Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Heartland Manor at Carriage Town,	)	Date: February 26, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-543
	)	Decision No. CR516
Health Care Financing Administration.	)	
	)	

DECISION

For the reasons stated below, I conclude that Petitioner, Heartland Manor at Carriage Town (Heartland Manor), is a prospective provider seeking the initial right to participate in the Medicare program as a skilled nursing facility (SNF). Accordingly, the Health Care Financing Administration's (HCFA) May 27, 1997 survey findings regarding Petitioner constitute an initial determination as to whether Petitioner qualifies as a provider, which determination is subject to reconsideration. I also conclude, however, that Petitioner's request for hearing is premature because HCFA has not yet rendered a reconsidered determination.

I. Background

A. Applicable law and regulations

Section 1866 of the Social Security Act (Act) outlines the conditions under which the Secretary of the Department of Health and Human Services (Secretary) may enter into an agreement, refuse to enter into an agreement, or may terminate an existing agreement for the provision of medical services under Medicare. Paragraph (h)(1) of that section further provides that an institution or agency dissatisfied with the Secretary's decision has a right to a hearing and to subsequent judicial review when: (1) the Secretary determines it is not a provider of services; or (2) the Secretary has made a determination described in section 1866(b)(2) of the Act. The determinations listed under section 1866(b)(2) of the Act are that the provider: (1) fails to

substantially comply with the provisions of the agreement, with the provisions of the Act and the regulations thereunder, or with required corrective action; (2) fails substantially to meet the applicable provisions of section 1861 of the Act; or (3) has been excluded from participation under sections 1128 or 1128A of the Act.

Section 1866(c)(1) of the Act provides: "[w]here the Secretary has terminated or has refused to renew an agreement under this title with a provider of services, such provider may not file another agreement under this title unless the Secretary finds that the reason for the termination or non-renewal has been removed and that there is reasonable assurance that it will not recur." It is noteworthy that section 1866(h)(1) of the Act does not grant a provider a right to a hearing where the Secretary determines that the reason for the termination has not been removed or where the Secretary finds that there is no reasonable assurance that it will not recur.

The regulations implementing the provisions of the Act with respect to appeal rights are found at 42 C.F.R. Part 498. Section 498.5 of the regulations recognizes that petitioners fall into two general categories: prospective providers, those entities seeking the right to participate in the Medicare program; and providers, those entities which have already been accepted into the program. In this case, Petitioner contends that it is a prospective provider, and asserts its right to hearing pursuant to 42 C.F.R. § 498.5(a)(1) and (2). Those sections provide:

> (1) Any prospective provider dissatisfied with an initial determination or revised initial determination that it does not qualify as a provider may request reconsideration in accordance with § 498.22(a).
>
> (2) Any prospective provider dissatisfied with a reconsidered determination under paragraph (a)(1) of this section, or a revised reconsidered determination under § 498.30, is entitled to a hearing before an ALJ [administrative law judge].

Similarly, 42 C.F.R. § 498.40(a)(2) provides in pertinent part:

> The affected party or its legal representative or other authorized official must file the request (for hearing) in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination . . . (emphasis added).

From reading the language above, it is clear that before a right to hearing is vested in a party, the Secretary must have rendered an initial determination, and, in the case of a prospective provider, a reconsidered determination.

In this case, HCFA contends that it never made an initial determination, and, accordingly, it could not render a reconsidered determination. HCFA points out that 42 C.F.R. § 498.3 defines what actions constitute initial determinations from which appeal rights ensue, and also delineates clearly some actions which are not initial determinations, and from which, accordingly, no appeal rights flow. HCFA notes that included among the actions that are not initial determinations is:

> The finding that an entity that had its provider agreement terminated may not file another agreement because the reasons for terminating the previous agreement have not been removed or there is insufficient assurance that the reasons for the exclusion will not recur.

42 C.F.R. § 498.3(d)(4).

By contrast, Petitioner cites to 42 C.F.R. § 498.3(b)(1) as support for its position that it is a prospective provider and that HCFA made an initial determination which could be reconsidered. That provision states clearly that whether a prospective provider qualifies as a provider is an initial determination.

The case, then, turns on the question as to whether Petitioner is a provider that had its provider agreement terminated, and is attempting to reenter the Medicare program, or whether it is a prospective provider. If, as HCFA contends, Petitioner is an entity that had its provider agreement terminated, HCFA's finding that the reasons for termination have not been removed, or, there is insufficient assurance that the reasons for exclusion will not recur, may not be appealed, and the case should be dismissed. If, on the other hand, Petitioner is a prospective provider, the finding that it did not qualify as a provider is subject to appeal.

B. Procedural history

Petitioner filed a request for hearing after HCFA refused to reconsider its determination that Heartland Manor was not qualified to participate in the Medicare program as a SNF. HCFA had denied Petitioner's request to reconsider its determination regarding a May 2, 1997 survey of Petitioner, stating that the

determination was not an initial determination subject to reconsideration under 42 C.F.R. § 498.3(d)(3).[1]

Pursuant to my Order dated September 16, 1997, the parties jointly submitted a notice of issue as to whether or not Heartland Manor had a right to hearing as a matter of law. 42 C.F.R. § 498.70(b). The parties simultaneously exchanged initial and reply briefs on the issue, together with accompanying exhibits in support of their respective positions. Neither party having raised objections to any proposed exhibits, I hereby receive into the evidence Petitioner's Exhibits A through H, as well as HCFA Exhibits 1-12, inclusive (HCFA Ex. 1-12).[2]

At the time the parties filed their reply briefs, Petitioner also filed a Motion Requesting an Expedited Ruling. HCFA filed a response opposing Petitioner's motion. HCFA also sought leave to supplement the record by submitting a brief statement clarifying its position on the interpretation of a case cited in Petitioner's Reply Brief (P. Reply), United States v. Vernon Home Health, Inc..[3] Petitioner objected to HCFA's request.

On January 26, 1998, I held a prehearing conference by telephone. During that conference, I noted Petitioner's motion for an expedited ruling. Having advised the parties that I would proceed to issue a decision in this case based upon the priorities extant in my docket, I then noted HCFA's request to file a supplemental statement to Petitioner's Reply. I asked counsel for HCFA what was the nature of his proposed statement to supplement the record. Counsel advised that he simply wished the record to note that Vernon did not involve a previously terminated facility. Counsel for Petitioner agreed to stipulate that it did not, and, accordingly, both parties advised that they would offer no additional submissions and that this matter was ready for adjudication.

II. Issue to be decided

The issue before me is whether HCFA's May 21, 1997 decision, denying Petitioner the right to participate in Medicare as a SNF, was an "initial determination" as defined in 42 C.F.R. Part 498.

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[1] See HCFA Br. at 3, n.3, stating that HCFA's July 2, 1997 letter to Petitioner referred inadvertently to subsection (d)(3) rather than subsection (d)(4) of 42 C.F.R. § 498.3.

[2] Petitioner's Exhibits A-H will be numbered and referred to as Exhibits 1-8 (P. Exs. 1-8).

[3] P. Reply at 6, citing United States v. Vernon Home Health, Inc., 21 F.3d 693 (5th Cir. 1994), cert. denied, 513 U.S. 1015 (1994).

HCFA contends that Petitioner is seeking to "reenter" the program, having once been terminated; its decision to deny participation is not an "initial determination" pursuant to 42 C.F.R. § 498.3(d)(4); and that, accordingly, Petitioner has no right to a hearing under 42 C.F.R. §§ 498.3 and 498.5. Petitioner asserts that it has requested participation as a prospective provider, denial of which is appealable as an "initial determination" pursuant to 42 C.F.R. § 498.3(b)(1).[4]

III. Uncontested facts

1. Petitioner is a SNF located in Flint, Michigan.

2. From at least January 1989 through March 1993, the facility was known as Chateau Gardens and it was owned and operated by Chateau Gardens, Inc. HCFA Br. at 1; HCFA Ex. 1; P. Br. at 2; P. Ex. 1-2.

3. On August 19, 1989, HCFA terminated Chateau Garden's participation in the Medicare program due to a determination that there was an immediate threat to patient health and safety. HCFA Br. at 2; HCFA Ex. 1; P. Br. at 3; P. Ex. 3.

4. On January 1, 1994, following a brief period during which the facility was administered by the State of Michigan, the facility was purchased by the Hurley Foundation, a subsidiary of the Hurley Medical Center, and the facility's name was changed to Heartland Manor at Carriage Town. HCFA Br. at 2; P. Br. at 3.

5. Since 1994, Petitioner requested several times that HCFA permit it to participate in the Medicare program, but all such requests have been denied. HCFA Br. at 2-3; P. Reply at 3-4.

6. Following a survey conducted on July 22, 1994, HCFA found that the deficiencies which led to the facility's termination in 1989 had recurred. HCFA denied Petitioner's request to enter the program, and advised Petitioner that this finding was not subject to appeal, citing 42 C.F.R. § 498.3(d)(4). HCFA Br. at 2; HCFA Ex. 3.

7. Following a survey conducted on August 19, 1996, HCFA determined that the deficiencies which led to the facility's termination in 1989 "were found again . . . ." HCFA informed the Petitioner that "[b]ecause you have not removed the causes of the termination or established reasonable assurance that those causes will not recur . . .," HCFA would not issue a new provider agreement, citing 42 C.F.R. § 489.57. Again, Petitioner was

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[4] See Joint Notice of Issue Regarding the Right to Hearing.

advised that this finding was not subject to appeal pursuant to 42 C.F.R. § 498.3(d)(4). HCFA Br. at 2; HCFA Ex. 5.

8. On January 7, 1997, Petitioner made another request to participate in the Medicare program as a skilled nursing facility. P. Ex. 4. On March 5, 1997, Petitioner, representatives of the Michigan Department of Consumer and Industry Services, and HCFA met to discuss the problems Petitioner had encountered in becoming a participating provider. HCFA Br. at 3; HCFA Ex. 6; P. Br. at 5. Both parties agree that HCFA treated this, and all other requests by Petitioner to participate in the Medicare program, as a request by a once terminated facility to reenter the program. HCFA Br. at 3; HCFA Ex. 6; P. Br. at 5. Following the meeting, HCFA agreed to conduct another survey of the facility. A survey was conducted on May 2, 1997, and because the surveyors determined that the facility did not meet program participation requirements, HCFA notified the facility on May 21, 1997 that its request to participate in the Medicare program was denied. HCFA Br. at 3; HCFA Ex. 7; P. Br. at 5-6.

9. On June 2, 1997, Petitioner requested a reconsideration of HCFA's decision denying the request to participate in the Medicare program. HCFA Br. at 3; HCFA Ex. 8; P. Br. at 6. On July 2, 1997, HCFA returned the request for reconsideration and advised Petitioner that its decision was an administrative decision, not an initial determination subject to review. P. Br. at 6; P. Ex. 7; HCFA Br. at 3.

10. Petitioner filed a request for hearing on September 4, 1997, contending that it was a prospective provider dissatisfied with an initial determination and accordingly it had a right to hearing. HCFA moves to dismiss the hearing request, contending Petitioner has no right to a hearing.

IV. Findings of fact and conclusions of law

11. I hereby adopt the uncontested facts herein numbered 1-10.

12. The statutory and regulatory scheme adopted by Congress and the Secretary governing appeals from decisions by HCFA is set forth in section 1866 of the Act, and the regulations at 42 C.F.R. Part 498. The Act and its implementing regulations govern appellate rights of facilities and individuals in three categories--providers, prospective providers, and providers whose right to participate in Medicare has been terminated but who are seeking readmission, or reentry, into the program.

13. Petitioner is not a "provider" as defined by 42 C.F.R. § 498.2, inasmuch as it does not have, and has never had in effect, an agreement to participate in Medicare.

14. Further, Petitioner is not a provider or entity that had its previous provider agreement terminated and which is seeking readmission or reentry into the Medicare program for the reasons discussed below.

15. Petitioner is a "prospective provider" within the meaning of 42 C.F.R. § 498.2, that is, a SNF that seeks to participate in Medicare as a provider.

16. Following a survey on May 2, 1997, HCFA notified Petitioner on May 21, 1997 that Petitioner did not qualify to participate in the Medicare program. HCFA Ex. 7. I find that this decision was, in fact, an "initial determination" within the meaning of 42 C.F.R. § 498.3(b)(1).

17. I further find that inasmuch as Petitioner is a prospective provider, it had a right to reconsideration pursuant to 42 C.F.R. § 498.22. Petitioner did request reconsideration. However, inasmuch as HCFA had previously determined that it had not made an initial determination, it also held that Petitioner was not entitled to reconsideration. That decision is hereby reversed. Petitioner is entitled to a reconsidered determination from HCFA, and, if dissatisfied with that reconsidered determination, to a hearing before an ALJ, pursuant to 42 C.F.R. § 498.5(a)(1) and (2).

V. Discussion

Both of the parties herein stipulate that Petitioner's predecessor, Chateau Gardens, was a provider whose provider agreement was terminated by HCFA in 1989 after survey findings indicated that the facility had serious deficiencies. Petitioner asserts, and HCFA does not dispute, that in March 1993, the Michigan Department of Public Health was appointed manager of Chateau Gardens, and on January 1, 1994, the Hurley Foundation, a subsidiary of Hurley Medical Center of Flint, Michigan, purchased the facility at the request of the State of Michigan. P. Br. at 3. The Hurley Foundation subsequently changed the name of the facility to Heartland Manor at Carriage Town. There is nothing in the record to suggest that the new owners had any ties to the previous owners, or that the purchase was anything other than an arms length transaction.

Petitioner also asserts that it has never had a provider agreement or a Medicare provider number. P. Br. at 10. Petitioner correctly points out that the terms "provider," and "prospective provider" are defined by regulation. "Provider" is defined at 42 C.F.R. § 498.2 to include a SNF "that has in effect an agreement to participate in Medicare . . . ." A "prospective provider" is defined at 42 C.F.R. § 498.2 to include a SNF (as well as other entities) "that seeks to participate in Medicare as a provider." By definition, Petitioner argues, it must be

considered a prospective provider, because it does not have, and has never had, an agreement in effect to participate in Medicare. Id.

However, the issue here is not whether Petitioner is a current provider, but whether Petitioner falls into yet a third category, that being "an entity that had its provider agreement terminated" and is seeking reentry to the program. 42 C.F.R. § 498.3(d)(4). The question, then, is whether or not Heartland Manor is the same "entity" that had its previous agreement to participate in Medicare terminated.

HCFA argues, essentially, that Petitioner and its predecessor, Chateau Gardens, are one and the same entity for purposes of participation in the Medicare program. Neither party disputes that since the time of Chateau Garden's termination there has been not only a change of name but a change of ownership. Neither party contends that a mere change of name would convert the status of a provider whose provider agreement had been terminated to that of a prospective provider. Petitioner does contend, however, that change of ownership is a critical factor in this case. Petitioner argues that because Heartland Manor, under the ownership and control of the Hurley Foundation and the Hurley Medical Center, has never had a Medicare participation agreement, it cannot be "an entity that had its provider agreement terminated" and is therefore not subject to the reentry provisions of 42 C.F.R. § 498.3(d)(4). Further, it argues that the determination made by HCFA in this case cannot be a non-reviewable determination made pursuant to section 1866(c)(1) of the Act, because the clear language of the Act provides that "[w]here the Secretary has terminated or has refused to renew an agreement under this title with a provider of services, such provider may not file another agreement . . . ." Petitioner argues that the words "such provider" can only refer to the provider whose agreement was terminated, and since Heartland Manor has never had an agreement, section 1866(c)(1) of the Act is inapplicable in this instance. P. Br. at 11.

HCFA appears to argue that at the time a facility changes ownership, it also inherits the history, including the wrongdoings, of the previous owners. In support of this argument, counsel cites 42 C.F.R. § 489.18, which provides in pertinent part:

> When there is a change of ownership . . . the existing provider agreement will automatically be assigned to the new owner . . . An assigned agreement is subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued . . .

42 C.F.R. § 489.18 and (d) (emphasis added); HCFA Br. at 12.

This regulation makes it clear that had Chateau Gardens had a provider agreement at the time it was purchased by the Hurley Foundation, the Hurley Foundation, the Hurley Medical Center and Heartland Manor at Carriage Town would have been bound by the terms of that agreement. However, in this case there was no provider agreement in place at the time of the change of ownership. In the words of Petitioner "[t]here has been a death of the previous provider's agreement." P. Reply at 5. The regulation does not say that, where there has been a previously terminated agreement, the new owners will be prohibited from applying for participation in the program as prospective providers. Similarly, the Act does not, on its face, prohibit such an application. I agree with Petitioner's contention above that section 1866(c)(1) of the Act only pertains to a provider who had a participation agreement which was terminated. The language of the statute is clear, and, where it is clear, the administrative law judge may not attempt to interpret it or give it broader scope than the express language of the Act would warrant.

HCFA further calls our attention to 42 C.F.R. § 488.414. HCFA Br. at 13. That section directs that certain actions be taken when a facility has been found to have repeated instances of providing substandard quality of care. The regulation provides in pertinent part:

> (3) Change of ownership. (i) A facility may not avoid a remedy on the basis that it underwent a change of ownership. (ii) In a facility that has undergone a change of ownership, HCFA does not and the State may not restart the count of repeated substandard quality of care surveys unless the owner can demonstrate to the satisfaction of HCFA or the State that the poor past performance no longer is a factor due to the change in ownership. 42 C.F.R. § 488.414(d)(3); HCFA Br. at 13.

HCFA also cites CarePlex of Silver Spring, DAB 1627 (1997). In that case, one day after a new owner acquired the facility, a survey was conducted and HCFA imposed a civil money penalty on the new owner for deficiencies, even though the deficiencies began under prior ownership. The Departmental Appeals Board (DAB) appellate panel upheld the penalty, holding in part that CarePlex was responsible for the continued existence of the deficiencies during its administration and was responsible for complying with Medicare requirements once it undertook to operate the facility.

When taken as a whole, HCFA contends that the provisions of 42 C.F.R. §§ 488.414(d)(3) and 489.18, and the decision in CarePlex stand for the proposition that a change of ownership does not relieve the new owners of complying with the requirements of

section 1866 of the Act or 42 C.F.R. § 489.57 (reinstatement after termination).

I agree with counsel for HCFA that the Act, the regulations cited above, and the DAB's decision in CarePlex are all consistent. However, I find that those authorities consistently stand for a different conclusion. It is important to note that each authority cited by HCFA contemplates an existing provider agreement. As noted above, 42 C.F.R. § 489.18 provides that when there is an existing provider agreement it will automatically be assigned to the new owners. Similarly, the provisions of 42 C.F.R. § 488.414(d)(3) state that new owners are bound by substandard quality of care findings attributed to the previous owners. This regulation assumes that the previous owners had an existing provider agreement and that the agreement was automatically assigned to the new owners. As the new owners assume the old provider agreement, they also assume responsibility for living up to its terms and correcting any deficiencies found under it. In CarePlex, too, there was an existing provider agreement that was transferred to a new owner and the new owner was essentially held responsible for the deficiencies of the old owner. The new owner assumed an existing provider agreement as well as responsibility for any deficiencies arising under it.

The above authorities consistently apply only to those instances where a facility has an existing provider agreement which is assigned to a new owner. These authorities are uniformly silent with respect to situations where a new owner acquires a facility that does not have an existing provider agreement.

HCFA acknowledges that each of the above authorities involved a provider that had an existing provider agreement, but argues that:

> [T]here is no logical basis to distinguish the context of a new owner seeking a provider agreement where its facility had been previously terminated from the program. Congress mandated that the Secretary must not approve such an agreement unless the operator demonstrates that the reason(s) for the termination have been eliminated, as well as reasonable assurance that it (they) will not recur. Just as compliance with program requirements properly applies to new owners as well as other providers under the authorities discussed above, new owners must comply with the requirement of statutory section 1866 and regulatory section 489.57.

HCFA Br. at 14.

There may or may not be a logical basis for distinguishing the situations, but the plain fact is that, in using the words "such provider," Congress has limited the requirements of section

1866(c)(1) of the Act to the provider whose agreement was terminated. Nothing in the Act requires new owners, who acquire the facility at a later date, and who have no provider agreement nor any prior involvement with the facility, to reapply under the provisions of this section of the Act. Similarly, the Secretary's regulations are not only silent with respect to their applicability to new owners acquiring a terminated facility, the express language of the regulations makes it clear that they do not apply given the facts in this case. The provisions of 42 C.F.R. § 489.57, cited by HCFA state:

> When a provider agreement has been terminated by HCFA under § 489.53, or by the OIG under § 489.54, a new agreement with that provider will not be accepted unless HCFA or the OIG, as appropriate, finds--
>
> (a) That the reason for termination of the previous agreement has been removed and there is reasonable assurance that it will not recur; and
>
> (b) That the provider has fulfilled, or has made satisfactory arrangements to fulfill, all of the statutory and regulatory responsibilities of its previous agreement (emphasis added).

It is quite clear in reading this regulation that it applies only to "that" specific provider which had a previous agreement, had that agreement terminated, and is seeking readmission to the program.

Petitioner cites Vernon for the proposition that even had there been an existing provider agreement to assign to Petitioner, it had the right to reject that agreement and apply for participation as a prospective provider.

In that case, the facility known as Vernon I had a provider agreement with Medicare. During the period of its ownership, Vernon I apparently received a large overpayment of Medicare benefits, which Medicare tried to recoup. Vernon I then sold the facility to Vernon II. Vernon II argued it was not liable for the overpayment debt as under State law it had only purchased Vernon I's corporate assets. The court held that Vernon II was liable for the overpayment, citing 42 C.F.R. § 489.18(d). Because Vernon II was automatically assigned Vernon I's existing provider agreement, it also was subject to the conditions of participation, one of which authorizes the Secretary to make adjustments for overpayments.

The findings in Vernon are, in fact, consistent with the other authorities previously cited in this case, i.e., where a previously existing provider agreement is assigned to a new owner, the new owner assumes responsibility for carrying out

legal obligations arising under that agreement. However, the Court in Vernon went a bit further, saying:

> Vernon II could have chosen not to accept automatic assignment of the provider agreement. Indeed, the government acknowledges that the case would be different if Vernon II had not assumed Vernon I's provider number. In that case, Vernon II would have had to apply as a new applicant to participate in the Medicare program.

Vernon, 21 F.3d at 696.

Vernon did not involve a facility where a provider agreement had been terminated. However, if one accepts HCFA's argument that a terminated provider agreement somehow attaches to a new, arm's length purchaser, it would only seem logical that said purchaser could elect to reject that terminated agreement just as it could elect to reject one in existence. However, in my judgment, the better view is that once an agreement is terminated, it ceases to exist for all but HCFA and the specific provider against whom the action was taken. A new owner cannot be assigned something which does not exist. It has no option other than to apply as a prospective provider.

VI. CONCLUSION

This matter is before me on Petitioner's request for a hearing, the parties' Joint Notice of Issue Regarding the Right to Hearing and Petitioner's Motion Granting Petitioner the Right to a Hearing Because Petitioner is a New Provider. I have ruled herein that HCFA has made an initial determination and that Petitioner has the right to reconsideration of same by HCFA. I also rule that Petitioner does not at this time have a right to a hearing inasmuch as HCFA has not yet rendered a reconsidered determination pursuant to 42 C.F.R. § 498.24. HCFA's previous refusal to make a reconsidered determination is not a reconsidered determination within the meaning of the aforesaid regulation. Petitioner's request for hearing is premature and is hereby Dismissed pursuant to 42 C.F.R. § 498.70(b).

/s/

Stephen J. Ahlgren

Administrative Law Judge