Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Metron of Forest Hills,	)	Date: August 21, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-98-055
	)	Decision No. CR546
Health Care Financing Administration.	)	
	)	

DECISION

Background

Petitioner, Metron of Forest Hills, is a Medicare and Medicaid certified long-term care facility located in the State of Michigan. It timely filed a request for hearing dated October 17, 1997, challenging the determinations issued by the Health Care Financing Administration (HCFA) in its notice letter dated August 20, 1997. In that letter, HCFA determined that Petitioner had been out of compliance with program requirements as of the July 18, 1997 survey and therefore imposed two remedies against Petitioner: a civil money penalty (CMP) of $750 per day commencing on July 18, 1997 and a denial of payment for all new Medicare and Medicaid admissions (DPNA), effective on September 6, 1997.[1]

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[1] In the briefs and exhibits presented to me, the parties have indicated that other surveys were also conducted after July 18, 1997 and that the findings of those surveys led to HCFA's setting the total amount of the CMP at $92,400 for 129 days of alleged noncompliance, computed as follows:

-- $750 per day for the first 42 days of

(continued...)

During January of 1998, the parties filed their respective "notice of issues" to inform me that certain issues should be decided by summary judgment. I adopted the unopposed briefing schedule suggested by Petitioner. Pursuant to that schedule, the parties have filed cross-motions for summary disposition with supporting documents as follows:

> Petitioner's Motion for Summary Judgment and "Brief in Support of Petitioner's Motion for Summary Judgment" (P. Br. in Supp. of Summ. Judg.);
>
> Petitioner's exhibits (P. Ex.) 1 through 10;
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> HCFA's Cross-Motion for Summary Affirmance and "Memorandum of the Health Care Financing Administration Opposing Petitioner's Motion for Summary Judgment and Supporting HCFA's Cross Motion for Summary Affirmance" (HCFA Mem. in Opp.);
>
> HCFA's exhibits (HCFA Ex.) 1 through 17;
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> "Petitioner's Brief in Reply to Respondent's Memorandum in Opposition to Petitioner's Motion for Summary Judgment, and In Opposition to HCFA's Motion for Summary Affirmance" (P. Reply); and
>
> "HCFA's Response to Petitioner's Reply to HCFA's Cross Motion for Summary Affirmance" (HCFA Reply).

All of the foregoing are now a part of the record, as I have not excluded any of them from my review and consideration in deciding the parties' cross-motions.[2]

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[1](...continued)
noncompliance, from July 18, 1997 through August 28, 1997;

-- $700 per day for the remaining 87 days of noncompliance, from August 29, 1997 through November 23, 1997.

[2] I am denying HCFA's August 10, 1998 motion to (continued...)

In its summary judgment motion, Petitioner asks me to invalidate HCFA's determinations by concluding that:

> HCFA's actions are invalid because they are based on invalid State actions. P. Br. in Supp. of Summ. Judg., 13 - 16;
>
> HCFA's notice of initial determination is invalid because it fails to adequately apprise Petitioner of HCFA's basis for imposing the CMP and its calculation of the CMP amount. P. Br. in Supp. of Summ. Judg., 16 - 20;
>
> HCFA's determination is invalid because the federal enforcement scheme (including the survey forms and manual instructions) used against Petitioner was never properly adopted as regulations by either the Secretary of the Department of Health and Human Services or the State of Michigan. P. Br. in Supp. of Summ. Judg., 20 - 31

Additionally, Petitioner's hearing request interposed the following issue in challenging the legal validity of HCFA's determination:

> Some or most of the citations made by the MDCIS [the Michigan State agency contracted by HCFA to conduct surveys] may have been made by individuals without requisite legal licensure, certification, or training to make determinations outside the scope of their professional discipline, and such findings and conclusions are therefore illegal.

Hearing Request, 3 at paragraph 2i.

HCFA asks me to deny Petitioner's summary judgment motion and then affirm its determinations without additional proceedings. HCFA's cross-motion for summary affirmance is based on its arguments that Petitioner has preserved only certain issues for adjudication and that denying

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[2] (...continued)
file an additional brief in this case ("HCFA's Submission of Additional Authority"), because I find that the parties have already adequately set forth their positions on the relevant issues.

Petitioner's summary judgment motion fully disposes of those issues.

Disposition of Motions

Recently, I decided the issues raised by the parties here in another case, which was based on facts and arguments very similar to those now before me. Orchard Grove Extended Care Center, DAB CR541 (1998).[3] As my discussion in that decision shows, the substance of the hearing request filed by the petitioner Orchard Grove is the same as the one filed by Petitioner herein. Also, the motions and briefs filed by the parties in Orchard Grove contain essentially the same arguments as those now before me in these cases. In relation to the legal principles and legal conclusions I had set forth in my Orchard Grove decision, the evidence now before me does not differ materially from what I had considered in Orchard Grove. The motions before me seek the same relief as those sought by the parties in Orchard Grove.

For these reasons, I adopt and incorporate Rulings 1 through 5 of my Orchard Grove decision, together with the corresponding analyses, to resolve the cross-motions before me. Specifically, I issue as my formal findings of fact and conclusions of law in this case[4] the following rulings explained in Orchard Grove:

> 1. RULING 1: I deny Petitioner's Motion for Summary Judgment. Orchard Grove, DAB CR541, at 1 - 9.
>
> 2. RULING 2: The requirements contained in 42 C.F.R. § 498.40 are controlling for determining whether and which issues have been preserved by Petitioner for

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[3] Petitioner may request a copy of this decision from my office if it does not currently have access to it.

[4] The regulations require me to set forth separately numbered findings of fact and conclusions of law in any decision I issue. 42 C.F.R. § 498.74(a). As in Orchard Grove, my decision here is based on the adjudication of issues presented by the parties' motions and their requests for specific legal conclusions or outcomes. Therefore, I find it useful and appropriate to set forth my findings and conclusions in the format of rulings on the parties' cross-motions.

adjudication in this forum. Orchard Grove, DAB CR541, at 9 - 15.

3. RULING 3: I grant the portion of HCFA's cross-motion for summary affirmance which pertains to its basis for imposing the CMP remedy against Petitioner. Orchard Grove, DAB CR541, at 9 - 12, 15 - 24.

4. RULING 4: I grant the portion of HCFA's summary affirmance motion which pertains to its determination of the CMP amount. Orchard Grove, DAB CR541, at 9 - 12, 24 - 30.

5. RULING 5: No new issue will be added pursuant to my authority under 42 C.F.R. § 498.56(a). Orchard Grove, DAB CR541, at 30 - 31.

In this case, Petitioner submitted a "Notice of Issues for Summary Judgment" with a proposed briefing schedule. HCFA did not oppose the briefing schedule, but it filed its own "Notice of Issues" to indicate its disagreement with Petitioner's position on the various issues and to assert that the issues identified by Petitioner were not properly before me. Thereafter, I granted the briefing schedule proposed by Petitioner, but precluded Petitioner from briefing issues concerning the surveyors' credentials and bias as part of its motion for summary judgment. Letter to parties dated January 15, 1998. I informed the parties that I would first rule on the legal issues raised by the parties' cross-motions before determining whether it would be necessary to hold a hearing to resolve any factual controversy concerning the surveyors' credentials and bias. Id.

Consequently, Petitioner herein has not made any showing in its briefs or exhibits to support its allegation that some or all of the citations made during the survey may have been done by individuals without the "requisite legal licensure, certification, or training to make determinations outside the scope of their professional discipline . . . ." Hearing Request, 3. However, pending before me is still the relevant portion of Petitioner's hearing request, which uses this allegation to contend that the survey findings are "therefore illegal." Id. Accordingly, I must decide whether further proceedings are necessary, because Petitioner has not introduced any evidence to show that the surveyors lacked the "requisite legal licensure, certification or training to make determinations outside the scope of

their professional discipline . . . ." Id. For the reasons which follow, and notwithstanding the absence of evidence in this case concerning any surveyor's professional licensure, I find additional proceedings unnecessary and have adopted and incorporated the entirety of Ruling 1 from the Orchard Grove decision.

In my Orchard Grove decision, I discussed why, as a matter of law, the survey findings could not be found illegal, just because the surveyors did not hold state licensure in particular health care disciplines. HCFA had conceded the truth of petitioner Orchard Grove's allegation that a surveyor did not hold the nursing or medical license petitioner Orchard Grove thought necessary. The wording of Petitioner's hearing request on this issue is identical to the wording used by petitioner Orchard Grove in its hearing request. Therefore, the conclusions I reached in Orchard Grove are not affected by the absence of evidence or agreement in this case concerning whether the surveyors here have licenses to practice in particular health care disciplines. When individuals work as surveyors, they are not practicing medicine or providing health care to anyone. Therefore, they do not need the State licensure indicated by Petitioner's hearing request. The findings they make are not "illegal," as contended by Petitioner in its hearing request, even if HCFA were to concede that the State of Michigan had never given the surveyors in question here licenses to provide health care to patients in the particular areas in which they made survey findings. Accordingly, no further proceeding is necessary on the matter of the surveyors' licensure or certification, as raised by paragraph 2i of Petitioner's hearing request.

For the reasons explained above, Petitioner also has not briefed or submitted evidence in support of Issue 5 of its "Notice of Issues For Summary Judgment":

> Whether HCFA's determination is based in whole or in part upon survey determinations made by a surveyor or surveyors who were biased against the facility, and whether the imposition of enforcement remedies based on those determinations is therefore invalid.

I rely on my analysis and discussion in Orchard Grove to conclude that the words used by Petitioner herein in its hearing request do not indicate any disagreement with HCFA's findings or conclusions due to the alleged bias of any surveyor. Pursuant to 42 C.F.R. § 498.40(b) and (c), Petitioner had the opportunity to include in its request

for hearing any fact-based belief it may have had concerning any surveyor's bias and the materiality of its effect on the survey's outcome. Petitioner did not do so. Instead, Petitioner included the above-quoted issue in a filing required by paragraph 2 of my November 14, 1997 Order in this case. Paragraph 2 of this Order does not authorize deviation from the requirements of 42 C.F.R. § 498.40(b) or (c).[5] Moreover, Petitioner did not assert the above-quoted issue to request amendment of its hearing request for good cause, but to seek summary judgment as a matter of right. Petitioner's "Notice of Issues for Summary Judgment." For these reasons, I do not find it appropriate to schedule additional proceedings to consider the question of whether any surveyor was biased. This issue was not preserved in Petitioner's hearing request and is not properly before me for review. See Ruling 2 of Orchard Grove decision.

In granting HCFA's motion for summary affirmance of its CMP amount (Ruling 4, above), I add also that HCFA has submitted its Exhibit 14, an "LTC [Long Term Care] Enforcement Review Sheet" with handwritten notations on it showing that information concerning Petitioner's financial condition had been obtained and analyzed in setting the CMP rate. Additionally, HCFA pointed out that Petitioner was aware from the correspondence it received that the surveying agency under contract to HCFA had recommended the imposition of much higher rates of CMP for the days of noncompliance. HCFA rejected those recommendations in favor of reducing the rates to $750 per day for the first 42 days of noncompliance (July 18, 1997 through August 28, 1997) and $700 per day for the remaining 87 days of noncompliance (August 29, 1997 through November 23, 1997). HCFA Reply, 5 and n.7 (with citations to exhibits).[6]

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[5] I note that my Order specifically authorizes the filing of a notice of issues to dismiss the action for cause or for disposition of the case unrelated to the merits of HCFA's determination. Paragraph 2B of November 14, 1997 Order.

[6] HCFA's rejection of the surveying agency's recommendations on the CMP amounts is relevant also for negating Petitioner's contention that HCFA's determination to impose the CMP is invalid as a matter of law because HCFA had depended wholly on a State process which Petitioner considers to be legally invalid. See P. Br. in Supp. of Summ. Judg., 13 - 16; P. Reply, 8 - 15; Ruling 1, above.

Petitioner does not deny that HCFA had in fact reviewed the financial information referenced by HCFA Ex. 14. Instead, Petitioner complains that HCFA Ex. 14 is merely a "reference to 1995 cost report information[,]" that "HCFA has made no attempt to show what that cost report information is, nor has it shown how in fact it would be relevant to a determination of the facility's current financial situation[,]" and that "HCFA has absolutely failed to show that it considered the cash flow position of the facility, which is the true indicator of ability to pay [footnote omitted]." P. Reply, 20 - 21 (emphasis in original). These criticisms and arguments are neither appropriate nor material to the CMP amount issue preserved by Petitioner in its hearing request. In its hearing request, Petitioner preserved only the issue of:

> [whether] HCFA has never looked at the facility's financial status nor its books and therefore has never had any appropriate information from which to make any determination regarding financial condition.

Hearing Request, 3.

The issue preserved by Petitioner, although noting that HCFA allegedly did not consider "appropriate" information, does not concern what information (cost reports versus other documents) would have been more appropriate for HCFA to review. Nor does the issue preserved by Petitioner concern whether HCFA should review current financial data, as opposed to those of a previous year.[7] Therefore, the content of HCFA's evidence (HCFA Ex. 14), together with Petitioner's failure to contest the truth of HCFA's representation that the financial information referenced therein had been considered in setting the CMP rates, is sufficient to eliminate the above-quoted issue preserved by Petitioner.

For this case, I add my observation that HCFA had also imposed a DPNA remedy against Petitioner. (In Orchard Grove, HCFA imposed only a CMP remedy.) As correctly

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[7] Obviously, Petitioner cannot reasonably fault HCFA for having failed to show its review of "current" fiscal information when HCFA was responding to Petitioner's allegation that HCFA had failed to exercise its legal obligation to consider Petitioner's financial condition before it imposed the CMP. Hearing Request, 3; see 42 C.F.R. § 488.438(f)(2).

noted by HCFA, Petitioner has not raised any challenge which relates specifically to the DPNA remedy. However, Petitioner's failure to specifically refer to the DPNA remedy in its motion and briefs does not warrant an outcome different than what I have previously set forth or incorporated by reference.

The regulations prohibit review of HCFA's discretion to select and impose one or more remedies when it finds a facility to be out of compliance with program requirements. 42 C.F.R. § 488.408(g)(2). Whether the remedy imposed is a CMP, a DPNA, or both, a facility has the right to contest the findings of noncompliance which underlie the imposition of the remedy or remedies. 42 C.F.R. § 498.3(b)(12). When a CMP is imposed, it merely allows the facility to challenge also the level of noncompliance determined by HCFA, if the level of noncompliance can result in changing the CMP range. 42 C.F.R. § 498.3(b)(13). Additionally, the same set of survey findings have resulted in HCFA's imposition of both the DPNA and CMP remedies in this case. For these reasons, the arguments Petitioner made concerning the CMP remedy would have necessarily included all the arguments it was legally entitled to make concerning the DPNA remedy. No further proceedings are necessary because Petitioner has not specifically referred to the DPNA remedy in any of its filings to date.

Conclusion

In accordance with the Rulings I have made above, Petitioner's request for hearing is hereby dismissed.

/s/

Mimi Hwang Leahy

Administrative Law Judge