

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Bernhard E. Dietz, M.D,	)	Date: February 25, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-30
	)	Decision No. CR1907
Centers for Medicare & Medicaid	)	
Services.	)	

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**DECISION**

I find that CIGNA Government Services (“CIGNA”) and the Centers for Medicare & Medicaid Services (CMS) incorrectly denied the application of Petitioner, Bernhard E. Dietz, M.D., to enroll in the Medicare program.

**I. Background**

Petitioner is a physician who practices medicine in the State of Tennessee. On May 8, 2008 Petitioner filed an application with CIGNA to enroll in the Medicare program.<sup>1</sup> On June 3, 2008, CIGNA denied Petitioner’s application. In denying the application CIGNA concluded that Petitioner was not practicing medicine within the scope of his professional license. CMS Ex. 7, at 1.<sup>2</sup> Petitioner requested reconsideration of this determination. After further review, and on reconsideration, Petitioner’s application was again denied. Then, Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

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<sup>1</sup> The application, specifically, was to change Petitioner’s enrollment in Medicare from a sole proprietorship to a professional limited liability company.

<sup>2</sup> I discuss the admissibility of exhibits in my first finding of fact and conclusion of law (Finding).

I issued a pre-hearing order which directed the parties to file exchanges consisting of briefs and their proposed exhibits including the written direct testimony of their proposed witnesses. I additionally afforded CMS the opportunity to file a reply brief. The parties complied with that order. At Paragraph 9 of the pre-hearing order I directed the parties to advise me if either of them proposed to cross-examine any of the witnesses whose written direct testimony was submitted. Neither CMS nor Petitioner requested to conduct cross-examination. Consequently, I am deciding this case based on the parties' written submissions including the written direct testimony of the parties' witnesses to the extent that I receive such testimony into evidence.

## **II. Issue, findings of fact and conclusions of law**

### **A. Issue**

The issue in this case is whether Petitioner was ineligible for enrollment as a provider in the Medicare program because he was not practicing medicine within the scope of his professional license.

### **B. Findings of fact and conclusions of law**

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

#### ***1. Good cause exists to admit into evidence certain of Petitioner's proposed exhibits.***

CMS submitted eight exhibits to support its case which it designated as CMS Ex. 1 – CMS Ex. 13. Petitioner submitted 14 exhibits which it designated as P. Ex. 1 – P. Ex. 14. Petitioner has not objected to my receiving into evidence any of CMS's proposed exhibits, and so I receive them.

CMS has objected to my receiving into evidence "all evidence that was not made part of the record at the time CIGNA issued its original decision on June 3, 2008." CMS's reply brief at 3. CMS has not specified which of Petitioner's exhibits fall into this category of objectionable exhibits. However, it would appear that P. Exs. 2, 4, and 6-14 were not supplied to CIGNA in connection with Petitioner's application for enrollment.<sup>3</sup>

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<sup>3</sup> P. Ex. 5 is a copy of the reconsideration decision in Petitioner's case. Obviously, it was not supplied by Petitioner to CIGNA because reconsideration came after the initial denial. It is a procedural document, however, and would be made part of the record of this case in any event.

Therefore, I am treating all of these exhibits as potentially objectionable.<sup>4</sup>

The regulations governing hearings in cases such as this one were amended effective August 2008 to preclude admission of evidence not supplied in connection with an application for enrollment absent a showing of good cause. 42 C.F.R. § 498.56(e). The regulation does not define what is meant by “good cause.”

CMS objects to the admission of Petitioner’s exhibits on the ground that they were generated after CIGNA’s initial determination and were, therefore, not made available to CIGNA.

Petitioner’s argument for receipt into evidence of its exhibits is that it could not have submitted any of them to CIGNA because none of them existed at the time that Petitioner made his application. Implicit in this assertion is the argument that Petitioner would have obtained and supplied certain exhibits to CIGNA had he known that CIGNA would object to his enrollment application on the ground that he was not practicing within the scope of his professional license.

I find that good cause exists for me to receive P. Exs. 2, 4, and 6-8. These exhibits all relate to the issue of whether, as of the date when Petitioner applied for enrollment, he was practicing medicine within the scope of his professional license in Tennessee. I agree with Petitioner that good cause exists for my receiving these exhibits even though Petitioner did not offer them to CIGNA as part of his enrollment application. At the time that he made his application Petitioner had no reason to assume that CIGNA would question whether he was practicing medicine within the scope of his license and, for that reason, had no reason to obtain or supply these exhibits with the application. It was CIGNA’s June 3, 2008 letter that first put Petitioner on notice of the reasons for his enrollment denial.

I do not receive into evidence P. Exs. 9-14. These exhibits all address events that occurred after Petitioner’s enrollment application was denied. Specifically, they address Petitioner’s change of status from a private practitioner to a hospital-based emergency room physician. In rejecting these exhibits I do not mean to suggest that Petitioner no longer qualified for enrollment when he changed his status but, rather, that this issue was never addressed by CIGNA and, therefore, is not properly before me.

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<sup>4</sup> CMS states that it does not oppose the admission into evidence of P. Ex. 4, an affidavit from Petitioner’s office manager, and P. Ex. 9 even though these exhibits were not furnished to CIGNA. However, it also argues that they are irrelevant because they were “generated after . . . [Petitioner’s] application was denied.” CMS’s reply brief at 4. This is obviously inconsistent with CMS’s argument that Petitioner failed to make a showing of good cause for admission of any of its exhibits other than P. Ex. 1 and P. Ex. 5.

***2. A health care professional is not eligible to participate in the Medicare program if her or she is not practicing within the scope of his or her professional license.***

The Medicare program pays for services that are provided by a professional who is:

legally authorized to practice by the State in which he or she performs . . .  
[such services] and who is acting within the scope of his or her license.

42 C.F.R. § 410.20(b). A professional may not enroll in Medicare to provide services that are outside of the scope of his or her professional license.

***3. Petitioner provided professional services within the scope of his license to practice medicine in Tennessee.***

CMS contends that the scope of Petitioner's license is defined by a consent order which was issued by the Tennessee Board of Medical Examiners on July 19, 2007. CMS Ex. 3; P. Ex. 2. That order placed limitations on the scope of Petitioner's professional practice as a physician. According to CMS, Petitioner was not complying with the order when he applied for enrollment and, therefore, was not acting within the scope of his professional license in Tennessee.

I agree with CMS that the consent order limited the scope of Petitioner's professional practice. However, the preponderance of the evidence supports my finding that Petitioner practiced medicine in compliance with the terms of the order. Consequently, Petitioner was practicing medicine within the scope of his professional license and was eligible for enrollment.

The order directed Petitioner to:

wind down his solo practice and on and after December 31, 2007 . . . cease the solo practice of medicine and at no time thereafter, for the duration of his probation [five years], shall [Petitioner] practice medicine unless he has another physician practicing with him. . . .

CMS Ex. 3, at 2; P. Ex. 2, at 2.

The order does not define the phrase "has another physician practicing with him" but the meaning is clear when the limitations on Petitioner's practice are read in context. The order intends to impose restrictions on Petitioner's prescribing controlled substances. The unopposed findings of the Tennessee Board of Medical Examiners were that, during a period which ran from 2002 through 2004, Petitioner wrote and delivered prescriptions

for controlled substances to numerous patients in amounts not medically justified and for which little, if any, substantiation existed in the patients' records for those prescriptions. CMS Ex. 3, at 1; P. Ex. 2, at 1.

Viewed in the context of the order the restriction against engaging in a solo practice of medicine is a measure intended to insure that Petitioner does not issue prescriptions for controlled substances without at least the advice and counsel of another physician.<sup>5</sup> What is plainly envisioned by the order was something more than a simple business relationship or a space-sharing arrangement with another physician. The order envisions an active relationship in which Petitioner is mentored by another physician and where, for a time, that other physician would assert direct control over Petitioner's prescribing of controlled substances.

That intent is also made evident by the other terms of the order. Petitioner was directed to surrender his Drug Enforcement Agency certificate for prescribing Schedule II and III controlled substances for a period of at least six months, during which any physician with whom Petitioner is practicing would be authorized to write such prescriptions for Petitioner's patients where he or she felt that they were authorized. CMS Ex. 3, at 4; P. Ex. 2, at 4. Petitioner was directed to complete a training program in the prescription of drugs. CMS Ex. 3, at 3; P. Ex. 2, at 3. He was also directed to enter into and fully comply with a contract with the Tennessee Medical Foundation to monitor both his prescribing restrictions and the restrictions placed on his practice. CMS Ex. 3, at 3; P. Ex. 2, at 3.

CMS contends that there is no evidence establishing that Petitioner complied with the terms of the order. Thus, according to CMS, Petitioner did not establish that he was practicing medicine within the scope of his professional license as is limited by the order, and may even have been practicing medicine in violation of the order's restrictions.

However, and CMS's arguments notwithstanding, the weight of the evidence supports a different conclusion. Petitioner complied with the terms of the consent order. There is, therefore, simply no basis to deny Petitioner's enrollment as a Medicare provider on the theory that he is not practicing medicine within the scope of his professional license in Tennessee.

The un rebutted evidence offered by Petitioner establishes that, as of the date that Petitioner applied for enrollment, he was complying with the Tennessee Board of Medical Examiners' order and was, therefore, practicing medicine within the scope of his professional license. Beginning in December 2007 Petitioner affiliated with another

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<sup>5</sup> During the initial stage of Petitioner's probation he was prohibited from issuing prescriptions for any Schedule II or Schedule III controlled substances. CMS Ex. 3, at 4; P. Ex. 2, at 4.

physician, Ernesto Padiernos Chioco, M.D. P. Ex. 4, at 1. Petitioner and Dr. Chioco shared patient examining rooms and Dr. Chioco was available to Petitioner for consultation. *Id.* Most significantly, Dr. Chioco assumed responsibility for prescribing Schedule II and Schedule III controlled substances for Petitioner's patients when Dr. Chioco concluded that such prescriptions were appropriate. *Id.* at 1-2.<sup>6</sup>

Moreover, the evidence offered by Petitioner establishes that he complied with the additional restrictions on his practice imposed by the consent order. On July 22, 2008, the Tennessee Board of Medical Examiners issued an order of compliance in which it certified that Petitioner complied with the consent order's prohibition on his prescribing Schedule II and Schedule III controlled substances until he completed the Vanderbilt University controlled substance prescribing program. P. Ex. 6, at 1; *see* P. Ex. 7; P. Ex. 8. Consequently, the Tennessee Board of Medical Examiners reinstated Petitioner's authority to prescribe Schedule II and Schedule III controlled substances. *Id.*

CMS argues, notwithstanding this unrebutted proof of compliance, that Petitioner's practice was in fact a solo practice that contravened the consent order. However, CMS has offered no persuasive evidence to support its assertion. Its principal argument is that Petitioner contends he satisfied the requirements of the consent order merely by allowing another physician to practice in the same location with him. CMS's reply brief at 2.

CMS's argument incorrectly characterizes Petitioner's position and, moreover, is belied by the evidence. Petitioner does not contend that he satisfied the consent order merely by having another physician practice with him. The evidence offered by Petitioner, moreover, shows that he and Dr. Chioco were not mere ships passing in the night. The unrebutted evidence establishes that Dr. Chioco performed the mentoring duties required by the consent order.

CMS argues additionally that Petitioner did not change the character of his medical practice after he executed the consent order because, as is shown in the electronic funds transfer application that Petitioner filed with his enrollment application, Petitioner was the only authorized signatory. CMS Ex. 5, at 4; CMS's brief at 3. Additionally, according to CMS, the fact that Petitioner never entered into a partnership with another physician is proof that he violated the terms of the consent order.

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<sup>6</sup> CMS argues that the evidence supporting these findings – an affidavit by Petitioner's office manager – is not credible because it is the testimony of a third party who is not a medical professional rather than the testimony of Dr. Chioco. I disagree. There is no reason for me to find that Petitioner's office manager lacks knowledge of Petitioner's practice. CMS had the opportunity to cross-examine Petitioner's witnesses but did not exercise that opportunity.

I do not find either of these assertions to be persuasive. They exalt form over substance. The consent order was not intended to regulate the technical elements of Petitioner's business. It was rather, as I have described, intended to insure that Petitioner was carefully monitored in the way that he dealt with patients who asked for or potentially needed prescriptions for controlled substances. That is precisely why the consent order did not direct a specific form of business organization for Petitioner so much as it ordered him to stop practicing medicine as a sole practitioner. Petitioner did not need to form a specific business relationship with another physician in order to comply with the order's terms. Nor did he need to cease being a sole authorized signatory for the receipt of Medicare reimbursement.<sup>7</sup>

Moreover, the Tennessee State Board of Medical Examiners has certified that Petitioner is in compliance with the terms of its order. That agency – and not CMS – is the best judge of whether its own requirements are being complied with. I defer to that agency's finding here, if for no other reason, because it is in the best position to judge whether Petitioner complied with its order.

CMS argues that the order of compliance that was issued by the Tennessee Board of Medical Examiners does not address the merits of this case because the compliance certification addresses only whether Petitioner complied with the provisions of the consent order which govern his prescription of controlled substances. But, in addressing that issue, the agency would have had to take into consideration the relationship between Petitioner and Dr. Chioco. That is because an *integral part* of the consent order was that Petitioner affiliate with another physician (Dr. Chioco) so that the other physician could mentor him and, for a time, issue prescriptions for controlled substances for Petitioner's patients. The evidence that Petitioner supplied to the Tennessee Board of Medical Examiners includes the affidavit that is in evidence in this case as P. Ex. 4. P. Ex. 7, at

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<sup>7</sup> However, CMS also states:

It is immaterial whether the physician practicing medicine with [Petitioner] acquired an ownership interest in [Petitioner's] practice and engaged with another physician in a joint venture, it would be necessary for [Petitioner] to enter into an arrangement whereby he was not the sole owner of his medical practice in order to comply with the terms of the Order.

CMS's reply brief at 2. I am uncertain what CMS means by this statement but, perhaps, CMS is arguing that there had to be some revenue sharing arrangement between Petitioner and Dr. Chioco in order for there to have been compliance with the terms of the consent order. If that is CMS's argument, I reject it because that clearly was not the intent of the consent order.

