Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bruce C. Barker, M.D.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-562

Decision No. CR2427

Date: September 13, 2011

DECISION DISMISSING REQUEST FOR HEARING

Pursuant to 42 C.F.R. § 498.70(b), I dismiss the hearing request of Petitioner, Bruce C. Barker, M.D. Petitioner has no right to a hearing.

I. Background

Petitioner is a physician in the State of California. He filed an application with Palmetto GBA (Palmetto), a Medicare contractor, to reenroll as a participating provider in Part B of the Medicare program. Palmetto informed Petitioner that his application for reenrollment was denied because Petitioner failed to supply Palmetto with requested information. Petitioner then filed a document with Palmetto that he apparently intended to be a corrective action plan (CAP). Palmetto notified Petitioner that the CAP was inadequate because it had failed to include certain requested documents.

Petitioner then supplied additional documents to Palmetto. Palmetto elected to treat this submission as a request for reconsideration of an initial determination. After reviewing the submission, Palmetto informed Petitioner that it was denying the request.

Petitioner then requested a hearing, and the case was assigned to me for a hearing and a decision. The Centers for Medicare and Medicaid Services (CMS) moved to dismiss the hearing request. With its motion, CMS filed 12 proposed exhibits that it designated as CMS Exhibit (Ex.) 1 – CMS Ex. 12. Petitioner opposed the motion. With his opposition, Petitioner filed three proposed exhibits that he designated as P. Ex. 1 – P. Ex. 3. I receive all of the parties' proposed exhibits into the record.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue is whether Petitioner has a right to a hearing.

B. Findings of Fact and Conclusions of Law

I find that Petitioner has no right to a hearing because Palmetto and CMS rejected his application for reenrollment. A party whose application is rejected has no right to a hearing.

The facts of this case are essentially undisputed. As I have discussed, Petitioner filed an application for reenrollment as a provider in the Medicare program. Section 3 of the application form required Petitioner to state whether he had ever had a final adverse action (including a criminal conviction in a court of law or an adverse decision by a State agency concerning his license to practice medicine) imposed against him. Petitioner answered that question affirmatively. CMS Ex. 2.[1] However, Petitioner failed to supply required information concerning the nature of the action and its date, the forum that imposed the adverse action against him, and the final resolution of any adverse action. Rather than supplying a complete statement of the action or actions taken against him, Petitioner submitted a printout from the Medical Board of California, which showed that he had pled guilty in the United States District Court for the Northern District of California to the felony of perjury and that sentencing was to have taken place on May 9, 2008. CMS Ex. 3. The form submitted by Petitioner also showed that his license to practice medicine in California had been suspended for one year but that it had been reinstated. *Id.*

What was missing from the information supplied by Petitioner was a complete record of the disposition of the felony charge against him and of the proceeding in California that led to suspension of his license to practice medicine in that State.

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[1] Petitioner appears to have first checked a box denying an adverse action and then corrected his error. CMS Ex. 2.

Petitioner did not disclose the events that resulted in his being charged with perjury nor did he provide any rationale for the Medical Board of California's adverse action against Petitioner's license and its subsequent determination to reinstate that license.

On December 20, 2010, Palmetto wrote to Petitioner requesting that he provide additional information within 30 days on any final adverse actions or convictions that may have been imposed against him. CMS Ex. 5 at 1. Palmetto specifically informed Petitioner that:

> Consistent with Federal Regulation found in 42 C.F.R. 424.525 we may reject your application or in accordance with regulations found in 42 C.F.R. 424.530(a)(1), we may deny your application if you do not furnish complete information within 30 days of the postmark of this letter. . . Failure to respond to this request could result in the closure of your application as well as revocation of your existing billing number (if applicable). Once closed, you need to complete and submit a new . . . application and include all supporting documentation to resume the enrollment process.

Id.

Petitioner did not reply to Palmetto's December 20, 2010 letter. On January 24, 2011, Palmetto notified Petitioner that his application was "denied" for failure to furnish the requested information within 30 days. CMS Ex. 6.

On February 1, 2011, Petitioner submitted to Palmetto a document, which he referred to as a "CAP reconsideration." CMS Ex. 7 at 1. This document contained a summary of the adverse actions taken against Petitioner but failed again to provide detailed information about the nature of the actions. *Id.* at 4-5. On March 19, Palmetto advised Petitioner that he had again failed to provide copies of the adverse actions taken against him. CMS Ex. 9. Petitioner responded on April 18, 2011 by submitting additional documents. CMS Ex. 10. On this occasion, Petitioner provided documentation of the adverse action taken against him by the Medical Board of California. He did not provide the official record of the criminal charges to which had pled guilty. *Id.*

Palmetto elected to treat Petitioner's February 1, 2011 filing and the supplemental documentation filed by Petitioner as a reconsideration request, and, on May 3, 2011, it denied the request. CMS Ex. 11 and CMS Ex. 12.

Regulations governing the provider application and enrollment process distinguish between a rejection of an application and a denial of an application.

An application may be *rejected* by CMS, or one of its contractors, if it lacks necessary information, if CMS or the contractor then requests that the missing information be supplied, and if the applicant fails to supply it within 30 days of the request. 42 C.F.R. § 424.525(a)(1), (2). A rejection of an application is not a determination that may be appealed. 42 C.F.R. § 424.525(d). Consequently, where an application is rejected, the applicant has no right to an administrative hearing, and any hearing request that he or she files should be dismissed. 42 C.F.R. § 498.70(b).

By contrast, an application may be *denied* by CMS, or one of its contractors, if the applicant is not in compliance with applicable Medicare enrollment requirements and has not submitted an acceptable CAP, or if the applicant is subject to any of the adverse actions, or falls into any of the other categories described, at 42 C.F.R. § 424.530(a). For example, CMS or a contractor may deny an application if an applicant has, within the ten years preceding the application, been found guilty of a felony that CMS determines to be detrimental to the best interest of the Medicare program or to the beneficiaries of that program. 42 C.F.R. § 424.530(a)(3). As another example, CMS or a contractor may deny an application where the applicant has been placed under a Medicare payment suspension. 42 C.F.R. § 424.530(a)(7). A denial of an application is an appealable determination, and an applicant who is dissatisfied with the denial determination and a reconsideration determination may have a right to a hearing before an administrative law judge.

A rejection is plainly distinguishable from a denial. There is no overlap between a rejection and a denial, no gray area that enables one to characterize an action by CMS or a contractor as being equally a rejection and a denial or interchangeably a rejection and a denial. CMS or a contractor *rejects* an application because the applicant has failed to provide all of the information necessary to enable CMS or the contractor to make an informed determination as to whether the applicant qualifies to participate. CMS or a contractor *denies* an application because the information that has been provided discloses something about the applicant that makes his or her participation in Medicare detrimental to the best interests of the program.

Here, Palmetto plainly *rejected* Petitioner's application. Petitioner failed to provide all of the information that Palmetto needed to make an informed determination about whether Petitioner qualified for participation. Petitioner acknowledged in his application that he had been convicted of perjury and that disciplinary action had been taken against his license. He did not, however, provide complete information about these adverse actions, and, consequently, Palmetto had insufficient information to determine whether to accept or deny Petitioner's application. Moreover, Petitioner failed to supply, within 30 days,

the information that Palmetto requested of him. Under the circumstances, rejection was the only action that Palmetto could have taken that was consistent with regulatory requirements.

Petitioner argues that he is entitled to a hearing because Palmetto called its action a "denial" of Petitioner's application. Moreover, Palmetto allowed Petitioner to file a CAP, and it reconsidered its initial action, something that would only have been appropriate had it denied – and not rejected – Petitioner's application.

Although it is true that Palmetto characterized its action as a denial of Petitioner's application, that does not change the reality that it rejected, and did not deny, the application. The fact that Palmetto erroneously labeled its action a denial and not a rejection does not change the legal character of Palmetto's action, nor does it confer rights on Petitioner that Petitioner is not entitled to. Put simply, labeling a rejection as a denial does not make it a denial. Incorrectly labeling a rejection as a denial does not confer rights that do not exist under the regulations.

Nor may Palmetto create hearing rights that do not exist under the regulations. Nothing in the regulations permits a contractor to grant hearing rights where there are no such rights.

Furthermore, the fact that Petitioner may have belatedly supplied information to Palmetto that might have enabled Palmetto to determine whether to deny Petitioner's application does not create rights that otherwise do not exist. Petitioner had no right to file a CAP because an applicant whose application is rejected does not have such a right. Therefore, it is unnecessary that I decide whether the information Petitioner supplied would have justified a denial of his application.

Petitioner argues that his failure to submit the information requested by Palmetto within 30 days of the request is not due to any fault on his part. He avers that he was out of town and not available to respond to the information request within the 30 day period. CMS or its contractor may extend the 30 day period at their discretion, if they decide that the applicant is working with them in good faith to supply requested information. 42 C.F.R. § 424.525(b). However, neither CMS

nor a contractor is required to grant an extension. Thus, a decision not to grant an extension is a non-reviewable act of discretion.

/s/
Steven T. Kessel
Administrative Law Judge