

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Douglas L. Clore, LMLP,

Petitioner,

v.

Centers for Medicare and Medicaid Services.

CRD Docket No. C-12-560

ALJ Ruling No. 2012-1

July 17, 2012

**ORDER REMANDING CASE AND DISMISSING
REQUEST FOR HEARING**

Petitioner applied for enrollment in the Medicare program as a psychologist billing independently (PBI). The Centers for Medicare and Medicaid Services (CMS) denied Petitioner's application because he did not meet the requirements to enroll as a clinical psychologist. Because CMS did not decide whether Petitioner met the requirements to enroll as a PBI, I remand this case for CMS to issue a new determination on that issue.

In September 2011, Petitioner filed a Form CMS-855I (Medicare Enrollment Application Physicians and Non-physician Practitioners) with CMS.¹ See CMS Exhibit (Ex.) 1, at 3. In section 2(D)(2) of that form, Petitioner indicated that he sought enrollment as a PBI. CMS Ex. 1, at 1. Petitioner also marked the box next to "Psychologist, clinical," but then completely crossed out that selection and initialed this action. CMS Ex. 1, at 1. In section 2(H) of the Form CMS-855I, entitled Clinical Psychologists, Petitioner indicated

¹ Individuals must file applications for enrollment with a "Medicare fee-for-service contractor." See 42 C.F.R. § 424.510(d)(1). In this order, the term "CMS" includes its Medicare contractors.

that he did not possess a doctoral degree. CMS Ex. 1, at 2. In section 2(I) of the form, Petitioner answered all four questions posed to PBI applicants. CMS Ex. 1, at 2.

On October 26, 2011, CMS determined that Petitioner did not qualify to enroll as a clinical psychologist because he did not have a doctorate in psychology. CMS Ex. 2, at 1. Petitioner requested reconsideration. On February 16, 2012, CMS again concluded that Petitioner did not qualify as a clinical psychologist. CMS Ex. 3, at 1. Neither of CMS's determinations addressed whether Petitioner was qualified to enroll as a PBI.

Petitioner filed a timely request for hearing in which he acknowledged that he was not a clinical psychologist. On April 11, 2012, I issued a pre-hearing order. In response to that order, the parties timely filed briefs and proposed exhibits. In its brief, CMS requests that I affirm its denial of Petitioner's enrollment application. Although CMS acknowledges that Petitioner sought enrollment as a PBI, CMS's argument exclusively focuses on Petitioner's failure to qualify as a clinical psychologist because he does not have a doctorate in psychology. CMS Br. 4-5.

Petitioner argues in his brief (P. Br.) that he is a Licensed Clinical Psychotherapist and that this is functionally the equivalent of a Licensed Psychologist. P. Br. 1. Petitioner further asserts that the examination he passed for licensure was at the doctoral degree level and that he is licensed to independently practice psychology at the master's degree level. P. Br. 1. Finally, Petitioner indicates that he serves a rural population that does not have access to doctoral level psychologists and that local physicians believe their patients need access to psychotherapy. P. Br. 2.

CMS is correct that Petitioner is not qualified to enroll in the Medicare program as a clinical psychologist. Congress defined "qualified psychologist services" as services performed by a clinical psychologist and authorized the Secretary of Health and Human Services (Secretary) to define the term "clinical psychologist." 42 U.S.C. § 1395x(ii); *see also* 42 U.S.C. § 1395u(b)(18)(C)(v). The Secretary determined that a clinical psychologist for Medicare purposes must hold "a doctoral degree in psychology." 42 C.F.R. § 410.71(d)(1). When promulgating this rule, the Secretary considered and rejected the enrollment of master's degree level psychologists. 63 Fed. Reg. 20,110, 20,115 (Apr. 23, 1998). There is no dispute that Petitioner does not have a doctoral degree, and I do not have the authority to waive this regulatory requirement. *See Rosalyn L. Olian*, DAB CR1472 (2006); *Kirtis Thomas*, DAB CR1452 (2006); *see also Sherry K. Jose*, LICSW, DAB CR1750, at 3 (2009); *Dorothy Rose Hrynyk*, DAB CR1444 (2006).²

Although CMS correctly determined that Petitioner did not qualify to enroll as a clinical psychologist, Petitioner sought enrollment as a PBI and not a clinical psychologist. CMS

² Departmental Appeals Board decisions are available at <http://www.hhs.gov/dab/decisions/index.html>.

Ex. 1, at 1. The regulations state that diagnostic psychological testing services may be billed to Medicare by “a clinical psychologist or an independent practicing psychologist as defined in program instructions.” 42 C.F.R. §§ 410.32(b)(2)(iii), 410.33(a)(2)(iii). Either a clinical psychologist or a PBI, may provide testing without the direct supervision of a physician. 62 Fed Reg. 59,048, 59,062 (Oct. 31, 1997).

Petitioner may meet the requirements for enrollment as a PBI. The most basic qualification for a PBI is to be “licensed or certified to practice psychology in the State or jurisdiction where he or she is furnishing services or, if the jurisdiction does not issue licenses, if provided by any practicing psychologist.” 63 Fed. Reg. at 20,114. Petitioner asserts that he holds a master’s level psychology license. P. Br. 1. Further, Petitioner does not need to hold a doctoral degree to be a PBI. Medicare Program Integrity Manual (MPIM), Ch. 10, § 12.4.12. Finally, Petitioner’s responses to the questions in section 2(I) on the Form CMS-855I (CMS Ex. 1, at 2) are sufficient to avoid immediate rejection of his application. *See* MPIM, Ch. 10, § 4.2.7.E.

CMS must determine whether Petitioner may enroll as a PBI under the criteria stated in Medicare program instructions. *See* MPIM, Ch. 10, § 12.4.12; Medicare Claims Processing Manual, Ch. 12, §§ 160, 160.1; Medicare Benefit Policy Manual, Ch. 15, § 80.2. Because CMS did not address this issue previously, I remand this case for CMS to consider it in the first instance. *See* 42 C.F.R. § 498.56(d) (an administrative law judge may remand a case to CMS for consideration of a new issue and, if appropriate, a new determination). Remand is also the most efficient course of action in this case because CMS controls the documentary record of Petitioner’s application and has expertise in determining whether an application is acceptable.

Order

This case is remanded to CMS to fully evaluate Petitioner’s application to enroll in Medicare as a PBI. CMS shall issue a new determination within **40 days** of the issuance of this order. If Petitioner is dissatisfied with CMS’s determination on remand, he may again request a hearing before an administrative law judge.

Because I am remanding this matter, Petitioner’s request for hearing is hereby dismissed. A party may file a written request that I vacate this dismissal for good cause within 60 days of the date of this decision. 42 C.F.R. § 498.72.

It is so ordered.

/s/
Scott Anderson
Administrative Law Judge