Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Affordable Skilled Nursing,	Date: December 29, 1998
Petitioner,	
- v. -	Docket No. C-98-308 Decision No. CR562
Health Care Financing Administration.	

DECISION

This case is before me on Petitioner's request for hearing dated May 5, 1998. In its hearing request, Petitioner, by counsel, sought to challenge HCFA's (Health Care Financing Administration's) determination that one of its locations did not qualify as a branch office under 42 C.F.R. § 484.2 for the period January 1, 1994 to February 28, 1997.[1] Petitioner asserted that the location in question met all of the requirements for branch designation and that the State survey agency had notice of this office and never indicated to Petitioner that it did not consider it to be a branch.

On August 21, 1998, HCFA filed a motion to dismiss Petitioner's hearing request. The basis of HCFA's motion was that Petitioner had not received any action by HCFA which constituted an initial determination under 42 C.F.R. § 498.3(b), and thus, Petitioner had no right to a hearing in this forum. Alternatively, HCFA asserted that, even if I found that HCFA had made an initial determination under 42 C.F.R. § 498.3(b) with respect to Petitioner, Petitioner's hearing request should be dismissed as untimely filed.

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[1] In its hearing request, Petitioner stated the time period in question as "January 1, 1994 to February 8, 1997." However, based on the parties' briefs, it appears that the February 8, 1997 date was stated in error, and that the correct date should be February 28, 1997.

HCFA's motion was accompanied by a brief and 28 exhibits (HCFA Exs. 1 - 28). Petitioner filed a brief in opposition, accompanied by four exhibits (P. Exs. 1 - 4). HCFA also filed a reply brief with two additional exhibits (HCFA Exs. 29 and 30). Neither party objected to the exhibits submitted by the other party. Accordingly, I admit HCFA Exs. 1 - 30 and P. Exs. 1 - 4 into evidence.

I have considered the parties' arguments, supporting exhibits, and the applicable law. For the reasons discussed below, I grant HCFA's motion to dismiss Petitioner's hearing request.

BACKGROUND

Petitioner is a home health agency that began doing business under new ownership, as Affordable Skilled Nursing, effective January 2, 1989. Its sole office was located in Akron, Ohio. HCFA Ex. 1. HCFA approved a Canton, Ohio, office as a branch office, effective February 2, 1995. HCFA Ex. 8. In a June 14, 1996 letter addressed to the Ohio Department of Health (ODH), Mary Sepulveda, Enrolled Agent for Petitioner, provided a description of Petitioner's "various locations," giving the "addresses of [their] offices and their functions . . . ." HCFA Ex. 9. Among others, Ms. Sepulveda described a site located on Beall Avenue in Wooster, Ohio:

> 1736 Beall Avenue, Wooster, Ohio - this is a satellite office maintained by 1 clerk and is used as a work site for the 2 RNs and 1 HHA that serve our patients in this area, where they complete paperwork and use the phones. Initial inquires [sic] are fielded and then transferred to the Canton office. A limited medical supply inventory is maintained and generally all active medical records are maintain [sic] in the Canton office.

HCFA Ex. 9, at 2.

In a letter to HCFA dated October 28, 1996, Ms. Sepulveda wrote that "costs associated with our Wooster and Canton offices [were] disallowed on our 1994 audit that was just finished." HCFA Ex. 10, at 1. Ms. Sepulveda enclosed a form HCFA 1513 "Disclosure of Ownership and Control Interest Statement" for the 1994 survey done by the ODH and alleged that "[t]his form clearly states that we have a branch in Wooster." Id., at 2. In a letter to Ms. Sepulveda dated July 7, 1997, HCFA's program representative, Douglas Wolfe, responded to Petitioner's October 28, 1996 letter

"concerning the approval of the Wooster, Ohio location as a branch office." HCFA Ex. 21. Mr. Wolfe explained that the information he reviewed --

> indicates that you did inform the ODH of the Wooster office location during the August 10, 1994 survey. In addition the documentation indicates that this site was used for a work site maintained by one clerk for 2 RNs and 1 HHA, where they completed paperwork and used the phones. A limited medical supply inventory was maintained and all active medical records were maintained in the Canton office. The Wooster office closed on February 28, 1997.

HCFA Ex. 21.

Mr. Wolfe stated that "we have determined that the Wooster office location does not meet the federal criteria for designation as a branch office because the medical records were not maintained at the Wooster location." Id. He stated further that "[t]his determination is not subject to administrative appeal." Id.

Petitioner, through Ms. Sepulveda, responded in a letter to Mr. Wolfe dated July 10, 1997. In the letter, Ms. Sepulveda asserted that HCFA erred in stating that the medical records for the Wooster office were maintained in the Canton branch office. She stated that they did not maintain a Canton branch office in 1994, and the Canton office was not "certified" as a branch office until 1995. Ms. Sepulveda requested again that the Wooster office be approved as a branch office. HCFA Ex. 22.

On July 11, 1997, HCFA, through Mr. Wolfe, apparently responded to Ms. Sepulveda's letter by sending her documentation supporting his conclusions that the Wooster location was not a branch office; however, this response was apparently "misrouted." HCFA Ex. 23; see HCFA Ex. 27. Ms. Sepulveda wrote again to Mr. Wolfe on January 2, 1998, stating that she had never received a response to her July 10 letter. She wrote, "[a]ccordingly, I assume that [HCFA] has decided to adhere to the position you articulated in your July 7 letter. I would appreciate it if you would confirm that this is correct." HCFA Ex. 26. By letter dated March 3, 1998, Mr. Wolfe responded to Ms. Sepulveda's January 2 letter. Mr. Wolfe stated that it appeared that his response to her July 7, 1997 letter had been "misrouted" and he enclosed a copy of the documentation that had been sent. Mr. Wolfe stated that "[o]ur determination of July 7, 1997 remains the same. However, a questionnaire was submitted on May 20, 1997

to [ODH] and on November 21, 1997 we approved the new Wooster location [at Walnut Street] effective July 1, 1997."[2] HCFA Ex. 27; see HCFA Ex. 24.

By letter dated May 5, 1998, Petitioner filed a hearing request with the Departmental Appeals Board (DAB) to contest the March 3, 1998 determination that the Beall Avenue, Wooster, location did not qualify as a branch office from January 1, 1994 through February 28, 1997. Petitioner also submitted a request for reconsideration to HCFA dated May 5, 1998.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. HCFA's determination that Petitioner's Beall Avenue location in Wooster, Ohio, did not qualify as a branch office is not an initial determination under 42 C.F.R. § 498.3(b) and therefore, Petitioner has no right to a hearing.

I find valid HCFA's argument that there has not been an "initial determination" under 42 C.F.R. § 498.3(b) with respect to Petitioner's Beall Avenue location in Wooster, Ohio; and therefore, Petitioner has no right to a hearing. HCFA's March 3, 1998 letter informing Petitioner that its earlier determination that Petitioner's Wooster, Ohio, location could not be approved as a branch office does not constitute an initial determination. Likewise, HCFA's July 7, 1997 letter to Petitioner stating that its Wooster location did not meet the federal criteria for designation as a branch office also does not constitute an initial determination affording Petitioner the right to a hearing.

Section 1866(h) of the Social Security Act (Act) provides for a hearing in those instances where an entity is "dissatisfied with a determination by the Secretary that it is not a provider of services." According to HCFA, the determination not to approve Petitioner's Wooster office location as a branch office is not among those determinations for which section 1866(h) confers hearing rights.

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[2] By letter dated November 21, 1997, HCFA informed Petitioner that, based on its review of information submitted to the ODH and additional information, it had determined that another Wooster office located at Walnut Street met the federal criteria for designation as a branch office effective July 1, 1997. The letter also noted that Petitioner had a parent office in Akron, Ohio, and a branch office in Canton, Ohio.

The Secretary's regulations at 42 C.F.R. Part 498 implement section 1866(h) of the Act. With respect to the appeal rights of prospective providers, 42 C.F.R. § 498.5(a)(1) provides that:

> [a]ny 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).

If the prospective provider is dissatisfied with the reconsidered determination, then 42 C.F.R. § 498.5(a)(2) provides that:

> [a]ny 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 [administrative law judge].

42 C.F.R. § 498.3(b) sets forth specifically those determinations which are to be considered initial determinations subject to review. An action taken by HCFA which is not one of the determinations listed at 42 C.F.R. § 498.3(b) is not subject to appeal under Part 498 of the regulations.

HCFA asserts that, in this case, the determination not to approve Petitioner's Beall Avenue, Wooster location as a branch office is not an initial determination under 42 C.F.R. § 498.3(b). Alternatively, HCFA contends that if the determination not to approve the Wooster location as a branch office does constitute an initial determination, then, Petitioner's hearing request would have to be dismissed as untimely because Petitioner did not file its request for hearing within 60 days of its receipt of such determination.

Petitioner contends that the governing statute does not specifically preclude its hearing request. Petitioner argues that HCFA's determination that its Wooster office did not qualify as a branch office was a determination concerning "[w]hether a prospective provider qualifies as a provider" and thus is an appealable determination under 42 C.F.R. § 498.3(b)(1). In support of its position, Petitioner relies on the reasoning contained in my ruling in Homelife Nursing, Inc., Docket No. C-94-382 (1995), Ruling Denying Health Care Financing Administration's Motion to Dismiss Request for Hearing.

I find no merit in Petitioner's arguments. As I will discuss below, I find that Petitioner's reliance on the reasoning contained in my ruling in Homelife is misplaced and would broaden the scope of the ruling beyond its intended limited application.

Petitioner's situation in this matter is factually distinguishable from the situation of the facility in Homelife. In Homelife, the California State survey agency licensed

Petitioner Homelife's Riverside office as a parent office rather than as a branch office. Subsequently, Homelife requested that HCFA designate its Riverside office as a branch office for purposes of Medicare certification. The California State survey agency, acting as an agent for HCFA, surveyed Homelife's Riverside office for Medicare certification purposes. Based on the survey results, the survey agency recommended to HCFA that it certify the Riverside office as a subunit for Medicare purposes. HCFA notified Homelife's Riverside office that it had accepted the Riverside office's agreement to participate as a home health agency in the Medicare program. HCFA assigned the Riverside office a provider number, separate from the parent and its branch, which indicated that HCFA had designated the Riverside office as a subunit rather than a branch. Petitioner sought to change the certification of the Riverside office from a subunit to a branch. Homelife Nursing, Inc., DAB CR417 (1996).

My ruling in Homelife dealt with the issue of whether HCFA's determination to designate Homelife's Riverside office as a subunit, rather than as a branch office, was a reviewable initial determination under 42 C.F.R. § 498.3(b). I recognized that the designation of branch or subunit status is inextricably intertwined with the determination of whether a prospective provider is qualifed to be certified as a provider. Under the regulations governing the certification of home health agencies, a branch office is not required to meet the conditions of participation independently from the parent office. However, a subunit must have sufficient administrative and supervisory capabilities to meet the conditions of participation independently of the parent office. Whether an entity qualifies as a subunit or a branch has significant impact on both the provider and HCFA regarding the provider's status and the consequential obligations imposed by regulation relating to such determination.

In Homelife, I found that the determination of whether a prospective provider qualifies as a provider under 42 C.F.R. § 498.3(b)(1) cannot be made without the integral determination of whether the prospective provider qualifies as a subunit or a branch. By determining that Riverside was a subunit rather than a branch, HCFA was in essence creating a separate provider status for this entity for which, absent a determination that such action was an initial decision, the prospective provider had no appeal rights. Thus, I held that HCFA's determination to certify Homelife's Riverside office as a subunit of the parent office, rather than as a branch, was a reviewable initial determination, within the meaning of 42 C.F.R. § 498.3(b)(1). Accordingly, I denied HCFA's motion to dismiss Riverside's request for hearing.

In this case, however, HCFA asserts that its determination not to approve Petitioner's Wooster location as a branch office does not involve the "branch vs. subunit" issue. I agree. The

determination of whether Wooster is a branch or some other entity does not impact on Petitioner's status as a provider. The reasoning contained in my Homelife ruling with respect to the branch/subunit distinction and its attendant implications with respect to the entity's responsibilities as a provider is inapplicable here.

> **a. A satellite workstation does not have any legal status under the regulations. The Beall Avenue, Wooster, worksite, as described by Petitioner, is neither a parent home health agency, branch office, nor a subunit as defined in the regulations. Therefore, it has no legal status under the regulations.**

First and foremost, I find that the documentary evidence establishes that Petitioner's Beall Avenue, Wooster, location was a satellite worksite, without the capabilities to act as a full-service office. This conclusion is consistent with Petitioner's own characterization of the Wooster site. In its letter to the ODH dated June 14, 1996, Petitioner gave a description of the Beall Avenue, Wooster, office:

> . . . this is a satellite office maintained by 1 clerk and is used as a work site for the 2 RNs and 1 HHA that serve our patients in this area, where they complete paperwork and use the phones. Initial inquires [sic] are fielded and then transferred to the Canton office. A limited medical supply inventory is maintained and generally all active medical records are maintain [sic] in the Canton office.

HCFA Ex. 9, at 2 (emphasis added).

Additionally, in a letter to ODH dated May 7, 1997, Petitioner notified ODH that ". . . our Wooster office (work station) has been closed since 2/28/97." HCFA Ex. 17 (emphasis added). It is apparent from Petitioner's own correspondence that Petitioner viewed the Wooster location as a workstation.

Petitioner thus sought branch office certification from HCFA for its Beall Avenue worksite in Wooster. The record indicates that HCFA determined that the Wooster site did not meet the federal criteria for designation as a branch office, and thus, did not approve the location as a branch office, essentially agreeing with Petitioner's own characterization of the office as a worksite. HCFA Ex. 21. A worksite has no legal status within the definitions used in regulating providers. The regulation at 42 C.F.R. § 498.2 lists various entities that can fall into the category of a "provider." Among the entities listed are hospitals, skilled nursing facilities, and home health agencies. 42 C.F.R. § 498.2 states also that a "'prospective provider' means any of the listed entities that seeks to participate in Medicare as a provider." A "worksite" is not among the listed

entities in 42 C.F.R. § 498.2. Thus, the regulations do not contemplate that a worksite can be a provider, or for that matter, a prospective provider.[3]

Moreover, the regulations pertaining specifically to home health agencies do not recognize workstations as entities having any legal status. 42 C.F.R. § 484.2 contains no definition for a worksite. In this case, there can be no dispute that the Wooster location is merely a worksite, without full-service capabilities. As such, the Wooster location could not be a provider, nor could it be considered by HCFA for certification as a prospective provider. Thus, unless the contested site is a parent or subunit, it has no legal significance as relates to its provider status. Based on Petitioner's own description of the Wooster site, it did not meet any of the stated definitions in the regulations. Consequently, HCFA correctly declined to grant Wooster "branch" status.

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[3] In its decision in Heartland Manor at Carriage Town, DAB No. 1664 (1998), an appellate panel of the DAB concluded that the appeal rights set forth in the Act which govern participation determinations attach to an institution/facility, not to the owner of that institution/facility. Thus, in Heartland Manor, the appellate panel found that, although petitioner had undergone a change in ownership following termination, the new owner of the facility could not seek to apply to the Medicare program as a prospective provider, but would be allowed to apply as a reentry provider. The appellate panel held that HCFA's notice to petitioner, stating that petitioner did not meet the criteria for reentry into the Medicare program, was an administrative action within the meaning of 42 C.F.R. § 498.3(d)(4), and was not an initial determination under 42 C.F.R. § 498.3(b). Accordingly, the appellate panel concluded that petitioner was not entitled to a reconsidered determination from HCFA or a hearing before an Administrative Law Judge (ALJ) on the action. The appellate panel thus dismissed petitioner's hearing request since no review rights attached to HCFA's determination. The situation of the petitioner in Heartland Manor is somewhat analagous to the present case, in that the new owner of the facility in Heartland Manor attempted to participate in the Medicare program as a prospective provider, and obtain a new provider number, different from that of the facility's previous owner. However, at no time was a new provider number involved. HCFA treated all requests by Heartland Manor to participate in the Medicare program as requests by a once terminated facility attempting to reenter the program. Heartland Manor could not have sought a new provider number as a prospective provider under those circumstances. Thus, as with the present case, there arose no issue in Heartland Manor concerning prospective providers, and Heartland Manor's hearing request was dismissed.

b. HCFA's determination concerning Petitioner's Beall Avenue, Wooster, worksite had no effect on Petitioner's existing provider certification status.

Finally, HCFA's determination concerning Petitioner's Wooster worksite had no effect on Petitioner's existing provider certification status. In its letter to Petitioner dated July 7, 1997, HCFA stated that "[b]ased on our review of the documentation, we have determined that the Wooster office location does not meet the federal criteria for designation as a branch office because the medical records were not maintained at the Wooster location." HCFA Ex. 21. HCFA made no mention of any adverse affect on the validity of Petitioner's provider number or provider agreement. Petitioner has never asserted that its status as a home health agency certified to participate in the Medicare program was affected by HCFA's determination to deny branch office status to the Wooster worksite. Based on the record, at all times during the period in issue, Petitioner has remained a certified provider with a Medicare provider agreement. In determining that Petitioner's Wooster worksite was not a branch office, HCFA has made no determination that Petitioner is not a provider, or that any existing provider agreement should be terminated.

In addition, Petitioner has argued that, should its request for hearing be dismissed, it will not have any avenue by which to contest HCFA's determination with respect to the Wooster location. Petitioner expresses its concern that, if it is not permitted to appeal HCFA's determination, it will suffer significant financial consequences.

The paramount goal of the certification requirements is to protect the health and safety of patients. The Secretary by her regulations has specifically concluded that not all actions taken by the agency are an initial determination subject to appeal. An action which does not impact on an entity's provider status is not subject to appeal. The action also must impact on the health and safety of patients and the conditions of participation to be appealed to the DAB.

CONCLUSION

For the reasons stated above, I conclude that, in determining that Petitioner's Beall Avenue, Wooster, worksite could not qualify as a branch office, HCFA took no action which constituted an initial determination under 42 C.F.R. § 498.3(b). Accordingly, I grant HCFA's motion to dismiss Petitioner's hearing request.

Because I find that Petitioner has no right to a hearing since HCFA has not made an initial determination within the meaning of 42 C.F.R. § 498.3(b)(1), I do not find it necessary to address the issue of whether Petitioner timely filed its request for hearing.

/s/

Edward D. Steinman
Administrative Law Judge