

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dean A. Stockwell,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-172

Decision No. CR2377

Date: May 27, 2011

DECISION

Petitioner, Dean A. Stockwell, a registered dietetic technician working in the State of New Hampshire, appeals the determination of the Centers for Medicare and Medicaid Services (CMS) to deny his Medicare enrollment application for billing privileges as a registered dietitian or nutrition professional. Considering it is undisputed that Petitioner does not possess a license in the State of New Hampshire as a dietitian or nutrition professional as the regulations require, I affirm CMS's denial. A legitimate legal basis exists for CMS to deny Petitioner's application. Accordingly, I grant CMS's motion for summary judgment.

I. Background

Petitioner is a registered dietetic technician working in New Hampshire. P. Br. at 1. Petitioner applied to enroll in the Medicare program as a "registered dietitian or nutrition professional," and NHIC Corp. (NHIC), a CMS contractor, denied his request. CMS Ex. 1, at 1; CMS Ex. 2. The initial denial states that Petitioner "does not have a license(s) or is not authorized by the Federal/State/local government to perform the services for which

[he] intends to render.” CMS Ex. 2. On November 11, 2010, a hearing officer from NHIC issued a reconsideration decision affirming the denial of Petitioner’s application on the grounds that, although Petitioner is a “trained nutrition professional,” he failed to provide adequate verification that he completed the supervised work requirement outlined in 42 C.F.R. § 410.134. CMS Ex. 3, at 2-3.

Petitioner timely filed a hearing request with the Civil Remedies Division of the Departmental Appeals Board (Board) to appeal the reconsideration decision. I issued an Acknowledgment and Pre-Hearing Order and, in accordance with that order, CMS submitted its Motion for Summary Judgment, supporting CMS Memorandum (CMS Br.), and twelve proposed exhibits. Petitioner responded to the CMS motion (P. Br.) and submitted three proposed exhibits. In the absence of objection, I admit CMS exhibits (CMS Exs.) 1-12 and Petitioner’s Exhibits (P. Exs.) 1-3 into the record.

II. Applicable Law and Regulations

A supplier¹ who wishes to bill Medicare for services must be enrolled in Medicare to have billing privileges. Medicare Part B will pay for services from registered dietitians and nutrition professionals. 42 C.F.R. § 410.134. The regulations define the qualifications for a registered dietitian and nutrition professional and state that:

For Medicare Part B coverage of [Medical Nutrition Therapy], only a registered dietitian or nutrition professional may provide the services.

“Registered dietitian or nutrition professional” means an individual who, on or after December 22, 2000:

(a) Holds a bachelor's or higher degree granted by a regionally accredited college or university in the United States (or an equivalent foreign degree) with completion of the academic requirements of a program in nutrition or dietetics accredited by an appropriate national accreditation organization recognized for this purpose.

(b) Has completed at least 900 hours of supervised dietetics practice under the supervision of a registered dietitian or nutrition professional.

(c) Is licensed or certified as a dietitian or nutrition professional by the State in which the services are performed. In a State that does not provide for licensure or certification, the individual will be deemed to have met this requirement if he or she is recognized as a “registered dietitian” by the Commission on Dietetic Registration or its successor organization, or meets the requirements of paragraphs (a) and (b) of this section.

(d) *Exceptions.* (i) A dietitian or nutritionist licensed or certified in a State as of December 21, 2000 is not required to meet the requirements of (a) and

¹ Medicare defines “supplier” to mean “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).

(b) of this section.

(ii) A "registered dietitian" in good standing, as recognized by the Commission of Dietetic Registration or its successor organization, is deemed to have met the requirements of (a) and (b) of this section.

42 C.F.R. § 410.134.

III. Issue

The sole issue in this case is whether CMS had a legitimate basis to deny Petitioner Medicare enrollment and billing privileges as a registered dietitian or nutrition professional.

IV. Discussion

A. CMS had a legitimate basis to deny Petitioner's enrollment in the Medicare program as a registered dietitian or nutrition professional because he did not have a license in the State of New Hampshire, as the statute and regulations require.

New Hampshire provides for licensure as a dietician or nutritional professional. CMS Exs. 7 and 8. It is undisputed that Petitioner is not licensed in the State of New Hampshire as a dietitian or nutrition professional. *See* P. Br. at 1. The reconsideration decision states that while "New Hampshire's licensing and certification rules apply to dietitians," the rules "do not apply to nutrition specialists" and the hearing officer found that Petitioner "[is] not certified, licensed, or registered either locally or nationally" as a dietitian. CMS Ex. 3, at 3. The hearing officer thus found that Petitioner could enroll in the Medicare program as an individual practitioner if he met the criteria for non-licensing states listed in the controlling regulation. *Id.* However, the hearing officer determined that Petitioner did not meet the criteria because Petitioner did not include sufficient documentation showing that he met the supervised work requirement and denied Petitioner's application. *Id.* Petitioner appealed the reconsideration decision and contends he has met the supervised work requirement. As a result, Petitioner claims he should "be eligible to bill Medicare as an individual Nutrition Professional practitioner." Hearing Request. Petitioner submitted a letter his supervisor signed along with his Hearing Request, documenting his employment there "as a Registered Diet Technician/Nutritionist" since April 2007. CMS Ex. 4.

In its brief, CMS now contends that the hearing officer should have denied Petitioner's application on the basis that the State of New Hampshire licenses "dietitian[s] or nutrition professional[s]" and cites to 42 C.F.R. § 410.134 and N.H. Rev. Stat. § 326-H:5. CMS argues that an "individual seeking enrollment in the Part B program under the registered

dietitian or nutrition professional designation must, for a state that licenses or certifies dietitians or nutrition professionals, obtain a license there.” CMS Br. at 3.

I note that CMS’s basis for the denial of Petitioner’s Medicare enrollment application has changed from the basis at the reconsideration level. However, a Petitioner is not deprived of due process when CMS provides Petitioner sufficient notice of the legal basis for the denial and a reasonable opportunity to respond at the Administrative Law Judge (ALJ) hearing level. *See Green Hills Enters., LLC*, DAB No. 2199, at 8 (2008); *see also Abercrombie v. Clarke*, 920 F.2d 1351, 1360 (7th Cir. 1990), *cert. denied*, 520 U.S. 809 (1991) (holding that defects in formal notice may be cured during the course of an administrative proceeding, and due process is satisfied as long as the party is reasonably apprised of, and given opportunity to address, the issues in controversy). Here I find that CMS, through its brief, provided Petitioner sufficient notice, and I provided Petitioner a reasonable opportunity to respond to CMS’s denial on the grounds that Petitioner is not a licensed dietitian or nutrition professional in New Hampshire.

With his brief, Petitioner submits three exhibits. The admission of new documentary evidence is limited by 42 C.F.R. § 498.56(e), and a party must show good cause for submitting evidence for the first time at the ALJ level. It appears Petitioner’s exhibits are documentary evidence submitted for the first time at the ALJ level, and this evidence was not available to CMS at the time of the reconsideration decision. I find that good cause exists for the admission of P. Exs. 1-3, considering that CMS changed the basis for denying Petitioner’s application at the ALJ level. Thus, I admit this evidence pursuant to 42 C.F.R. § 498.56(e).

In his brief, Petitioner contends he has submitted evidence showing that “in 2010 alone [he] worked over 1600 hours at the Androscoggin Valley Hospital under the supervision of Roberta Balon, RD.” P. Br. at 1; P. Ex. 3. Thus, Petitioner essentially argues that he met the requirement of 42 C.F.R. § 410.134(b), which provides that Petitioner must have “at least 900 hours of supervised dietetics practice under the supervision of a registered dietitian or nutrition professional.” I accept as true, for purposes of summary judgment, that Petitioner has all of the work experience that he claims. However, even if Petitioner was supervised under a registered dietitian for at least 900 hours, he still did not possess the requisite state license necessary for enrollment in the Medicare program. It is undisputed that, while Petitioner is certified by the Commission on Dietetic Registration as a registered dietetic technician, he is not licensed as a dietitian in New Hampshire. CMS Ex. 3 at 3; P. Br. at 1.

To enroll in Medicare as a nutrition professional, the language of the statute and regulation is plain and clear. An individual must be licensed or certified as a dietitian or nutrition professional by the State in which the services are performed. 42 C.F.R. § 410.134. Because New Hampshire licenses dietitians, Petitioner is required to obtain a state license.

Petitioner argues that the New Hampshire requirements for state licensure provide that applicants must have passed the examination administered by the Commission on Dietetic Registration, which “will only accept applicants . . . from the Commission of Accreditation for Dietetics Educators with an approved academic and supervised practice program.” P. Br. at 1. Petitioner argues that “[t]his is the standard requirement for a Registered Dietician, and excludes any Nutrition Professional from taking the examination.” *Id.* Thus, Petitioner argues that New Hampshire effectively precludes any nutrition professional who is not a registered dietitian from obtaining a state license. *Id.*

Petitioner essentially argues that CMS should allow for an exception and grant his enrollment request as a nutrition professional because his credentials and experience as a dietetic technician ensure that Medicare beneficiaries will receive services from a competent practitioner, as the statute and regulation intend. However, nothing in the Social Security Act (Act) or the regulations provides that an individual may qualify to enroll in the Medicare program with education or experience that fails to precisely satisfy the regulatory requirements. Additionally, nothing in the Act or the regulations permits the Secretary of the Department of Health and Human Services to waive the qualifying criteria for even the most competent of individuals to participate as nutrition professionals. *See Elizabeth M. Prokay*, DAB CR1860 (2008), at 2-4 (holding that the Act does not allow for a “functional equivalent” exception to the participation criteria and does not permit the Secretary to waive the statutory qualifying criteria). Moreover, I lack authority to invalidate or change an existing regulation or grant Petitioner an exemption from compliance with regulatory requirements. *1866ICPayday.com*, DAB No. 2289, at 14 (2009).

Accordingly, the statute and regulations restrict me, and I lack authority to direct CMS to make any exception. A legitimate legal basis exists for CMS to deny Petitioner’s enrollment request, and therefore I must affirm the denial.

B. Summary judgment is appropriate in this case

CMS argues that it is entitled to summary judgment. 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). An ALJ’s role in deciding a summary judgment motion differs from its 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).

I have accepted all of Petitioner’s factual assertions as true. In addition, I have drawn all reasonable inferences in his favor. However, no dispute exists that Petitioner lacks the requisite state license for enrollment in the Medicare program. Accordingly, summary judgment is appropriate, and I grant CMS’s motion.

V. Conclusion

I sustain CMS’s determination to deny Petitioner enrollment into Medicare as a registered dietician or nutrition professional because Petitioner does not possess a license in the State of New Hampshire and does not satisfy the statutory and regulatory requirements. Considering Petitioner has no state license, CMS had a legitimate legal basis to deny his enrollment application. Accordingly, I grant CMS’s motion for summary judgment.

_____/s/
Joseph Grow
Administrative Law Judge