

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Marcia M. Snodgrass, APRN,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1542

Decision No. CR3442

Date: November 5, 2014

DECISION

An administrative contractor for the Centers for Medicare & Medicaid Services (CMS) denied the December 2013 Medicare enrollment application of Petitioner, Marcia M. Snodgrass, APRN, because she did not meet the regulatory requirements for a nurse practitioner. The CMS contractor upheld its determination on reconsideration. Petitioner requested a hearing before an administrative law judge to challenge that determination. CMS now moves for summary judgment, which Petitioner opposes.

For the reasons explained below, I grant summary judgment in favor of CMS, affirming that it had the authority to deny Petitioner's December 2013 enrollment application.

I. Case Background

Petitioner is a professional nurse licensed as a nurse practitioner in Kansas.¹ Petitioner originally enrolled in Medicare as a nurse practitioner effective October 1, 2002.

¹ Petitioner designated herself as an APRN, or "advance practice registered nurse," which is the functional equivalent of a nurse practitioner. In Kansas, the applicable license does not distinguish between the two: "APRN/NP (Nurse Practitioner)." *See* Petitioner's Exhibit (P. Ex.) 3, at 1.

CMS Exhibit (Ex.) 1. While Petitioner has remained licensed in Kansas, she does not deny that a national certifying body that has established standards for nurse practitioners has not certified her as a nurse practitioner.

As part of the revalidation process, Petitioner submitted a Medicare enrollment application to the Medicare contractor in September 2010. *See* 42 C.F.R. § 424.515 (providing the procedures for revalidation of enrollment information, including the required submission of a Medicare enrollment application). The contractor denied that application. Petitioner filed a new enrollment application on December 30, 2013. By letter dated February 28, 2014, the contractor notified Petitioner that her December 2013 enrollment application was denied pursuant to 42 C.F.R. § 424.530(a)(1) because she did not satisfy the regulatory requirement that a national certifying body certify her as a nurse practitioner. CMS Ex. 2. The contractor provided Petitioner an opportunity to submit a corrective action plan (CAP) within 30 days of the notice of the denial. CMS Ex. 2. There is no record of Petitioner having submitted a CAP. Instead, Petitioner requested reconsideration by submitting a letter to United States Senator Jerry Moran, whose office, in turn, forwarded that letter to the CMS contractor. CMS Ex. 3, at 1. On June 9, 2014, the contractor issued its reconsidered determination, which upheld the denial of Petitioner's December 2013 enrollment application because Petitioner had not shown that a national certifying body had certified her as a nurse practitioner. CMS Ex. 3. Petitioner then requested a hearing (P. Req. for Hrg.) challenging that determination.

CMS subsequently moved to dismiss Petitioner's hearing request and, alternatively, for summary judgment. CMS filed a brief in support of its motion for summary judgment (CMS Br.). It also filed three proposed exhibits that are identified as CMS Ex. 1 – CMS Ex. 3. Petitioner opposed CMS' motion to dismiss and filed a separate brief opposing the motion for summary judgment (P. Br.) along with six proposed exhibits.² Petitioner did not properly label her exhibits; however, the exhibit numbers for each set of documents that Petitioner filed are clear from her description and labeling of the documents in the Departmental Appeals Board's electronic filing (DAB E-File) system. Therefore, I refer to Petitioner's proposed exhibits as P. Ex. 1 – P. Ex. 6, consistent with the labeling of the documents in the DAB E-File system.

Petitioner did not object to CMS' proposed exhibits, and I admit them. CMS did not object to Petitioner's proposed exhibits. Ordinarily, 42 C.F.R. § 498.56(e) governs the admission of new documentary evidence at this level of review. However, because the determinations issued by the contractor did not warn Petitioner that she could not offer new documentary exhibits if she did not offer them at the reconsideration level, and because CMS did not object to their admission, I admit P. Ex. 1 – P. Ex. 6.

² Upon consideration of CMS' motion to dismiss and Petitioner's opposition, I find that Petitioner has perfected her hearing request and I deny the motion. The remainder of this decision only addresses CMS' motion for summary judgment and Petitioner's opposition.

II. Issue

The issue here is whether the applicable regulations authorize CMS or its contractor to deny Petitioner's Medicare enrollment application based on her qualifications at the time she submitted that enrollment application.

III. Findings of Fact and Conclusions of Law

1. Petitioner did not meet the regulatory qualifications for a nurse practitioner at the time of her enrollment application.

Medicare Part B pays for certain services that a nurse practitioner provides to program beneficiaries. 42 C.F.R. § 410.75(c)-(e). The regulation establishes the following qualifications for nurse practitioners who seek Medicare coverage for their services:

(b) *Qualifications.* For Medicare Part B coverage of his or her services, a nurse practitioner must be a registered professional nurse who is authorized by the State in which the services are furnished to practice as a nurse practitioner in accordance with State law, and must meet one of the following:

(1) Obtained Medicare billing privileges as a nurse practitioner for the first time on or after January 1, 2003, and meets the following requirements:

(i) Be certified as a nurse practitioner by a recognized national certifying body that has established standards for nurse practitioners.

(ii) Possess a master's degree in nursing or a Doctor of Nursing Practice (DNP) doctoral degree.

(2) Obtained Medicare billing privileges as a nurse practitioner for the first time before January 1, 2003, and meets the standards in paragraph (b)(1)(i) of this section.

(3) Obtained Medicare billing privileges as a nurse practitioner for the first time before January 1, 2001.

42 C.F.R. § 410.75(b) (italics in original).

It is undisputed that Petitioner does not meet either of the requirements stated in section 410.75(b)(1). She is not certified as a nurse practitioner by a recognized national

certifying body that has established standards for nurse practitioners. P. Br. at 15; P. Req. for Hrg. at 1; *see also* P. Ex. 1 at ¶¶ 9-12. She also does not hold a master's degree in nursing or a DNP doctoral degree. *See* P. Br. at 2-3; P. Ex. 1 at ¶ 9. At the time of her 2010 enrollment application, only the qualification stated in subsection 410.75(b)(1)(i) applied to her because she first obtained her Medicare billing privileges as a nurse practitioner on October 1, 2002, prior to the deadline established in section 410.75(b)(2). However, neither party addressed in their briefs the legal quandary of whether section 410.75(b)(2) still applied to Petitioner after the contractor denied her 2010 enrollment application and Petitioner did not further challenge that denial. I need not resolve that issue because, regardless of whether section 410.75(b)(2) applied to Petitioner's December 2013 enrollment application, which is the only application subject to review in this proceeding, Petitioner needed to comply with at least the certification requirement listed in section 410.75(b)(1)(i), which she clearly did not.

2. The regulations authorize CMS or its contractor to deny Petitioner's enrollment as a nurse practitioner because she did not comply with all of the applicable enrollment requirements.

CMS or its administrative contractor may deny the enrollment of a provider or supplier if, among other reasons:

- (1) *Compliance.* The provider or supplier at any time is found not to be in compliance with the Medicare enrollment requirements described in this section or on the applicable enrollment application to the type of provider or supplier enrolling, and has not submitted a plan of corrective action as outlined in part 488 of this chapter.

42 C.F.R. § 424.530(a)(1) (italics in original). The requirements for a nurse practitioner to receive Medicare Part B payment for his or her services include those in 42 C.F.R. § 410.75(b), which I have outlined above. That regulatory provision does not expressly state that it is an "enrollment requirement" for nurse practitioners. However, any alternative interpretation of that regulation is unreasonable. A nurse practitioner who cannot receive Medicare Part B coverage for the services he or she provides to beneficiaries has no purpose being enrolled as a supplier in the Medicare program. In addition, 42 C.F.R. § 424.502 defines enrollment as the process for establishing eligibility to submit claims for payment to Medicare, and 42 C.F.R. § 424.505 requires that a supplier be enrolled before submitting claims for payment. Logically, a supplier who does not meet the specific requirements for submitting a claim for payment to Medicare may be denied enrollment. Therefore, while section 410.75(b) addresses the requirements for payment for services that a nurse practitioner provides, the qualifications of a nurse practitioner in that section must be construed as an enrollment requirement referred to in section 424.530(a)(1).

Petitioner argues that the regulation setting forth the qualifications of nurse practitioners only applies to new applicants seeking enrollment in the Medicare program, not those recertifying enrollment. P. Br at 13-14. I disagree. Section 410.75(b)(1)(i) provides a categorical standard — national certification — for all nurse practitioners enrolled after January 1, 2001. *See* 42 C.F.R. § 410.75(b)(2)-(3). Had the Secretary intended to limit this standard to only those nurse practitioners newly enrolling in the Medicare program, she would have said so. I cannot create a new standard for some nurse practitioners or add a “grandfathering” provision to an unambiguous regulation.

It is undisputed that at the time of her December 2013 enrollment application Petitioner did not meet all of the Medicare payment qualifications for a nurse practitioner stated in 42 C.F.R. § 410.75(b)(1). Petitioner, therefore, did not meet all of the enrollment requirements for a nurse practitioner. The regulations authorized the CMS contractor to deny Petitioner’s enrollment application. 42 C.F.R. § 424.530(a)(1). The contractor complied with regulatory procedures for denying an enrollment application by providing Petitioner an opportunity to submit a CAP within 30 days of the denial notice letter, but she did not do so. *See* CMS Ex. 2.

3. Petitioner’s additional arguments are not relevant in this proceeding because I do not have equitable authority to ignore or not follow an applicable regulation or declare the Secretary’s regulations ultra vires the Social Security Act.

Petitioner makes several additional arguments about her case, all of which, however, seek equitable relief. After laying out the statutory and regulatory history, she argues that the final regulation at 42 C.F.R. § 410.75 is inconsistent with CMS’ own assertions in the preamble and with various amendments to the Social Security Act and therefore should not be enforced against her. P. Br. at 4-7, 9. Petitioner also argues that CMS’ contractor erred in its handling of her enrollment status and information when CMS implemented the Provider Enrollment Chain and Ownership System (PECOS), resulting in her not ever being listed in the “original” PECOS. She argues that if CMS had properly advised her of the national certification requirement prior to 2010, she could have sat for that certification exam. Finally, Petitioner emphasizes that she poses no risk to the Medicare program or its beneficiaries. P. Br. at 10-12, 15-16.

I am without authority to carve out equitable exceptions to the regulatory requirements. Petitioner’s assertion that the regulation is inconsistent with the Act means that for me to take any action in Petitioner’s favor, I must declare the regulation *ultra vires* the Act. I do not have the authority to do so. Also, as explained above, while there is no dispute that Petitioner previously participated in the Medicare program without incident, the regulations do not permit CMS or me to “grandfather in” an individual who does not meet the regulatory criteria for a nurse practitioner, even if she was an enrolled practitioner before. Moreover, to the extent Petitioner blames CMS and its contractor for

not properly handling her enrollment in PECOS, she has not demonstrated that there was any affirmative misconduct on the part of CMS. Any equitable estoppel claims, therefore, must, and do, fail.

I should note that I have no doubts that Petitioner is a well-respected and capable health care provider in Kansas. However, the regulatory qualifications for nurse practitioners establish a basic level of consistency across the Medicare program, and Petitioner does not meet those qualifications. The level of care she provides and necessity of her services in her geographic area simply do not permit me to subvert the regulatory standards that I am bound to follow. I can only encourage Petitioner to obtain the qualifications she needs to meet the regulatory standards and later apply to enroll as a nurse practitioner in the Medicare program so that beneficiaries will soon again benefit from her services.

I grant summary judgment in favor of CMS because, as discussed above, there is no genuine dispute of any material facts and CMS is entitled to judgment as a matter of law. *See* CRDP § 7 (rev. 2009); Fed. R. Civ. P. 56(a). I uphold the denial of Petitioner's December 2013 Medicare enrollment application.

/s/
Steven T. Kessel
Administrative Law Judge