Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Karim Maghareh, Ph.D. and
BestCare Laboratory Services, LLC
(O.I. File No. H-13-4-3272-9),

Petitioner,

v.

The Inspector General.

Docket No. C-16-40

ALJ Ruling No. 2016-20

Date: September 20, 2016

ORDER DENYING MOTION TO COMPEL DISCOVERY

Karim Maghareh, Ph.D. and BestCare Laboratory Services, LLC (Petitioners) moved to compel the Inspector General (IG) of the Department of Health and Human Services (HHS) to produce documents related to audits performed by HHS contractors in 2003 and 2007 of BestCare Laboratory Services, LLC. In the alternative, Petitioners requested that I issue subpoenas requiring that the HHS contractors produce those documents. The IG responded that Petitioners already received all of the responsive documents in the IG's possession and that the IG is not obligated to obtain documents from other HHS components in order to provide them to Petitioners. The IG also argued that subpoenas should not issue because it would only result in duplicative efforts to provide documents that Petitioners already received.

I deny Petitioners' motion to compel discovery (P. Motion) because the IG is correct that the discovery rules applicable to this proceeding limit requests to documents that the IG possesses. Further, I deny Petitioners' request for subpoenas because Petitioners' request did not comply with regulatory requirements.

I. Background

In an August 21, 2015 letter, the IG notified Petitioners that he proposed to exclude them from Medicare, Medicaid, and all other federal health care programs for a period of 15 years pursuant to 42 U.S.C. § 1320a-7(b)(7)). Specifically, the IG alleged that Petitioners submitted "claims to Medicare for items and services that [they] knew or should have known were not provided as claimed and were false or fraudulent" in violation of 42 U.S.C. § 1320a-7a. Request for Hearing, Attachment A at 2. Petitioners timely requested a hearing before an administrative law judge (ALJ) to dispute the proposed exclusion.

On December 2, 2015, I held a prehearing conference with the parties' counsel and, at the conference, counsel agreed to certain deadlines for discovery. *See* December 3, 2015 Order Following Prehearing Conference and Schedule for Discovery.

While the parties were still in the discovery process, on March 8, 2016, Petitioners filed a motion to stay this proceeding. Petitioners argued that I should stay this proceeding until such time as the United States District Court for the Southern District of Texas (District Court) rules on a motion for summary judgment pending before it in a related proceeding. The next day, Petitioner sought an extension of the discovery deadlines because the deadlines to complete discovery were likely to lapse before I ruled on the motion to stay. The IG opposed Petitioners' motion to stay on March 17, 2016. I denied Petitioners' motion on March 23, 2016, but extended the deadlines for the parties to respond to discovery requests, seek a motion for a protective order, file a status report, and file a motion to compel the production of documents.

On April 19, 2016, Petitioners requested that the District Court enjoin this proceeding; however, on April 20, 2016, the District Court denied Petitioner's request. Subsequently, Petitioners filed a motion to compel discovery or, in the alternative, to issue subpoenas.

II. Petitioners' Motion to Compel Discovery

Petitioners seek to compel the IG to produce documents described in two of Petitioners' discovery requests: Request for Production 13 and Request for Production 19. P. Motion at 2; s*ee* P. Motion, Attachment A at 9, 11. Request for Production 13 asks the IG to produce "all documents evidencing TriCenturion's review, including its evaluations, comments, results, analysis and/or determinations, of any of BestCare's claims." P. Motion, Attachment A at 9. Request for Production 19 asks the IG to produce "all records, notes, memoranda or other documents relating or referring to any correspondence or communication, whether oral or in writing, between BestCare and [the

Centers for Medicare & Medicaid Services (CMS)] and/or its agents, including, but not limited to TrailBlazer, TriCenturion and/or CERT Documentation Contractors (CMS 500-99-0019/002 PSC CERT), regarding billing for flying specimens under P9603."[1] P. Motion, Attachment A at 11. Petitioners seek to "confirm the existence and obtain from [the IG] certain reports, summaries, memoranda or other findings or conclusions of audits of BestCare performed by the Government[2] beginning in 2003 ('CERT DC AUDIT') and performed by TriCenturion, Inc. in 2007 ('TriCenturion Audit')." P. Motion at 1.

Hearings in exclusion proceedings are governed by 42 U.S.C. § 405(b). 42 U.S.C. § 1320a-7(f)(1)-(2). Section 405(b) does not expressly provide for discovery. Where a controlling statute is silent, the Administrative Procedure Act does not require discovery in administrative proceedings at all, and agencies may provide for limited discovery by regulation. *See Sturm Ruger & Co. v. Chao*, 135 Fed. Appx. 431, 436 (1st Cir. 2005) (*per curiam*); *Trailways Lines, Inc. v. I.C.C.*, 766 F.2d 1537, 1546 (D.C. Cir. 1985) ("[T]he conduct and extent of discovery in agency proceedings is a matter ordinarily entrusted to the expert agency . . . ."); *Pacific Gas & Electric Co. v. FERC*, 746 F. 2d 1383, 1387 (9th Cir. 1984). The regulations at 42 C.F.R. § 1005.7 provide limited discovery rights in exclusion proceedings. *See* 57 Fed. Reg. 3298, 3325 (Jan. 29, 1992) (The Secretary of Health and Human Services (Secretary) stated in the final rule establishing the discovery regulation that she intended "discovery . . . to be as limited as possible . . . ."

Section 1005.7(a) defines to whom discovery requests can be made and states that "a party may make a request to another party for the production of documents . . . which are relevant and material to the issues before the ALJ." Further, the regulations state that "[i]n exclusion cases, the parties to the proceeding will consist of the petitioner and the IG. 42 C.F.R. § 1005.2(b); *see also* 42 C.F.R. § 1005.1 (defining the term *Inspector General (IG)* as the Inspector General of HHS).

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[1] Petitioners' motion to compel names only government contractors as the targets for its discovery requests, but Request for Production 19 also requests documents related to communications with CMS. Because Petitioners refer only to their desire to receive documents related to the contractor audits, they appear to have narrowed Request for Production 19 in their motion to compel. The fact that, in the alternative, Petitioners only request subpoenas to be issued to CERT DC and TriCenturion, but not CMS, demonstrates that that they do not seek the described documents from CMS.

[2] Elsewhere Petitioners clarify that it was not "the Government," but HHS contractors, the "CERT Documentation Contractor" and "TriCenturion, CMS's Program Safeguard Contractor," who performed these audits. Request for Hearing, Attachment B at 7.

The IG argues that Petitioners may only request documents in *the IG's* possession, not documents that another entity possesses. The IG argues that section 1005.7(a) only permits one party to the litigation to request documents possessed by another party to the litigation and that the preamble to the final rule establishing section 1005.7 limits the IG's responsibility to only producing documents in the IG's possession. IG Response to Petitioners' Motion to Compel at 4-6.

Petitioners argue that the IG must produce documents in the possession of HHS contractors on the theory that the IG has "control" over them. Petitioners cite Federal Rule of Civil Procedure 34 as support. P. Motion at 5.

I agree with the IG's position. While Petitioners accuse the IG of "reading in" a restriction on the kinds of documents the IG must produce (P. Motion at 5-6), it is Petitioners who are reading language into section 1005.7 that is not present. Unlike Federal Rule of Civil Procedure 34, section 1005.7 does not require disclosure of documents within a party's "possession, custody, or control." Section 1005.7 is silent on the scope of the parties' production obligations; as Petitioners observe, "[i]t does not speak to the sources from whom documents may be obtained." P. Motion at 5. To the extent that the regulation is ambiguous on the scope of the parties' production obligations, it is appropriate to turn to the preamble to the final rule. *El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008) ("[T]he preamble language should not be considered unless the regulation itself is ambiguous"); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("While language in the preamble of a regulation is not controlling over the language of the regulation itself . . . [it] is evidence of an agency's contemporaneous understanding of its proposed rules. . . . Although the preamble does not 'control' the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent.").

The preamble to the final rule promulgating section 1005.7 directly addresses the scope of the parties' discovery obligations. When the Secretary proposed what would become section 1005.7, several commenters "were concerned that the type of discovery provided for under § 1005.7 was too limited," and "[a]nother commenter was concerned whether the [IG], in response to a discovery request, was required to seek or obtain material in the possession of other branches or divisions of the agency." 57 Fed. Reg. at 3325. In responding to these comments and concerns, the Secretary explained "that discovery requests may only be made from one party to 'another party.' Therefore, the [IG] may only be requested to produce documents in the possession of the [IG], as a party to the proceeding under § 1005.2(b), *and not documents potentially in the possession of other branches or divisions of the Department . . . .*" *Id.* (emphasis added). The Secretary

could hardly have been clearer. Because section 1005.7 does not directly address whether the parties must produce documents that are outside their direct possession, I defer to the Secretary's interpretation of the regulation at its inception.

The burden is on Petitioners to demonstrate that their requests should be allowed. 42 C.F.R. § 1005.7(e)(4). In the present matter, Petitioners have not shown that the IG has an obligation to produce documents that are not in the IG's possession. As a result, the IG is only required to produce documents in his direct possession, which he apparently has done. Therefore, I deny Petitioners' motion to compel discovery.

III. Petitioners' Subpoena Requests

Petitioners request that, in the alternative, I issue subpoenas to CERT DC Audit and to TriCenturion for the precise documents that they seek from the IG. P. Motion at 6. Petitioners argue that I have the authority to issue a subpoena for documents pursuant to 42 C.F.R. § 1005.4(b)(5), which grants me the authority to "[i]ssue subpoenas requiring the attendance of witnesses at hearings and the production of documents at or in relation to hearings."

I do not reach the merits of Petitioners' subpoena request. The request clearly does not comply with the requirements for subpoena requests set forth in 42 C.F.R. § 1005.9(d). Therefore, I deny Petitioners' request for subpoenas at this time, but will consider a properly made motion for a subpoena should Petitioners make one at a later date.

It is so ordered.

_____/s/_____
Scott Anderson
Administrative Law Judge