Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Ellyn J. Baergen,	)	Date: January 15, 2010
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-630
	)	Decision No. CR2058
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) contractor, as was affirmed on reconsideration, to deny the request of Petitioner, Ellyn J. Baergen, to participate in the Medicare program.

I. Background

On November 20, 2008, Petitioner applied to participate in the Medicare program as a speech-language pathologist. CMS Ex. 1. The CMS contractor denied her application. Petitioner requested reconsideration, and on reconsideration, she was again denied enrollment on May 26, 2009. By letter dated July 26, 2009, she requested a hearing, and the case was assigned to me for a hearing and a decision.

On August 21, 2009, I held a pre-hearing conference in this case. During the conference, Diane Todd, PT, MBA, who is Petitioner's former employer, informed me that she initiated the appeal. I directed her to submit a document with Ms. Baergen's signature authorizing Ms. Todd to represent her, otherwise we would not be able continue with the proceedings. Petitioner submitted the authorization with her signature, and on September 21, 2009, I held a second pre-hearing conference. Both parties agreed that this matter could be decided based on written submissions and that an in-person hearing in the case was not necessary. I issued an order on September 21, 2009, directing the parties to file exchanges of evidence and argument.

CMS filed a brief and seven proposed exhibits which it identified as CMS Ex. 1 – CMS Ex. 7. Petitioner filed a letter in reply on November 16, 2009, and filed two exhibits which it identifies as Exhibit A and Exhibit B. To conform with Civil Remedies Division procedures, my office has marked Exhibit A as P. Ex. 1 and Exhibit B as P. Ex. 2. CMS has not submitted a reply. I receive into the record CMS Ex. 1 – CMS Ex. 7 and P. Ex. 1 – P. Ex. 2.

II. Applicable Law

Part B of the Medicare program is a voluntary supplemental insurance program covering outpatient services and is the program in which Petitioner seeks to provide her services. Social Security Act (Act) §§ 1831-1848. The program provides reimbursement for physician services and certain "medical and other health services" provided by non-physician practitioners. *See* Act §§ 1861(s); 1842(b)(18)(C); 1861(bb); 1861(ll). The entities or individuals furnishing such healthcare services are known as "suppliers." 42 C.F.R. § 400.202.

The Act requires the Secretary to issue regulations establishing a process for the enrollment of suppliers. Act § 1866(j). To receive payment, a supplier must be enrolled in the Medicare program. 42 C.F.R. § 424.505. The Medicare Program Integrity Manual (MPIM) lists the types of non-physician practitioners that may be enrolled in the Medicare program as suppliers, referencing the statutory and regulatory basis for Medicare payment to these suppliers. CMS Pub. 100-8, Ch. 10, section 12.4, *available at* http://www.cms.hhs.gov/Manuals (then follow hyperlink for internet only manuals). The MPIM lists the qualifications for each non-physician practitioner type and represents current CMS policy.

III. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether CMS is authorized to deny Petitioner's application for enrollment as a Medicare supplier.

B. Finding of fact and conclusions of law

I make findings of fact and conclusions of law to support my decision in this case. I set forth each Finding below as a separate heading.

1. ***At the time Petitioner applied, she was not eligible to enroll in the Medicare program as a supplier and CMS is thus authorized to deny her application for enrollment.***

Petitioner submitted an application for enrollment in Medicare on November 20, 2008. CMS Ex. 1. Petitioner stated her intent to enroll as a speech-language pathologist. CMS Ex. 1, at 17.

On February 18, 2009, after reviewing Petitioner's application, First Coast Service Options (FCSO), the Medicare contractor with the initial authority to approve or deny enrollment, denied her application, stating that she did not meet the conditions for enrollment or meet the requirements to qualify as a speech-language pathologist. CMS Ex. 2, at 1. FCSO stated that, per 42 C.F.R. § 405.400, the specialty speech-language pathologist is not a covered healthcare provider under the Medicare program.[1] CMS Ex. 2, at 1. Petitioner requested reconsideration of the decision, and on May 26, 2009, FCSO reaffirmed its decision stating that "Speech Language Pathologist is not a covered healthcare provider for the purposes of Medicare enrollment." CMS Ex. 4, at 1-2. In the reconsideration decision, FCSO again referred to 42 C.F.R. § 405.400, but also referred to CMS Publication 100-8, Medicare Program Integrity Manual, Chapter 10, which outlines requirements for enrollment in the Medicare program. CMS Ex. 4, at 2.

At the time Petitioner applied for enrollment, speech-language pathologists were not among non-physician practitioners listed in the Act or in the MPIM.

Section 143 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) amended several sections of the Social Security Act that applied to speech-language pathologists. Pub. L. No. 110-275, § 143, 122 Stat. 2494 (2008). The amendments would "apply to services furnished on or after July 1, 2009."[2] MIPPA § 143(c). MIPPA amended section 1832(a)(2)(C) of the Act by adding that Medicare would now pay for outpatient speech-language pathology services. MIPPA § 143(b)(1).

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[1] Pursuant to 42 C.F.R. § 405.400, a non-physician practitioner "means a physician assistant, nurse practitioner, clinical nurse specialist, certified registered nurse anesthetist, certified nurse midwife, clinical psychologist, clinical social worker, registered dietitian or nutrition professional, who is currently legally authorized to practice in that capacity by each State in which he or she furnishes services to patients or clients."

[2] MIPPA § 143(d), provides that: "Nothing in this section shall be construed to affect existing regulations and policies of the Centers for Medicare & Medicaid Services that require physician oversight of care as a condition of payment for speech-language pathology services under part B of the Medicare program."

It also amended section 1861(s)(2)(D) by adding outpatient speech-language pathology services.[3] MIPPA § 143(b)(6).

In response to the MIPPA amendments, CMS issued an updated payment policy. CMS announced that it would begin enrolling speech-language pathologists as suppliers of Medicare services as of June 2, 2009, and that once enrolled, speech-language pathologists would be allowed to bill Medicare for outpatient speech-language pathology services furnished in private practice beginning July 1, 2009. After that date, enrolled speech-language pathologists in private practice would be allowed to bill Medicare and receive direct payment for their services. Speech-Language Pathology Private Practice Payment Policy, CMS Pub 100-02, Transmittal 106, C.R. 6381, April 24, 2009, *available at* http://www.cms.hhs.gov/Transmittals.

Before this change, the Medicare program could only pay for speech-language pathology services if an institution, physician or non-physician practitioner billed them.[4] *Id.*; *see* Speech-Language Pathology Private Practice Payment Policy, MLN Matters Number: MM6381, April 24, 2009, *available at* http://www.cms.hhs.gov/MLNMattersArticles (then follow hyperlink for 2009 MLN Matters Articles).

Petitioner contends that she applied for individual and group speech-language pathology in November 2008, and that upon completion of her application she called enrollment customer support to determine where on the form she should indicate the supplier type. She was instructed to enter speech-language pathologist on the form on the blank line below undefined non-physician practitioner type. She also states that she was not told that outpatient speech therapy was not an allowed outpatient specialty provider. P. Br. at 2; *see* P. Ex. 2, at 1-2.

I accept Petitioner's assertion that she was told, by an employee of FCSO, that she should enter speech-language pathologist on the form, and that no one at FCSO told her that outpatient speech therapy was not an allowed outpatient specialty provider. However, any such representations cannot bind CMS or estop CMS from following clear statutory

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[3] Thus, Medicare currently covers services provided by non-physician practitioners, including physician assistants, nurse practitioners, physical therapists, occupational therapists, clinical nurse specialists, certified nurse-midwives, clinical social workers, clinical psychologists, registered dietitians or nutrition professionals, anesthesiology assistants, and speech language pathologists and audiologists.

[4] CMS also updated its policy on non-physician practitioners by listing the qualifications necessary for speech-language pathologists in private practice to enroll as of July 1, 2009. Incorporation of Physician Fee Schedule Regulatory Changes, CMS Pub 100-08, Transmittal 289, C.R. 6310, April 15, 2009, *available at* http://www.cms.hhs.gov/Transmittals.

provisions. *Physicians Medical Center of Santa Fé*, DAB CR1790, at 7-8 (2008); *Oklahoma Heart Hospital*, DAB CR1719, at 10-11 (2008); *Prime Care Home Health Agency, Inc.*, DAB CR1678, at 7 (2007); *Danville HealthCare Surgery Center*, DAB CR892 (2002).

IV. Conclusion

I have no authority, nor does CMS, to grant Petitioner the remedy she seeks. The decision to allow reimbursement for outpatient speech-language pathology services must be made by Congress through amendment of the Act. Here, Congress recognized the value of the services Petitioner provides and amended the Act, but the amendments were not effective until several months after Petitioner applied for enrollment. As CMS points out in its brief, if Petitioner were to reapply, she would likely be eligible for enrollment. Because speech-language pathology was not covered at the time of her application, CMS is authorized to deny her application for enrollment as a Medicare supplier.

/s/
Alfonso J. Montaño
Administrative Law Judge