced" by the possibility that Petitioner maintained multiple sets of records for different purposes. HCFA's posthearing brief at 30. I understand HCFA to be asserting that Petitioner may not avoid a duty to supply information to a surveyor by supplying the wrong

records in response to a request. But, that is not what happened in this case, at least insofar as Mr. End is concerned. My conclusion is that Mr. End made no request of Petitioner for documents. Petitioner may have misunderstood what Mr. Livesey was asking for. But, there was no misunderstanding of what Mr. End was asking for, because Mr. End asked for nothing. And, even assuming that Petitioner's staff were remiss in what they supplied to Mr. Livesey, Mr. Livesey was not at Petitioner's office on April 5, 1995 as a representative of the New Jersey State survey agency.

I do not find that Petitioner's staff was under any duty to ascertain what Mr. End might have wanted to review--but did not ask for--in light of Mr. End's presence at Petitioner's facility on April 5, 1995. See HCFA's posthearing brief at 23, n.13. Petitioner was not obligated to guess at what Mr. End might have wanted to see. Mr. End had a duty to communicate to Petitioner what it was that he wanted to see. Mr. End made no communications to Petitioner's staff on April 5, 1995, aside from asking to see the file cabinets in which Petitioner maintained its clinical records.

The argument that HCFA seems to be making is that Mr. End's very presence at Petitioner's facility on April 5, 1995, was sufficient for Petitioner's staff to infer that he was there for a reason that was connected to Petitioner's certification status. From this, HCFA seems to argue that Petitioner's staff was under a duty to ascertain what Mr. End was there for, and, after doing so, to give him what they determined he wanted to see.

I find this argument to be without merit. It ignores the obligations that are imposed on State agency surveyors and on providers and their employees by the regulations which govern compliance surveys. It also ignores the facts of this case.

The regulations contained in 42 C.F.R. Part 488 impose a duty on State agency surveyors to follow procedures established by HCFA to assure that accurate and reliable information is obtained at a survey. See 42 C.F.R. § 488.26. The regulations which govern surveys of providers at 42 C.F.R. Part 488 additionally impose on a provider a duty to comply with a surveyor's request.

However, the regulations do not impose on a provider the requirement that it divine the surveyor's purpose where the surveyor fails to articulate his or her purpose. There is nothing in the regulations to suggest that the mere presence of a State agency surveyor at a provider's facility triggers a duty on the provider's part to interrogate the surveyor.

The preponderance of the evidence is that, on April 5, 1995, Mr. End did not explain his purpose for accompanying Mr. Livesey, nor did he ask even the elementary questions of Petitioner that would create an obligation by Petitioner to produce its clinical records for Mr. End to review. Mr. End was content to allow Mr. Livesey to

request documents and to rely on what Mr. Livesey obtained. The New Jersey State survey agency, and ultimately, HCFA, were held hostage to the response that Petitioner made to Mr. Livesey's request as a consequence of Mr. End's failure to explain the purpose of his visit or to request documents from Petitioner.

In fact, Mr. End's presence in the company of Mr. Livesey at Petitioner's Lakewood, New Jersey office on April 5, 1995 did not suggest to Petitioner's employees that they should produce Petitioner's clinical records for Mr. End to review. Petitioner's employees had no reason to conclude from Mr. End's unexplained appearance that Mr. End was at Petitioner's office to examine Petitioner's clinical records. Furthermore, they had at least some reason not to conclude that Mr. End was at Petitioner's office to examine clinical records.

As of April 5, 1995, Petitioner's employees had every reason to believe that the New Jersey State survey agency had determined Petitioner to be in compliance with all participation requirements, and no reason to assume that the New Jersey State survey agency, or Mr. End, suspected otherwise. For that reason, Petitioner's employees did not have reason to suspect--absent any announcement from Mr. End about his purpose for being at Petitioner's office on April 5, 1995--that, on April 5, 1995, Mr. End was present at Petitioner's office to survey Petitioner's clinical records. On February 22, 1995, only six weeks previous to April 5, 1995, Mr. End had conducted a survey of Petitioner after which he had certified that Petitioner was complying with *all* conditions of participation, including the condition which governed Petitioner's clinical records. Tr. 2/13/96 at 68 - 69; P. Ex. 3. The New Jersey State survey agency had communicated these findings of compliance to Petitioner. P. Ex. 3; see P. Ex. 2.

Mr. End and his supervisor, Mr. Kozek, testified that they certified Petitioner as complying with all conditions of participation after the February 1995 survey even though they had determined that, as of that date, Petitioner was not complying with the condition governing clinical records. Tr. 2/13/96 at 68 - 69, 169 - 170. According to Mr. End, he decided to give Petitioner the benefit of the doubt at the February 22, 1995 survey. Tr. 2/13/96 at 69. Mr. End and Mr. Kozek both aver that it was their intent that Mr. End return to Petitioner's Lakewood, New Jersey office at a later date to check for compliance with the clinical records requirement. Id. at 69, 170 - 171. They aver that the purpose of the April 5, 1995 visit was to conduct this planned check. Id.

Mr. End's and Mr. Kozek's determination that Petitioner was not in compliance with a condition of participation and their determination to give Petitioner the benefit of the doubt are determinations which Mr. End and Mr. Kozek did not share with Petitioner. The New Jersey State survey agency never told Petitioner that it was giving Petitioner the benefit of the doubt, despite Petitioner's continued noncompliance with the clinical records condition of participation. To the contrary, after the February 22, 1995

survey, the New Jersey State survey agency told Petitioner that it had determined that Petitioner was complying with *all* conditions of participation. P. Ex. 3. Nor does the record reflect any communication from the New Jersey State survey agency to Petitioner warning it that Mr. End might return to Petitioner's office to check on its compliance with the clinical records condition.

The exhibits that are in evidence concerning the February 22, 1995 survey establish that Petitioner's employees' assumed that as of April 5, 1995 they were not under scrutiny by the New Jersey State survey agency for possible continued failure to comply with the clinical records condition. These exhibits include the communication that Petitioner received from the New Jersey State survey agency telling Petitioner that it had been found to be in compliance with all conditions of participation. P. Ex. 3. They also include a letter that Dr. Akinrolabu sent to Mr. End on February 28, 1995. HCFA. Ex. 10; P. Ex. 2. Mr. End requested that the letter be sent to him by Petitioner after the February 22, 1995 survey to assure that Petitioner was compiling and maintaining copies of its clinical records at its Lakewood, New Jersey office. Tr. 2/13/96 at 69 - 70.

Petitioner's version of the exhibit contains two handwritten notations at the bottom of the exhibit. P. Ex. 2. These notations were made by Dr. Akinrolabu. Tr. 2/13/96 at 242. The first notation states:

> [i]nspector states that a letter stating that all files shall be stored in the main office will complete the final requirement.

Id. The second notation, which I infer, was written by Dr. Akinrolabu at a later date states:

> [n]o [d]eficiency or HCFA Form 2567 was sent out following this revisit! Because according to inspector we have met all requirements!

Id. There is nothing of record to suggest that Dr. Akinrolabu added these comments to P. Ex. 2 at dates that were not in close proximity to the February 22, 1995 survey. The inference I draw from these comments is that Dr. Akinrolabu made this second handwritten notation on his copy of P. Ex. 2 to express his satisfaction at being told by the New Jersey State survey agency that Petitioner was complying with all participation requirements.

Thus, so far as Petitioner's employees were aware, the New Jersey State survey agency told Petitioner only six weeks previous to Mr. End's April 5, 1995 visit that it was complying with all conditions of participation. That information would have given Petitioner's employees some sense of security. And, in light of that, Mr. End's

presence, without explanation, on April 5, 1995 would not put Petitioner's employees on notice that there was anything in particular that Mr. End wanted to see on that date.

I emphasize that Mr. End's failure to comply with requisite survey procedures on April 5 is not the basis for my decision that HCFA's case against Petitioner is without substantiation. This is not a case where, in the process of conducting a survey, a surveyor fails to complete a form, or fails to provide information to a provider precisely as is called for by regulations or State manuals which govern surveys. If such were the case, I would not necessarily find the evidence that was obtained at the survey lacked credibility or is irrelevant. What occurred in this case is not a "procedural defect." The preponderance of the evidence is that *no survey was conducted* on April 5, 1995 by Mr. End.

4. HCFA is without authority to terminate Petitioner's participation in Medicare.

HCFA's case against Petitioner constitutes only unsubstantiated allegations that, as of April 5, 1995, Petitioner was not complying with conditions of participation in Medicare. HCFA is without authority to terminate Petitioner's participation in Medicare.

I recognize that my decision leaves open the question of whether Petitioner actually was complying with participation requirements as of April 5, 1995. I am concluding that the issue of Petitioner's actual compliance is out of bounds because the preponderance of the evidence is that HCFA did not make substantiated allegations of noncompliance. The case is on the exact footing as if HCFA had alleged, but not made, a prima facie case that Petitioner failed to comply with conditions of participation. As I conclude at Finding 1, a provider is not obligated to prove affirmatively that it was complying with participation requirements either where HCFA fails to establish a prima facie case, or where the provider proves, by a preponderance of the evidence, that HCFA's prima facie evidence is not credible or relevant.

I anticipate that my decision will raise a concern that a provider that is not, in fact, complying with conditions of participation might, in the unique circumstances of this case, circumvent its duty to comply with participation requirements. That in turn raises the question of whether my decision means that beneficiaries might be unprotected from a provider that is failing to discharge its duties under the Social Security Act and regulations.

The possibility exists that the question of a provider's compliance might not get addressed in a case, where, as here, the provider proves that HCFA fails to offer credible or relevant evidence of noncompliance. Fortunately, this case comprises a unique instance of dereliction of responsibility by a State agency surveyor which I have

not seen in any other case that I have heard. For that reason alone, I am confident that the circumstances of this case do not provide much of a precedent for future cases. Furthermore, my decision does not leave HCFA without recourse to protect the welfare of those beneficiaries who are cared for by Petitioner. Nothing in my decision precludes HCFA from authorizing that a proper compliance survey be done of Petitioner at any time. That survey may be made without prior notice being given to Petitioner.

I understand the temptation to make dispositive findings based on evidence that a provider offers at a hearing as alternative evidence to evidence which is intended to refute HCFA's prima facie case. The logic which underlies this temptation is that the provider willingly offers the affirmative evidence. If such evidence fails to prove compliance with participation requirements--or suggests that the provider was not complying with participation requirements--then, the logic would be that a decision adverse to the provider could be based solely on the provider's affirmative evidence.

There are both legal and practical problems with this approach. First, it would render meaningless the duty of HCFA to establish a prima facie case based on credible and relevant evidence. Second, it would motivate a provider to request the administrative law judge to rule as to whether the provider rebutted completely HCFA's prima facie case, before the provider is put to the task of offering affirmative evidence of its compliance. That in turn, might necessitate lengthy recesses in hearings while the administrative law judge evaluates the evidence which relates to HCFA's prima facie case. Time and resources do not permit such split hearings.

B. Additional Findings which I make to satisfy concerns that the appellate panel may have directed me to address

As I hold at Finding 1, a provider is under no obligation to prove affirmatively that it is complying with conditions of participation, either where HCFA fails to offer a prima facie case of noncompliance, or where, the provider completely rebuts the evidence on which HCFA relies to make its prima facie case. Here, Petitioner has rebutted completely HCFA's prima facie case. My decision that HCFA is not authorized to terminate Petitioner's participation in Medicare thus ends with my Finding 4.

Were this case mine to hear and decide without direction from the appellate panel, I would not make additional Findings to address the question of whether Petitioner proved affirmatively that, as of April 5, 1997, it was complying with Medicare conditions of participation. Such Findings would be completely unnecessary, given the fact that Petitioner fully rebutted HCFA's prima facie case. Any Findings I might make to address Petitioner's affirmative evidence of compliance would be dicta of no legal effect.

In its analysis of the case, the appellate panel found that HCFA made a prima facie case of noncompliance and then turned to the issue of whether Petitioner's evidence established affirmatively that Petitioner was complying with participation requirements. The appellate panel directed me, on remand, to give the Petitioner opportunity to supplement its affirmative proof, in light of the appellate panel's analysis of the evidence that Petitioner offered at the February 13, 1996 hearing.

The appellate panel did not address the possibility that, on remand, Petitioner might opt to attack the credibility and relevance of the prima facie evidence that HCFA offered on February 13, 1996. The appellate panel's decision does not address--although it does not preclude--the possibility that, on remand, Petitioner might establish a complete rebuttal to HCFA's prima facie case.

It is not clear in the appellate panel's decision whether the appellate panel would want me to make Findings concerning affirmative proof of compliance offered by Petitioner in light of my Finding that Petitioner rebutted completely HCFA's prima facie case. In fact, absent an apparent directive from the appellate panel that I make such Findings, it would be error for me to do so. I conclude that it is prejudicial to require Petitioner to prove affirmatively that it complied with participation requirements where HCFA has not established by credible and relevant evidence that Petitioner failed to comply with those participation requirements.

I believe that my decision would be consistent with the appellate panel's remand order if I limit it to the Findings I make that Petitioner completely rebutted HCFA's prima facie case. However, I do not want the appellate panel to view my decision on remand as being incomplete. For that reason alone, I make additional Findings in this section, solely as dicta, which address the affirmative evidence offered by Petitioner. I stress that these additional Findings have no bearing on my decision that HCFA is without authority to terminate Petitioner's participation in Medicare.

The additional Findings that I make address the question of whether the affirmative evidence that Petitioner offered at the two hearings proves that Petitioner was complying with participation requirements as of April 5, 1995. These Findings do not address the question of whether Petitioner actually complied with those requirements. As Petitioner notes, it is impossible for Petitioner to reconstruct the precise state of its treatment records as of April 5, 1995. That is because it was never asked on April 5, 1995 to produce those records and nearly one year elapsed before Petitioner was put to the task of reconstructing those records at the February 13, 1996 hearing. Therefore, it is not possible to draw any conclusions as to what Petitioner's treatment records actually stated on April 5, 1995.

The additional Findings which I make, solely as dicta, are as follows:

> ***5. Petitioner proved that, on April 5, 1995, its clinical records were readily accessible for review by a surveyor as is required by 42 C.F.R. § 405.1722.***

I find from the unrebutted testimony of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry, that, as of April 5, 1995, Petitioner was complying with its previous agreement to maintain copies of its clinical records, updated at 30-day intervals, at its Lakewood, New Jersey office. See HCFA Ex. 10; P. Ex. 2. Petitioner thus proved that it was complying with the requirement of 42 C.F.R. § 405.1722 that it maintain clinical records that are readily accessible.

The only credible and relevant evidence which is of record to establish whether Petitioner's clinical records would have been available for review, on April 5, 1995, had Mr. End asked for them, is the testimony of Dr. Akinrolabu, Ms. Reed, and Ms. Sidberry. The credible testimony of these witnesses is that copies of clinical records, updated at 30-day intervals, were maintained at Petitioner's Lakewood, New Jersey office. Tr. 6/17/97 at 21, 24, 89 - 90, 98, 102 - 103, 117. These witnesses assert, also without contradiction, that they would have produced clinical files on April 5, 1995, had they been requested to produce them on that date. Id.

> ***6. Petitioner did not prove that, as of April 5, 1997, it was complying with requirements of participation stated in 42 C.F.R. §§ 405.1717 (physician review and approval of plans of care and progress reviews) and 405.1722 (prompt completion of clinical records).***

At the February 13, 1996 hearing, Petitioner offered exhibits consisting of P. Ex. 9 - 28 in order to show that it had in its possession a more complete set of records than that which HCFA offered as HCFA Ex. 17 - 35. In my original decision, I held, as I do here, that HCFA Ex. 17 - 35 were not relevant to evaluating the state of Petitioner's compliance with conditions of participation as of April 5, 1995. I evaluated the issue of Petitioner's compliance with conditions of participation based on P. Ex. 9 - 28.

In my original decision I held that, based solely on P. Ex. 9 - 28, HCFA had failed to prove that Petitioner was not complying, either with the condition of participation stated in 42 C.F.R. § 405.1717, or with the condition of participation stated in 42 C.F.R. § 405.1722. I held that P. Ex. 9 - 28 did not establish credible evidence that Petitioner was failing to comply with the physician approval of plans of care and progress reviews stated in 42 C.F.R. § 405.1717. Specifically, I held that HCFA did not prove that Petitioner had failed, for each patient at issue, to generate a written plan of care and progress reviews established and periodically reviewed by a physician. For that reason, I concluded that HCFA had failed to prove that Petitioner was not complying with the

applicable requirements of 42 C.F.R. § 405.1717, or with the overall condition of participation stated in the regulation.

With respect to Petitioner's compliance with 42 C.F.R. § 405.1722, I held that P. Ex. 9 - 28 showed that Petitioner was not complying with the standard of participation established in 42 C.F.R. § 405.1722(c), governing timely completion of clinical records. Specifically, I held that, although Petitioner's exhibits established that physicians had reviewed and approved plans of care and patient progress reviews, the exhibits also established that, in some instances approvals had not been accomplished timely. I held, however, that P. Ex. 9 - 28 did not establish a pattern of noncompliance sufficient to prove a condition-level deficiency. For that reason, I concluded that HCFA failed to prove that Petitioner was deficient under this condition.

The appellate panel decided that I had erred in allocating the ultimate burden of persuasion to HCFA. I have discussed this holding above. The appellate panel concluded also, based on its analysis both of HCFA Ex. 17 - 35 and P. Ex. 9 - 28, that HCFA had established a prima facie case that Petitioner had not complied with the conditions of participation stated in 42 C.F.R. §§ 405.1717 and 405.1722. It held that P. Ex. 9 - 28 were insufficient to overcome the prima facie evidence of noncompliance contained in HCFA Ex. 17 - 35.

As I hold at Findings 2 - 4, Petitioner has established that HCFA Ex. 17 - 35 are not relevant evidence of Petitioner's compliance with participation requirements. The *only* relevant evidence of the state of Petitioner's records is evidence introduced by Petitioner. This includes P. Ex. 9 - 28 and additional exhibits which Petitioner offered at the June 17, 1997 hearing as P. Ex. 30 - 34. P. Ex. 30 - 34 consist of the affidavits of physicians who provided care for some of the residents whose records are in evidence as P. Ex. 9 - 28.

On remand, I have evaluated P. Ex. 9 - 28 and P. Ex. 30 - 34 in order to decide whether these exhibits establish that Petitioner was complying with conditions of participation as of April 5, 1995. I base my conclusions on the following considerations:

- The appellate panel held that P. Ex. 9 - 28 are not by themselves, reliable evidence that Petitioner was complying with the physician approval and review requirements of 42 C.F.R. § 405.1717. Appellate panel decision at 60. The appellate panel concluded that the absence of dates next to physicians' signatures in the exhibits made it less likely that reviews occurred within the 30-day period required by regulations. Id. The appellate panel noted additionally that in some instances, progress reviews in P. Ex. 9 - 28 are unsigned by physicians.

- The appellate panel held that P. Ex. 9 - 28 are not by themselves sufficient to establish that Petitioner complied with clinical records requirements of 42 C.F.R. § 405.1722. In my original decision, I held that on their face, P. Ex. 9 - 28 established that Petitioner was not complying with a standard of 42 C.F.R. § 405.1722. I found that P. Ex. 9 - 28 established that, in some instances physicians had signed records more than 14 days after their creation, in contravention of the standard. I found also that, in many instances physicians had not dated their signatures. Original decision at 26 - 27. I held that HCFA failed to prove that Petitioner's standard-level deficiencies were so severe as to prove that Petitioner failed to comply with the overall condition stated in the regulation. The appellate panel noted that Petitioner did not appeal my conclusion that standard-level deficiencies were established. It held that the burden was on Petitioner to prove that these deficiencies were not of a condition level and not on HCFA to prove that they were of a condition level. The appellate panel held that the evidence offered by Petitioner at the February 13, 1996 hearing did not prove that Petitioner's deficiencies were of less than a condition level of severity.

- The appellate panel imposed on Petitioner the burden of proving that any failure by it to comply with a standard of participation was not so severe as to be a condition-level deficiency justifying termination of its participation in Medicare.

a. The evidence offered by Petitioner concerning its compliance with the physician approval and review requirements of 42 C.F.R. § 405.1717

The starting point for my analysis of Petitioner's evidence of its compliance with the requirements of 42 C.F.R. § 405.1717 is the appellate panel's conclusion that P. Ex. 9 - 28 are insufficient to establish that Petitioner was in compliance with the requirements of the regulation. In effect, the appellate panel directed me to draw inferences adverse to Petitioner from the absence of dates next to physicians' signatures in P. Ex. 9 - 28. An inference that I must draw is that, where a physician signed a record, but did not date that signature, then the record was not executed timely by that physician. The additional, and more significant, inference that I am required by the appellate panel to draw is that untimely execution of a record by a physician evidences failure by that physician to give approval for treatment or to conduct timely reviews of treatment.

I find that, when P. Ex. 9 - 28 are reviewed in light of the appellate panel's directives to me, they do not establish that Petitioner complied with the requirements of 42 C.F.R. § 405.1717. Many of the exhibits contain numerous undated signatures of

physicians. Some of the documents within the exhibits, particularly progress reviews, are unsigned.

At the June 17, 1997 hearing, Petitioner attempted to buttress its proof of compliance by offering the affidavits of four physicians. P. Ex. 30 - 34. These affidavits were offered to show that the physicians gave requisite approvals and made timely reviews of care. For example, P. Ex. 30 is the affidavit of Jacqueline Gettys, M.D. In her affidavit, Dr. Gettys avers that she reviewed the clinical records of care provided to four patients during the months of January and February 1995. P. Ex. 30 at 1. Dr. Gettys avers that she certified the plans of care for all of these patients, and reviewed the care provided to them, at 30 - day intervals. Id. at 2. She avers further that, in some instances, she did not personally date her signatures on the clinical records, but adopted the existing date on the records. Id. Dr. Gettys denies back-dating any signatures. Id.

The other affidavits are similar in appearance and content to P. Ex. 30. P. Ex. 31 - 34. In total, they account for the care that four physicians provided to 10 of the 19 patients whose records are in evidence as P. Ex. 9 - 28.

The affidavits that Petitioner offered are not specific. None of the doctors whose affidavits are in evidence address the contents of specific clinical records. None of the doctors attest as to why his or her signature might be missing from a particular record, why some records are missing signatures, or why some are dated after the fact. By the same token, HCFA sought neither to cross-examine the authors of any of the affidavits nor to offer rebuttal evidence. The general conclusions in each of the affidavits are uncontradicted by any evidence offered by HCFA.

I conclude that P. Ex. 30 - 34 provide assurance, with respect to 10 of the 19 patients at issue, that physicians provided the approvals and reviews of care that are required under 42 C.F.R. § 405.1717. However, these affidavits do not address the deficiencies that the appellate panel found extant in the remaining cases. I conclude, therefore, that Petitioner did not prove that it was complying with the requirements of 42 C.F.R. § 405.1717 in those instances of care not addressed in P. Ex. 30 - 34.

The appellate panel made it plain that it was Petitioner's burden to prove that any deficiencies it manifested were of less than condition-level severity. Petitioner has not offered any evidence to address this issue. Therefore, I conclude that Petitioner did not prove that its deficiencies under 42 C.F.R. § 405.1717 were of less than a condition level of severity.

b. The evidence offered by Petitioner concerning its compliance with the clinical records requirements **of 42 C.F.R. § 405.1722**

As I note above, it is not a matter in dispute that Petitioner failed to comply with the standard of participation stated at 42 C.F.R. § 405.1722(c). The appellate panel concluded that it is Petitioner's burden to prove that this deficiency is of less than a condition level of severity. Petitioner failed to adduce any evidence at the February 13, 1996 and June 17, 1997 hearings which addresses this question. I conclude that Petitioner failed to prove that its failure to comply with the standard of participation was of less than a condition level of severity.

/s/

Steven T. Kessel
Administrative Law Judge