Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Revathi Bingi, Ed.D.,	)	Date: March 8, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-558
	)	Decision No. CR1573
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I affirm the determination of the Medicare Part B Hearing Officer (Hearing Officer) to uphold the revocation by the Medicare Part B carrier, AdminaStar Federal (Carrier), of Petitioner's Medicare provider identification number (PIN) from February 15, 2000 through March 12, 2006 (the relevant period). I find the Hearing Officer correctly determined that during the relevant period Petitioner did not meet all state requirements to be considered a clinical psychologist, in that she had not been endorsed by the Indiana State Psychology Board (Psychology Board) as a Health Service Provider in Psychology (HSPP).

I. APPLICABLE AUTHORITY

Section 1866(j) of the Social Security Act (Act), as amended by section 936 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, authorized the Secretary of Health and Human Services to establish a process for the enrollment in the Medicare Program of providers of services and suppliers. Section 1866(j)(2) of the Act gives providers and suppliers appeal rights for certain determinations involving enrollment, using the procedures that apply under section

1866(h)(1)(A) of the Act. These procedures are set out at 42 C.F.R. Part 498, *et. seq.*, and provide for hearings by Administrative Law Judges (ALJs) and review of ALJ decisions by the Departmental Appeals Board (Board).

In provider appeals under 42 C.F.R. § 498, the Board has determined that CMS must make a *prima facie* case that an entity has failed to comply substantially with federal requirements. *See MediSource Corporation*, DAB No. 2011 (2006). *"Prima facie"* means that the evidence is "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted." *Rosalyn L. Olian,* DAB CR1472, at 2 (2006), *quoting Black's Law Dictionary* 1228 (8th ed. 2004); *see also Hillman Rehabilitation Ctr. v. U.S. Dept. of Health and Human Services,* No. 98-3789 (GEB) (D.N.J. May 13, 1999). To prevail, the entity must overcome CMS's showing by a preponderance of the evidence. *Batavia Nursing and Convalescent Center,* DAB No. 1904 (2004), *aff'd, Batavia Nursing and Convalescent Center v. Thompson,* 129 Fed. Appx. 187 (6th Cir. 2005); *Emerald Oaks,* DAB No. 1800 (2001); *Cross Creek Health Care Center,* DAB No. 1665 (1998); *Hillman,* DAB No. 1611 (1997).

Section 1861 of the Act defines the medical and other health services that are eligible for Medicare reimbursement by a non-physician practitioner or an allied health professional. Under section 1842(b)(18)(C) of the Act, the types of "practitioners" include the following: a physician assistant, nurse practitioner, clinical nurse specialist, certified nurse-midwife, clinical social worker, and clinical psychologist. The Act further defines "qualified psychologist services" as

> [S]uch services and such services and supplies furnished . . . by a clinical psychologist (as defined by the Secretary) which the psychologist is legally authorized to perform under State law (or the State regulatory mechanism provided by State law) as would otherwise be covered if furnished by a physician or as an incident to a physician's service.

Act, section 1861(ii).

CMS regulations define the credentialing requirements and criteria for providers and provider eligible services at 42 C.F.R. §§ 410.69-410.78. The regulation at 42 C.F.R. § 410.71(d) sets forth the qualifications required to be enrolled in the Medicare program as a clinical psychologist. A clinical psychologist is defined as an individual who –

> (1) Holds a doctoral degree in psychology; and

(2) Is licensed or certified, on the basis of the doctoral degree in psychology, by the State in which he or she practices, at the independent practice level of psychology to furnish diagnostic, assessment, preventive, and therapeutic services directly to individuals.

42 C.F.R. § 410.71(d).

II. SUMMARY JUDGMENT

CMS submitted a motion for summary judgment and brief (CMS Br.) accompanied by joint exhibits (J. Exs.) 1-12 and CMS exhibits (CMS Exs.) 1-7. Petitioner submitted a motion for summary judgment and brief and a response to CMS's motion (P. Br.) and Petitioner's exhibits (P. Exs.) 1-9. CMS submitted a brief in response to Petitioner's motion and a reply to Petitioner's response (CMS reply), and Petitioner submitted a reply (P. Reply). I admit J. Exs. 1-12, CMS Exs. 1-7, and P. Exs. 1-9.[1]

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[1] Both parties submitted motions to strike and objections and responses. Petitioner submitted a motion to strike paragraph 3 of the Declaration of Shelly L. Mazo, Board Director of the Psychology Board, asserting that she did not have personal knowledge of the alleged purpose behind the establishment of the HSPP requirement in 1985. Petitioner also submitted a motion to strike paragraph 7 of the Declaration of Christy J. Van Dyke, Manager, Indiana Part B Provider Enrollment at AdminaStar Federal, Inc., asserting that the Manager's declaration regarding the requirements necessary to obtain a Medicare PIN as a clinical psychologist for billing purposes was not a "fact" based on "personal knowledge" but a legal conclusion. CMS submitted motions to strike Petitioner's exhibits 4, 5, and 6. CMS asserted P. Ex. 4, an internet printout of the Indiana Professional Licensing Agency, printed on November 29, 2006, listing Barbara McNutt as Chief Counsel, is irrelevant. CMS asserted that P. Ex. 5, a Medicare Remittance Notice dated October 12, 2006, and sent to Von Bargen Sims and Associates, is also legally irrelevant as this case does not involve recoupment by Medicare of funds provided to Von Bargen. CMS also asserted that P. Ex. 6, a copy of an e-mail to Petitioner, is not authenticated and cannot be accepted into evidence for the truth of the matters asserted in it. I am denying all of these motions to strike. They reflect disputes over facts not material to the legal issue under 42 C.F.R. § 410.71(d). They would be material only if I could entertain claims of equitable estoppel or if some "knowledge," "reliance," "willfullness," or "intent" showing was necessary to grant or deny the PIN.

While FED. R. CIV. P. 56 is not directly applicable to proceedings under 42 C.F.R. Part 498, it does provide guidance for the standard of review for summary judgment motions. Summary judgment is generally appropriate when the record reveals that no genuine dispute exists as to any material fact and the undisputed facts clearly demonstrate that one party is entitled to judgment as a matter of law. *Residence at Kensington Place,* DAB No. 1963 (2005); *White Lake Family Medicine, P.C.,* DAB No. 1951 (2004). Here, both parties have moved for summary judgment. In fact, as set forth below, the parties do not disagree concerning the material facts of the case. Their disagreement lies in the application of the law to the facts. A dispute between the parties over the correct conclusion to be drawn from undisputed facts is not an impediment to the entry of summary judgment, and in truth may be understood as the precise procedural context in which summary disposition is most appropriate. Moreover, although I find for CMS, I am adopting the relevant and material findings as urged and set forth by Petitioner in her brief.

III. UNDISPUTED MATERIAL FACTS

I adopt relevant and material undisputed facts set forth in Petitioner's brief at P. Br. 2-6.

1. On or about June 30, 1998, Petitioner first submitted an application for a Medicare PIN as a clinical psychologist (as that term is used at 42 C.F.R. § 410.7(d)), to allow the organization for which she then worked, Hobson Psychiatric Services (Hobson), to bill Medicare for payment for clinical psychologist services rendered to Medicare beneficiaries.

2. In an addendum to her application dated September 28, 1998, Petitioner indicated that she was not endorsed as a HSPP in Indiana. J. Ex. 1, at 12; P. Ex. 1, at 3-4.

3. In the addendum, Petitioner expressly and legibly wrote by hand: "I am not endorsed as Health Service Provider (HSPP) in Psychology in Indiana." In the final paragraph she noted "with the above additional information I am not sure if I qualify. However, I am signing because if I do it will be helpful." J. Ex. 1, at 12.

4. The Carrier reviewed the application and issued Petitioner Medicare PIN number 926320A by letter dated November 3, 1998.

5. Petitioner left Hobson to provide services at Von Bargen Sims & Associates (Von Bargen). Petitioner submitted a Medicare application for a new Medicare PIN in order for Von Bargen to bill for services rendered by Petitioner as a clinical psychologist to Medicare beneficiaries at Von Bargen.

6. Petitioner's second application did not indicate or assert that she was endorsed as a HSPP in Indiana.

7. Petitioner was issued Medicare PIN number 667150F on February 15, 2000.

8. Petitioner relied on the issuance of the PINs and provided services to Medicare beneficiaries.

9. On August 24, 2005, Medicare revoked Petitioner's second PIN, stating that Petitioner did not meet the requirements for a clinical psychologist because she was not endorsed as a HSPP.

10. On March 13, 2006, Petitioner was endorsed as a HSPP by the Psychology Board.

11. Petitioner timely appealed the revocation. After a hearing, the Hearing Officer issued a decision partially favorable to Petitioner, finding that her second PIN should be reinstated, but only as of March 13, 2006, the date she received endorsement as a HSPP.

12. Petitioner timely appealed the unfavorable portion of the Hearing Officer's decision, and the case was assigned to me for a hearing and a decision.

13. During the relevant period, Petitioner held an Ed.D., a doctoral degree in educational psychology (counseling), which she received on December 17, 1994.

14. During the relevant period, Petitioner was a fully licensed psychologist in the State of Indiana.

15. During the relevant period, Petitioner was also a fully licensed mental health counselor in the State of Indiana.

16. At no time during the relevant period were Petitioner's Indiana licenses (as either a psychologist or a mental health counselor) ever revoked, suspended, or otherwise removed or limited.

IV. ISSUE

The issue before me in this case is whether Petitioner satisfied the requirements necessary to obtain a Medicare PIN as a clinical psychologist, as set out at 42 C.F.R. § 410.71(d), during the relevant period. It is not contested that Petitioner met those requirements as of March 13, 2006.

V. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

1. Petitioner did not satisfy the requirements necessary to obtain a Medicare PIN as a clinical psychologist, as set out at 42 C.F.R. § 410.71(d), during the relevant period.

To be deemed qualified to receive a Medicare PIN as a clinical psychologist during the relevant period, Petitioner must show that she met all statutory and regulatory requirements during that period. The regulations, at 42 C.F.R. § 410.71(d), state that a "clinical psychologist" is an individual who: (1) holds a doctoral degree in psychology; and (2) is licensed or certified, on the basis of the doctoral degree, by the state in which he or she practices, at the independent practice level of psychology, to furnish diagnostic, assessment, preventive, and therapeutic services directly to individuals. CMS accepts that Petitioner met the first requirement during the relevant period and held an acceptable doctoral degree in psychology. CMS Br. at 14. However, CMS asserts that Petitioner did not possess the required state certification for furnishing diagnostic, assessment, preventive and therapeutic services until March 13, 2006, when the Psychology Board issued her a HSPP endorsement. *Id.*

Petitioner argues that she did meet the requirements, either as a licensed psychologist in Indiana or as a combination of her Indiana licenses as a psychologist and a mental health counselor. Petitioner refers to Federal Register guidance behind the regulations (63 Fed. Reg. 20110 (April 23, 1998)), which she interprets to mandate that I take a broad reading of the regulatory requirements. In her interpretation of how I should take such an expansive view, Petitioner asserts that, although she might not have received her HSPP endorsement until March 13, 2006, she otherwise met the Medicare requirements necessary to obtain a PIN as a clinical psychologist (as set forth at 42 C.F.R. § 410.71(d)) as of February 15, 2000, because her experience and her Indiana licenses as a psychologist and as a mental health counselor are the functional equivalent of the HSPP endorsement.

This argument based on the functional equivalence of Petitioner's qualifications to the HSPP endorsement, and thus to the Medicare requirements, is the armature upon which her position here is erected. Petitioner asserts that 42 C.F.R. § 410.71(d)(1) and (2) actually encompass three requirements. The first of the three requirements — as Petitioner views the matter — is the educational requirement that she have earned a doctoral degree in psychology, and her satisfaction of that requirement is uncontested here. But it is her analysis of the following requirements that falls short of success in this case. Specifically, Petitioner divides subsection 410.71(d)(2), arguing that it should be broken down as follows: first, that she be licensed or certified, on the basis of the

doctoral degree in psychology, by the State of Indiana — which she was — and, second and separately, that she practice at the independent practice level of psychology to furnish diagnostic, assessment, preventive, and therapeutic services directly to individuals — which she asserts she did on the basis of both her licenses. P. Br. at 10-25.

In support of her argument, Petitioner asserts that during the relevant period she was authorized to: independently provide mental health services to individuals directly, up to her education, training, and experience (under her mental health license), excluding rendering a diagnosis as a physician is authorized to do; and independently render mental health services within the scope of her psychology license. Thus, she declares that she was professionally competent and legally authorized to independently furnish diagnostic, assessment, preventive, and therapeutic services directly to individuals during the relevant period. She argues that a HSPP endorsement should only be seen as one way — but not the only way — for an individual to meet the requirement that he or she practice at the independent practice level of psychology to furnish diagnostic, assessment, preventive and therapeutic services directly to individuals. *See* P. Br. at 21.

I accept for purposes of this summary judgment motion that, throughout the relevant period, Petitioner may very well have had the education, training, and experience that would have supported her application for HSPP endorsement and permitted her to be endorsed as a HSPP. The fact is, however, that she did not apply for a HSPP endorsement and was not so endorsed. And, without that endorsement, Petitioner did not meet the regulatory requirement to receive a PIN as a clinical psychologist.

The Act requires that a clinical psychologist only furnish services which he or she is legally authorized to perform under state law or under the regulatory mechanism provided by state law. Act, section 1861(ii); *see also* 42 C.F.R. §§ 410.10(v), 410.71(a). For a clinical psychologist in Indiana, that regulatory mechanism is the Psychology Board. CMS Ex. 1; J. Ex. 9, at 18-23. The Psychology Board is the only agency in Indiana responsible for licensing and certifying the professional activities of psychologists in Indiana. It is separate from the Indiana Social Worker, Marriage and Family Therapist, and Mental Health Counselor Board. The operations and requirements of any other board have no effect on the operations and requirements of the Psychology Board and any individual licensed in Indiana is subject to the Psychology Board's rules and regulations. Declaration of Shelly L. Mazo, Psychology Board Director, CMS Ex. 7, at 1, ¶ 2. The Indiana statute establishing the Psychology Board is codified at IC 25-33-1-3. IC 25-33-1-5.1, governs the issuance of licenses and endorsements as a HSPP. CMS Ex. 1, at 7-8; J. Ex. 9, at 23-24. Indiana does not specifically license clinical psychologists. Instead, Indiana issues a general psychologist license. If the psychologist provides services Medicare has defined as those of a clinical psychologist (as cited above in section I of this

decision), Indiana, through the Psychology Board, requires the psychologist to obtain a separate HSPP endorsement. *Id.* A HSPP endorsement means that a psychologist has had extra training that enables that psychologist to diagnose and treat mental and behavioral disorders. If a psychologist chooses not to diagnose, but wants to treat mental and behavioral disorders, then he or she would still need to obtain a HSPP endorsement from the Psychology Board. CMS Ex. 7, at 2, ¶ 5. Specifically, the Indiana Administrative Code notes at IAC 1.1-13-1.1 at subsection (c) that "[e]ndorsement as a health service provider in psychology is required, by definition of the practice of psychology . . . for all licensed psychologists who engage in the diagnosis and treatment of mental and behavioral disorders . .except for psychologists working under supervision or who hold a limited license." Further, under subsection (e), a HSPP "is a title conferred by endorsement upon Indiana psychologists who have training and experience sufficient to establish competence in an applied health service area of psychology (such as clinical, counseling, or school psychology) and who meet the experience requirements of IC 25-33-1-5.1(c). Subsection (g) defines treatment to refer "to the provision of psychotherapy, counseling, consultation . . . or any other form of planned intervention to an individual or individuals for the purpose of alleviating diagnosed mental and/or behavioral disorders." J. Ex. 9, at 42. To receive the Psychology Board's endorsement, an individual must apply in a form and manner in which the Psychology Board prescribes, and provide verification of experience in an organized health service training program ("1500 hours of supervision in an internship, and 1,600 hours, 900 of which must consist of direct patient contact, of supervision in a postdoctoral health service setting.") CMS Ex. 7, at 2, ¶ 6. The Psychology Board then reviews the applicant's qualifications to determine whether all endorsement requirements have been satisfied. J. Ex. 9, at 24, 44; CMS Ex. 1, at 5-8; CMS Ex. 7, at 2, ¶ 7.

While Petitioner has made a game attempt to find a way (via her personal interpretation of federal and state law) to show that her background is functionally equivalent to a HSPP endorsement, neither federal or state law (as set forth above) recognizes such functional equivalency. Petitioner needed a HSPP endorsement to bill as a clinical psychologist, did not have one, and thus was ineligible to receive a Medicare PIN as a clinical psychologist until she received the HSPP endorsement.

2. I have no authority to consider Petitioner's claim that CMS is estopped as a matter of equity from revoking her Medicare PIN during the relevant period.

Petitioner agues that, assuming I find she did not meet the requirements to receive a PIN as a clinical psychologist during the relevant period, CMS is nevertheless estopped from revoking her PIN. Petitioner argues that when she applied for her first PIN she wrote on the addendum to her application that she was not endorsed as a HSPP and that she was

not sure she qualified for the PIN. Carrier employees reviewed her application and issued her first PIN and then another PIN when she went to work for a different employer (the PIN in question here). Petitioner asserts that such issuance was an "express written representation by CMS that Petitioner was qualified to have such PIN." P. Br. at 24. Further, Petitioner asserts that the two different Carrier employees' negligent failure to take her express statement into account constitutes "affirmative misconduct" by those employees. Petitioner states that she reasonably relied upon the CMS representations that she qualified as a clinical psychologist by the receipt of her PINs and that she then provided care for, billed for, and received reimbursement for services she provided to Medicare beneficiaries for several years. As a result, and to her detriment, she is bearing the cost of her appeal and, if unsuccessful, will have to repay Medicare for services billed under her second PIN during the relevant period (based on claims for recoupment she asserts that Medicare has issued relating to services she rendered during the relevant period). P. Br. at 24-25.

Petitioner refers to the general elements of an estoppel argument: first, the estopped party must have made a definite misrepresentation of fact to a second party having reason to believe that the second party will rely upon it; next, the party asserting estoppel must have reasonably relied upon that misrepresentation of fact; third, the party asserting estoppel must have changed its position in reliance upon the misrepresentation; and fourth, the party asserting estoppel must have suffered a detriment as a result.

I have no authority to consider appeals based on equitable estoppel, as the regulations at 42 C.F.R. Part 498 limit my authority to hearing and deciding only initial determinations. 42 C.F.R. §§ 498.3, 498.5. *See Kirtis Thomas*, DAB CR1452, at 8 (2006); *Danville HealthCare Surgery Center,* DAB CR892, at 7 (2002). I note, however, that the greatest difficulty for Petitioner is encountered at the very outset of her analysis: Petitioner recognizes that if the doctrine of estoppel could be applied to an act of the federal government at all, at the very least it required a showing of "affirmative misconduct" on the part of federal officials, and that there must be shown a definite misrepresentation, not silence, not error, nor a failure to act. *Tennessee Deptartment of Health and Environment*, DAB No. 1082 (1989); P. Br. at 23-24. Erroneous information from government employees does not rise to estoppel against the government or entitle the recipient of the incorrect information to monetary payments not otherwise permitted by law. *Danville HealthCare Surgery Center,* DAB CR892, at 7; *see Tennessee*

Department of Health and Environment, DAB No. 1082 (1989); *Office of Personnel Management (OPM) v. Richmond,* 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County,* 467 U.S. 51 (1984).[2]

VI. CONCLUSION

Having determined that, as a matter of law, Petitioner is without a right to the relief she seeks, I affirm the determination of the Hearing Officer to uphold the revocation by the Carrier of Petitioner's Medicare PIN during the relevant period.

/s/
Richard J. Smith
Administrative Law Judge

[2] Although I do not have the authority to provide Petitioner the equitable relief she seeks, I do note that Petitioner appears to have provided services to Medicare beneficiaries in good faith and that, if possible, CMS should take that into consideration in any recoupment efforts it may ultimately decide to undertake. I can find nothing in this record to justify a punitive or confiscatory approach in any such efforts, just as I can find nothing in this record to suggest that Petitioner deliberately concealed or misrepresented her credentials to anyone at any time.