Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Earl Braunlin, M.D.
Docket No. A-15-37
Decision No. 2630
March 30, 2015

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Earl Braunlin, M.D. (Petitioner) requests Board review of the Administrative Law Judge decision in *Earl Braunlin, M.D.*, DAB CR3499 (2014) (ALJ Decision). The ALJ concluded that Petitioner did not meet the requirements of 42 C.F.R. § 424.514 for a hardship exception to the requirement to pay an application fee with his Medicare enrollment application.

In a letter acknowledging receipt of the appeal, the Board advised the parties that under the applicable Board guidelines, the Centers for Medicare & Medicare Services (CMS) must file a response to the appeal no later than February 13, 2015. On February 10, CMS filed a motion asking the Board to remand this matter to the ALJ pursuant to 42 C.F.R. § 498.88,[1] with instructions for the ALJ in turn to remand it to CMS for further proceedings consistent with a decision issued by the Board on January 15, 2015, *Dr. S.A. Brooks, D.P.M.*, DAB No. 2615 (2015). For the reasons set forth below, we grant CMS's motion.

Background

Section 1866(j)(2)(C)(i) of the Social Security Act requires generally that the Secretary of HHS impose a fee on an applicant for Medicare enrollment. Section 1866(j)(2)(C)(ii) provides that the Secretary "may, on a case-by-case basis, exempt [an applicant] from the imposition of an application fee…if the Secretary determines that the imposition of the application fee would result in a hardship." The Medicare enrollment regulations require that, at the time of filing an enrollment application, both "prospective" and "revalidating" "institutional providers" must submit either the application fee or a request for a hardship exception, or both. 42 C.F.R. § 424.514(a), (b). Section 424.514(f), titled "*Information*

[1] As relevant here, subsection 498.88(a) authorizes the Board to "remand the case to an ALJ for a hearing and decision[.]"

needed for submission of a hardship exception request," states: "A provider or supplier requesting an exception from the application fee must include with its enrollment application a letter that describes the hardship and why the hardship justifies an exception."

Petitioner is an ophthalmologist, optometrist, and optician who was previously enrolled in Medicare as a supplier of durable medical equipment but apparently voluntarily terminated his program participation in 2013. ALJ Decision at 1. He submitted a Medicare enrollment application, Form CMS-855S, seeking to reactivate his Medicare supplier billing number, together with a request for a hardship exception, both dated April 2, 2014.[2] CMS Ex. 1. The request alleged that Petitioner provided a "[s]ignificant amount of charity care/financial assistance…to patients." *Id.* at 1. The request also stated:

> [T]he enclosed office financial statement for 2013 …shows there was no actual office income to Dr. Braunlin. In fact, there was an actual loss of $3,718.40. The list of expense does not include any office rent expenses. Any money spent for office salaries was for office personnel. There was no office salary or office income paid to Dr. Braunlin. Dr. Braunlin had an actual loss of $3,718.40 for 2013.

Id. Included with the request was an "Income Statement" for the 12 months ended December 31, 2013 and a letter from a CPA verifying that Petitioner had an "office income loss for 2013 of $3,718.40." *Id*. at 1-3.

A National Supplier Clearinghouse Medicare Administrative Contractor, Palmetto GBA (or "NSC"), denied Petitioner's request for a hardship exception. NSC gave the following reason for the denial: "Chapter 15.9.1C of the Program Integrity Manual requires the supplier to present a strong argument to support its request, including providing comprehensive documentation. Based on the NSC's review of the information submitted, there is not strong enough evidence to grant a hardship exception to the application fee." CMS Ex. 2 (NSC letter dated 4/16/14).

By letter dated April 23, 2014, Petitioner requested reconsideration of NSC's decision by a NSC hearing officer. Petitioner enclosed a "Schedule of Practice Income and Expenses" for the year ended December 31, 2011 and a separate schedule for the year ended December 31, 2012. Petitioner also resubmitted his April 2, 2014 request for a

[2] It is undisputed that Petitioner was subject to the requirement for an application fee although his application did not indicate that he was a new enrollee or seeking to revalidate his enrollment.

hardship exception and the enclosures to that request. CMS Ex. 3.[3] Subsequently, Petitioner sent the hearing officer several letters, some of which included argument, but no additional documentation. CMS Ex. 5 (letter dated 5/16/14, enclosing copies of 4/23/14 request for reconsideration and letter dated 5/6/14); CMS Ex. 6 (letter dated 5/16/14 (not the same as the letter in CMS Ex. 5)); CMS Ex. 7 (letter dated 5/19/14); CMS Ex. 8 (letter dated 5/22/14).

The hearing officer issued a decision dated May 27, 2014, which states in part:

> This hearing officer …reviewed supporting documentation sent to the NSC, which included but was not exclusive of: CMS 855S revalidation application; income statements for the fiscal years 2011, 2012 and 2013; letter from CPA…; and letter for the hardship exception request. This hearing officer additionally established telephone communication with Dr. Braunlin. His office sent to this hearing officer additional documentation by Earl Braunlin MD in order support his appeal for an exception to the application fee, which included but was not limited to, a summary of total office income/loss for the years 2011, 2012 and 2013.

CMS Ex. 9, at 2. The decision continues:

> After review of this information and the case file, this hearing officer has concurred that Earl Braunlin MD failed to present a strong argument for the hardship exception based upon the criteria set forth by CMS [in the Medicare Program Integrity Manual (PIM), Ch. 15, § 15.19.1.(C)(2)], specifically, 'Hardship exceptions should not be granted when the provider simply asserts that the imposition of the application fee represents a financial hardship'. Thus, Earl Braunlin MD['s] argument does not satisfy the requirements for a hardship exception to the application fee. **The NSC is deemed appropriate in the denial of the hardship exception fee waiver based upon the information on the record at the time of denial**.

Id. at 2-3 (emphasis added).[4]

---

[3] Only the second page of the "Income Statement" for the year ended December 31, 2013 is included in CMS Exhibit 3.

[4] The decision goes on to quote provisions in the PIM stating that in reviewing an initial enrollment decision or a revocation, the hearing officer should "exclude…from the scope of the review" any evidence that demonstrates that a provider or supplier "met or maintained compliance after the date of denial or revocation[.]" *Id*. at 3. These provisions do not on their face apply to a hearing officer's review of the denial of a request for a hardship exception. Furthermore, the rationale for limiting the scope of a hearing officer's review of a denial or revocation of enrollment would not apply here where the question to be resolved by the hearing officer was not whether the applicant was in compliance at a particular point in time but whether the record before the hearing officer justified the need for a hardship exemption.

In her decision upholding the reconsidered decision, the ALJ noted that the PIM "lists factors that may suggest hardship," including "significant amount of charity care/financial assistance furnished to patients" and "presence of substantive partnerships…with those who furnish medical care to a disproportionately low-income population[.]" ALJ Decision at 2-3. The ALJ stated that the "applicant must provide its supporting evidence at the time it submits its hardship request," but nevertheless proceeded to consider not only the supporting documentation Petitioner submitted to NSC but also the supporting documentation Petitioner submitted with his request for reconsideration. *Id*. at 4, citing PIM, Ch. 15, § 15.19.1(C)(2). The ALJ found that Petitioner "provides no evidence establishing that his patients are disproportionately low-income or that he furnishes significant charity care" but instead "submitted his accountant's statements only[.]" *Id*. The ALJ also stated that "the figures [Petitioner] submitted suggest that he owns significant assets" and that "CMS may legitimately consider assets as well as income in assessing whether a hardship exception is appropriate," concluding that CMS "has not abused its discretion" in determining to deny Petitioner's request for a hardship exception. *Id*. at 4-5.

On appeal to the Board, Petitioner disputes the ALJ's statement that he provided no evidence showing that he provided significant charity care as well as the ALJ's conclusion that even considering the figures Petitioner did provide, denial of the hardship exception was justified. Notice of appeal dated 12/30/14. We do not resolve these disputes, however, in light of our dispositive action on the motion for remand, as explained below.

CMS's Motion for Remand (Motion) states in relevant part:

> In *Brooks,* the Board held that at the lower levels of the administrative process, the Medicare contractor should have given the supplier "timely notice that additional documentation was needed to support the hardship claims." [*Brooks*, DAB No. 2615] at 9; *see id.* at 8-9. Moreover, in discussing the supplier's waiver request, the Board alluded to various potential considerations that might arise in the case-by-case waiver determination analysis, such as whether the supplier in *Brooks* had sufficient income or was "adequately capitalized" to pay the fee without significant burden. *E.g., id.* at 14. The Board ultimately decided to remand the *Brooks* matter to the ALJ for optional additional development of the record and a new decision consistent with Board's analysis. *Id.* at 18.
>
> CMS believes that remanding this matter to the agency would conserve the Board's time and resources. It would also afford both parties the opportunity to further develop their positions and the evidentiary record in light of *Brooks* and any new relevant considerations that it may have raised.

Motion at 1-2. The Board gave Petitioner an opportunity to respond to the Motion; however, Petitioner did not address the Motion, but instead addressed the merits of the case. P. letters dated 2/11/15 and 3/9/15 (with attached documentation).

Discussion

We conclude that remand is appropriate. We agree with CMS that, under the Board's holding in *Brooks*, DAB No. 2615, the administrative process resulting in CMS's denial of Petitioner's request for a hardship exception was flawed, although our conclusion is based on a somewhat different rationale than CMS articulated.

Petitioner submitted supporting documentation with his request for a hardship exception. NSC found that Petitioner had not submitted "strong enough evidence" to support his request for a hardship exception and denied the request. Petitioner requested reconsideration of NSC's denial, submitting additional supporting documentation. The NSC hearing officer's reconsideration decision indicates that the hearing officer had reviewed the supporting documentation Petitioner submitted to NSC with his request for a hardship exception, the supporting documentation Petitioner submitted with his request for reconsideration, and additional supporting documentation Petitioner submitted after the hearing officer "established telephone communication" with Petitioner.[5] The hearing officer nevertheless stated that her decision to uphold NSC's denial of Petitioner's request for a hardship exception was based **only** on the record before NSC, i.e., Petitioner's request for a hardship exception and the supporting documentation submitted with that request, finding that the PIM limited the scope of her review to that record.

In *Brooks*, the Board found that NSC, and perhaps the NSC hearing officer on reconsideration, erred in reading the PIM "as establishing a requirement that an institutional provider claiming financial hardship include supporting documentation **with the enrollment application**."[6] *Brooks* at 8 (emphasis in original). The Board reasoned:

> [I]mposing on Petitioner an obligation to have submitted all supporting documentation with her application would be inconsistent with section 424.514(f) [of 42 C.F.R.]. That section requires a requester to submit with the application

[5] The record in this case does not show that Petitioner submitted any new supporting documentation to the hearing officer after filing his request for reconsideration. However, for purposes of our decision, it is immaterial whether Petitioner submitted new supporting documentation only with his request for reconsideration or also after that date.

[6] The Board stated that it was unclear from the hearing officer's decision denying the request for a hardship exception "whether the reconsideration was based on a failure to submit supporting documentation with the revalidation application or on the inadequacy of the documents Petitioner submitted to the Hearing Officer." *Brooks* at 8.

> only a letter describing the hardship and stating why it justifies an exception. As applied in this case, the manual provision effectively imposed on Petitioner an obligation to have submitted comprehensive supporting documentation **with her application** in addition to the letter required by the regulation. A manual provision that imposes a new obligation is not merely interpretative, contrary to what CMS argues.

Id. (emphasis in original).

Unlike Dr. Brooks, Petitioner here submitted with his Form CMS-855S some supporting documentation for his request for hardship exception, which NSC considered in determining to deny Petitioner's request. However, as the Board found may have been the case in *Brooks*, the hearing officer here read the PIM as imposing an obligation on Petitioner to have submitted comprehensive supporting documentation to NSC, thus precluding her from considering any additional supporting documentation. The Board concluded in *Brooks* that this view is inconsistent with the regulation at 42 C.F.R. § 424.514(f), which requires only a letter describing the hardship and stating why it justifies an exception. Thus, the hearing officer acted inconsistently with the applicable regulation by denying Petitioner's request for a hardship exception without considering the supporting documentation Petitioner submitted with his request for reconsideration.

The ALJ also appeared to take the position that CMS may consider only supporting documentation submitted with the request for a hardship exception in determining whether an exception is justified. ALJ Decision at 4 (stating that an "applicant must provide its supporting documentation at the time it submits its hardship request", citing the PIM provision).[7] Notwithstanding that position, the ALJ proceeded to discuss all of the supporting documentation Petitioner submitted, concluding based on that evidence that CMS did not abuse its discretion when it determined to deny Petitioner's request for a hardship exception. *Id*. at 4-5. However, the ALJ could not cure CMS's failure to consider all of the supporting documentation Petitioner submitted by considering it

[7] The ALJ also cited other regulations as requiring applicants to submit all documentation "before the contractor issues its initial determination" or be "precluded from introducing new evidence at higher levels of the appeal process." ALJ Decision at 3, citing 42 C.F.R. §§ 405.874(c)(5)(2011), 405.803(e), 498.56(e). Section 405.874 was replaced in 2012 by section 405.803 (*see* 77 Fed. Reg. 29,002 (May 16, 2012)). The relevant provisions in both versions do not refer to what documentation must be submitted to the contractor with an enrollment application, but rather to the requirement to submit all documentation at the reconsideration level when appealing a denial. The regulation actually requires the hearing officer on reconsideration to contact the supplier "to try and obtain the evidence" if it is not submitted with the appeal request. 42 C.F.R. § 405.803(d). Only at the levels of appeal above reconsideration is a supplier precluded from submitting new evidence absent good cause. 42 C.F.R. §§ 405.803(e), 498.56(e). In any case, the problem in the present case is not that the hearing officer refused to admit documentation on reconsideration and, in fact, the hearing officer contacted Petitioner before issuing the reconsideration. The problem is that both the reconsideration and the ALJ Decision appear to be based on a misunderstanding that only documentation submitted before the initial denial could be treated as relevant to the hardship exception.

herself. As the ALJ recognized, "[t]he statute and regulation give CMS broad discretion to determine whether to exempt a Medicare applicant from paying the application fee." *Id*. at 5. The ALJ could not determine that CMS did not abuse that discretion unless CMS first exercised it in a manner that was consistent with the regulation.

We therefore reverse the ALJ Decision and remand the case to the ALJ to in turn remand to CMS (or CMS's contractor) for further proceedings consistent with *Brooks* and our decision today. The ALJ should instruct CMS to consider all arguments and supporting documentation Petitioner submitted to NSC and the NSC hearing officer. CMS is not precluded from considering additional documentation Petitioner submitted in the proceedings before the ALJ and the Board or any additional documentation Petitioner submits at CMS's request.

We note that Petitioner's notice of appeal states "I am requesting to meet personally." Notice of appeal at 3. The Board guidelines state that a party may request an opportunity to appear before the Board. *See* http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html, "Development of the Record on Appeal." We deny Petitioner's request. An oral proceeding on the merits of this case is not appropriate given our conclusion that a remand is required to ensure that CMS considers all of Petitioner's supporting documentation in making a determination on Petitioner's request for a hardship exception.

Conclusion

For the reasons stated above, we reverse the ALJ Decision and remand this case to the ALJ.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member