Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Earl Braunlin, M.D.,
(PTAN: 0646100001),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-1324

Decision No. CR3499

Date: December 5, 2014

DECISION

Petitioner, Earl Braunlin, M.D., is an ophthalmologist, optometrist, and optician who applied to participate in the Medicare program as a supplier of durable medical equipment (eye glasses and contact lenses for cataract patients). He has asked the Centers for Medicare and Medicaid Services (CMS) to waive his $542 Medicare enrollment fee. Acting on behalf of CMS, the Medicare contractor denied the waiver, and Petitioner appeals.

I agree that Petitioner is not entitled to the waiver, and, for the reasons discussed below, I affirm the denial.

Background

Petitioner was apparently enrolled in the Medicare program as a supplier of durable medical equipment, but, rather than revalidate his enrollment, he voluntarily terminated his program participation in 2013. He subsequently submitted a new application, Form CMS-855S, dated April 2, 2014. CMS Ex. 1 at 4-36. At the same time, he asked for a

hardship exception so that he would not have to pay the $542 application fee and included an "income statement" for calendar year 2013, which showed income of $107,646.36, but an "office income loss" of $3,718.40. CMS Ex. 1 at 1-3.

In a letter dated April 16, 2014, the Medicare contractor, Palmetto GBA, denied Petitioner's request for a hardship exception, finding that he had not submitted "strong enough evidence" to support the exception to the application fee. CMS Ex. 2. Petitioner sought reconsideration. CMS Ex. 3. In a reconsidered determination, dated May 27, 2014, a Medicare hearing officer agreed that Petitioner did not satisfy the requirements for a hardship exception. CMS Ex. 9. Petitioner appeals the reconsidered determination. *See* 42 C.F.R. §§ 424.514(h)(2); 405.874(c) (2011).[1]

CMS has submitted a brief, a motion for summary judgment, and 11 exhibits (CMS Exs. 1-11). In the absence of any objections, I admit into evidence CMS Exs. 1-11. In addition to his hearing request, Petitioner submitted written arguments dated June 18, 2014, July 14, 2014, and August 2, 2014, with a letter from his accountant, dated August 25, 2014.

Neither party proposes any specific witnesses, provides any written declarations of witnesses, nor asks to cross-examine an appropriate witness.[2] *See* Acknowledgment and Prehearing Order at 3 (¶ 4(c)(iv)); 5 (¶ 8). Because a hearing would serve no purpose, I issue this decision without considering CMS's motion for summary judgment.

Discussion

CMS properly exercised its discretion to deny Petitioner Braunlin's request for a hardship exception.[3]

An applicant for Medicare enrollment must pay an application fee or request a hardship exception. Social Security Act (Act) § 1866(j)(2)(C)(i); 42 C.F.R. § 514(a). If he requests an exception from the fee, he must include, with his application, a letter that

[1] Section 424.514(h)(2) makes a hardship exception appealable "using § 405.874 of this chapter." In 2012, CMS recodified section 405.874(c) as 42 C.F.R. § 405.803. 77 Fed. Reg. 29001, 29016-17 (May 16, 2012). CMS has not updated section 424.514(h)(2) to reflect that change, but concedes that Petitioner's appeal rights remain intact. 77 Fed. Reg. at 29017; *see* CMS Br. at 5, fn 6.

[2] Although Petitioner asks to cross-examine government counsel (July 14 letter), these individuals presented CMS's legal arguments (to which Petitioner has responded), not evidence, and are not subject to cross-examination.

[3] I make this one finding of fact/conclusion of law.

describes the hardship and explains why the hardship justifies an exception. 42 C.F.R. § 424.514(f). By statute and regulation, "on a case-by-case basis," CMS has the discretion to exempt an applicant from paying the fee if it "determines that the imposition of the application fee would result in a hardship." Act § 1866(j)(2)(C)(ii); 42 C.F.R. §§ 424.514(a)(2) and (b)(2).

I agree with CMS that section 424.514(f) describes threshold requirements that must be met before CMS will even consider granting an exception (i.e., the applicant must file a request with his application). Nothing in that regulation prohibits CMS from requiring that the applicant support his claims of hardship. In exercising its discretion to grant an exception, CMS may – indeed, CMS *should* – require applicants to support their claims with credible underlying documentation. *See, e.g.*, *Maximum Comfort, Inc. v. Sec'y. of Health and Human Servs.*, 512 F.3d 1081, 1087 (9th Cir. 2007) (where the statute required only a certificate of medical necessity, nothing prevented CMS from imposing additional documentation requirements on suppliers of durable medical equipment). CMS is obligated to protect program integrity, and it would be irresponsible to grant a waiver based solely on an applicant's unsupported allegation.

The application fee here is modest – $542 for calendar year 2014 – and "should not represent a significant burden for an adequately capitalized . . . supplier." PIM, Chap. 15, § 15.19.1(C)(2); *see* Act § 1866(j)(2)(C); 42 C.F.R. § 424.514(d)(2). Indeed, Petitioner has not claimed that he is unable to pay the fee.

Instead, he complains that the regulations "appear to have been written in a manner that makes it difficult if not impossible to qualify for an exception." (June 18 letter). He is correct. In drafting the regulations, CMS declared that it would grant exceptions "infrequently." 76 Fed. Reg. 5862, 5955 (Feb. 2, 2011). In the Medicare Program Integrity Manual, which I consider a reasonable exercise of CMS's authority to interpret its own regulations, CMS explains that the supplier "must . . . make a strong argument to support its request, including providing comprehensive documentation (which may include, without limitation, historical cost reports, recent financial reports such as balance sheets and income statements, cash flow statements, tax returns, etc.)." PIM, Chap 15, § 15.19.1(C)(2). The applicant must submit such documentation before the contractor issues its initial determination and is "precluded from introducing new evidence at higher levels of the appeals process." 42 C.F.R. § 405.874(c)(5)(2011); *see* 42 C.F.R. §§ 405.803(e); 498.56(e).

The Program Integrity Manual lists factors that may suggest hardship: a) considerable bad debt expenses; b) significant amount of charity care/financial assistance furnished to patients; c) presence of substantive partnerships (whereby clinical, financial integration are present) with those who furnish medical care to a disproportionately low-income population; d) "considerable amounts" of an institution's funding is from disproportionate share hospital payments; and e) the supplier is located in a

presidentially-declared disaster area. The applicant must provide its supporting evidence at the time it submits its hardship request. PIM, Chap. 15, § 15.19.1(C)(2). Plainly, CMS anticipated granting exceptions in ways that would benefit disadvantaged program beneficiaries.

To support his claim for an exception, Petitioner cites only one of these factors: charity care/financial assistance. He claims to practice in an "inner city" location and to provide "a significant amount of charity care/financial assistance to patients." (June 18 letter). But he provides no evidence establishing that his patients are disproportionately low-income or that he furnishes significant charity care. Indeed, as CMS points out, his financial statements do not mention bad debt or reflect any significant problems collecting fees. *See, e.g.*, CMS Ex. 3 at 3-4 (reflecting professional receipts equaling 96.7% and 102.8% of charges in 2011 and 2012).

Petitioner here submitted his accountant's statements only – no tax returns or other underlying documentation explaining how he reached the cited figures. He submitted no information about his savings, investments, or net worth. He submitted no data at all for 2014. Nevertheless, the figures he submitted suggest that he owns significant assets – the building in which the business operates, for which he claims no mortgage expenses. CMS may legitimately consider assets as well as income in assessing whether a hardship exception is appropriate.

Except for one year, Petitioner's business has consistently made at least a small profit. In 2013 he had a gross income of $107,646.36. After deducting labor costs (he apparently has two employees), property expenses (including taxes, repairs and maintenance), automobile expenses (gasoline, repairs and insurance), and "miscellaneous expenses" (including travel and lodging, meals and entertainment), he claimed a loss of $3,718.40.[4] His accountant explains that Petitioner's revenues have declined "over the past several years" because of Petitioner's age and because he no longer performs surgical procedures. (August 25 letter).[5] CMS may legitimately determine that an otherwise solvent applicant is not entitled to a hardship exemption based on his voluntarily curtailing his practice. If, as Petitioner argues (June 18 and July 14 letters), this ultimately means that the application fee exceeds the income he derives from the Medicare program (for glasses he provides to post-cataract-surgery patients), it may not make good business sense for him to continue his program participation, but that does not create a basis for a hardship exception.

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[4] To arrive at this figure, he deducted $5,143.90 as depreciation for the building he owned, which obviously did not involve an out of pocket expense.

[5] The accountant's statement would not be admissible as new evidence. 42 C.F.R. § 405.874(c)(5)(2011). However, I accept it as argument.

Conclusion

The statute and regulation give CMS broad discretion to determine whether to exempt a Medicare applicant from paying the application fee. Here, in determining to deny Petitioner that exception, CMS has not abused its discretion. I therefore affirm the reconsidered determination.

/s/
Carolyn Cozad Hughes
Administrative Law Judge