Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Eli Gordin, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-220

Decision No. CR3205

Date: April 17, 2014

DECISION

Petitioner, Eli Gordin, M.D., is a physician, licensed to practice medicine in Texas, who applied for enrollment in the Medicare program. The Centers for Medicare & Medicaid Services (CMS) denied his application, finding that he did not meet Medicare requirements. Petitioner now appeals that denial. The parties agree that no material facts are in dispute and have filed cross-motions for summary judgment.

For the reasons set forth below, I find that CMS improperly denied Petitioner's enrollment application. I therefore grant Petitioner Gordin's motion for summary judgment and deny CMS's.

Background

On May 1, 2013, Petitioner Gordin applied for enrollment in the Medicare program as an otolaryngologist (ear, nose, and throat specialist). CMS Ex. 1; P. Ex. 7. In a letter dated May 30, 2013, the Medicare contractor, Novitas Solutions, Inc., denied his applications, claiming that he did not meet conditions of enrollment. CMS Ex. 2; P. Ex. 1. Petitioner sought reconsideration. In a reconsidered determination, dated September 24, 2013, the contractor's hearing specialist affirmed the denial. She determined that Petitioner Gordin

rendered services "as part of [a] fellowship program," which, in her view, precluded his Medicare enrollment. She then cited 42 C.F.R. § 415.200, which limits payment for services provided in certain "graduate medical education" (GME) programs. CMS Ex. 5; P. Ex. 5.

Petitioner timely appealed and the matter is now before me. The parties have filed cross-motions for summary judgment. With its motion, CMS submits six exhibits (CMS Exs. 1-6). With his motion, Petitioner submits nine exhibits (P. Exs. 1-9).

Discussion

1. Petitioner is entitled to summary judgment, because, although the Medicare statute and regulations limit reimbursement for services provided in GME-approved programs, they do not preclude participants in such programs from Medicare enrollment.[1]

A Medicare "supplier" is a physician or other practitioner, facility, or other entity (other than a "provider" of services) that furnishes items or services under Medicare. Act § 1861(d); 42 C.F.R. § 400.202.[2] To receive Medicare payments for services furnished to program beneficiaries, the supplier must be enrolled in the Medicare program. 42 C.F.R. § 424.505. "Enrollment" is the process used by CMS and its contractors to: 1) identify the prospective supplier; 2) validate the supplier's eligibility to provide items or services to Medicare beneficiaries; 3) identify and confirm a supplier's owners and practice location; and 4) grant the supplier Medicare billing privileges. 42 C.F.R. § 424.502.

Here, Petitioner's enrollment application indicates that he is a licensed physician who participates in a "fellowship program." He renders services as part of a "group" that is sponsored by a practicing physician and is not affiliated with any institution. CMS Ex. 1 at 7; P. Ex. 7 at 7. According to CMS, because Medicare will not pay for services provided by residents or "fellows" in medical training programs, Petitioner may not enroll in the Medicare program.[3] CMS MSJ at 5. I disagree.

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[1] My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

[2] "Providers" include hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospices and similar entities that participate in the Medicare program. 42 C.F.R. § 400.202.

[3] "Resident" is defined as an individual who participates in a GME-approved program or who is authorized to practice in a hospital only. The term is synonymous with "intern" and "fellow." 42 C.F.R. § 415.152.

I understand that resident services provided in GME-approved programs are generally not eligible for Medicare payment as "physician services." 42 C.F.R. § 415.200. It does not follow, however, that physicians who participate in these programs may not enroll in the Medicare program. In fact, the regulations anticipate that residents in GME-approved programs will enroll in the Medicare program and will provide covered services (although generally not as part of their residencies).

First, neither the statute nor any regulation precludes a qualified physician from enrolling in the Medicare program, even if some – or virtually all – of that physician's services would not be covered. CMS relies on two regulations, neither of which precludes Petitioner's enrollment:

- 42 C.F.R. § 415.200 has nothing to do with physician enrollment. It says that, with limited exceptions (*see* 42 C.F.R. § 415.174), services provided in hospitals by residents in approved GME programs are payable as "hospital services" (Medicare Part A), not "physician services" (Medicare Part B).

- 42 C.F.R. § 424.505 says that a supplier must be enrolled in Medicare in order to receive payment for covered services; it does not say that an otherwise-qualified prospective supplier may not be enrolled if the services he provides are generally not covered.

Many Medicare-enrolled physicians provide services that the Medicare program will not reimburse. For example, the bulk of services provided by a cosmetic surgeon or a pediatrician may not be covered, but those practitioners may occasionally provide a covered service to a Medicare-eligible patient, and, under 42 C.F.R. § 424.505, they must be enrolled in order to bill the program and be paid.

Significantly, the regulations anticipate that residents will enroll in Medicare, because they explicitly allow residents in GME-approved programs to bill for services that are outside the scope of those programs (referred to as "services of moonlighting residents"), and those services are payable under Medicare, if certain criteria are met. 42 C.F.R. § 415.208. In fact, even some services provided in residency programs may be covered. *See* 42 C.F.R. § 415.174 (authorizing payment for "certain evaluation and management services" furnished by residents, if certain conditions are met).

CMS relies on the case of *Peter McCambridge, C.F.A.*, DAB No. 2290 (2009), for the proposition that the agency "may deny a prospective supplier enrollment if the Medicare program does not authorize payment for services." CMS MSJ at 4. CMS misreads that decision. In *McCambridge*, the prospective supplier – a non-physician "surgical first assistant" – was *not eligible* to participate in the Medicare program, although the services he provided are generally covered when performed by specified practitioners, such as physician assistants, nurse practitioners, or clinical nurse specialists. A non-physician

"surgical first assistant" is not among the types of practitioners who can enroll in the Medicare program. Thus, that case involved an *unqualified practitioner* who sought enrollment so that he could bill Medicare for services that would be covered if performed by a qualified practitioner, as opposed to a *qualified practitioner* providing services that might not be covered.

2. Even if a resident participating in an approved GME program were precluded from enrolling in the Medicare program, Petitioner Gordin would be entitled to summary judgment here, because the undisputed evidence establishes that he does not participate in a GME-approved program within the meaning of 42 C.F.R. § 415.152.

Even if I accepted CMS's position regarding a resident's eligibility to enroll in Medicare (which I do not), Petitioner would prevail, because the undisputed evidence establishes that his "fellowship" is not part of an approved GME program.

42 C.F.R. § 415.200 generally excludes from Medicare payment physician services "furnished in hospitals by residents in approved GME programs." An "approved GME program" means: 1) a program that has been approved by a recognized accrediting organization;[4] 2) a program that may count toward certification in a named specialty or subspecialty; 3) a program that is approved by the Accreditation Council for Graduate Medical Education; or 4) a program that would be accredited except for abortion-related restrictions. 42 C.F.R. §§ 413.75(b), 415.152.

Petitioner has come forward with evidence establishing that his fellowship is not part of an "approved GME program." He is a licensed physician, who has already completed his residency in otolaryngology. P. Ex. 9 at 1 (Gordin Decl. ¶ 2). He participates in a training program sponsored by Yadro Ducic, M.D. This program is private; it is not hospital-based; it is not university-based; and, most important, it is not approved by the Accreditation Council for Graduate Medical Education, or any of the other groups listed in 42 C.F.R. § 413.75(b) or § 415.152. The "Ducic fellows" are all fully licensed physicians, not residents. They bill payors independently, with no supervision. P. Ex. 8 (Ducic Decl. ¶¶ 2, 3, 4); P. Ex. 9 at 1 (Gordin Decl. ¶ 2).

CMS has not come forward with any evidence suggesting a dispute over these facts. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (holding that a non-moving party avoids summary judgment by tendering evidence of specific facts

[4] These organizations are listed in the regulation: the Accreditation Council for Graduate Medical Education, the American Osteopathic Association, the Commission on Dental Accreditation of the American Dental Association, or the Council on Podiatric Medical Education of the American Podiatric Medical Association. 42 C.F.R. § 415.152.

showing that a dispute exists). Petitioner would therefore be entitled to summary judgment on that basis.

Conclusion

Nothing in the Medicare Act or regulations precludes Petitioner from enrolling in the Medicare program. I therefore grant Petitioner's motion for summary judgment and deny CMS's.

/s/
Carolyn Cozad Hughes
Administrative Law Judge