

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robin H. Vaughan
(CCN: 10196011100088-001),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-950

Decision No. CR2325

Date: February 18, 2011

DECISION

For the reasons set forth below, I grant the Centers for Medicare and Medicaid Services' (CMS's) motion for summary judgment. Palmetto GBA, the CMS contractor, had a legitimate basis to determine that Robin H. Vaughan (Petitioner) did not meet the requirements to enroll in the Medicare program as a non-physician practitioner of neurophysiology. I therefore affirm the contractor's determination to deny Petitioner's application.

I. Background

Petitioner states that he holds a Masters Degree in audiology, in which he is currently licensed, and a Ph.D. in neurophysiology, which does not have a licensing program. Hearing Request (HR). Petitioner seeks to enroll in the Medicare program as a non-physician practitioner, specifically as a neurophysiologist, to perform and bill for services including intraoperative neurophysiologic monitoring and electrodiagnositics. *Id.* In May 2010, Petitioner filed an enrollment application. CMS Ex. 2 at 1-3. The CMS contractor denied his application and explained that Petitioner's specialty is not covered under the Medicare program. CMS. Ex. 3, at 1. Upon reconsideration, the contractor again denied

Petitioner's application for enrollment and reiterated that a neurophysiologist was not recognized as a supplier type eligible to enroll and bill for services rendered to Medicare patients. CMS Ex. 5 at 1 (*citing* 42 C.F.R. § 405.400). Pursuant to 42 C.F.R. § 498.40, Petitioner timely filed a request for an Administrative Law Judge (ALJ) hearing by letter dated August 25, 2010. With Petitioner's hearing request, he included thirteen supplemental pages, which I have marked as Petitioner's Exhibit 1 (P. Ex. 1).

This case was originally assigned to Board Member Leslie A. Sussan, pursuant to 42 C.F.R. § 498.44, which permits a Member of the Departmental Appeals Board (Board) to hear appeals under Part 498. The case was subsequently transferred to me for decision, and the parties were notified by letter dated October 25, 2010. Pursuant to the September 2, 2010 Acknowledgement and Pre-Hearing Order, CMS filed a motion for summary judgment and supporting memorandum (CMS Br.) on October 22, 2010. CMS accompanied its submission with CMS Exhibits 1-6. On November 12, 2010, Petitioner filed a letter in reply, stating that he did "not have any additional documents or exhibits to add to [his] appeal" In the absence of objection, I receive into the record of this case P. Ex. 1 and CMS Exs. 1-6.

II. Issue

The issue in this case is whether CMS is authorized to deny Petitioner's application for enrollment as a supplier in the Medicare program as a non-physician practitioner.

III. Applicable Standard

The Board stated the standard for summary judgment:

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role

in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc*, DAB No. 2291, at 5 (2009). The Board has further stated, “[i]n addition, it is appropriate for the tribunal to consider whether a rational trier of fact could regard the parties’ presentation as sufficient to meet their evidentiary burden under the relevant substantive law.” *Dumas Nursing and Rehab., L.P.*, DAB No. 2347, at 5 (2010).

II. Findings of fact, Conclusions of Law, and Discussion

I make a single finding and conclusion set out below:

CMS was authorized to deny Petitioner’s application for enrollment because he was not eligible to enroll in the Medicare program

Petitioner appeals the contractor’s determination denying his application to enroll in the Medicare program as supplier of neurophysiology services. HR. As noted, the contractor denied his application, stating that neurophysiology was not a recognized supplier type eligible to enroll and bill for services rendered to Medicare patients. CMS Ex. 5 at 1 (*citing* 42 C.F.R. § 405.400).

Part B of the Medicare program is a voluntary supplemental insurance program covering outpatient services. Social Security Act (Act) §§ 1831-1848, 42 U.S.C. §§ 1395j – 1395w-4. The program provides reimbursement for physician services and certain “medical and other health services” provided by non-physician practitioners, including physician assistants, nurse practitioners, physical therapists, occupational therapists, clinical nurse specialists, certified nurse-midwives, clinical social workers, clinical psychologists, registered dietitians or nutrition professionals, anesthesiology assistants, and speech language pathologists and audiologists. *See* Act § 1861(s), 42 U.S.C. § 1395x(s); Act § 1842(b)(18)(C), 42 U.S.C. § 1395u(b)(18)(C); Act § 1861(bb), 42 U.S.C. § 1395x(bb); Act § 1861(ll), 42 U.S.C. § 1395x(ll). The entities or individuals furnishing such health care services are known as “suppliers.” 42 C.F.R. § 400.202.

The Act requires the Secretary to issue regulations establishing a process for the enrollment of suppliers. Act § 1866(j). To receive payment, a supplier must be enrolled in the Medicare program. 42 C.F.R. § 424.505. The purpose of the Medicare Part B enrollment process is to determine a supplier’s eligibility to bill and receive Medicare payment for health care services. 42 C.F.R. § 424.502 (defining the term “enrollment” to mean a process for establishing eligibility to submit payment claims to Medicare). CMS may deny a prospective supplier enrollment if Part B does not authorize payment for services. 42 C.F.R. § 424.505. *See Peter McCambridge, C.F.A.*, DAB CR1961 (2009), *aff’d*, DAB No. 2290 (2009). It is appropriate to deny an enrollment application if a prospective supplier is not found in compliance with the enrollment requirements. 42 C.F.R. § 424.530(a)(1).

The Medicare Program Integrity Manual (MPIM), CMS's guidance for affiliated contractors, lists the types of non-physician practitioners that may be enrolled in the Medicare program as suppliers, referencing the statutory and regulatory basis for Medicare payment to these suppliers.¹ In accordance with Federal regulations, a neurophysiologist is not included among the types of non-physician practitioners authorized to receive payment for services as a supplier under the Medicare program. *MPIM, Chpt. 10, Section 12.4; see 42 CFR § 405.400; see also 42 CFR §§ 424.5, 410.1 – 410.175*

Petitioner recognizes that his profession is not an area the Medicare program is authorized to cover. In his hearing request, Petitioner states:

I did not dispute that neurophysiology is not included in that list [of non-physician practitioners]. My point is simple, once upon a time a physician assistant or nurse practitioner appeals to Medicare to become a Non Physician Practitioner and it was granted. There was a process that that application went through and was granted. I am asking for that same process.

I do not question Petitioner's reported credentials or that Petitioner provides a valuable service to his clients. However, I have no authority, nor does CMS through this enrollment appeals process, to grant Petitioner the remedy he seeks. The purpose of the Medicare Part B enrollment process is to determine a supplier's eligibility to bill and receive Medicare payment for health care services. 42 C.F.R. § 424.502; *see McCambridge, DAB No. 2290, at 4*. This enrollment appeals process is not the proper forum for challenging current regulation or policy. Neither the Board nor I can create or dictate such a policy. The authority to create coverage and payment policy, as embodied in the Medicare statute and regulations, instead rests with Congress and CMS. My role is to apply the Medicare laws as they exist, and I see nothing in those laws that authorize CMS to pay for Petitioner's services as a neurophysiologist. *See McCambridge, DAB No. 2290, at 7-8*.

I must apply the regulations as they are stated. The applicable regulations do not authorize CMS to enroll Petitioner in the Medicare program as a neurophysiologist. Petitioner points to no source of authority for me to grant an exemption on policy or equitable grounds. Moreover, I have no authority to declare the statute or the regulation

¹ On July 30, 2010, the provisions in Chapter 10 of the MPIM were relocated to Chapter 15 of the MPIM. *See Chapter 10 Manual Redesign, CMS Pub. 100-08, C.R. 6938, July 15, 2010, available at <http://www.cms.gov/transmittals/downloads/R347PI.pdf>*. In this decision, however, I cite to the MPIM provisions as they existed during the relevant period.

invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (“An ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.”).

III. Conclusion

It is undisputed that Petitioner does not qualify as a non-physician practitioner supplier under the regulation. I therefore grant the CMS motion for summary judgment and affirm the reconsideration to deny Petitioner’s request to participate in the Medicare program as neurophysiologist.

/s/
Joseph Grow
Administrative Law Judge