

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Riley A. Elliott, DDS,)	Date: October 28, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-442
)	Decision No. CR1856
Centers for Medicare & Medicaid)	
Services.)	

DECISION

Petitioner, Riley A. Elliott, DDS, is a dentist licensed in the State of Vermont who, for the last 29 years, has been teaching and practicing general anesthesiology at the University of Vermont College of Medicine and its affiliated medical center. He appeals the March 24, 2008 decision of a Medicare contractor hearing officer finding that the Medicare contractor properly denied his application to enroll in the Medicare program as an anesthesiologist.

Because I find that Petitioner Elliott is authorized under state law to practice as a general anesthesiologist, I reverse the hearing officer’s decision.

Background

The Medicare Part B Contractor, NHIC, Corp., has denied Petitioner Elliott’s request to change his Medicare billing specialty designation from Doctor of Dental Surgery (DDS) to Anesthesiology.¹ In a decision dated March 24, 2008, a Contractor Hearing Officer

¹ To administer Medicare Part B, CMS contracts with private insurance companies. Among other duties, these contractors process and pay claims for reimbursement, communicate information related to the administration of the Medicare program, and assist in discharging administrative duties necessary to carry out program

ruled that he was not eligible to participate in the Medicare program as an anesthesiologist because he is not qualified under state law to administer anesthesia except in connection with dental procedures. P. Ex. 1, at 12-13 (Reconsideration Decision at 3-4). Petitioner now files this appeal, pursuant to section 1866(j)(2) of the Social Security Act (Act).

The parties have filed cross-motions for summary judgment. They agree that no material facts are in dispute, and that the case can be decided on their written submissions, without need for an in-person hearing. *See*, Pre-Hearing Conference Order, at 2 (June 3, 2008).²

Discussion

Petitioner is eligible to enroll in the Medicare program as an anesthesiologist because, under Vermont law, he is authorized to administer anesthesia in all types of cases, including non-dental cases.³

Medicare Part B is a supplementary medical insurance program for the aged and disabled. Act, sections 1831-1848. Among other benefits, the Part B program will pay for anesthesiology services provided by physicians, registered nurse anesthetists, and anesthesiologists' assistants. 42 C.F.R. §§ 410.20, 410.69. The term "physician" includes doctors of medicine, osteopathy, dental surgery, podiatric medicine, and optometry, as well as chiropractors, but, for the services to be covered, the physician must be legally authorized to practice by the State in which he or she performs the functions or actions, and he/she must be acting within the scope of his or her license. Act § 1861(r); 42 C.F.R. §§ 410.20(b), 410.24.

As the parties agree, nothing in the Medicare statute or regulations precludes Petitioner Elliott's participation in the Medicare program as an anesthesiologist so long as he can do so legally under state law. CMS Br. at 7; P. Br. at 2, 5.

purposes. Act § 1842(a).

² CMS has submitted a pre-hearing brief/motion for summary judgment. (CMS Br.) Petitioner submitted a pre-hearing brief/cross motion for summary judgment (P. Br.) with nine exhibits (P. Exs. 1-9). CMS also filed a supplemental memorandum (CMS Supp. Br.) and Petitioner filed a reply memorandum (P. Reply) and a surreply Memorandum (P. Surreply) with one additional exhibit (P. Ex. 10). In the absence of any objections, I admit into the record P. Exs. 1-10.

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

CMS points to Vermont's dental practice statute which defines the scope of dental practice, and authorizes a licensed dentist to administer "dental anesthetics, either general or local." 26 V.S.A. § 721(a)(4). The Vermont statute also says that its provisions should not be construed as precluding a licensed physician from administering anesthetics. 26 V.S.A. § 721(b). In CMS's view, this statutory language explicitly limits dentists to administering anesthesia in cases involving dental procedures.

Petitioner, however, points out that the state agencies responsible for regulating dental and medical practice in Vermont recognize that Petitioner practices and teaches general anesthesiology, and they consider that he is acting within the scope of his licensure and certification (as discussed in more detail below).

CMS acknowledges that the Supreme Court, in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), called for deference to an agency's interpretation of its own governing statutes, but, according to CMS, such deference is not appropriate here because the state statute unambiguously limits a dentist's practice of anesthesiology.

I do not read the state statute as unambiguous. CMS is probably correct that, under its provisions, a Vermont dentist who lacks additional training or certification could only administer anesthetics in connection with dental procedures. But it does not follow that a degree in dentistry *precludes* someone from practicing general anesthesiology without regard to whatever additional qualifications he might have. The state statute is silent on this issue.

Petitioner Elliott is no ordinary dentist. He has a license in dentistry with a "general anesthesia endorsement." P. Ex. 1, at 63.⁴ In 1976, he completed a one year hospital dentistry/oral surgery internship at the Medical Center Hospital of Vermont, a program that included a rotation in non-dental anesthesia. He then completed a two year anesthesia residency program at the Medical Center/University of Vermont. This program, sponsored by the American Council of Graduate Medical Education, trains both medical doctors and dentists in general anesthesiology. P. Ex. 1, at 15; P. Ex. 2, at 2-3 (Elliott Decl. ¶¶ 9-12). After passing the required examination, Petitioner Elliott was

⁴ The Dental Board issues a general anesthesia endorsement "to authorize qualified dentists to administer general anesthesia, parenteral deep sedation, and parenteral sedation, and parenteral conscious sedation in dental offices." Rule 5.25. P. Ex. 1, at 86.

certified by the National Board of Anesthesiology in May 1990.⁵ P. Ex. 1, at 17. He has practiced general medical anesthesiology at the Medical Center Hospital of Vermont, which is the university's primary teaching hospital, for 29 years. P. Ex. 2, at 4 (Elliott Decl. ¶ 17). Since 1995, he has been on the medical faculty of the University of Vermont College of Medicine, where he is currently an associate professor of anesthesiology. P. Ex. 2, at 3-4 (Elliott Decl. ¶¶13, 17).

Because the state statute does not address whether someone with Petitioner Elliott's credentials may lawfully practice general anaesthesiology, I look to the interpretive rules and opinions provided by those state administrative bodies charged with implementing the statutes governing medical and dental practice in Vermont: the State Board of Dental Examiners and the Vermont Board of Medical Practice.

Although they do not directly address the issue, the dental board's administrative rules implicitly recognize that certain dentists may be credentialed to provide general anesthesia services in a hospital setting because they exempt from the anesthesia endorsement requirements any dentist who administers anesthesia "in a hospital setting with supervision by a physician or *dentist credentialed by the hospital to provide anesthesia services.*" Rule 5.28. In an opinion letter dated May 14, 2008, the dental board chair noted that Rule 5.28 "contemplates that a dentist credentialed by a hospital may provide anesthesia services." P. Ex. 5.

In a December 21, 1995 letter to a private insurer, the Director of the State Office of Professional Regulation denied that either her office or the Vermont Board of Dental Examiners had ever ruled that Dr. Elliott was practicing outside the scope of his license. P. Ex. 1, at 67.

More recently, the Chair of the Vermont Board of Medical Practice, writing on behalf of his organization, opined that the Petitioner "is practicing within a scope of practice for which he has had appropriate training." Referring to the opinion of the Vermont Board of Dental Examiners, he also cited their rule 5.28 "as support for the legality of a dentist

⁵ That he received the highest score of his class on the written exam is an interesting aside, but not dispositive here. P. Ex. 1, at 16; P. Ex. 3, at 3 (Hunter Decl. ¶ 16). Dr. John A. Hunter's declaration offers an interesting historical perspective on D.D.S. anesthesiologists in Vermont and other jurisdictions. In the 1970s, a shortage of M.D. and D.O. candidates induced anesthesiology training programs to open their doors to D.D.S. and D.M.D. applicants, who became practicing general anesthesiologists. Those numbers have dwindled in recent years, as more medical doctors have opted to train as anesthesiologists. *See*, P. Ex. 3, at 2-3 (Hunter Decl. ¶¶ 12-19).

providing non-dental anesthesia services if so credentialed by the hospital.” The Chair acknowledged that Petitioner’s “educational pathway was not common,” but concluded that “it was legitimate . . . and had ample precedent.” P. Ex. 10.

I see no reason not to defer to the state agencies’ judgments, particularly where Petitioner Elliott has plainly – and lawfully – been practicing general anesthesiology for many years.

Conclusion

Because he is acting within the scope of his state license, Petitioner is eligible to enroll in the Medicare program as an anesthesiologist.

/s/
Carolyn Cozad Hughes
Administrative Law Judge