

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

James Harrison Straub, Ed.D.
(NPI: 1821189507),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-1012

Decision No. CR2677

Date: December 21, 2012

DECISION

Wisconsin Physicians Service (WPS), an administrative contractor acting on behalf of the Centers for Medicare and 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, James Harrison Straub, Ed.D., completed and signed a Form CMS-855I (Medicare Enrollment Application) on November 11, 2011, seeking revalidation of his enrollment as a clinical psychologist. CMS Exhibits (Exs.) 1, 3, 4. Petitioner had been an enrolled supplier in the Medicare program for decades and had received revalidation in the past. CMS Ex. 11, at 1.

Petitioner earned a Doctor of Education (Ed.D.) in counseling and guidance from the University of Arizona in May 1976. CMS Exs. 6, 7. Since 1978, Petitioner has been

licensed as a psychologist in the State of Missouri based on his Ed.D. degree. CMS Exs. 8; 11, at 1. He has taught in the counseling psychology department at the University of Missouri, supervised graduate and resident psychologists, and teaches and consults in the psychiatry department at the University of Missouri. Request for Hearing (RFH) at 1.

In a January 17, 2012 letter to Petitioner, WPS informed Petitioner that it received his application to revalidate his enrollment in the Medicare program on December 6, 2011, and requested that Petitioner provide additional information, including: the year of his graduation; a copy of his official transcripts because his “Diploma does not state doctoral degree in Psychology”; and a copy of his professional license for signature verification. CMS Ex. 5, at 1. After Petitioner responded to WPS’s requests, on February 9, 2012, WPS denied Petitioner’s application because Petitioner did not meet the qualification requirements to enroll as a clinical psychologist under 42 C.F.R. § 410.71. CMS Ex. 10. Petitioner timely requested reconsideration of WPS’s determination. CMS Ex. 11. On May 8, 2012, WPS issued an unfavorable reconsidered determination concluding that: “According to our records the transcripts indicates [sic] Doctoral of Education with a major in counseling and guidance, which does not meet the requirement [doctoral degree in psychology] listed in the regulation [42 C.F.R. § 410.71] above.” CMS Ex. 12, at 1.

Petitioner timely requested a hearing with the Departmental Appeals Board, Civil Remedies Division. Following the issuance of my August 1, 2012 Acknowledgment and Pre-hearing Order (Order), CMS filed a motion for summary judgment and supporting memorandum (CMS Br.), a list of proposed exhibits, 13 proposed exhibits (CMS Exs. 1-13), and a list proposing one witness. CMS mistakenly failed to file its sixth exhibit and I gave CMS an opportunity to do so. Petitioner’s brief repeated his arguments from his request for hearing and Petitioner enclosed a statement from two professors at the University of Missouri. Because I interpreted the latter document as written direct testimony, Petitioner resubmitted it at my request after the professors signed it under penalty of perjury. That document was received in my office on December 4, 2012, and I marked it as Petitioner’s Exhibit (P. Ex.) 1. Neither party has objected to any of the exhibits offered; therefore, I admit CMS Exs. 1-13 and P. Ex. 1 into the record.

The 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). Although CMS and Petitioner offered written direct testimony for its witnesses (CMS Ex. 13, P. Ex. 1), neither CMS nor Petitioner requested to cross-examine those witnesses. See Order ¶ 10. Consequently, I will not hold an in-person hearing in this matter. See *Kate E. Paylo, D.O.*, DAB CR2232, at 9 (2010). Accordingly, the record is closed and I will evaluate the documentary evidence admitted into the record. See Order ¶¶ 11, 12.

II. Discussion

In order to participate in the Medicare program as a supplier,¹ individuals and entities must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. A supplier who seeks to provide “qualified psychologist services” under the Medicare program must be 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).

A. Issue

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

B. Findings of Fact, Conclusions of Law, and Analysis²

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

Petitioner asserts that he holds an Ed.D. from the University of Arizona. RFH at 1; CMS Ex. 7. CMS does not dispute that Petitioner holds an Ed.D. CMS Br. at 1. 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,” and that CMS must strictly apply the regulatory requirement that the doctoral degree be in “psychology.” CMS Br. 1-2. CMS argues that it may not consider whether a non-psychology degree is the functional equivalent of a psychology degree and the fact that Petitioner has a state psychologist license cannot substitute for the doctoral degree requirement. CMS Br. 2-3. CMS further asserts that the psychology department

¹ 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).

² My findings of fact and conclusions of law are set forth in italics and bold font.

at the university that Petitioner attended had an American Psychological Association (APA) accredited doctoral program and that Petitioner did not take any classes from that program. CMS Br. 3-4. CMS stated: “it is difficult, if not impossible, on the basis of the record in this case to engage in anything other than conjecture as to whether a degree in education with a major in counseling is but for a label a degree in psychology.” CMS Br. at 4. CMS summed up its argument by stating that “self-regulatory oversight pertaining to the standards of doctoral programs in the APA-credentialed psychology graduate school programs is significant. CMS is entitled to rely on that oversight as a measure of the doctoral graduates who ultimately provide services to Medicare beneficiaries. The record contains nothing regarding whether such oversight exists with respect to graduate programs in education.” CMS Br. at 5.

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, neither one of which would fulfill the requirement on their 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. RFH at 1.

I disagree with CMS that Petitioner has not proven that his doctoral degree, earned in the 1970s, is in fact a counseling psychology degree. CMS is to evaluate each applicant’s doctoral degree on a “case-by-case basis.” 63 Fed. Reg. 20110, 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 testified to by the hearing officer who rendered the reconsidered determination, reviewed “Petitioner’s academic transcript from the University of Arizona setting forth courses taken and the award of a doctorate of education with a major in counseling and guidance” CMS Ex. 13, at 2. However, despite reviewing Petitioner’s transcript, the hearing officer denied Petitioner’s reconsideration because the transcript did not expressly use the word “psychology.” CMS Exs. 12, at 1; 13, at 2. 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 would be designated as a counseling psychology program today. 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 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 the statement of Petitioner’s faculty advisor during his doctoral education, Philip J. Lauver, Ph.D.

Dr. Lauver is an associate professor emeritus from the University of Arizona, former Chair of the Department of Counseling and Guidance at the University of Arizona, and an Arizona licensed psychologist. CMS Ex. 11, at 4. Dr. Lauver stated, “that the component track which [Petitioner] completed was in clinically applied counseling psychology” and that the program “offered coursework, experimental training and supervised experience in the clinical application of counseling/psychotherapy.” CMS Ex. 11, at 4. He further stated that graduates of the program have become licensed psychologists in various states. CMS Ex. 11, at 4. A review of Petitioner’s transcript supports Dr. Lauver’s statements because few of the classes Petitioner completed are purely educational in nature. CMS Ex. 6.

I consider Dr. Lauver’s statement to be extremely important evidence of the program from which Petitioner graduated. As Chair of the program and faculty advisor to Petitioner, Dr. Lauver is in the best position to describe the nature of the degree program Petitioner graduated from and the coursework Petitioner completed. While CMS and I

may not fully understand the import of the courses listed on Petitioner's transcript, Dr. Lauver does and I give significant weight to his assessment that Petitioner's degree was in "clinically applied counseling psychology." CMS did not dispute Dr. Lauver's statement.

Dr. Lauver's assessment of Petitioner's degree is supported by testimony of Petitioner's witnesses. P. Ex. 1. 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. I also find that Petitioner's course of study was clinically based. An Ed.D. from a counseling psychology program with sufficient clinical training meets the degree requirement in section 410.71(d)(1). *See Revathi Bingi, Ed.D.*, DAB CR1573, at 5, 6 (finding that 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.")

As indicated above, CMS argues that Petitioner's doctoral program at the University of Arizona was not APA accredited and that CMS is entitled to rely on the oversight of the APA to ensure that psychology doctoral programs are sufficient. CMS Br. at 5. However, CMS's position is directly contradicted by the Secretary in the final rule promulgating section 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 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 expressly decided not to rely on the APA or other accrediting bodies to determine whether a psychology program met "appropriate academic standards."³ Therefore, CMS's argument concerning accreditation is irrelevant.

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

Petitioner asserts that he is "a licensed psychologist and licensed health services provider in Missouri" and that he has been licensed based on his Ed.D. since 1978. RFH at 1, 4. CMS Ex. 11, at 1. Petitioner provided CMS with a certificate from the State of Missouri indicating that his psychology license is valid through January 31, 2014. CMS Ex. 11, at 5. Petitioner's address is in Missouri. CMS Exs. 3, at 1;11, at 5. CMS does not dispute that Petitioner is a licensed psychologist in the State of Missouri. CMS Br. at 3.

Missouri law limits the "practice of psychology" to persons who are licensed by the state. Mo. Rev. Stat. § 337.015(1). The "practice of psychology" means:

the observation, description, evaluation, interpretation, treatment, and modification of human behavior by the application of psychological principles, methods, and procedures, for the purpose of preventing, treating, or eliminating symptomatic, maladaptive, or undesired behavior and of

³ Petitioner is licensed as a psychologist by the State of Missouri. CMS Ex. 8, at 1. State law requires that for any applicant seeking a psychology license based on a degree granted prior to August 28, 1990, such an applicant must submit satisfactory evidence that "the applicant . . . received a doctoral degree, based upon a program of studies from a recognized educational institution the contents of which were primarily psychological, as defined by rule, and who has had at least one year of satisfactory supervised professional experience in the general field of psychology as defined by rule. Mo. Rev. Stat. §337.21(1)(1), (2)(1). The Missouri State Committee of Psychology must have determined that Petitioner's doctoral program was "primarily psychological." Such a determination would be consistent with the testimony of Petitioner's witnesses and Dr. Lauver's statement.

enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, and mental health. The practice of psychology includes, but is not limited to, psychometric or psychological testing and the evaluation or assessment of personal characteristics, such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; diagnosis and treatment of mental and emotional disorder or disability in both inpatient and outpatient settings, alcoholism and substance abuse, disorders of habit or conduct, as well as the psychological aspects of physical illness, accident, injury, or disability; psychoeducational evaluation, therapy, remediation, and consultation; and teaching and training of psychological competence. Psychological services may be rendered to individuals, families, groups, and the public. . . . The application of these principles and methods includes, but is not restricted to: diagnosis, prevention, treatment, and amelioration of adjustment problems and emotional and mental disturbances of individuals and groups; hypnosis; counseling; educational and vocational counseling; personnel selection and management; the evaluation and planning for effective work and learning situations; advertising and market research; and the resolution of interpersonal and social conflicts.

Mo. Rev. Stat. § 337.015(3)-(4).

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),” the state law quoted above provides ample support to find that Petitioner is licensed to independently practice psychology and furnish diagnostic, assessment, preventative, and therapeutic services directly to individuals. *See Paul L. Daniels, Psy.D., DAB CR2640, at 6 (2012).* Therefore, I conclude that Petitioner meets the qualification requirements specified in 42 C.F.R. § 410.71(d)(2).

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 find that Petitioner’s Ed.D. degree and Missouri issued psychologist license satisfy the qualification requirements in section 410.71(d) to enroll in the Medicare program as a clinical psychologist.

