

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Gayle Pugh, PA,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1317

Decision Number CR3420

Date: October 17, 2014

**DECISION**

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor Novitas Solutions, denied the revalidation enrollment application of Petitioner, Gayle Pugh, as a physician assistant because Petitioner indicated that she was a sole practitioner on her application. Because I conclude that Petitioner serves as a physician assistant with the rural health clinic (RHC) Petitioner owns, I reverse CMS's determination.

**I. Background and Procedural History**

Petitioner is a physician assistant for and the owner of Buna Medical Clinic (Buna), an RHC located in Buna, Texas. Petitioner Declaration (P. Decl.) at 1-3; P. Exhibit (Ex.) 1, at 1, 8. Petitioner enrolled in Medicare as a physician assistant. CMS Ex. 2; P. Exs. 2, at 1; 10, at 5. As the owner and authorized representative of Buna, she enrolled Buna in Medicare Part B as a RHC. P. Decl. at 1-3; P. Ex. 10, at 2-4, 8-9, 14; CMS Ex. 11. Petitioner states her Medicare Part B services as a physician assistant are billed under Buna's PTAN and NPI. P. Decl. at 3.

In a March 1, 2013 letter, Novitas notified Petitioner that she had to revalidate her enrollment information. CMS Ex. 1. The letter was sent to Petitioner as a physician assistant, not to Buna as a RHC, although the letter inconsistently cited Petitioner's NPI and Buna's PTAN. CMS Ex. 1, at 1-2. Petitioner submitted a revalidation enrollment application.

On January 9, 2014, Novitas issued an initial determination denying Petitioner's enrollment application under 42 C.F.R. § 424.530(a)(1) because, as a Medicare supplier, Petitioner did not meet CMS enrollment requirements. Specifically, Novitas determined that because Petitioner is a physician assistant she "cannot be enrolled into Medicare as a Sole Proprietor. [She] must report an employer to receive payment for services rendered in Part B Medicare." The letter informed Petitioner that she could either submit a corrective action plan (CAP) within 30 days from the date of the letter or exercise her right to request reconsideration within 60 days from the date of the letter. CMS Ex. 3.

Petitioner requested reconsideration twice, once on February 25, 2014, in a letter signed by her billing manager, and again on March 6, 2014, in a letter signed by Petitioner. CMS Exs. 4, 5. Novitas treated the February 25, 2014 letter as a CAP and did not process it as it "was not signed by the individual provider." CMS Ex. 7. Novitas considered Petitioner's March 6, 2014 reconsideration request. On June 2, 2014, a Novitas hearing officer issued a decision upholding the original revalidation denial. In the decision, the hearing officer stated that,

Novitas Solutions is unable to process the revalidation application that was received on March 20, 2013 since the Medicare file is set up as a physician assistant sole proprietor. Per 42 § CFR 410.74 . . . physician assistant's services are covered by Medicare Part B only if the services furnished are billed by the employer of a physician assistant. Since the Medicare file is only for the physician assistant and there is no employer tied to this file, the denial of the revalidation application was correct.

CMS Ex. 8, at 2.

On June 9, 2014, the Civil Remedies Division received Petitioner's request for an administrative law judge hearing. The case was assigned to me for hearing and decision. In response to my June 25, 2014 Acknowledgment and Pre-Hearing Order, CMS filed a pre-hearing brief and motion for summary judgment (CMS Br.), and 11 proposed exhibits (CMS Exs. 1-11). CMS did not list any proposed witnesses. Petitioner filed a declaration in opposition (P. Decl.) and 10 proposed exhibits (P. Exs. 1-10).

## II. Decision on the Record

In the absence of objection, I admit CMS Exs. 1-5, 7-11 and P. Exs. 1-10 into the record. I do not admit CMS Ex. 6 because, despite what CMS's exhibit list indicates, CMS Ex. 6 is identical to CMS Ex. 5 and, therefore, repetitive.

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would be necessary only if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8-10. CMS did not submit written direct testimony for any proposed witnesses. Petitioner signed and submitted a document entitled Petitioner's Declaration in Opposition to Respondent's Motion for Summary Judgment. CMS neither objected to this document nor sought to cross-examine Petitioner based on this document. Order ¶¶ 7-9. Consequently, I will issue a decision on the record. Order ¶ 11.

## III. Issue

The general issue is whether CMS had a legitimate basis to deny Petitioner's revalidation of enrollment as a physician assistant under 42 C.F.R. § 424.530(a)(1). The specific issue is whether CMS correctly determined that Petitioner is not qualified to be enrolled as a physician assistant because she is not employed and her employer does not bill for her services. 42 C.F.R. § 410.74(a)(2)(v).<sup>1</sup>

## IV. Jurisdiction

I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

## V. Findings of Fact, Conclusions of Law, and Analysis<sup>2</sup>

In order to maintain Medicare billing privileges, suppliers enrolled in the Medicare program must periodically revalidate their enrollment by submitting an enrollment application to CMS. 42 C.F.R. § 424.515. CMS may deny a supplier's enrollment

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<sup>1</sup> Petitioner, who appears pro se, appears to be somewhat confused regarding the actual issue in the case, discussing whether Buna was in compliance with Medicare enrollment requirements, not whether she is qualified to be enrolled as a physician assistant. P. Decl. at 1. Although Petitioner's argument may not be focused, her statements regarding the nature of the relationship between her ownership of Buna and her employment by Buna effectively address the issue I must decide.

<sup>2</sup> My findings of fact and conclusions of law in this case are set forth in italics and bold font.

application in the Medicare program if a supplier is found not to be in compliance with Medicare enrollment requirements applicable to the type of supplier enrolling. 42 C.F.R. § 424.530(a)(1).

For Medicare program purposes, physician assistants are suppliers. 42 C.F.R. §§ 400.202 (definition of *Supplier*); 498.2 (definition of *Supplier*). A “physician assistant” is an individual “who performs such services as such individual is legally authorized to perform (in the State in which the individual performs such services) in accordance with State law (or the State regulatory mechanism provided by State law), and who meets such training, education, and experience requirements (or any combination thereof) as the Secretary [of HHS] may prescribe in regulations.” 42 U.S.C. § 1395x(aa)(5)(A). Physician assistant services may be billed as physician services. 42 U.S.C. § 1395x(s)(2)(H)(i), K(i). However, “Medicare Part B covers physician assistants’ services only if [the services] . . . are billed by the employer of a physician assistant.” 42 C.F.R. § 410.74(a) and (a)(2)(v); *see also* 42 C.F.R. § 410.150(b)(15).

***1. Petitioner is both the owner of and the physician assistant for Buna, a rural health clinic.***

Neither party disputes that Petitioner owns Buna. Petitioner states:

Petitioner, Gayle Pugh, PA, enrolled in Medicare A, personally, as a provider, and was approved. Petitioner, Gayle Pugh, PA was issued Medical Provider #8A3714, UPIN #S53556. Petitioner, as the owner and authorized representative of Buna Medical Clinic, also enrolled Buna Medical Clinic, as a sole proprietor in the Medicare B program. Buna Medical Clinic was approved and issued Medical Provider #67-3844, UPIN #00726U. Gayle Pugh is the owner of the facility and is also employed by the facility as the facilities provider of Medical services.

P. Decl. at 3. Petitioner asserts that her Medicare Part B services are billed through her employer, Buna, and her Medicare Part A services are billed through her own transaction numbers. P. Decl. at 1, 3. Enrollment documents filed by Petitioner in 2003 show that she submitted two Medicare enrollment applications, one for Buna and one for herself as a physician assistant. CMS Ex. 9. The first is Petitioner’s “Practitioner Enrollment Application,” reflecting Buna Medical as a “legal business name,” giving Buna’s location, stating that Petitioner practices at Buna, and that Medicare payment is to be sent to Buna. Petitioner signed the certification statement for this enrollment application on February 28, 2003. CMS Ex. 9, at 1-14. The second enrollment application is a supplier application for Buna Medical Clinic, and reflects that Buna is organized as a “sole proprietor.” It reflects that Petitioner is Buna’s owner and the individual with

management control. Buna is identified as a RHC. Petitioner signed the certification statement as the “authorized official for Buna on February 27, 2003. CMS Ex. 9, at 16, 17, 29, 41; P. Ex. 1. Buna was assigned PTAN 00726U on March 31, 2003. P. Ex. 10, at 8. Petitioner signed a Medicare “Participating Physician or Supplier Agreement” on behalf of Buna as “Pa/Owner” on April 4, 2003, which was received by Medicare and effectuated. P. Ex. 10, at 9, 14; CMS Ex. 11. Nothing in these enrollment applications conflicts with Petitioner’s statement that she functions as both the owner of Buna and the physician assistant of Buna as its “facilities provider.” Further, CMS also determined that Buna met the requirements to be a RHC. P. Ex. 10, at 3.

Petitioner’s declaration that she is an employee of Buna and that Buna bills for her Medicare Part B services is supported by the enrollment documents in evidence indicating that she and Buna were separately enrolled in Medicare. From Petitioner’s statements, I find that she is both the owner of Buna and serves as the physician assistant for Buna.

- 2. Petitioner’s position as owner and the physician assistant for Buna, a RHC, satisfies the requirement in 42 C.F.R. § 410.74(a)(2)(v) that she be an employee of Buna because the specific regulations governing RHCs permits this.***

The only disputed issue in this case is whether Petitioner is employed as a physician assistant and her employer bills the Medicare program for her services. Based on the regulatory provisions related to RHCs, I conclude that Petitioner’s ownership position in Buna, taken with the fact that Petitioner serves as the physician assistant for Buna, is sufficient for Petitioner to meet the employment and billing requirements in 42 C.F.R. § 410.74(a)(2)(v).

As mentioned above, Petitioner declares in opposition to CMS’s position that she is the owner of Buna, a sole proprietorship, and that she is also an employee of Buna. P. Decl. at 3. Petitioner also asserts that Buna is enrolled in the Medicare program as an RHC, and that Buna bills the Medicare program for Medicare Part B services that Petitioner provides. P. Decl. at 3.

CMS states that it denied revalidation of Petitioner’s PTAN because “although Petitioner applied to participate in Medicare as a physician’s assistant, she failed to include an employer in her revalidation application.” CMS Br. at 1. Despite the fact that CMS states in its exhibit list that it was filing Petitioner’s 2013 revalidation application as CMS Ex. 10, CMS instead filed as CMS Ex. 10 an “Application Record Data Report” that is

essentially unreadable. Thus, there is no substantive exhibit admitted into the record that supports CMS's argument.<sup>3</sup> However, even if Petitioner did not list Buna as her employer, this would not change the analysis below.

This case presents a situation where there is a minor conflict between the general regulatory provision involving physician assistant enrollment requirements, and the statutory and regulatory provisions meant to permit RHCs to operate in areas of the country that are underserved.

A RHC is defined by regulation as "a clinic that is located in a rural area designated as a shortage area . . ." 42 C.F.R. § 491.2. A "shortage area" is defined by regulation as "a defined geographic area designated by the Department [of HHS] as having either a shortage of personal health services . . . or a shortage of primary medical care manpower." 42 C.F.R. § 491.2. The purpose of establishing special rules for RHCs is to better address the problem of areas underserved by health care providers.

Physician assistants [and nurse practitioners] play a central role to the functions of RHCs. In order for RHCs to be enrolled in the Medicare program: the RHC must employ a physician assistant [or a nurse practitioner]; the RHC must have a physician assistant [or nurse practitioner] present for at least half the RHC's hours of operation; and the RHC may designate a physician assistant to ensure the execution of the operating policies of the RHC. 42 U.S.C. § 1395x(aa)(2)(F), (J), (K)(iii). There are also a variety of other requirements in the regulations; however, once they have been met and CMS has approved a provider agreement, the RHC may bill Medicare for physician assistant services. 42 C.F.R. §§ 405.2402, 405.2414. Most significant for this decision, "[t]he physician assistant . . . member of the [RHC] staff may be the owner or an employee of the clinic . . ." 42 C.F.R. § 491.8(a)(1), (3).

Petitioner's position is that she owns and is employed by Buna. However, Petitioner has also stated Buna is a sole proprietorship. The difficulty in this case arises from Petitioner's choice of ownership of Buna (i.e., a sole proprietorship). It is unlikely that Petitioner can be, as she asserts, an employee of Buna. This is because sole proprietorships have essentially the same legal personality as its owner. *Ideal Lease Service, Inc. v. Amoco Production Co., Inc.*, 662 S.W.2d 951, 952 (Tex. 1983) ("Blue Streak Welding Service was, in law and in fact, one and the same as Thompson because a sole proprietorship has a legal existence only in the identity of the sole proprietor."); see also Black's Law Dictionary (9<sup>th</sup> ed. 2009) (defining "sole proprietorship" as "[a

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<sup>3</sup> CMS also states that although Petitioner has been enrolled in Medicare since 2003, her initial enrollment was in error because her initial Medicare enrollment applications all reflect that she was a sole proprietor and no employer was listed to bill for the services she furnished. CMS Br. at 4; CMS Ex. 9, at 5.

business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity.”). Although CMS believes that the inquiry into Petitioner’s enrollment ends with this conclusion, it does not.

It is significant that “[r]ural health clinic staffs must also include one or more physician assistants” and “[t]he physician assistant . . . member of the staff may be the owner or an employee of the clinic . . . .” 42 C.F.R. § 491.8(a)(1), (3). From the context of the two quoted provisions above, it is clear that the “[t]he physician assistant” who may be the owner of the RHC is the same as the physician assistant who is a member of the RHC’s staff. Further, the regulation permits that physician assistant to be either the owner or an employee. It would create an absurdity, and be counter to Congress’ efforts to foster rural health care using physician assistants, to interpret 42 C.F.R. § 410.74(a)(2)(v) in a manner that would ensure that no physician assistant on the staff of a RHC could ever own the RHC. Rather, a more reasonable interpretation would be to permit a physician assistant who owns and is on the staff of a RHC to be enrolled as a physician assistant if the RHC bills for the services provided by that physician assistant. *See* 42 C.F.R. §§ 405.2402, 405.2414.

CMS argue that the Novitas hearing officer found that denial of Petitioner’s revalidation application was correct because a physician assistant cannot enroll in Medicare as a sole proprietor since the physician assistant requires a supervising physician to bill for physician assistant services and Petitioner’s revalidation application did not include an employing physician. CMS Br. at 2-3. However, the reconsideration determination did not say this and, if it had, it would have been incorrect. 42 C.F.R. § 410.74(a)(2)(v). The hearing officer in fact found that physician assistant services are covered by Medicare Part B only if the services furnished are billed by the physician assistant’s “employer”; it does not state that the employer must be a physician.<sup>4</sup> CMS Ex. 8, at 2.

## **VI. Conclusion**

Petitioner is a physician assistant who owns and is on the staff of an enrolled RHC. The RHC bills for the Medicare Part B services Petitioner provides. Therefore, Petitioner satisfies the requirement that physician assistant services be billed by an employer.

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<sup>4</sup> CMS’s position that a physician assistant must be employed by a physician is also not accurate in regard to the regulations that apply to RHCs. The regulations require that a RHC be under the medical direction of a physician and that the physician supervise the RHC’s health care staff, which must include a physician assistant or nurse practitioner. However, the physician does not need to be on the RHC’s staff or be its owner to accomplish this. Instead, the physician may provide physician services “under agreement” with the RHC. 42 C.F.R. §§ 491.7; 491.8(a)(2).

For the reasons stated above, I reverse CMS's determination to deny Petitioner's revalidation application.

/s/  
Scott Anderson  
Administrative Law Judge