Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
William Penn Care Center,	)	Date: October 21, 1998
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-97-471
	)	Decision No. CR552
Health Care Financing Administration.	)	
	)	

DECISION

I sustain the determination of the Health Care Financing Administration (HCFA) to deny Petitioner, William Penn Care Center, payment for new admissions effective June 9, 1997.

I. Background

This case is before me on the parties' written submissions. Neither party has requested that there be an in-person hearing. HCFA submitted a brief and seven exhibits (HCFA Ex. 1 - HCFA Ex. 7). Petitioner submitted a brief and two exhibits which it designated as Exhibit A and Exhibit B. I have redesignated Petitioner's Exhibit A as P. Ex. 1 and Petitioner's Exhibit B as P. Ex. 2. Neither party objected to my receiving into evidence any of the exhibits. Therefore, I receive into evidence HCFA Ex. 1 - HCFA Ex. 7 and P. Ex. 1 - P. Ex. 2.

Petitioner is a 119-bed skilled nursing facility that is located in Jeannette, Pennsylvania. HCFA Ex. 1 at 1. It has participated in the Medicare program since April 18, 1994. Id.

In order to participate in the Medicare program, long-term care facilities, including skilled nursing facilities, must comply with participation requirements that are established by statute and regulations. Social Security Act (Act), sections 1819, 1866(b)(2); 42 C.F.R.

Parts 483, 488. The Secretary of the Department of Health and Human Services (Secretary) and HCFA are authorized to impose remedies against a participating long-term care facility that is found not to be complying with an applicable participation requirement. Act, section 1819(h)(2)(B); 42 C.F.R. §§ 488.406, 488.417. Remedies which may be imposed against a noncompliant facility include denial of payment for new admissions. Id.

In December 1996, the Pennsylvania Department of Health (Pennsylvania State survey agency) received a complaint that Petitioner was not permitting a resident to be treated by the personal physician of the resident's choice. HCFA Ex. 2 at 1. The Pennsylvania State survey agency investigated this complaint and found it to be substantiated. HCFA Exs. 2, 3. HCFA determined from the results of the investigation that Petitioner was not complying with the participation requirement that is set forth in 42 C.F.R. § 483.10(d)(1). That requirement states that a resident has a right to "choose a personal attending physician." HCFA afforded Petitioner the opportunity to correct the alleged deficiency. HCFA determined to impose against Petitioner the remedy of denial of payment for new admissions when it concluded that Petitioner had failed to submit to HCFA an acceptable plan of correction. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether Petitioner failed to comply with an applicable participation requirement thereby giving HCFA authority to impose a remedy against it.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

1. Petitioner denied its residents the right to choose their personal attending physicians.

The evidence in this case establishes that Petitioner imposed barriers against physicians having access to residents at Petitioner's facility in order to provide care to those residents. I accept for purposes of this decision Petitioner's argument that any limitations on access that it imposed were intended to assure that its residents received care of the highest quality. Nonetheless, Petitioner's acts had the consequence of denying its residents the right to choose their personal attending physicians.

Petitioner admits that it restricted the ability of physicians to see residents in Petitioner's facility and of residents to choose their physicians. According to Petitioner, it permits a physician to have access to its facility only if that physician agrees to visit his or her patients at least once every 30 days. P. Ex. 1. Additionally, according to Petitioner, as a condition for being permitted to treat residents at Petitioner's facility, the physician must attend at least 50 percent of the quality assurance committee meetings that Petitioner holds for its attending physicians. Id.; see P. Ex. 2.

Petitioner acknowledges that implementation of its policies may limit the access of physicians to its residents:

> When physicians refuse to meet their obligations to participate in the development of interdisciplinary cooperation and the resolution of quality of care issues, the facility has sufficient grounds to terminate . . . attending privileges.

Petitioner's brief at 3.

What is evident from Petitioner's physician privileges policy is that physicians may be denied access to residents unless they agree in advance to abide by the policy. Petitioner not only terminates privileges for failure by a physician to comply with its policy but it requires a physician to accede to its policy as a precondition in advance of being admitted to the facility to see residents.

HCFA asserts that Petitioner restricts physician access to a greater extent than Petitioner acknowledges. HCFA contends that Petitioner dictates its residents' choices of physicians by allowing only two physicians to treat its residents and by assigning each of these two physicians to one-half of Petitioner's residents. According to HCFA, Petitioner selected two physicians to serve as staff physicians and then excluded all other physicians from having access to its residents. HCFA asserts that Petitioner's quality control policy was a pretext for denying physicians, other than the two who were selected by Petitioner, access to residents of Petitioner.

The evidence which HCFA submitted establishes a prima facie case to support its contentions, which Petitioner did not rebut. On November 4, 1996, Petitioner wrote to physicians advising them that, effective January 5, 1997, Petitioner would be implementing a policy of "team care" at its facility. HCFA Ex. 4. The "team care" policy envisioned that Petitioner would retain the services of two physicians. Id. Each of these two physicians would be assigned to care for the residents of a discrete wing of Petitioner's facility. Id. This policy effectively precluded each of Petitioner's residents

from choosing any physician other than the physician which Petitioner assigned to give care to that resident.

Petitioner began to implement its "team care" policy of physician access in December 1996. In that month, Petitioner advised at least one physician that the physician would not be permitted to treat residents at Petitioner's facility because the physician had not been selected by Petitioner to serve as a team member. HCFA Ex. 5.

Moreover, it appears from the evidence submitted by HCFA that Petitioner attempted to use the unwillingness of physicians to submit to Petitioner's quality control policies as a justification for excluding physicians from treating residents at Petitioner's facility. In January 1997, Petitioner advised at least one physician that the physician would no longer be permitted to attend to residents at Petitioner's facility due to the physician's failure to abide by Petitioner's quality control policy. HCFA Ex. 6.

Although the evidence supports HCFA's assertion that Petitioner actually excluded all but two physicians from having access to Petitioner's residents, it is not necessary for me to decide whether Petitioner's policy was so restrictive. Both the policy which Petitioner admits it implemented, and the policy which HCFA asserts Petitioner implemented, restricted the access of physicians to residents and limited the residents' choices of physicians. Both policies had the consequence of denying residents of Petitioner the right to choose their personal attending physicians.

> ***2. Petitioner failed to comply with the participation requirement which gives a resident of a long-term care facility the right to choose his or her own personal physician.***

The plain meaning of 42 C.F.R. § 483.10(d)(1) is that a long-term care facility may not in any respect limit the right of a resident of the facility to choose his or her own personal physician. Petitioner failed to comply with this requirement by implementing a policy which restricted physicians' access to its residents and its residents' access to physicians.

Petitioner asserts that the right to choose a physician is only a qualified right. According to Petitioner, a long-term care facility has the obligation to assure that its residents receive quality medical care. This obligation includes a duty to monitor and control the performance of attending physicians. Petitioner argues that a balance must be struck between the rights of residents to choose physicians and the obligation of a long-term care facility to monitor and control the performance of attending physicians. Petitioner contends that its policy of limiting physician access to residents is a reasonable method for striking that balance. Petitioner asserts that any limitation on a resident's right to

choose a physician which may result from Petitioner's implementation of its policy is an unavoidable and necessary consequence of striking the appropriate balance.

I do not agree with Petitioner that it has the right – by way of controlling the quality of physicians' services – to limit its residents' choices of physicians. There is no "rule of reason" implicit in 42 C.F.R. § 483.10(d)(1). The regulation plainly and simply operates to prohibit a facility from taking *any* action which interferes with a resident's right to choose his or her own physician. A facility may not curtail that right even if it does so with good intentions.

Petitioner argues that HCFA's own interpretive guidelines suggest that the right to choose a physician must be balanced against a facility's obligation to monitor and control the care that a physician provides. It asserts that these interpretive guidelines contain a statement that if a physician of a resident's own choosing fails to fulfill a requirement a facility shall have the right to seek alternate physician participation to assure that the resident is given adequate care and treatment. Petitioner's brief at 3.

Petitioner has not provided a citation for this alleged guideline. I cannot verify that what Petitioner cited to is an accurate excerpt from an authoritative HCFA policy statement. Furthermore, the excerpt to which Petitioner cited evidently omits examples which might serve to clarify the alleged guideline. For purposes of this decision, I am assuming that Petitioner has in fact quoted accurately from interpretive guidelines published by HCFA. Assuming that to be so, the statement which Petitioner cites does not support its argument that the right of a resident to choose his or her own physician may be restricted by a long-term care facility in the interest of promoting quality medical care.

On its face, the statement permits a long-term care facility to find *alternative* physician care for a resident *after* it has become apparent that the resident's physician of choice has not discharged a responsibility to a resident. The statement does not suggest that a facility has the authority to prejudge the qualifications of a physician to provide care. Nor does it authorize a facility to establish conditions which a physician must meet before he or she may provide care to a resident. It certainly does not suggest that a facility may erect artificial barriers to physician access, such as requiring that a physician attend a predetermined number of quality assurance committee meetings as a prerequisite to being permitted to treat residents.

Moreover, I would not find the alleged interpretive guideline to be a dispositive interpretation of 42 C.F.R. § 483.10(d)(1) even if I were to find that it meant what Petitioner claims it to mean. As I have stated, the meaning of the regulation is plain. A resident has an unconditional right to choose his or her own personal physician. HCFA may not rewrite this regulation or change its meaning with an interpretation.

3. HCFA is authorized to impose against Petitioner the remedy of denial of payment for new admissions.

Petitioner has not complied with the participation requirement that is stated in 42 C.F.R. § 483.10(d)(1). HCFA is authorized to impose a remedy for Petitioner's noncompliance. Permissible remedies include denial of payment for new admissions.

/s/

Steven T. Kessel
Administrative Law Judge