DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Social Service Board of North Dakota
Docket No. 79-160-ND-HC
Decision No. 166

DATE: April 30, 1981

DECISION

The Social Service Board of North Dakota (State) appealed from a penalty disallowance of $55,090 made by the Health Care Financing Administration (Agency) pursuant to Section 1903(g) of the Social Security Act (the Act) for the quarter ending September 30, 1978. The penalty disallowance was made after an Agency validation survey, required by Section 1903(g)(2) of the Act, in which the Agency determined that the records for thirteen patients in five facilities did not meet the certification requirement of Section 1903(g)(1)(A) of the Act. For reasons stated below, we conclude that the disallowance should be upheld.

This decision is based on the State's application for review, the Agency's response to the appeal, a supplemental memorandum filed by the Agency informing the Board of a Comptroller General's decision concerning this Section of the Act, a memorandum filed by the State concerning the Agency's response to the appeal, and the parties' responses to the Board's Invitation to Brief, dated February 23, 1981. We have determined that there are no material facts in dispute which a hearing or conference would help resolve and that a conference or hearing would not assist the development of the issues.

Pertinent Statutes, Regulations, and Agency Policy

Section 1903(g) of the Act requires that the State agency responsible for the administration of the State's Medicaid plan under Title XIX of the Act show to the satisfaction of the Secretary that there is an "effective program of control over utilization of" long-term inpatient services in certain facilities, including skilled nursing facilities (SNFs). This showing must be made for each quarter that the federal medical assistance percentage (FMAP) is requested with respect to amounts paid for such services for patients who have received care for 60 days in SNFs, or the FMAP will be decreased according to the formula set out in Section 1903(g)(5). The satisfactory showing must include evidence that "in each case for which payment is made under the State plan, a physician certifies at the time of admission, or, if later, the time the individual applies for medical assistance under the State plan ... that such services are or were required to be given on an inpatient basis because the individual needs or needed such services" (Section 1903(g)(1)(A)). This statutory

requirement is implemented by regulation. The applicable regulation for the period in question in this appeal was 42 CFR 450.18(a)(2), which stated that certification must occur "at the time (sic) admission or, in the case of an individual who makes application for assistance while in an institution, prior to authorization of payment ...." Action Transmittal SRS-AT-75-122, dated November 13, 1975, contains statements that "define and clarify what is required in order for States to be considered in adherence" with the regulatory requirement. This Action Transmittal was addressed to State Administrators and "other interested agencies and organizations."

SRS-AT-75-122, November 13, 1975 stated that certification is --

> the process by which a physician attests to an individual's need for a specific level of institutional care not later than the date of admission....

It listed several conditions "which must be met in order for the certification to be considered valid." The certification must be in writing, it must be signed by a physician using his/her signature or initials, and the certification must be dated at the time it is signed or initialed. Under the condition that the state agency describe what type of documentation it will require for certification, several examples of documents acceptable as certifications are listed, including a statement signed and dated by an attending, staff, or consultant physician that the patient needs a particular level of care, physician orders signed and dated on or before the date of admission, or a medical evaluation signed and dated by a physician prior to admission. The Agency's policy, as expressed in its instructions to validation survey reviewers, is that if initials cannot be positively identified as those of a physician, they are not acceptable. Means of identification include the abbreviations "M.D." or "D.O." written after the initials, or reviewing the patient's record in order to find a fully written signature with the appropriate title corresponding to the initials (Field Staff Information and Instruction Series: FY-79-28, November 30, 1978, addressed to Regional HCFA Administrators, concerning Validation Survey for the Quarter ending September 30, 1978, hereinafter referred to as Internal Memorandum).

Statement of the Case

The Agency reviewed 20 SNFs during a validation survey conducted in January 1979 in the State for the quarter ending September 30, 1978. On the basis of the survey, the Agency determined that the records for thirteen patients in five facilities did not meet the certification requirement as set out in the statute, implementing regulation and the Agency's interpretation of these (Action Transmittal, SRS-AT-75-122).

The State's appeal from the disallowance asserted that, in two of the facilities, the records reflected on their face the requisite certifications. It further asserted that, for the patient records in the other three facilities, the fact that certifications lacked a date or were

dated subsequent to the date of the patient's admission was due to the procedure frequently used for certification by physicians in the State. When a patient was admitted, a member of the nursing staff would enter the physician's telephoned orders onto the admission form and sign next to them. The physician would subsequently sign the orders during a visit to the facility or upon receipt of the form in the mail. The State argued that these orders should be considered valid certifications because the date the physician's orders are entered into the record is the critical date, and the date of the physician's subsequent verification of his telephone orders is not important for purposes of validating the certification (Application for Review, July 27, 1979, page 2). Furthermore, the State has argued that because many communities have few or no physicians, a requirement that a physician sign and date a certification on or before the date of admission is burdensome, and is therefore, unreasonable (State Response to Invitation to Brief, March 23, 1981, page 9). The State submitted copies of the medical records as proof of its allegations. The Agency examined this documentation and responded on November 5, 1979. This Response indicated that the "majority of the documents submitted by petitioner reflect the procedure described in Petitioner's application for review" (page 17). The Agency's position is that, to be acceptable as a certification, physician orders must be personally signed by the physician on or before the date of admission, and that signature must be dated (SRS-AT-75-122, November 13, 1975). Furthermore, the Agency argues that initials which cannot be identified as those of a physician are also unacceptable for certification (Internal Memorandum, p. 9).

The State has admitted in its Memorandum of June 10, 1980, that the requirements of the Action Transmittal were not met for these thirteen patients (page 4). The State's position is that its showing need only comply with the statute and regulations and not with the Agency's Action Transmittal and Internal Memorandum because these transmittals were not definitions or clarifications of the regulation but a new set of requirements which should have been set forth in a regulation promulgated under Section 553 of the Administrative Procedure Act (5 U.S.C. 553 (1977)). The State has alleged that it is not bound by the requirements that the certifications be in writing and signed and dated on or before admission because they were not properly promulgated as rules. The State also has asserted that the Internal Memorandum instructing federal validation survey reviewers to use M.D. or D.O. as a means of identifying signatures or initials as those of a physician is an Agency requirement. Furthermore, it has alleged that the Agency's failure to properly promulgate these conditions as rules and the taking of a disallowance based on substantive requirements set forth only in an Action Transmittal and Internal Memorandum is arbitrary and capricious. The Board, on Febraury 23, 1981, invited both parties to brief these issues.

Discussion

We conclude that the State did not meet the conditions, stated in the Agency Action Transmittal, for valid certifications for thirteen patients. This conclusion is based on the Agency's determination that the documentation submitted by the State did not satisfy those conditions and the State's admission that they did not meet them. The issue presented here is whether the conditions set forth in the Action Transmittal SRS-AT-75-122 and the Internal Memorandum are interpretations of Section 1903(g)(1)(A) and its implementing regulation, or whether they are substantive requirements that should have been promulgated as rules under the procedures of Section 553 of the Administrative Procedure Act.

The Internal Memorandum gives instructions to federal validation survey reviewers. It does not require an indication of the physician's degree, but merely states that such abbreviations are one means of identifying whether signatures or initials are those of a physician. If such abbreviations are used, they must be those of a physician, i.e., M.D. or D.O., rather than a nurse. The point made in the Internal Memorandum is that it is important to be able to discern whether a physician signed the certification, a requirement clearly set out both in the statute and in the regulation. The Memorandum itself imposes no requirements on the State but merely elucidates for the reviewers various means that may be used to determine whether a physician certified the patient's need for care. Therefore, we conclude that there is nothing in the Internal Memorandum that is independently binding on the State, nor does anything stated in it, standing alone, affect the validity of this disallowance.

The State argues that if a policy statement narrowly limits administrative discretion, it will be taken for a binding rule of substantive law (Guardian Federal Savings & Loan Ass'n v. Federal Savings and Loan Ins. Corp., 589 F. 2d 658 (D.C. Cir. 1978)). This case, relied on by the State, articulated that principle in conjunction with the presence of certain other circumstances, i.e., that the Agency discretion being narrowed is quite broad and that the policy statement fills in details of a comprehensive and general framework of discretionary action. Here, the Agency's discretion is already quite limited by the statute, which specifically requires that a physician certify at the time of admission for each patient. The Action Transmittal cannot limit a discretion that does not exist, and, therefore, the circumstances are not present here which would allow us to find that the Action Transmittal sets out a rule of substantive law. The Action Transmittal seems quite clearly to be merely an interpretation of the terms used in the statute: "certification ... by a physician" and "at the time of admission." Gibson Wine Co. v. Snyder, 194 F. 2d 329 (1952); Guardian Federal, supra. Therefore, we conclude that the requirements set forth in SRS-AT-75-122 are not new, substantive requirements but are merely interpretations of the terms of the statute and regulation.

Since common law conceptions of fairness may require notice and comment procedures where an interpretative rule has substantial impact (e.g., alters rights and obligations of persons affected), Independent Broker-Dealers Trade Ass'n v. SEC, 442 F.2d 132, 144 (D.C. Cir.), cert. den., 404 U.S. 828 (1971), we must examine the impact of SRS-AT-75-122. We conclude that the State's obligations have not been altered. The only restrictions that the Action Transmittal places on the certifications which are not explicit in the statute and regulation are those that the certification be in writing and that time of admission means on or before the date of admission. Both of these are logical extensions of a requirement that there be a certification at the time of admission, and both carry out the purpose of the statute, i.e., that the Secretary be satisfied that the State have an effective program of utilization control. These requirements appear to be reasonable for purposes of administrative convenience. (How can the Agency verify that a certification has actually been made if it is not in writing?) We conclude that there is no alteration of rights or other substantial impact on the states that is not already imposed by the statute and regulations.

Official Agency interpretations of a statute or regulation may be binding on the persons to whom they pertain where actual notice has been given. The State has not questioned whether it had actual notice of the Action Transmittal, and indeed, its arguments in the record are based on its knowledge of the Action Transmittal, which was addressed to and sent to all states. Therefore, we conclude that the State had notice of the Agency's policy as stated in the Action Transmittal, and that its requirements are binding on the State.

The State argues that it is an extremely rural state, with many communities having few or no physicians, and that it is inconvenient and impractical for a physician to travel to a facility for the sole purpose of signing a form on a particular date. We do sympathize with the plight of rural states and the problems created by a shortage of physicians. There are indications in this appeal that the Agency's strict policies regarding signing and dating certifications are sometimes counterproductive; however, there has been no showing that the policy is illegal or unreasonable under most circumstances. We defer to the Agency's policy, as stated in the Action Transmittal SRS-AT-75-122, and conclude that the State's showing should have met those conditions.

CONCLUSION

We conclude that the requirements in the Action Transmittal are interpretative in nature and do not have an independent substantial impact on the states; rather they only implement what is already imposed by

Section 1903(g) and the regulations. The requirements as set out in Action Transmittal SRS-AT-75-122 are binding upon the State. Therefore, we conclude that the disallowance should be upheld.

/s/ Donald F. Garrett

/s/ Alexander G. Teitz

/s/ Cecilia Sparks Ford, Panel Chair