Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Robert E. Feiss, M.D.
Docket No. A-17-16
Decision No. 2776
March 14, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Robert E. Feiss, M.D. (Petitioner) appealed the ruling of an Administrative Law Judge (ALJ) dismissing his request for a hearing on the ground that he had no right to a hearing. Ruling Dismissing Request for Hearing, Docket No. C-16-755 (November 1, 2016) (Ruling). For the reasons below, we uphold the dismissal.[1]

Petitioner is a physician who was enrolled in the Medicare program as a supplier. In 2010, the Patient Protection and Affordable Care Act added section 1833(x) to the Social Security Act (Act) establishing a program of incentive payments to primary care practitioners for primary care services furnished from January 1, 2011 to January 1, 2016. A "primary care practitioner" includes "a physician . . . who has a primary specialty designation of family medicine, internal medicine, geriatric medicine, or pediatric medicine" and "for whom primary care services accounted for at least 60 percent of the allowed charges . . . in a prior period as determined appropriate by the Secretary[.]" Act § 1833(x)(2)(A); *see also* 42 C.F.R. § 414.80(a) (a physician is eligible for the incentive payments if "[e]nrolled in Medicare with a primary specialty designation of 08-family practice, 11-internal medicine, 37-pediatrics, or 38-geriatrics" and "[a]t least 60 percent of the physician's allowed charges under the physician fee schedule . . . during a reference period specified by the Secretary are for primary care services."). Section 1833(x)(4) of the Act provides that "[t]here shall be no administrative or judicial review . . . respecting the identification of primary care practitioners under this subsection." However, in the preamble to the final rule implementing section 1833(x), CMS interpreted section 1833(x)(4) as not precluding it from correcting "errors resulting from clerical or mathematical mistakes." 75 Fed. Reg. 73,170, 73,439 (Nov. 29, 2010).

[1] We proceed to decision without permitting Petitioner to present oral argument, as requested in his reply brief. Petitioner did not identify any specific issue for oral argument, and we find that oral argument would not facilitate the Board's decisionmaking.

According to Petitioner, he was eligible for the incentive payments, known as PCIP payments, from the inception of the program. However, CMS advised Petitioner by letter dated May 16, 2014 that it had determined that he was not eligible for PCIP payments for calendar years (CYs) 2011-2013 because his "Medicare primary specialty designation during the reference periods for those years was not one that is considered a 'primary care physician or practitioner' eligible for the PCIP."[2] CMS Ex. 4, at 1. CMS stated that "we could not identify a clerical or mathematical error that led to your not being eligible." *Id*. at 2. CMS also stated that Petitioner "became eligible for the PCIP in CY 2014" after "you changed your Medicare primary specialty designation to family practice in CY 2012." *Id*. at 1.

Petitioner filed a request for an ALJ hearing on July 22, 2016. CMS moved to dismiss the hearing request with prejudice pursuant to 42 C.F.R. § 498.70(b), which states that the ALJ may dismiss a hearing request if there is "[n]o right to a hearing" because the "party requesting a hearing is not a proper party or does not otherwise have a right to a hearing." In support of its motion, CMS cited the prohibition on administrative review in section 1833(x)(4) of the Act. CMS Motion to Dismiss at 2. The ALJ granted CMS's motion on the ground that, under that section, he is "denied authority to adjudicate a dispute between a practitioner and CMS concerning his or her eligibility for incentive payments." Ruling at 2.

Before the Board, Petitioner argues, as he did before the ALJ, that he was found ineligible for the PCIP payments because a CMS Medicare contractor made a clerical error in not identifying him as a primary care practitioner. *See, e.g.*, P.'s submission dated 11/11/16, at 3-4. Petitioner appears to suggest that section 1833(x)(4) of the Act, as interpreted by CMS, does not bar a hearing on CMS's determination that he was ineligible for the PCIP payments if that determination was based on a clerical error made by CMS. Petitioner further argues that he has a right to a hearing before an ALJ under 42 C.F.R. § 498.5. P.'s submission dated 1/4/17, at 2.

The ALJ concluded that section 1833(x)(4) bars administrative review of CMS's ineligibility determination without addressing Petitioner's argument that this determination was based on a clerical error. Similarly, we do not address that argument because we conclude that, even in the absence of a statutory bar on administrative review of CMS's determination, Petitioner has no right to a hearing before an ALJ.

[2] The "reference period" used by CMS was the year two years prior to the PCIP payment year for suppliers who were enrolled in Medicare that year. *See* 75 Fed. Reg. at 73,438.

In support of his position that he has a right to a hearing under 42 C.F.R. § 498.5, Petitioner points to paragraph (e) of that section, which reads: "Appeal rights of suppliers. Any supplier dissatisfied with an initial determination that the services subject to the determination no longer meet the conditions for coverage, is entitled to a hearing before an ALJ." P.'s 1/4/17 submission at 2. Petitioner also points to language in paragraph (*l*) of section 498.5, giving a "prospective supplier or existing supplier" dissatisfied with an "initial determination . . . related to the denial or revocation of Medicare billing privileges" the right to reconsideration by the Medicare contractor and a hearing before an ALJ if the prospective or existing supplier is dissatisfied with the reconsidered determination. *Id*. at 3.

However, "initial determination" as used in section 498.5 is a term of art. As relevant here, it is limited to determinations "that CMS makes with respect to the matters specified in paragraph (b) of" section 498.3. 42 C.F.R. § 498.3(a)(1). The ALJ held that "CMS's failure to qualify Petitioner to receive incentive payments is not an initial determination as is defined by 42 C.F.R. § 498.3(b)." Ruling at 2 n.2. Petitioner does not identify any error in this holding, nor do we find one. Thus, CMS properly moved to dismiss Petitioner's hearing request pursuant to section 498.70(b).

Petitioner nevertheless takes the position that due process entitles him to "an independent hearing," stating that "[n]owhere in the [Act] . . . does it . . . provide protection for errors committed by CMS and/or its contractors to go unanswered and unaddressed." P.'s 1/4/17 submission at 2. However, there is no general right to an ALJ hearing in the absence of statutory, regulatory or administrative authority.

Accordingly, we conclude that the ALJ did not err in dismissing Petitioner's hearing request.

/s/
Christopher S. Randolph

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member