

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Elizabeth M. Prokay,	)	Date: October 31, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-555
	)	Decision No. CR1860
Centers for Medicare and	)	
Medicaid Services.	)	
_____	)	

**DECISION**

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) sustaining its determination to deny Petitioner, Elizabeth Prokay, enrollment in the Medicare program.

**I. Background**

Petitioner applied to participate in the Medicare program to provide mental health care services to Medicare beneficiaries as a non-physician practitioner. Specifically, Petitioner seeks to participate in Medicare as a licensed professional counselor of mental health services.

CMS denied Petitioner's application on the ground that Petitioner does not possess the necessary professional qualifications to participate in Medicare. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

CMS moved for summary judgment. In support of its motion CMS provided five proposed exhibits which it designated as CMS Ex. 1 - CMS Ex. 5. Petitioner opposed the motion.

For purposes of the record I am receiving CMS Ex. 1 - CMS Ex. 5.

## II. Issue, findings of fact and conclusions of law

### A. Issue

The issue in this case is whether CMS is authorized to deny Petitioner enrollment in the Medicare program.

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

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

***1. The Medicare program does not accept as participating providers and/or suppliers individuals whose professional qualifications do not satisfy specific participation requirements.***

The qualifications of those who may participate in Medicare are established by relevant sections of the Social Security Act (Act) and by implementing regulations. Neither the Act nor the regulations define a “licensed professional counselor” as a provider who qualifies to participate in Medicare. Recognizing that there is no specific statutory recognition of her profession, Petitioner argues that she should nonetheless be certified to participate in Medicare as a provider of clinical social worker services. She asserts that the professional services provided of a licensed professional counselor are indistinguishable from those provided by a clinical social worker. She argues that she should qualify to participate as a clinical social worker based on the functional identity of the services performed by the two classes of professionals.

The Act defines “clinical social worker services” at section 1861(hh)(2). In order to qualify as a participating provider of such services one must qualify as a “clinical social worker”. Act, section 1861(hh)(1). This section of the Act defines a clinical social worker as an individual who:

- (A) possesses a master’s or doctor’s degree in social work;
- (B) after obtaining such degree has performed at least 2 years of supervised clinical social work; and
- (C)(i) is licensed or certified as a clinical social worker by the State in which the services are performed, or
  - (ii) in the case of an individual in a State which does not provide for licensure or certification –

- (I) has competed at least 2 years or 3,000 hours of post-master's degree supervised clinical social work practice under the supervision of a master's level social worker in an appropriate setting (as determined by the Secretary), and
- (II) meets such other criteria as the Secretary establishes.

There is nothing in either the Act or in implementing regulations which provides that an individual may qualify to provide clinical social worker services – or counseling services – with education or experience that does not satisfy precisely the statutory criteria for participation as a clinical social worker. Nor is there anything in either the Act or in implementing regulations that would require or permit the Secretary of this Department to waive the statutory qualifying criteria in order to allow an individual to participate as a clinical social worker. Therefore, in order to sustain Petitioner's argument that she qualifies for participation I must find that Petitioner satisfies exactly the statutory criteria for a participating clinical social worker.

***2. The undisputed material facts of this case establish that Petitioner fails to satisfy the statutory requirements for participation as a clinical social worker.***

The undisputed material facts of this case establish that Petitioner fails to satisfy the statutory participation requirements for a provider of social worker services. Consequently, she does not qualify to participate and CMS correctly determined to deny her enrollment application.

Petitioner asserts that she meets all requirements for a “licensed professional counselor” in the State of Ohio. She contends that, under Ohio law, she is qualified to provide any and all of the services that a provider of social worker services provides. Consequently, according to Petitioner, she possesses equivalent professional qualifications to those required by the Act of a provider of social worker services and, therefore, should be certified to participate in Medicare.

However, Petitioner has not provided evidence to show that she has a Master's or Doctor's degree in social work, she has not established that she has provided at least two years of supervised clinical social work, and she has not shown that she is licensed or certified as a clinical social worker by the State of Ohio. Act, section 1861hh(1)(A), (B), (C)(i). Nor has Petitioner proven that Ohio does not provide for licensure or certification of clinical social workers and that she meets the criteria which pertain in that case. Act, section 1861(hh)(1)(C)(ii).

Petitioner argues that a legal distinction between a clinical social worker and a licensed professional counselor is unfair because, in fact, the work performed by these two classes of health care professionals is essentially identical as are their qualifications. I make no findings in this decision whether the education, training, and experience possessed by Petitioner are functionally equivalent to those that are possessed by a clinical social worker as that term is defined by section 1861(hh)(1) because, even if that were so, it would have no impact on my decision. In this case the Act simply does not allow for a “functional equivalent” exception to its precise criteria for participation. I am without authority to direct CMS to make such an exception.\*

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/s/  
Steven T. Kessel  
Administrative Law Judge

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\* The issue of equivalency has been addressed by administrative law judges in at least two other cases. In each of them the judge held that failure by an applicant for provider status to prove that he or she met precisely the criteria established by section 1861(hh) of the Act supported CMS’s determination not to certify the applicant. In each case the judge rejected an “equivalency” argument. *Dorothy Rose Hrynyk*, DAB CR1444 (2006); *Rosalyn L. Olian*, DAB CR1472 (2006).