

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

John A. Stoltzfus Ph.D., LP,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1325

Decision No. CR3112

Date: February 10, 2014

**DECISION**

Wisconsin Physicians Service (WPS), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), denied Petitioner's application for enrollment in the Medicare program because WPS determined that he did not qualify as a clinical psychologist under 42 C.F.R. § 410.71(d). Petitioner appealed. For the reasons stated below, I reverse CMS's determination to deny Petitioner's enrollment application.

**I. Case Background and Procedural History**

Petitioner, John A. Stoltzfus, Ph.D., LP, earned a Doctor of Philosophy in Counseling and Guidance from the University of Wisconsin – Madison in December 1980. CMS Exhibit (Ex.) 3, at 12, 16. Petitioner worked under the supervision of a clinical psychologist for two years and, in March 1983, became a licensed psychologist in the State of Minnesota. CMS Exs. 3, at 3-4; 6, at 1. Petitioner's areas of competency listed with the Minnesota Board of Psychology include individual, marriage, child, and group psychotherapy, as well as teaching and supervising students of psychology. CMS Ex. 3, at 5. For the past 30 years, Petitioner has "been practicing and delivering clinical services as an independent psychologist." CMS Ex. 6, at 1.

On December 28, 2012, Petitioner completed and signed a Form CMS-855I (Medicare Enrollment Application) seeking enrollment in the Medicare program as a clinical psychologist. CMS Ex. 1. In an April 29, 2013 letter, WPS informed Petitioner that it received his enrollment application and requested that Petitioner provide additional information; the letter stated that Petitioner's "diploma does not specifically state your degree is in psychology; please submit a copy of your transcripts." CMS Ex. 2, at 1. After Petitioner responded to WPS's request, on June 14, 2013, WPS issued an initial determination denying Petitioner's application because enrollment in the Medicare program as a clinical psychologist requires a doctoral degree in psychology and Petitioner's "doctoral degree was earned in the field of counseling and guidance, which does not meet this requirement." CMS Ex. 5, at 1. Petitioner timely requested reconsideration of WPS's determination, in which Petitioner provided additional information concerning his degree. CMS Ex. 6. WPS issued a reconsidered determination upholding the denial of enrollment for the same reason stated in the initial determination. CMS Ex. 7.

Petitioner timely filed a request for hearing (RFH) with the Departmental Appeals Board, Civil Remedies Division. Following the issuance of my September 25, 2013 Acknowledgment and Pre-hearing Order (Pre-hearing Order), CMS filed a motion for summary judgment and supporting brief (CMS Br.), a list of proposed exhibits, and seven proposed exhibits (CMS Exs. 1-7). Petitioner did not file a brief; however, after I issued an Order to Show Cause, Petitioner submitted a response (P. Response) stating that he did not believe he needed to submit any additional documents.

## **II. Decision on the Record**

Petitioner did not object to any of CMS's proposed exhibits. Petitioner submitted documents with his RFH; however, copies of all except one appear in CMS's proposed exhibits. The one exception is an updated version of CMS Ex. 3, at 3, showing that Petitioner's psychology license in Minnesota is current through February 28, 2015. RFH Supporting Documents at 5. CMS did not object to this document. Therefore, I admit CMS Exs. 1-7 and RFH Supporting Documents at 5 into the record.

My Pre-hearing Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8, 9, 11; *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses).<sup>1</sup> Neither party offered written direct testimony for any witnesses. Accordingly, an in-

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<sup>1</sup> Administrative decisions and rulings cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

person hearing is not necessary and I issue this decision based on the written record. *See* Order ¶ 12.

### **III. Issue**

The issue in this case is whether Petitioner satisfied the requirements in 42 C.F.R. § 410.71(d) to enroll in the Medicare program as a clinical psychologist.

### **IV. Findings of Fact, Conclusions of Law, and Analysis<sup>2</sup>**

In order to participate in the Medicare program as a supplier,<sup>3</sup> individuals and entities must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. Psychologists may enroll in the Medicare program as either “clinical psychologists” or “psychologists billing independently.” *See Douglas L. Clore, LMLP, ALJ Ruling 2012-1, at 2-3 (HHS CRD July 17, 2012)*. A psychologist who seeks to enroll in order to provide “qualified psychologist services” under the Medicare program must meet the requirements for a “clinical psychologist,” as that term is defined by the Secretary of Health and Human Services (Secretary). 42 U.S.C. § 1395x(ii); *see also* 42 U.S.C. § 1395u(b)(18)(C)(v). The Secretary’s regulations define a “clinical psychologist” as an individual who:

- (1) Holds a doctoral degree in psychology; and
- (2) Is licensed or certified, on the basis of the doctoral degree in psychology, by the state in which he or she practices, at the independent practice level of psychology to furnish diagnostic, assessment, preventative, and therapeutic services directly to individuals.

42 C.F.R. § 410.71(d).

#### ***1. Petitioner holds a doctoral degree in counseling psychology.***

Petitioner asserts that he holds a Ph.D. from the University of Wisconsin – Madison. CMS Ex. 3, at 16. CMS does not dispute this. *See* CMS Br. at 5. However, CMS asserts that Petitioner does not have a doctoral degree in psychology. The primary basis for this position is that Petitioner’s degree is in “counseling and guidance” and not “psychology,”

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<sup>2</sup> My numbered findings of fact and conclusions of law are set forth in italics and bold font.

<sup>3</sup> A “supplier” is “a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services.” 42 U.S.C. § 1395x(d).

and that CMS must strictly apply the regulatory requirement that the doctoral degree be in “psychology.” CMS Br. at 4-6. CMS argues that it may not consider whether a non-psychology degree is the functional equivalent of a psychology degree and Petitioner’s state-issued psychologist license cannot substitute for the doctoral degree requirement. CMS Br. at 4-6. CMS further asserts that Petitioner’s doctoral degree cannot be considered a qualifying one in psychology because it was not until after Petitioner obtained his degree that the University of Wisconsin – Madison Counseling and Guidance Department became American Psychological Association (APA) accredited and changed the degree name to “counseling psychology.” CMS Br. at 5. Finally, CMS argues that Petitioner seeks an exception to the regulatory requirements to enroll as a clinical psychologist and that an administrative law judge cannot grant exceptions. CMS Br. at 7-8.

Although I agree with CMS that neither I nor CMS can engage in a functional equivalency analysis of an applicant’s degree or license, Petitioner does not seek such an analysis. An example of a functional equivalence argument appeared in a case in which the petitioner attempted to use two different licenses in combination to show that she met the psychology licensing requirement, when neither one of which fulfilled the requirement on its own. *See Revathi Bingi, Ed.D, DAB CR1573, at 7-8 (2007)*. However, Petitioner is not arguing that his doctoral degree is the functional equivalent to a doctoral degree in psychology; rather, Petitioner is arguing that his degree is, using modern terminology, a counseling psychology degree. CMS Ex. 3, at 1. In fact, Petitioner characterized his doctoral degree in his enrollment application as a counseling psychology degree. CMS Ex. 1, at 7.

I disagree with CMS that Petitioner’s doctoral degree, earned primarily in the late 1970s, is not a counseling psychology degree. CMS is to evaluate each applicant’s doctoral degree on a “case-by-case basis.” 63 Fed. Reg. 20,110, 20,116 (Apr. 23, 1998). This is because, as the Secretary acknowledged when promulgating the final rule concerning clinical psychologists, psychology degrees vary widely.

We realize that there are many psychologists who, although their doctoral degree is labeled other than “clinical psychology,” graduated from psychology programs that provided them with the appropriate knowledge, training, and experience in clinical psychology. *We are very concerned that we not indirectly deny beneficiaries access to the care of qualified psychologist services solely because the degree that a practitioner has earned is labeled something other than “clinical psychology.”* Based on our carriers’ experience in interpreting the [clinical psychologist] definition on a case-by-case basis, we do not agree with those commenters who believe that removal of the existing requirement for a doctoral

degree from a program in “clinical psychology” presents a danger to the Medicare population. . . . While we have made allowances for the types of psychology programs that can qualify a practitioner under Medicare’s [clinical psychology] benefit, we require that the individual’s doctoral degree at least be from a program that is designated as a psychology program. *The [clinical psychologist] benefit was created as a discrete benefit for psychologists, and not nonphysician practitioners who may receive some clinical training as part of their doctoral degree programs.* We believe that Congress would have to create a separate benefit to recognize practitioners whose degrees are in a field other than psychology.

63 Fed. Reg. at 20,116 (emphases added).

In the present matter, WPS requested that Petitioner provide the transcript of his doctoral studies (CMS Ex. 5, at 1) and, as indicated in the reconsidered determination, the hearing officer reviewed all of the documents in the file. CMS Ex. 7, at 1. However, despite reviewing Petitioner’s transcript, the hearing officer denied Petitioner’s enrollment application because Petitioner’s degree was in the field of counseling and guidance. CMS Ex. 7, at 1. Although, as quoted above, the Secretary indicated that the doctoral degree be from a program designated as a psychology program, the hearing officer failed to make the required case-by-case analysis to determine if, as a factual issue, Petitioner’s doctoral program was a counseling psychology program.

The Secretary made it clear in the quote above that the foremost issue was to ensure that nonphysician practitioners who may only receive some clinical training as part of their doctoral programs would not be enrolled as clinical psychologists. 63 Fed. Reg. at 20,116. There is no reason to assume that the Secretary meant to exclude doctoral degrees that, for historical reasons, originally did not include the word “psychology” in them, but later were updated to include that term. Therefore, the hearing officer should have considered the substance of Petitioner’s transcript and Petitioner’s statements concerning the program he attended.<sup>4</sup>

Petitioner states that he attended the Counseling and Guidance doctoral program at the University of Wisconsin – Madison because the program expressly offered a psychology

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<sup>4</sup> It is clear from WPS’s e-mails related to the initial determination that WPS and CMS personnel simply looked at the name of the degree program, Counseling and Guidance, to conclude that it was not a psychology program. There is no indication of a substantive review of the course transcript to determine whether the program was in fact a psychology program. CMS Ex. 4.

track that would qualify Petitioner to obtain a psychology license. CMS Ex. 6, at 1. Petitioner asserts that the majority of participants in the program attended in order to be psychologists and that, as his transcript shows, most of the classes he took were psychological courses. CMS Ex. 3, at 1. As part of this degree coursework, Petitioner took classes offered by the psychology and psychiatric departments. CMS Exs. 3, at 12-15; 6, at 1. Petitioner's dissertation "was a psychological study of the concept of adolescent differentiation from family" based on a model developed by the psychiatric department, and a professor from the psychiatric department was on Petitioner's dissertation committee. CMS Exs. 3, at 1; 6, at 1. Finally, Petitioner points out that the Minnesota Board of Psychology concluded that Petitioner's doctoral degree was a psychology degree when it licensed him. CMS Ex. 3, at 1. Although CMS might dismiss these statements as an attempt by Petitioner to argue that his degree is functionally equivalent to a psychology degree, it is important to consider Petitioner's statements in the historical context of the development of counseling psychology doctoral programs. When one does this, Petitioner's statements do not show equivalency; instead, they show that his doctoral program was in fact a counseling psychology program.

In *James Harrison Straub, Ed.D.*, DAB CR2677 (2012), the petitioner made the same argument as Petitioner in this case. The decision in that case summarizes testimony on the background to counseling psychology programs in the United States:

Drs. Norm Gysbers and Joe Johnson are professors at the University of Missouri, College of Education, Department of Educational, School, and Counseling Psychology. The witnesses testified that in the 1970s, counseling programs that trained psychologists were often located in a university's "College of Education." P. Ex. 1, at 1. "Persons who trained in the counseling psychology track decades ago were in programs with titles different today." P. Ex. 1, at 1. This is because "[c]ounseling psychology programs were typically in departments such as Counseling and Guidance and Counseling and Personnel Services which often housed a variety of tracks. Thus degrees often reflected the department and not the track." P. Ex. 1, at 1. The witnesses concluded that in evaluating who has clinical psychological training, "simply looking at the department that offered the degree is not sufficient. Most state licensing boards evaluate applicants for licensing to make sure they have at least the minimal training to provide clinical work." P. Ex. 1. I assign significant weight to Drs. Gysbers' and Johnson's uncontroverted testimony. CMS did not object to it or attempt to discredit it. Both individuals are professors at a university program that is similar to the one from which

Petitioner graduated. The testimony is also consistent with Dr. Lauver's statement. Therefore, based on this testimony, Dr. Lauver's statement, Petitioner's transcript, and the evidence of record as a whole, I find that Petitioner graduated from what today would be called a counseling psychology program.

*Straub*, DAB CR2677, at 6. As indicated in the decision, the testimony from the professors was consistent with the statement of the former Chair of the Department of Counseling and Guidance at the University of Arizona (referred to as Dr. Lauver in the quoted text above), that the Counseling and Guidance doctoral degree earned by the petitioner was a degree in "clinically applied counseling psychology." *Id.*

In the present case, CMS cited to the webpage on the University of Wisconsin – Madison's website that provides a history of the Counseling Psychology Department at that school. CMS Br. at 5. A review of that page shows that Petitioner's doctoral program developed in a similar manner as the ones described by the witnesses and the former Chair of the Counseling and Guidance Department at the University of Arizona in *Straub*. See History, University of Wisconsin – Madison, School of Education, Department of Counseling Psychology, at <http://counselingpsych.education.wisc.edu/cp/about/history> (last visited on January 31, 2014).

Petitioner also points out that the State of Minnesota evaluated his doctoral degree and found that it was a psychology degree. CMS Ex. 3, at 1. Petitioner was licensed in 1983 as a "Licensed Consulting Psychologist." CMS Ex. 3, at 7. A review of the statute applicable to Petitioner when he applied for the license indicates that such a license required Petitioner to show that he had "received a doctoral degree with a major in psychology, which may include educational and child psychology, from an education institution meeting the standards which may be prescribed by regulation of the board [of psychology]." Minn. Stat. § 148.91, subd 4 (3) (1982). The fact that Petitioner was licensed by the Minnesota Board of Psychology, therefore, is additional evidence that Petitioner's doctoral degree is in fact a psychology degree.

CMS also argues that Petitioner's doctoral degree is not qualifying for Medicare enrollment purposes because, at the time Petitioner received his doctoral degree, the University of Wisconsin – Madison's Department of Counseling and Guidance was not accredited by the APA. However, CMS's position is directly contradicted by the final rule promulgating 42 C.F.R. § 410.71(d). In response to public comments, the Secretary decided to remove the requirement in the proposed rule that the doctoral degree be from an accredited program, see 58 Fed. Reg. 68,829, 68,839 (December 29, 1993), and stated:

We have thoroughly examined the academic accreditation or approval requirements imposed by the various States for licensure or certification of psychologists. The wide degree of variation in the specifics of State requirements makes creation of a uniform Federal standard infeasible. We have concluded that reliance on State licensure or certification requirements provides adequate assurance that an individual's doctoral degree was obtained from a program that met appropriate academic standards.

63 Fed. Reg. at 20,117. The Secretary decided not to rely on the APA or other accrediting bodies to determine whether a psychology program met "appropriate academic standards." Therefore, CMS's argument concerning accreditation is irrelevant.

Based on a review of the entire record and as explained above, I find that Petitioner's doctoral degree is a counseling psychology degree.

***2. Petitioner is licensed to independently practice psychology in the State of Minnesota, based on his doctoral degree, and is authorized to furnish diagnostic, assessment, preventative, and therapeutic services directly to individuals.***

Petitioner asserts that he is a licensed psychologist in Minnesota and has been licensed there based on his Ph.D. since 1983. CMS Ex. 3, at 1, 4. Petitioner provided documentation that his Minnesota psychology license is valid through February 28, 2015. RFH Supporting Documents at 5. Petitioner's address is in Minnesota. CMS Exs. 1, at 12-15, 19; 6, at 1; P. Response at 1. CMS has not disputed that Petitioner is a licensed psychologist in the State of Minnesota.

Minnesota law limits the "independent practice of psychology" to persons who are licensed by the state. Minn. Stat. § 148.907, subd 1 (2013). The term "Independent practice" means "the practice of psychology without supervision." Minn. Stat. § 148.89 subd 3. The term "Practice of psychology" means:

the observation, description, evaluation, interpretation, or modification of human behavior by the application of psychological principles, methods, or procedures for any reason, including to prevent, eliminate, or manage symptomatic, maladaptive, or undesired behavior and to enhance interpersonal relationships, work, life and developmental adjustment, personal and organizational effectiveness, behavioral health, and mental health. The practice of psychology includes, but is not limited to, the



following services, regardless of whether the provider receives payment for the services:

- (1) psychological research and teaching of psychology;
- (2) assessment, including psychological testing and other means of evaluating personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning;
- (3) a psychological report, whether written or oral, including testimony of a provider as an expert witness, concerning the characteristics of an individual or entity;
- (4) psychotherapy, including but not limited to, categories such as behavioral, cognitive, emotive, systems, psychophysiological, or insight-oriented therapies; counseling; hypnosis; and diagnosis and treatment of:
  - (i) mental and emotional disorder or disability;
  - (ii) alcohol and substance dependence or abuse;
  - (iii) disorders of habit or conduct;
  - (iv) the psychological aspects of physical illness or condition, accident, injury, or disability, including the psychological impact of medications;
  - (v) life adjustment issues, including work-related and bereavement issues; and
  - (vi) child, family, or relationship issues;
- (5) psychoeducational services and treatment; and
- (6) consultation and supervision.

Minn. Stat. § 148.89, subd 5.

Therefore, I find that Petitioner is licensed, based on his doctoral degree, to independently practice psychology in Minnesota, the state in which he practices, and that Petitioner is authorized to provide full diagnostic and therapeutic services based on that license.

***3. Petitioner satisfies the requirements in 42 C.F.R. § 410.71(d) to enroll in the Medicare program as a clinical psychologist.***

Based on the foregoing, I conclude that Petitioner's Ph.D. degree is a counseling psychology degree that is sufficient to meet the doctoral degree requirement in 42 C.F.R. § 410.71(d). See *Straub*, DAB CR2677, at 6; *Revathi Bingi, Ed.D.*, DAB CR1573, at 5, 6 (finding that the petitioner "held an Ed.D., a doctoral degree in educational psychology (counseling), which she received in 1994" and noting that "CMS accepts that Petitioner met the first requirement [i.e., doctoral degree in psychology] during the relevant period and held an acceptable doctoral degree in psychology.").

Further, I conclude that Petitioner is licensed to practice psychology based on his doctoral degree in psychology in the state in which he practices. Because “the specific scope of practice as provided in state law is controlling as to who is qualified to be a clinical psychologist under section 410.71(d)(2),” *see Paul L. Daniels, Psy.D.*, DAB CR2640, at 6 (2012), I conclude that, based on his doctoral degree, Petitioner is licensed to independently practice psychology in Minnesota and furnish diagnostic, assessment, preventative, and therapeutic services directly to individuals.

### **III. Conclusion**

CMS’s determination denying Petitioner’s enrollment in the Medicare program as a clinical psychologist is hereby reversed. CMS will enroll Petitioner as a clinical psychologist and assign an appropriate effective date for Medicare billing privileges.

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/s/

Scott Anderson  
Administrative Law Judge