

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sheldon Pinsky, Ph.D., LICSW,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-86

Decision No. CR2347

Date: April 6, 2011

DECISION

Petitioner, Dr. Sheldon Pinsky, Licensed Independent Clinical Social Worker (LICSW), of Minnesota Medical and Rehabilitative Services, LLC, appeals the determination of the Centers for Medicare and Medicaid Services (CMS) to deny his enrollment application into the Medicare program as a clinical social worker. Considering it is undisputed that Petitioner does not possess a master's or a doctoral degree in social work, as the Social Security Act (Act) and the implementing regulations require, I affirm CMS's denial. A legitimate legal basis exists for CMS to deny Petitioner's application; accordingly, I grant CMS's motion for summary judgment.

I. Background

Petitioner completed a Master of Science degree in Guidance and Personnel Services at the State University of New York at Albany in 1971. CMS Exhibit (Ex.) 7, at 8. Petitioner then completed a Ph.D. in Higher Education at Iowa State University in 1978. *Id.* at 9. On April 7, 1989, Petitioner obtained his LICSW license in Minnesota. *Id.* at 1-2. There are several social work licenses in Minnesota including the LICSW license. MINN. STAT. ANN. § 148D.055 subdiv. 5 (2010). At the time Petitioner obtained his LICSW license, the Minnesota Board of Social Work issued LICSW licenses to individuals with certain practice experience, "if the board determines that the applicant has received a master's degree from an accredited program of social work or doctoral

degree in social work; or a master's or doctoral degree from a graduate program in a human service discipline as approved by the board.” MINN. STAT. ANN. § 148B.23 subdiv. 1, cl. 4 (1989). The Minnesota Board of Social Work granted Petitioner's LICSW license, “based on the determination that [Petitioner's] MA degree in Guidance and Personnel Services . . . and [his] PhD in Education . . . was ‘a master's or doctoral degree from a graduate program in a human service discipline as approved by the Board.’” CMS Ex. 3, at 2.

On August 4, 2010, Wisconsin Physician Services (WPS), a CMS contractor, denied Petitioner's individual enrollment request into Medicare. CMS Ex. 2. In its denial, WPS explained that Petitioner did not meet the enrollment conditions to qualify as a clinical social worker because he lacked a master's or doctorate degree in social work, pursuant to 42 C.F.R. § 410.73. *Id.* at 1. WPS also stated that Petitioner has “a master's degree in guidance and personnel services and a doctoral degree in education.” *Id.* Petitioner subsequently sought reconsideration on August 10, 2010. CMS Ex. 3, at 1. Petitioner submitted evidence regarding his qualifications and experience in the field of social work. CMS Exs. 4-5. However, the materials submitted did not indicate that Petitioner obtained a graduate degree in social work. On October 26, 2010, a Hearing Officer affirmed the denial of Petitioner's Medicare enrollment application on the grounds that Petitioner did not satisfy the regulatory requirements for a clinical social worker. CMS Ex. 1. The Hearing Officer stated that Petitioner provided “no new information regarding the required educational documents in order to enroll [Petitioner] into the Medicare program.” *Id.* at 1.

On November 4, 2010, Petitioner filed a hearing request to appeal the reconsideration decision. An Acknowledgment and Pre-Hearing Order was sent to the parties on November 17, 2010. On December 9, 2010, CMS submitted its Motion for Summary Judgment, supporting CMS Memorandum (CMS Br.), and ten proposed exhibits. Petitioner filed numerous submissions consisting of often duplicative evidence and argument. Petitioner filed these submissions on the following dates: November 4, 2010; November 30, 2010; December 9, 2010; December 14, 2010; December 28, 2010; December 30, 2010; January 6, 2011; and January 10, 2011. On January 12, 2011, CMS moved for the closure of the record and a ruling on its Motion for Summary Judgment. On January 20, 2011, I issued an Order Closing Record in this case. In the absence of any objection that would materially affect the outcome in this case,¹ I admit into the record CMS exhibits (CMS Exs.) 1-10 and all documents Petitioner submitted.

¹ CMS initially raised an objection to Petitioner's submission of any document “not submitted to CMS during the enrollment application process or on reconsideration” and noted that Petitioner failed to follow Civil Remedies Division Procedures with respect to serving additional materials on CMS at the time of filing. CMS Br. at 7. Because none of the additional materials submitted by Petitioner alter the outcome of this case, and because I am deciding this case on summary judgment, I have admitted into the record all documents Petitioner submitted.

II. Applicable Law and Regulations

A supplier² who wishes to bill Medicare for clinical social worker services must be enrolled in Medicare to have billing privileges. Specifically, Medicare Part B will pay for services from clinical social workers who accept Medicare assignment. Act § 1842(b)(18)(A), (C)(iv); 42 C.F.R. § 410.150(b)(18). The Act and the regulations define a “clinical social worker” as an individual who: (1) possesses a master’s degree or doctorate in social work; (2) has performed at least two years of supervised clinical work after receiving the degree; and (3) is licensed, or certified, in the state that the services are performed. Act § 1861(hh)(1); 42 C.F.R. § 410.73(a).

III. Issue

The sole issue in this case is whether Petitioner satisfied the necessary requirements to enroll into the Medicare program as a clinical social worker.

IV. Discussion

A. Petitioner was ineligible to enroll in the Medicare program as a clinical social worker because he did not have a master’s degree in social work, as the statute and regulations require.

In his hearing request and submissions, Petitioner describes his extensive experience as a clinical social worker in the State of Minnesota and his many credentials, affiliations, and activities. Petitioner states that he provides services for “patients on Medicaid and every insurance company in Minnesota” and believes he is entitled to Medicare reimbursement. P. Letter Dated December 28, 2010. I accept as true, for purposes of summary judgment, that Petitioner has all of the education and experience that he states in his hearing request and numerous submissions.

However, Petitioner does not present evidence or assert that he has a master’s or a doctoral degree in social work as 42 C.F.R. § 410.73(a) requires. To enroll in Medicare as a clinical social worker, the language of the statute and regulation is plain and clear. An individual must possess a graduate degree in social work to qualify. Prior Administrative Law Judge (ALJ) decisions reflect that CMS has consistently denied Medicare billing privileges to individuals similarly situated to Petitioner. *See Vikki Green, LMSW, DAB CR2318 (2011), Jeanne E. Daly-McIntee, DAB CR2073 (2010), Elizabeth M. Prokay, DAB CR1860 (2008), Sherry K. Jose, LICSW, DAB CR1750 (2008), Dorothy Rose Hrynyk, DAB CR1444 (2006)*. Petitioner does not have the requisite graduate degree in social work, which he does not dispute. Instead, Petitioner essentially argues that CMS should allow for an exception and grant his enrollment

² Medicare defines “supplier” to mean “a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services.” Act § 1861(d), 42 U.S.C. § 1395x(d).

request as a supplier of clinical social worker services because his credentials and extensive experience as a social worker ensure that Medicare beneficiaries will receive services from a competent practitioner, as the statute and regulation intend. Petitioner also argues that, because he has been approved and receives reimbursement for Medicaid, a State and Federal program, he should also be approved for Medicare reimbursement. P. Letter Dated January 10, 2011.

However, nothing in the Act or the regulations provides that an individual may qualify to provide clinical social worker services with education or experience that fails to precisely satisfy the criteria to participate as a clinical social worker with Medicare. Additionally, nothing in the Act or the regulations permits the Secretary of the Department of Health and Human Services (Secretary) to waive the statutory or regulatory qualifying criteria and allow an individual to participate as a clinical social worker. Congress has not granted the Secretary any discretion to accept another degree as functionally equivalent to a master's or doctorate degree in social work. *See McIntee*, DAB CR2073 at 4-5; *see also Prokay*, DAB CR1860 at 3-4 (holding that the Act does not allow for a "functional equivalent" exception to the participation criteria and does not permit the Secretary to waive the statutory qualifying criteria), *Rosalyn L. Olian*, DAB CR1472 (2006) (rejecting equivalency argument). Although Petitioner's degrees in "a human service discipline" met the requirements for licensure by the Minnesota Board of Social Work in 1989, his educational background does not satisfy the Medicare requirement that clinical social workers have a master's or doctoral degree in social work. Thus, Petitioner does not satisfy the education requirement for classification as a clinical social worker in the Medicare program. Act § 1861(hh)(1); 42 C.F.R. § 410.73(a).

Accordingly, the statute and regulations restrict me, and I lack authority to direct CMS to make any exception. A legitimate legal basis exists for CMS to deny Petitioner's enrollment request, and therefore I must affirm the denial.

B. Summary judgment is appropriate in this case

CMS seeks summary disposition in the nature of summary judgment. The Board stated 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 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).

I have accepted all of Petitioner's factual assertions as true. In addition, I have drawn all reasonable inferences in his favor. However, no dispute exists that Petitioner lacks the requisite graduate degree in social work required for enrollment into the Medicare program. Accordingly, summary judgment is appropriate, and I grant CMS's motion.

V. Conclusion

I sustain CMS's determination to deny Petitioner enrollment into Medicare because Petitioner does not possess the requisite degree and does not satisfy the statutory and regulatory requirements. Considering Petitioner has no graduate degree in social work, CMS had a legitimate legal basis to deny his enrollment application. Accordingly, I grant CMS's motion for summary judgment.

/s/
Joseph Grow
Administrative Law Judge