Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	
Peter McCambridge, C.F.A.,	
Petitioner,	DATE: February 2, 2010
- v. -	App. Div. Docket No. A-10-30 Request to Reopen Decision No. 2290
Centers for Medicare & Medicaid Services.	Ruling No. 2010-1

DENIAL OF REQUEST TO REOPEN

On December 29, 2010, Peter McCambridge (Petitioner) filed a request to reopen the Board's decision in Peter McCambridge, C.F.A., DAB No. 2290 (2009). In DAB No. 2290, the Board held that Petitioner was ineligible to enroll in Medicare Part B as a surgical first assistant.

The Board may reopen a decision, within 60 days of the date of notice of the decision, upon its own motion or the request of either party. 42 C.F.R. § 498.100. The regulations do not specify a standard for granting a request to reopen. Procedures applicable to other types of disputes provide that the Board may reconsider a decision when a party promptly alleges a clear error of fact or law. 45 C.F.R. § 16.13. This standard is reasonably applied here as well. Reopening a Board decision is not a routine step under the Board's regulations in 42 C.F.R. Part 498. Rather, it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong.

In his request to reopen, Petitioner asserts that he provides "assistant-at-surgery" services within the scope of an employment relationship with a surgeon. He also alleges that a "separate fee" for those services is payable by Medicare to the surgeon. In light of these facts, says the Petitioner, his services constitute Medicare-covered services, and, accordingly, either he should be allowed to enroll in Medicare as a surgical first assistant, or Medicare payment for his assistant-at-surgery services should be made to the surgeon on his behalf.[1] In support of this argument, Petitioner cites 42 C.F.R. § 410.26, which governs Medicare coverage of services "incident to" the professional services of a physician, as well as various provisions of CMS's Medicare Claims Processing Manual.

As a preliminary matter, to the extent that Petitioner is asking the Board to direct the Medicare program to pay the surgeon for his (Petitioner's) assistant-at-surgery services, that request is clearly beyond the scope of the underlying appeal and thus not a proper basis to reopen our decision. The issue in the underlying appeal is not whether Medicare is obligated to pay the surgeon for the services Petitioner provides as the surgeon's employee or contractor, but whether Petitioner is eligible to enroll in Medicare Part B.

Apart from this jurisdictional hurdle, Petitioner's contentions do not persuade us that DAB No. 2290 contains errors of law or fact. During the appeal proceeding, Petitioner submitted no evidence about how Medicare pays the surgeons he works with or about his employment

---

[1] Petitioner states:

> Either I should be allowed to enroll to receive payments for assistant at surgery services, or the surgeon should collect my fees for the services as part of my employment. But to allow these [assistant-at-surgery] services to be provided for free, and know that they are being provided for free, is just wrong.

Petitioner's Request for Reopening at 2.

relationship, if any, with those surgeons.[2] And as we noted in DAB No. 2290, the record lacked evidence that Petitioner's services are, in fact, rendered "incident to" a physician's services within the meaning of Medicare's coverage regulations. See DAB No. 2290, at 6 (noting that the Board had "no reason to believe that Petitioner's services, which ([the Board understand[s]) are furnished to hospital inpatients, would even qualify for 'incident to' status because they are not of the kind "commonly furnished in physicians' offices"). In short, there is no factual basis in the record for Petitioner's apparent suggestion that Medicare pays or should pay the surgeon a "separate fee" for Petitioner's assistant-at-surgery services or that Medicare pays the surgeon for those services as "incident to" the surgeon's professional services.

Even assuming, for the sake of argument, that a surgeon could receive Medicare payment for Petitioner's services, that fact would not make Petitioner eligible for enrollment. A person who provides medical services may enroll in Medicare only if he is, in fact, eligible to receive payment directly from Medicare for covered services. As we discussed at length in DAB No. 2290, the Medicare statute and regulations nowhere indicate that services provided by a surgical first assistant constitute "covered services," nor do the statute and regulations authorize Medicare to pay a surgical first assistant directly for services. The regulations and CMS manual provisions to which the Petitioner cites in his request to reopen do not indicate otherwise.[3] Regardless of the value of Petitioner's services to the surgeon, hospital, or Medicare beneficiary, Congress has not authorized the Medicare program to pay surgical first assistants directly for their services, and for that reason CMS properly determined that he is ineligible to enroll in the program

[2] In suggesting that Medicare recognize his relationship with the surgeon for payment purposes, Petitioner's request to reopen is at odds with the statement he made at oral argument that payment should be made to him directly and not to the physician.

[3] To the extent that a surgeon or hospital receives Medicare payment for surgical services that Petitioner participates in providing, Petitioner is, of course, free to arrange with the surgeon or hospital to receive appropriate compensation from them.

as a surgical first assistant. The Board does not have the legal authority to require CMS to take an action (i.e., enrolling Petitioner in Medicare as a surgical first assistant) that would be inconsistent with the Medicare statute and regulations.

Because Petitioner has shown no error of law, and has neither alleged nor shown any clear error of fact, the Board denies his petition to reopen the Board Decision.

Judicial Review

Section 498.95 of 42 C.F.R. provides that an affected party that is dissatisfied with a Board decision and is entitled to judicial review must commence civil action within 60 days from receipt of the notice of the Board's decision, unless the party files a request for extension with the Board in writing before the 60-day period ends and the Board extends the time for good cause shown. Petitioner has not requested that the Board extend the time for judicial review. Accordingly, the time for requesting judicial review runs from his receipt of the Board Decision.

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Leslie A. Sussan

_____/s/_____
Stephen M. Godek
Presiding Board Member