

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

---

In the Case of:	)	
	)	
Riley A. Elliott,	)	DATE: March 23, 2009
	)	
Petitioner,	)	
	)	Civil Remedies CR1856
	)	App. Div. Docket No. A-09-25
- v.-	)	
	)	Decision No. 2236
	)	
Centers for Medicare &	)	
Medicaid Services.	)	

---

FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) appeals the October 28, 2008 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes, Riley A. Elliott, DDS, DAB CR1856 (2008) (ALJ Decision). The ALJ reversed the decision of a Medicare contractor hearing officer that denied the application of Riley A. Elliott, DDS, to enroll in the Medicare program as an anesthesiologist. The ALJ found that Dr. Elliott was "authorized under state law to practice as a general anesthesiologist." ALJ Decision at 1. For the reasons discussed below, we affirm the ALJ Decision.<sup>1</sup>

Dr. Elliott is a dentist who is licensed in the state of Vermont. Since 1979, Dr. Elliott has been practicing general anesthesiology at Fletcher Allen Health Care (formerly known as the Medical Center of Vermont), an academic teaching hospital affiliated with the University of Vermont School of Medicine,

---

<sup>1</sup> We have fully considered all of CMS's arguments on appeal, regardless of whether we have specifically addressed particular assertions or documents in this decision.

where he is an associate professor of anesthesiology. Dr. Elliott is seeking a Medicare enrollment status that will permit him to bill his anesthesia services as "physicians' services," which are defined in the Medicare statute as "professional services performed by physicians, including surgery, consultation, and home, office, and institutional calls." Social Security Act (Act) § 1861(q). Under the Medicare statute, the "term 'physician,' when used in connection with the performance of any function or action, means . . . (2) a doctor of dental surgery or of dental medicine who is legally authorized to practice dentistry by the State in which he performs such function and who is acting within the scope of his license when he performs such functions." Act § 1861(r). Thus, in order to bill and receive Medicare payment for professional services, a physician must be "legally authorized to practice by the State in which he performs the functions or actions . . . and acting within the scope of his or her license." 42 C.F.R. § 410.20(b).

The parties agree that the sole issue in this appeal is whether the ALJ erred in deciding that Vermont law authorizes Dr. Elliott to provide anesthesia services in non-dental cases.<sup>2</sup> RR at 1-2 & n.2; Response Br. at 10-11. In contending that Dr. Elliott was not so authorized, CMS points to section 721 of Title 26 of the Vermont Statutes Annotated, which describes the conduct that the state regards as "practicing dentistry." Section 721(a)(7) provides that a person shall be regarded as practicing dentistry when he administers "dental anaesthetics, either general or local." According to CMS, this provision prohibits Dr. Elliott from administering anesthesia to non-dental patients under his existing license. RR at 6-11.

We disagree. As the ALJ correctly held, section 721 does not expressly prohibit a dentist from administering anesthesia in non-dental cases. The statute merely provides a non-exhaustive list of activities that Vermont regards as "practicing dentistry." Nothing in the statute speaks to whether a dentist with appropriate education, training, and experience may engage in a general hospital-based anesthesiology practice, as Dr. Elliott does. CMS has not pointed to any other Vermont statute or regulation that governs Dr. Elliott's unique circumstances.

---

<sup>2</sup> CMS does not contest Dr. Elliott's qualifications to practice as an anesthesiologist. In its request for review, CMS concedes that Dr. Elliott is eligible to enroll in Medicare as an anesthesiologist if he is "authorized by Vermont law to administer anesthesiology in all types of surgical cases." RR at 2 n.1.

Because section 721 is silent or ambiguous about whether Dr. Elliott may administer anesthesia to non-dental patients, it was appropriate for the ALJ to consider other sources of state law, including administrative regulations and the interpretive opinions of the Vermont dental and medical licensing boards.

The Vermont Board of Dental Examiners (VBDE) regulates the practice of dentistry in Vermont and has a general mandate to "protect the public health, safety, and welfare." 26 Vt. Stat. Ann. tit. 26, §§ 761, 767; P. Ex. 6, at 4 (Rule 1.3). The VBDE has issued "Administrative Rules" that, among other things, govern the administration of anesthesia by dentists in Vermont. P. Ex. 6, at 15-24 (Rules 5.1-5.30). Those rules provide that a dentist must obtain a "general anesthesia endorsement" to his license before administering "general anesthesia" in his office or other outpatient setting, which Dr. Elliott has obtained. Id. at 22 (Rule 5.24); P. Ex. 1, at 16. However, Rule 5.28 also states:

The General Anesthesia Endorsement requirement does not apply to dentists administering general anesthesia, parenteral deep sedation, or parenteral conscious sedation in a hospital setting with supervision by a physician or dentist credentialed by the hospital to provide anesthesia services.

Id. at 23 (emphasis added). Although Rule 5.28 does not explicitly address the issue before us, the ALJ correctly found that it "implicitly recognize[s] that certain dentists may be credentialed to provide general anesthesia services in a hospital setting . . . ." ALJ Decision at 4 (emphasis added). The ALJ's finding is consistent with the VBDE's interpretation of its own rules. For example, in a letter dated May 14, 2008, the Chair of the VBDE stated that Rule 5.28 "contemplates that a dentist credentialed by a hospital may provide anesthesia services." P. Ex. 5. In our view, this is a sufficiently clear and authoritative statement by VBDE that Dr. Elliott, who is credentialed by a hospital (i.e., the Fletcher Allen Health Care) to administer anesthesia in non-dentistry cases, is acting within the scope of his license in his anesthesiology practice.

The record indicates that the state of Vermont has been aware of the nature of Dr. Elliott's anesthesiology practice in a hospital setting since at least 1995. In that year, the Vermont Office of Professional Regulation (OPR), which oversees and supports the

operation of various state licensing boards,<sup>3</sup> including the VBDE, advised a private insurer that neither OPR nor the VBDE "has ever ruled that Dr. Elliott is practicing outside the scope of his license." P. Ex. 1, at 67.

Furthermore, the Vermont Board of Medical Practice (VBMP), which licenses medical doctors,<sup>4</sup> issued a letter on October 1, 2008 acknowledging the VBDE's reliance on Rule 5.28 "as support for the legality of a dentist providing non-dental anesthesia services if so credentialed by the hospital." P. Ex. 10. Based on its review of the circumstances, the VBMP asserted that Dr. Elliott was "practicing within a scope of practice for which he had appropriate training, and in a setting with adequate regulatory oversight." *Id.* Indeed, there is no evidence that the VBDE has ever determined that Dr. Elliott is acting beyond the scope of his license or has been disciplined for doing so. See P. Ex. 1, at 67; P. Ex. 5; P. Ex. 10.

As discussed, the Vermont regulatory bodies with authority to oversee the practice of medicine and dentistry have, in their discretion and professional judgment, determined that Dr. Elliott is qualified by education, training, and experience to administer anesthesia in his hospital-based practice and that he is doing so legally under Vermont law. We have no basis to doubt the professional judgment of these licensing bodies concerning Dr. Elliott's qualifications to practice anesthesiology. The undisputed evidence in the record supports the ALJ's conclusions that Dr. Elliott is a highly qualified anesthesiologist and that his participation in the Medicare program will enhance, not diminish, the health and safety of Medicare beneficiaries. See P. Ex. 1, at 67; P. Ex. 5; P. Ex. 10. This result is consistent with the preamble to Part 5 of the VBDE's Administrative Rules, which indicates that the purpose of the Part 5 rules, including Rule 5.28, is "to protect the public health, safety, and welfare by adopting specific rules in the area of anesthesiology and pain reduction." P. Ex. 6, at 15. Thus, we find that the ALJ did not err in relying upon the interpretation of Vermont law by the Vermont regulatory bodies to support her conclusion that Dr. Elliott was acting within the scope of his license under Vermont law in providing anesthesia services in non-dental cases.

The ALJ's reliance upon the opinions by the VBDE and VBMP

---

<sup>3</sup> See Vermont Stat. Ann. tit. 26, §§ 3101-3107; id. tit. 3, §§ 122-23.

<sup>4</sup> See Vermont Stat. Ann. tit. 26, §§ 1311 et seq.

concerning the legality of Dr. Elliott's hospital-based anesthesiology practice is also consistent with the statutory and regulatory framework underlying the Medicare program. For example, the Medicare conditions of participation for hospitals requires that anesthesia services be administered only by, among others, a "dentist [or] oral surgeon . . . qualified to administer anesthesia under State law." 42 C.F.R.

§ 482.52(a)(3). In a rule that amended section 482.52 to change the physician supervision requirement for certified registered nurse anesthetists, CMS emphasized that "State authorities that are experienced at regulating the licensing, education, training, and skills of the professionals practicing under their purview" have "discretion" to make the "ultimate determination" about whether a licensed practitioner may administer anesthesia in a hospital setting. 66 Fed. Reg. 4674, 4675 (Jan. 18, 2001). "Allowing States to make determinations about health care professional standards of practice, and hospitals to make decisions regarding the delivery of care, assures that those closest to, and who know the most about, the health care delivery system are accountable for the outcomes of that care." Id. at 4676. "There is no evidence," said CMS, that "States are less concerned with ensuring safety and quality than the Federal government, especially where the health of their citizens is at stake." Id. at 4675.

CMS has offered no persuasive reason to reject the opinions expressed by the VBDE and VBMP in their letters concerning Dr. Elliott.<sup>5</sup> CMS contends that "neither letter constitutes an authoritative or reasoned interpretation of [section 721] that would be entitled to significant deference from a Court." RR at 15. In support of this argument, CMS asserts that "neither board attempted to reconcile [Dr. Elliott's] practice of non-dental anesthesia with the express limitation established by section 721(a)(7)." Id. We find no merit in this argument because, as discussed, section 721 does not expressly prohibit a dentist from administering anesthesia in non-dental cases. The Vermont licensing boards therefore could rely on Rule 5.28 in opining that Dr. Elliott was within the scope of his dental license in practicing non-dental anesthesiology. Accordingly, we find that the ALJ properly deferred to the Vermont licensing boards in concluding that Dr. Elliott was authorized under Vermont law to practice as a general anesthesiologist.

---

<sup>5</sup> CMS cites court decisions from Washington, Florida, and other states, RR at 8-10, but these decisions are irrelevant because they do not address the applicable law of Vermont.

Conclusion

For the reasons discussed above, the ALJ did not err in concluding that Dr. Elliott is authorized to administer anesthesia in non-dental cases and that he is therefore eligible to bill Medicare for his hospital-based anesthesia services.

\_\_\_\_\_/s/  
Judith A. Ballard

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Stephen M. Godek  
Presiding Board Member