Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Susan Ortelt, PT,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-300

Decision No. CR2565

Date: July 12, 2012

DECISION

Susan Ortelt (Petitioner) appeals the reconsideration determination of the National Heritage Insurance Company (NHIC), a Medicare contractor, and argues that Petitioner's Medicare enrollment date for direct-billing privileges should be effective from the date she started working at her practice group on May 31, 2011. However, I grant the Centers for Medicare and Medicaid Services' (CMS's) motion for summary judgment. I find the undisputed evidence supports an effective date of July 11, 2011, the date Petitioner passed the Rhode Island approved examination for physical therapists and thereafter met all the Medicare program requirements for enrollment.

I. Background

On May 2, 2011, Petitioner submitted an application to NHIC to enroll as a physical therapist in Medicare. By letter dated July 19, 2011, NHIC approved Petitioner's application with an effective date of July 11, 2011. Petitioner requested reconsideration on September 6, 2011 and asked that her effective date be May 31, 2011, the date she started work at her practice group. On December 6, 2011, NHIC informed Petitioner that the reconsideration review was unfavorable and that NHIC had correctly calculated Petitioner's enrollment date because she did not met all the requirements to enroll in

Medicare as a physical therapist until July 11, 2011, when she passed a state-approved examination for physical therapists in Rhode Island.

Petitioner claimed that she met all the Medicare requirements after she graduated from the University of Rhode Island on May 1, 2011 and when she received her temporary license to practice physical therapy from April 21, 2011 to July 20, 2011 in Rhode Island. CMS Ex. 4, at 1-2. On January 23, 2012, Petitioner filed a hearing request with the Civil Remedies Division. An Acknowledgment and Pre-hearing Order was sent to the parties on January 24, 2012. On February 24, 2012, CMS filed a Motion for Summary Judgment and brief (CMS Br.), accompanied by six proposed exhibits (CMS Exs. 1-6). On April 13, 2012, Petitioner filed her response (P. Response) accompanied by nine proposed exhibits (P. Exs. 1-9). On April 23, 2012, CMS filed a reply (CMS Reply). Absent any objection, I admit all proposed exhibits into evidence.

II. General Authority

Part B of the Medicare program is a voluntary supplemental insurance program covering outpatient services. Social Security Act (Act) §§ 1831-1848, 42 U.S.C. §§ 1395j – 1395w-4. The program provides reimbursement for physician services and certain "medical and other health services" provided by non-physician practitioners, including physical therapists. *See* Act § 1861(s), 42 U.S.C. § 1395x(s); Act § 1842(b)(18)(C), 42 U.S.C. § 1395u(b)(18)(C); Act § 1861(bb), 42 U.S.C. § 1395x(bb); Act § 1861(ll), 42 U.S.C. § 1395x(ll). The entities or individuals furnishing such health care 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 purpose of the Medicare Part B enrollment process is to determine a supplier's eligibility to bill and receive Medicare payment for health care services. 42 C.F.R. § 424.502 (defining the term "enrollment" to mean a process for establishing eligibility to submit payment claims to Medicare).

For Medicare purposes, among other requirements, a physical therapist must: (1) be licensed by the State where practicing, if the State requires licensure; (2) have graduated after successful completion of an approved physical therapist program; (3) have "passed an examination for physical therapists approved by the state in which services are provided." *See* 42 C.F.R. §§ 410.60 and 484.4(a). If licensed on or before December 31, 2009, a physical therapist need not pass an examination approved by the state in which services are provided. 42 C.F.R. § 484.4(b).

Once a physical therapist meets all the requirements to be enrolled in the Medicare program:

> The effective date for billing privileges for physicians, nonphysician practitioners and physician and nonphysician practitioner organizations is the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d).

III. Issue

The issue in this case is whether CMS had a legitimate basis for determining July 11, 2011 as the effective date for Petitioner's Medicare enrollment and billing privileges.

IV. Discussion

A. This case is appropriate for summary judgment.

CMS argues that it is entitled to summary judgment. The Departmental Appeals Board (Board) explained 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 Administrative Law Judge's (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).

CMS has moved for summary judgment arguing that there are no material facts in dispute. CMS Br. at 2-3. Indeed, Petitioner has not disputed the one critical material fact in this case, specifically, that until July 11, 2011, Petitioner had not passed an examination for physical therapists approved by the state in which services are provided. P. Response at 1. Therefore, summary judgment is appropriate.

B. Petitioner must pass an examination for physical therapists, approved by the state in which services are provided, to qualify to be enrolled in the Medicare program.

Petitioner graduated from the University of Rhode Island on May 1, 2011 and received a temporary license to practice as a physical therapist in Rhode Island, effective from April 21, 2011 through July 20, 2011. The temporary license required that Petitioner take the next offered Federation of State Boards of Physical Therapy Examination. In the event that Petitioner failed this examination, her temporary license would be automatically revoked. CMS Ex. 4, at 1-2. Petitioner began working at her practice group on May 31, 2011 while she had her temporary license. As a physical therapist with a temporary license, Petitioner was considered a "graduate physical therapist" and was allowed to "perform as a physical therapist under the supervision of a physical therapist licensed in this State [Rhode Island]." Rhode Island Department of Health, Rules and Regulations for Licensing Physical Therapists and Physical Therapist Assistants, part 2, § 3.1(c). Petitioner took the next offered Federation of State Boards of Physical Therapy Examination, passed it, and received a permanent license from Rhode Island on July 11, 2011. CMS Ex. 5, at 1.

It is undisputed that when Petitioner began working at her practice group on May 31, 2011, she had not yet taken and passed the Federation of State Boards of Physical Therapy Examination. Therefore, Petitioner did not meet the requirements to enroll as a physical therapist in the Medicare program until July 11, 2011 because she had not "passed an examination for physical therapists approved by the state in which services are provided." 42 C.F.R. § 484.4(a). The requirement, for physical therapists licensed after December 31, 2009, to pass a state approved examination was duly published as a final rule in the Federal Register after a notice and comment period. *See* 72 Fed. Reg. 66,328, 66,330-31, 66,406-07 (2007).

Petitioner argues that she did not receive notice of this change in the requirements and explains that the Medicare Program Integrity Manual (MPIM), CMS Publication 100-08, erroneously omits the requirement for physical therapists to pass a state approved examination. She asserts that the MPIM should be controlling on this issue because the laws are complex, and CMS encourages suppliers to reference its manuals. P. Response at 3.

Assuming for summary judgment purposes that the CMS manuals were never updated to reflect the final rule published in the Federal Register on November 27, 2007, I am still bound by the regulations. Petitioner does not dispute that she became licensed after December 31, 2009 and that she did not pass the qualifying exam until July 11, 2011. Although I may be sympathetic to Petitioner's frustration of referencing an out-of-date agency manual, I am without authority to require that CMS waive qualifying exam criteria for physical therapists that are established in the regulations. Further, Medicare suppliers are presumed to have constructive notice of statutes and regulations that govern their participation as a matter of law. *Manor of Wayne Skilled Nursing & Rehab.*, DAB No. 2249, at 10-11 (2009).

C. I am unable to grant Petitioner's request for an earlier effective date based on equitable estoppel.

Petitioner maintains that, by relying on guidance that did not require her to pass a state exam for Medicare eligibility, her effective date imposes an economic hardship on her practice group and that, with a shortage of physical therapists in Rhode Island, this added requirement could result in a possible denial of care for Medicare beneficiaries. Petitioner also suggests her understanding was that other Medicare contractors may have approved, despite the regulatory requirements, physical therapists' enrollments in Medicare without requiring evidence of the passage of a qualifying exam.

I am unable to grant the relief that Petitioner requests. Petitioner's arguments amount to a claim of equitable estoppel. It is well-established by federal case law, and in Board precedent, that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler* 467 U.S. at 51; *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009). Petitioner does not allege any affirmative misconduct here.

V. Conclusion

It is undisputed that Petitioner passed the Rhode Island approved examination for physical therapists on July 11, 2011. I find it was not until then that she met all the regulatory Medicare program requirements for enrollment. Therefore, I grant CMS's motion for summary judgment and find CMS had a legitimate basis for determining Petitioner's effective date for Medicare enrollment and billing privileges.

/s/
Joseph Grow
Administrative Law Judge