

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

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In the Case of:	)	
	)	Date: July 22, 1998
Heartland Manor at Carriage Town,	)	
	)	
Petitioner,	)	
	)	Docket Nos. C-98-360
- v. -	)	Decision No. CR543
	)	
Health Care Financing	)	
Administration.	)	
	)	
	)	

**DECISION DISMISSING REQUEST FOR HEARING**

I dismiss the request for hearing which Petitioner, Heartland Manor at Carriage Town, filed on May 29, 1998. As is made apparent from the decision of an appellate panel of the Departmental Appeals Board in Heartland Manor at Carriage Town, DAB No. 1664 (1998), Petitioner has no right to a reconsideration determination or to a hearing in this case.

I base my decision to dismiss Petitioner's May 29, 1998 hearing request on the facts recited in the hearing request and on the associated documents that Petitioner submitted in connection with its request. For purposes of this decision, I am assuming all of the facts recited in those documents to be true. I have taken the somewhat unusual step of not asking the parties to brief the issues in this case. I have not done so because it is apparent from the face of Petitioner's hearing request and from the appellate panel's decision in Heartland Manor that Petitioner has no right to a reconsideration determination or to a hearing.

**I. BACKGROUND AND UNDISPUTED FACTS**

**A. Background**

The background of this case is linked closely to the appellate panel's Heartland Manor decision. DAB No. 1664 at 4 - 5.

Petitioner operates a skilled nursing facility. The facility which is operated by Petitioner was owned previously by another entity, Chateau Gardens, Inc., and was operated as Chateau Gardens. The facility participated in the Medicare program. However, in 1989, the Health Care Financing Administration (HCFA) terminated the participation of Chateau Gardens in the Medicare program based on findings of deficiencies in meeting participation requirements that were of such severity as to pose an immediate threat to the health and safety of the facility's residents.

The facility was sold to the Hurley Foundation on January 1, 1994 in an arms-length transaction. The Hurley Foundation subsequently changed the name of the facility to Heartland Manor at Carriage Town (Petitioner). On January 7, 1997, Petitioner made a request to participate in the Medicare program. It was surveyed on May 2, 1997 by representatives of the Michigan Department of Consumer and Industry Services. The surveyors determined that Petitioner did not meet all participation requirements as of that date. On May 21, 1997, HCFA notified Petitioner that Petitioner's January 7, 1997 request to participate was denied. Petitioner requested reconsideration from this action. On July 2, 1997, HCFA advised Petitioner that it was not entitled to reconsideration. Petitioner then requested a hearing.

HCFA asserted that its action denying Petitioner's request to be certified to participate in Medicare was not a determination from which Petitioner had a right to reconsideration or a hearing. HCFA argued that Petitioner was a "terminated provider" with no rights to reconsideration or a hearing. In his initial decision of the case, Administrative Law Judge Stephen J. Ahlgren addressed the narrow fact and legal issue of whether Petitioner was a "terminated provider" without reconsideration and hearing rights or a "prospective provider" with reconsideration and hearing rights. Heartland Manor at Carriage Town, DAB CR516 (1998). The administrative law judge concluded that Petitioner was a prospective provider. He concluded that HCFA's May 21, 1997 notification to Petitioner denying it participation in Medicare was a determination from which Petitioner, as a prospective provider, was entitled to reconsideration.

The administrative law judge, in effect, remanded the case back to HCFA for a reconsideration determination. Additionally, he dismissed Petitioner's hearing request, reasoning that Petitioner would not be entitled to a hearing where HCFA had failed to conduct a reconsideration of its determination not to certify Petitioner. DAB No. CR516, at 12.

HCFA appealed the administrative law judge's decision. On appeal, the appellate panel reversed the administrative law judge's decision to remand the case for a reconsideration determination. The appellate panel concluded that Petitioner was not a "prospective provider." Therefore, Petitioner had no right to a reconsideration determination or to a hearing from HCFA's determination that it did not comply with participation requirements. DAB No. 1664 at 24 - 25.

## **B. Additional undisputed facts**

Petitioner's current hearing request addresses fact developments that were not raised by Petitioner or HCFA in the case that was decided by Administrative Law Judge Ahlgren and which was reviewed by the appellate panel. These additional fact developments relate to a survey

of Petitioner on November 24, 1997 which led to HCFA's January 14, 1998 notification to Petitioner that Petitioner was again being denied certification to participate in Medicare.

Petitioner submitted a number of attachments with its most recent hearing request. For purposes of creating a record, I am identifying these attachments as exhibits and I am receiving them into evidence. The exhibits establish the additional fact developments on which I base my decision. The exhibits are as follows: letter dated July 2, 1997 from HCFA's Region V office to counsel for Petitioner (P. Ex. 1); letter dated July 30, 1997 from HCFA's Region V office to Petitioner's administrator (P. Ex. 2); letter dated September 4, 1997 from counsel for Petitioner to Gerald P. Chopin (P. Ex. 3); letter dated January 14, 1998 from HCFA's Region V office to Petitioner's administrator (P. Ex. 4); letter dated January 26, 1998 from HCFA's Region V office to Petitioner's administrator (P. Ex. 5); letter dated February 2, 1998 from counsel for Petitioner to HCFA's Region V office (P. Ex. 6); letter dated March 6, 1998 from HCFA's Region V office to counsel for Petitioner (P. Ex. 7); letter dated March 6, 1998 from counsel for Petitioner to HCFA's Region V office (P. Ex. 8); letter dated March 20, 1998 from counsel for Petitioner to HCFA's Region V office (P. Ex. 9); letter dated March 26, 1998 from HCFA's Region V office to counsel for Petitioner (P. Ex. 10); letter dated March 26, 1998 from Department of Health and Human Services Region V Office of the Chief Counsel to counsel for Petitioner (P. Ex. 11); letter dated May 29, 1998 from counsel for Petitioner to Jacqueline T. Williams requesting an administrative hearing (P. Ex. 12).

The exhibits offered by Petitioner in connection with its current request for a hearing establish that Petitioner applied again to participate in Medicare during the pendency of the case which was before Administrative Law Judge Ahlgren. See P. Ex. 4. Petitioner was surveyed on November 24, 1997. See Id. On January 14, 1998, HCFA notified Petitioner that, at the November 24, 1997 survey, Petitioner had been found to be deficient in complying with several participation requirements. P. Ex. 4. On January 26, 1998, HCFA sent Petitioner an additional notice in which it informed Petitioner of the results of an informal dispute resolution proceeding which had been conducted to address the issues raised by the November 24, 1997 survey of Petitioner. P. Ex. 5. HCFA advised Petitioner in this notice that the informal dispute resolution proceeding had confirmed that Petitioner was not complying with participation requirements as of the November 24, 1997 survey. Id.

On February 2, 1998, counsel for Petitioner wrote to HCFA. P. Ex. 6. In that letter, counsel reasserted Petitioner's contention that it was a prospective provider. Id. HCFA replied to that letter on March 6, 1998. P. Ex. 7. In that letter, HCFA advised Petitioner that it had been notified of Administrative Law Judge Ahlgren's decision that Petitioner was a prospective provider. Id. HCFA advised Petitioner that it would respond to counsel's February 2, 1998 letter after it had reviewed the administrative law judge's decision and had determined the implications of that decision. Id.

On March 6, 1998, counsel for Petitioner wrote again to HCFA. P. Ex. 8. Counsel formally requested pursuant to Administrative Law Judge Ahlgren's decision that a reconsideration by HCFA be made of its determination to deny participation to Petitioner based on the results of the May 2, 1997 survey. Id. On March 20, 1998, counsel for Petitioner sent an additional letter to HCFA. P. Ex. 9. In that letter, counsel reviewed the history of Petitioner's attempts to participate

in Medicare and reminded HCFA that it had not yet responded to her requests that HCFA reconsider its previous determinations not to certify Petitioner to participate. Id.

HCFA responded to these requests with a letter to Petitioner's counsel dated March 26, 1998. P. Ex. 10. HCFA advised counsel that it had referred Petitioner's requests to the Office of General Counsel. Id. The March 26, 1998 response of the Office of General Counsel was attached to HCFA's letter to Petitioner's counsel. Id.; see P. Ex. 11.

In its response, the Office of General Counsel reiterated HCFA's position that Petitioner was not a prospective provider. P. Ex. 11. Further, it advised Petitioner that HCFA had decided to appeal Administrative Law Judge Ahlgren's decision to an appellate panel of the Departmental Appeals Board. Id. at 2. Therefore, according to the Office of General Counsel, the administrative law judge's decision had not become final. Id. The Office of General Counsel advised Petitioner that HCFA would not reconsider its action to deny participation based on the outcome of the May 1997 survey of Petitioner pending a final decision in Petitioner's case. Id. Additionally, and "[f]or the same reasons," HCFA declined to reconsider its January 14, 1998 action denying participation to Petitioner based on the result of the November 24, 1997 survey. Id.

## II. ISSUE, FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Issue

The issue in this case is whether Petitioner is entitled to reconsideration of or a hearing from HCFA's refusal to reconsider its action to deny Petitioner participation in Medicare based on the outcome of the November 24, 1997 survey of Petitioner.

### B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision that Petitioner is not entitled to a reconsideration determination or to a hearing. I set forth each Finding below as a separately numbered heading. I discuss each Finding in detail.

#### ***1. The issues raised by Petitioner's current hearing request have been resolved as a matter of law by the appellate panel's final decision in the appeal of Administrative Law Judge Ahlgren's decision.***

The appellate panel's decision in Heartland Manor is based on a different survey than is Petitioner's current hearing request. The survey that was the basis for the appellate panel's decision is the May 2, 1997 survey, and not the November 24, 1997 survey which is the basis for Petitioner's current request. The following issues are implicit in Petitioner's current request: (1) whether Petitioner is a prospective provider; and (2) whether Petitioner is entitled to reconsideration of or a hearing from HCFA's January 14, 1998 action in which HCFA found that Petitioner would not be certified to participate in Medicare.

I find that the appellate panel's decision operates to decide these issues. In its decision, the appellate panel found that: (1) Petitioner is not a prospective provider; and (2) Petitioner was not

entitled to reconsideration of or a hearing from the action that HCFA took based on the May 2, 1997 survey of Petitioner. The facts of the case that the appellate panel decided are indistinguishable from those which are now before me. Thus, the reasoning of the appellate panel must apply equally to the facts of the current case as it applied in the case that the appellate panel decided. It is evident from the appellate panel's decision that Petitioner is not a prospective provider. Also, it is evident that Petitioner is not entitled to reconsideration of or a hearing from HCFA's January 14, 1998 action.

***2. Petitioner's hearing request must be dismissed.***

I dismiss Petitioner's current request for a hearing. Petitioner is not entitled to a reconsideration determination from HCFA inasmuch as it is not a prospective provider. Nor is Petitioner entitled to a hearing.

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/s/  
Steven T. Kessel  
Administrative Law Judge