DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Tennessee Department of Public Health
Docket No. 79-203-TN-HC
Decision No. 167

DATE: April 30, 1981

DECISION

The State of Tennessee Department of Public Health (State) appealed from a penalty disallowance of $34,731 made by the Health Care Financing Administration (Agency) pursuant to Section 1903(g) of the Social Security Act (the Act) for the quarter ending March 31, 1978. The penalty disallowance was made after an Agency validation survey, required by Section 1903(g)(2) of the Act, determined that the records for one patient in one facility did not meet the certification and recertification requirements 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, the parties' responses to the Board's request for further information, dated January 15, 1981, a telephone conference call between the parties' representatives and a Board staff attorney, and the parties' written responses to questions and issues raised in the conference call. We have determined that there are no material facts in dispute which a conference or hearing would help resolve, and that a conference or hearing would not assist the development of the issues.

Statement of the Case

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 intermediate care facilities (ICFs). 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 ICFs, 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." The patient must be recertified "at least every 60 days." (Section 1903(g)(1)(A)). These statutory requirements are 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 ...." 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."

A validation survey, for the quarter ending March 31, 1978, was conducted during June and July 1978 in the State of Tennessee, involving 20 intermediate care facilities (ICFs). As a result of this survey, the Agency determined that one patient in one facility did not have a valid certification. Although the State's appeal to the Board was untimely, the Board Chair accepted the appeal on February 12, 1980, after a determination that the State had good cause for the untimeliness of its submission.

According to affidavits submitted by the State, the patient whose records are in question here is a "profoundly retarded" individual who was already present in the facility when the facility qualified as a Medicaid provider. The patient had been eligible for Medicaid since October 1969, and the State, in an affidavit submitted to the Board, indicates that her status, disability and income have at all times been such that she retains her eligibility for Medicaid. (Affidavit by M. Biddle, Reimbursement Officer, Greene Valley Development Center, March 25, 1981). The first certification made for the patient, as reflected in the record, was dated June 11, 1976; the physician certified that the patient needed intermediate care for her lifetime. In July 1976 the patient was placed in a group home on an experimental basis, as part of a program to determine the ability of low-functioning mentally retarded adults to live in a group home setting outside an institution. The group home was organizationally part of the institution and the level of care received during her residence in this group home was the same as she would have received in an ICF unit; the group home, however, was not certified for Medicaid (Conference Call, March 3, 1981). Therefore, even though the patient was eligible for Medicaid, no Medicaid monies were expended for her during the time that she was in the group home. On January 23, 1978, the patient was transferred to another unit in the facility, which was certified for Medicaid. A physician certified that the patient required ICF care on March 3, 1978; recertifications were completed thereafter every 60 days. No certifications or recertifications were completed for the patient between June 11, 1976 and March 3, 1978 (Conference Call, March 3, 1981; State's Response, March 27, 1981, p. 2).

The State admits that, after it received notice of the violation and consequent disallowance, it denied reimbursement to the provider for the services provided to the patient and that the sole reason for this

denial of reimbursement was because of the violation (Conference Call, March 3, 1981; Confirmation of Telephone Conference, March 6, 1981).

Discussion

The State's original allegation in its appeal was that no disallowance should be imposed because "no State or federal Medicaid monies ... (were) expended for that recipient during ..." the period in question. The State admitted that the sole reason for this non-expenditure was the violation and subsequent disallowance. This admission led the parties to conclude that whether the disallowance should be reversed on this basis was no longer an issue in the appeal (Conference Call, March 3, 1981; Confirmation of Telephone Call, March 6, 1981).

Thus, the issue to be decided is whether certification was required for the patient when she was transferred from a non-Medicaid certified unit to a Medicaid-certified unit in the same facility on January 23, 1978, and, if not, whether recertification was necessary every sixty days during any period following the June 11, 1976 certification, that she was in a Medicaid-certified unit.

The State argues that a transfer within a facility is not an admission and that, therefore, no certification for admission would have been required upon the patient's transfer from one unit to another. Furthermore, the State alleges that because the patient had been previously certified as "profoundly retarded," her need for this level of care could never change, and a certification upon transfer from one unit to another would not be necessary to control unnecessary delivery of services.

Both Section 1903(g)(1)(A) and 42 CFR 450.18(a)(2) require that each patient for whom payment is made under the State plan be certified at the time of admission and recertified at least every 60 days thereafter. The Agency argues that a transfer from a non-certified unit to a certified unit is the same as an admission for purposes of the certification requirement and that the patient should have been certified on or before January 23, 1978. Furthermore, the Agency argues that even if the transfer were not considered an admission, it would then have been necessary for her to be recertified for the period between January 23 and March 3, 1978 because certifications are considered effective for a period of only 60 days and, therefore, the certification completed in 1976 was not effective for the period January 23, 1978 through March 3, 1978 (Agency Response, March 30, 1981, page 6).

Neither the statute nor the regulation distinguish between patients who are clearly in need of lifetime care and other patients requiring long-term medical assistance. While it seems unnecessarily bureaucratic to require that a physician recertify a "profoundly retarded" individual every 60 days, the State has not pointed to anything in the applicable

law that requires the Agency to make an exception from the certification and recertification requirements for this type of patient. Furthermore, the intent of the utilization control requirements is to prevent patients' institutionalization without periodic reassessment of the need for that level of care. Patients whose medical assistance is paid through Medicaid must be certified to show that their care was necessary for all periods of time for which payment is made. Therefore, we conclude that the failure to certify or recertify upon transfer to a certified unit that the patient was in need of ICF care was a violation of Section 1903(g) and 42 CFR 450.18(a)(2).

The State also alleges that its failure to certify this one patient is not an indication that it does not have an effective program of utilization control of such services and that the penalty should not be imposed. The statute, however, does not provide the Secretary with the discretion to waive or reduce the penalty once there is a finding that a violation has occurred. The Secretary is required to impose a penalty calculated according to the statutory formula set forth at Section 1903(g)(5) unless the State agency makes a satisfactory showing that there are valid certifications "in each case." None of the waivers or exceptions specifically provided in the Act apply to this appeal. The 1977 amendment of Section 1903(g) (Pub. L. 95-142, Sec. 20, 91 Stat. 1205 (1977)) altered the penalty formula from a rigid requirement that 33 1/3 percent of the federal medical assistance percentage be deducted, to a more flexible formula that reflects the difference between significant and nominal violations by adjusting the reduction in proportion to the number of patients in only the facilities that were found to have violations. Thus, the penalty formula builds in a sliding scale that reflects the extent of the State's deviation from the requirements (123 Cong. Rec. S16008, daily ed., September 30, 1977).

Furthermore, the Comptroller General issued an Opinion on March 4, 1980 (File No. B-164031(e).154), concluding that if the requirements of Section 1903(g) are not met in every case, the Secretary has no alternative but to consider the State's showing unsatisfactory or invalid and impose the penalty according to the statutory formula. The Comptroller General based this conclusion on the legislative history of the Act and on the fact that amendments to the Act described specific circumstances in which the Secretary could waive application of the penalty, leading the Comptroller General to conclude that Congress did not intend to permit waivers under any other circumstances.

This Board gives deference to the interpretation given a statute by the Agency, in accordance with principles established by the courts. New York Department of Social Services, Decision No. 101, May 23, 1980, p. 6; California Department of Health Services, Decision No. 158, March 31, 1981, p. 7. The primary rationale for this practice is the deference accorded agency expertise. Southern Mutual Help Assoc.,

Inc. v. Califano, 574 F.2d 518, 526 (D. C. Cir. 1977). The Agency's interpretation of the Act, based on the legislative history and specific amendments to Section 1903(g), is that it does not have the discretion to waive a penalty reduction once there is a finding that a violation has occurred. The Comptroller General's Opinion confirmed this interpretation. The Board concludes that such an interpretation is reasonable and that the Secretary does not have the discretion to waive the penalty for even one violation of the Act.

CONCLUSION

We conclude that the failure to certify or recertify the patient upon transfer to a certified unit was a violation of Section 1903(g) and 42 CFR 450.18(a)(2) and that the Secretary has no discretion to waive the penalty for the violation. Therefore, we sustain the disallowance.

/s/ Donald F. Garrett

/s/ Alexander G. Teitz

/s/ Cecilia Sparks Ford, Panel Chair