Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Wolverine State Inpatient Services
Docket No. A-13-34
Decision No. 2509
April 23, 2013

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Wolverine State Inpatient Services (WSIS) appeals the decision of an Administrative Law Judge (ALJ) granting summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), *Wolverine State Inpatient* Services, DAB CR2671 (2012) (ALJ Decision). The ALJ upheld CMS's denial of WSIS's application to enroll in Medicare as a multi-specialty group, a type of supplier.

We conclude that the ALJ properly determined that WSIS did not qualify as a supplier under the Medicare regulations based on the undisputed facts that WSIS did not furnish health care services and was not operational to furnish such services. On appeal, WSIS has not shown that it raised any genuine issue of material fact precluding summary judgment or that the ALJ made a prejudicial error of law. We therefore uphold the ALJ's decision affirming the denial of WSIS's enrollment application.

Background[1]

Effective November 1, 2010, Inpatient Services of Michigan, P.C. (ISM) and Michigan EM-II (EM-II) formed a partnership, the business of which was to be carried on under the name Wolverine State Inpatient Services (WSIS). ALJ Decision at 4; CMS Ex. 5, at 1. The partnership agreement states that the sole purpose of the partnership "is to provide a 'pay to' address when billing third party payors to facilitate the bookkeeping of the payments received from such payors." *Id*. The partnership agreement further states: "The Partnership is an affiliate of ISM. ISM and its subsidiaries and affiliates will employ all physicians for which this Partnership acts as the billing entity. The Partnership shall instruct all patient and third party payors to remit all payments for services that the physicians render to a lock box under the Partnership's control. All funds remitted to the lock box . . . shall then be distributed as ISM directs." CMS Ex. 5, at 2.

[1] The ALJ set out relevant statutory and regulatory provisions in the "Applicable Law" and "Analysis" sections of his decision. ALJ Decision at 2-3, 5-6. We quote some of these provisions later in the text.

On October 24, 2011, WSIS submitted an enrollment application, Form CMS-855B, to Wisconsin Physicians Service (WPS), a Medicare contractor. CMS Ex. 4, at 1. WSIS sought to enroll as a "Multi-Specialty Group" supplier and identified its "Practice Location" as a hospital in Clare, Wisconsin. *Id*. at 6, 13. According to the 855B, WSIS "saw [its] first patient at this practice location" on 11/01/2010. *Id*. at 13. The 855B names as WSIS's "Billing Agency" (defined on the application form as "a company . . . that you contract with to prepare and submit your claims") Reimbursement Technologies, Inc. in Conshohacken, Pennsylvania. *Id.* at 32-33. The 855B also names both IMS and EM-II as a "partner" of WSIS and the president of IMS as WSIS's "5 Percent or Greater Direct/Indirect Owner" and "Authorized Official," effective 11/1/2010. *Id*. at 20, 22, 24. The 855B names yet another entity, "EmCare, Inc.," as having "Managing Control." *Id*. at 26. Together with the 855B, WSIS submitted a reassignment application (CMS Form-855R) for each of three physicians showing that the physician was reassigning his "benefits" to WSIS. CMS Ex. 4, at 1; CMS Ex. 6, at 1; Ex. 7, at 1; Ex. 8, at 1.

By letter dated December 14, 2011, WPS denied WSIS's enrollment application, stating that WSIS did "not meet the conditions of enrollment or meet the requirements to qualify as a Multi Specialty Clinic." CMS Ex. 2, at 3. In response to WSIS's request for reconsideration, WPS by letter dated April 5, 2012 reaffirmed the denial of WSIS's enrollment application, stating that WSIS did not meet the regulatory requirement that the supplier be "operational to furnish Medicare covered items or services" or "meet Medicare enrollment requirements to furnish Medicare covered items or services." CMS Ex. 1, at 1. Both WPS's December 14, 2011 letter and its April 5, 2012 letter cited 42 C.F.R. § 424.530(a)(5) as the applicable regulation. CMS Ex. 2, at 1; CMS Ex. 1, at 1. In addition, both letters stated: "An entity seeking Medicare payment must be able to receive reassigned benefits from physicians in accordance with the Medicare reassignment provisions in § 1842(b)(6) of the Act (42 U.S.C. 1395u(b))." *Id.*

WSIS timely requested a hearing before an ALJ. CMS filed a Motion for Summary Disposition that was opposed by WSIS. ALJ Decision at 2. The ALJ granted CMS's motion and affirmed the denial of WSIS's enrollment application. *Id*. at 1. WSIS then sought review by the Board pursuant to 42 C.F.R. § 498.80.

Standard of Review

The standard for summary judgment is set out in the ALJ Decision. ALJ Decision at 3-4, quoting *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010). Whether summary judgment is appropriate is a legal issue that we address de novo. *1866ICPayday.com*, DAB No. 2289, at 2 (2009), citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004). Our standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, http://www.hhs.gov/dab/divisions/appellate/guidelines/index.html.

The ALJ Decision

The ALJ concluded that "CMS was authorized to deny Petitioner's request to enroll in the Medicare program because Petitioner did not meet the definition of a supplier and is not operational to furnish Medicare covered items or services." ALJ Decision at 4. The ALJ explained his conclusion as follows:

> WSIS does not qualify for enrollment in the Medicare program because it does not meet the definition of a "supplier" under Medicare, and also because it is not operational to furnish Medicare covered items or services. For Medicare purposes, "[*s*]*upplier* means a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202. A supplier must be operational to furnish Medicare covered items or services before being granted Medicare billing privileges. *See* 42 C.F.R. § 424.510(d)(6). "*Operational* means the provider or supplier has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable, based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered), to furnish these items or services." 42 C.F.R. § 424.502. In order to enroll in the Medicare program, a supplier must demonstrate that it has the ability to furnish health care items or services. If CMS determines upon reliable evidence that an entity is not operational or is not meeting Medicare enrollment requirements, CMS may deny enrollment. *See* 42 C.F.R. § 424.530(a)(5).
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> Petitioner does not argue that WSIS furnishes health care services or that it has a qualified physical practice location open to the public, providing health care related services. Instead, Petitioner concedes that a separate legal entity (ISM) employs physicians. Rather, Petitioner admits WSIS was created to be a separate general partnership simply to serve as a billing entity to facilitate the bookkeeping of payments received from third party payors.

ALJ Decision at 4-5.

The ALJ noted WSIS's argument "that although it does not provide health care services, it is linked as a practical matter to a legal entity that does." *Id*. at 6. However, the ALJ held that such a link was an insufficient basis for enrollment, stating: "WSIS does not contract with physicians, only ISM contracts with physicians. Simply having a billing or reassignment arrangement with a supplier does not meet the legal requirements for enrolling in the Medicare program as a supplier." *Id*. The ALJ continued:

> As a matter of law, Petitioner does not meet the definition of a Medicare supplier and cannot be enrolled in the Medicare program. Petitioner is a general partnership established solely to receive payments for the services of a physician group. Petitioner does not employ physicians, have a contractual arrangement with physicians, and does not furnish health care services in any capacity.

Id. at 7 (footnote omitted).

Discussion

On appeal, WSIS does not dispute the ALJ's finding that it neither furnishes health care services nor is operational to furnish such services, as required by the Medicare regulations at 42 C.F.R. § 424.530(a)(5) (stating that CMS may deny enrollment if it determines "that the provider or supplier is not operational, or is not meeting Medicare enrollment requirements to furnish Medicare covered items or services."). Instead, WSIS argues that the ALJ erred in not addressing its argument that CMS was required to approve its enrollment pursuant to 42 U.S.C. § 1395u(b)(6)(A)(ii), a provision of the Social Security Act pertaining to reassignment of payment for Medicare-covered services. WSIS also argues that even if the Board does not agree that WSIS is entitled to enroll pursuant to section 1395u(b)(6)(A)(ii), the Board should vacate the ALJ Decision and remand the case to the ALJ because WSIS raised a genuine dispute of material fact by alleging that CMS approved enrolling entities with the same business structure as WSIS. As discussed below, these arguments do not provide a basis for reversing or vacating the ALJ Decision.

1. Section 1395u(b)(6)(A)(ii) is not an enrollment provision.

Section 952 of the 2003 Medicare Prescription Drug, Improvement, and Modernization Act (MMA) amended section 1842(b)(6)(A)(ii) of the Social Security Act, 42 U.S.C. § 1395u(b)(6)(A)(ii), to read as follows:

> (6) No payment under this part for a services provided to any individual shall . . . be made to anyone other than such individual or (pursuant to an assignment described in subparagraph (B)(ii) of paragraph (3)) the physician or other person who provided the service, except that
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> (A) payment may be made
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> * * * * *
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> (ii) where the service was provided under a contractual arrangement between such physician or other person and an entity, to the entity if, under the contractual arrangement, the entity submits the bill for the service and the contractual arrangement meets such program integrity and other safeguards as the Secretary may determine to be appropriate[.]

Prior to its amendment, subparagraph (ii) permitted reassignment of payment for Medicare-covered services only to the hospital, critical access hospital, clinic, or other facility in which the service was provided. As amended, this provision permits reassignment of payment to the entity with which a provider or supplier contracts to submit the bill for those services even though the services are not provided on the premises of the entity. *See* 69 Fed. Reg. 66,236, 66,314 (Nov. 15, 2004).

According to WSIS, the amended provision makes possible "the enrollment of entities established to submit claims pursuant to contractual relationships with physicians, and since those contractual relationships exist here . . . , it follows that WSIS is the exact type of entity that should be enrolled." Request for Review (RR) at 11. WSIS acknowledges that ISM is the entity that employs the physicians working at the hospital identified on WSIS's enrollment application. *See* WSIS Reply at 5, 8; *see also* P. Ex. 1, at 2 (Declaration of Gregory Hufstetler) (stating that WSIS was established "to submit claims for hospitalist services" "by physicians employed by ISM"). However, WSIS takes the position that it qualifies as an entity with a contractual arrangement with physicians pursuant to section 1395u(b)(6)(A)(ii) by virtue of the fact that ISM is its "owner" or "parent." WSIS Reply at 5, 8.

WSIS does not point to any legal authority for finding that WSIS was a party to ISM's contractual relationships simply because ISM was WSIS's owner or parent.[2] Even if WSIS could be considered to have a contractual relationship with the physicians, however, section 1395u(b)(6)(A)(ii) would not provide an independent basis for approving WSIS's enrollment application. There is no mention in section 1395u(b)(6)(A) (ii) of enrollment. As WSIS itself states, "the plain language of Section 1395u(b)(6)(A) instructs that payment for covered services can be made to an entity submitting a claim on behalf of a physician furnishing that service." RR at 9. Section 1395u(b)(6)(A) on its face merely permits, but does not require, Medicare to pay an entity for health care services furnished by a supplier that has reassigned payment to the entity pursuant to a contractual agreement, expressly making payment conditional on the entity meeting safeguards the Secretary determines appropriate.

Contrary to what WSIS argues, moreover, the legislative history of section 1395u(b)(6)(A)(ii) does not provide "further confirmation that WSIS qualifies for enrollment[.]" RR at 9. WSIS quotes the following language from the conference report that accompanied the MMA:

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[2] As noted earlier, the partnership agreement states that WSIS "is an affiliate of ISM" and that "ISM and its subsidiaries and affiliates will employ all physicians for which this Partnership acts as the billing entity." CMS Ex. 5, at 2. While this language indicates that some ISM affiliates may employ physicians, WSIS does not claim that it does or would, in fact, employ physicians.

> This provision amends the Social Security Act to allow physicians and non-physician practitioners to reassign payment for Medicare-covered services, regardless of where the arrangement [sic] (including but not limited to a hospital, clinic, medical group, a physician practice management organization, or a staffing company) so long as there is a contractual arrangement between the physician and the entity under which the entity submits the bill for such service. *As a result, the Secretary could enroll these entities in the Medicare program.* The Secretary may also provide for other enrollment qualifications to assure program integrity including joint and several liability.

Id. , quoting H.R. Rep. No. 108-391, at 804 (2003) (Conf. Rep.) (emphasis added by WSIS). However, the specific language to which WSIS points merely reflects Congress' intent to authorize the Secretary to enroll the types of entities described. Nothing in this language indicates that every such entity is entitled to enroll in the Medicare program. Whether an entity qualifies for enrollment is governed by the Medicare enrollment regulations issued by the Secretary in 2006, including the regulation at 42 C.F.R. § 424.530(a)(5) requiring that a supplier furnish health care services and be operational to furnish such services.

WSIS also argues that 42 C.F.R. § 424.80(b)(2), which was issued in 2004 to implement section 1395u(b)(6)(A)(ii), "does not contain enrollment criteria and cannot in any way be considered as limiting the scope of either the plain language of Section [1395u(b)(6)(A)(ii)] or the context and purpose of the amendment as explained in the legislative history." WSIS Reply at 7. Section 424.80(b)(2), captioned "*Payment to an entity under a contractual agreement*," states: "Medicare may pay an entity **enrolled in the Medicare program** if there is a contractual arrangement between the entity and the supplier under which the entity bills for the supplier's services . . . ." (Emphasis added.) As the ALJ found, this expressly requires that an entity be enrolled in order to receive payment. *See* ALJ Decision at 6. Thus, although it does not specify criteria for Medicare enrollment, the regulation limits the entities otherwise eligible to receive Medicare payments under section 1395u(b)(6)(A)(ii) to those that meet any applicable criteria for enrollment.[3]

WSIS nevertheless maintains that the preamble to the 2004 regulations supports its interpretation of section 1395u(b)(6)(A)(ii). WSIS notes that "[i]n response to a comment, CMS stated that once a supplier assigns its payment rights, '*the entity receiving the assigned payments essentially takes the place of the supplier*.'" RR at 6, quoting 69 Fed. Reg. 66,236, 66,318 (2004) (emphasis added by WSIS). However, the

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[3] Consistent with section 424.80(b)(2), section 424.71 states, "*Entity* means a person, group, or facility that is enrolled in the Medicare program."

quoted language responds to a comment regarding section 424.80(c), which states: "An employer or entity that may receive payment under paragraph (b)(1) or (b)(2) of this section is considered the supplier of those services for purposes of subparts C, D, and E of this part. . . ." All of those subparts pertain to payment. Thus, the quoted language means only that the entity receiving the assigned payments takes the place of the supplier for the purpose of receiving payments, not that the entity is entitled to enroll as a supplier.[4]

WSIS argues further that section 424.80(b)(2) is invalid because it is "a construction of Section [1395u(b)(6)(A)(ii)] that nullifies it in practice[.]" WSIS Reply at 5. This argument does not advance WSIS's case. As discussed above, WSIS points to nothing that supports its view that WSIS is entitled to enroll in the Medicare program pursuant to section 1395u(b)(6)(A)(ii). Thus, the fact that the regulation limits the entities otherwise eligible to receive Medicare payments to those that are enrolled does not nullify the statutory provision.

Finally, WSIS argues that CMS's position that "the direct furnishing of medical services" is a requirement for enrollment is inconsistent with section 424.73(b)(3), which permits Medicare to pay an agent who furnishes billing and collection services to a provider. WSIS Reply at 7. While WSIS is correct that this provision, which is made applicable to suppliers by section 424.80(b)(5), does not require a billing agent to be enrolled in Medicare, the provision is inapposite here since WSIS seeks to be enrolled. In any event, WSIS's enrollment application identifies Reimbursement Technologies, Inc. as the "billing agency" (CMS Exhibit 4, at 32), and the partnership agreement represents that WSIS's "sole purpose . . . is to provide a 'pay to' address" for ISM's bookkeeping purposes (CMS Ex. 5, at 1).

Accordingly, we conclude that WSIS's argument that it is entitled to enroll in the Medicare program pursuant to section 1395u(b)(6)(A)(ii) has no merit and that the ALJ's failure to address this statutory provision thus was not a prejudicial error.

2. WSIS has not raised a genuine issue of material fact.

WSIS argues that the Declaration of Gregory Hufstetler (Petitioner Exhibit 1), who identifies himself as the Vice President of Reimbursement Technologies, raises genuine issues of material fact "on the question of the proper application of [section 1395u(b)(6)(A)(ii)] to an application for Medicare enrollment by an entity such as WSIS" and that the ALJ therefore erred in concluding that summary judgment was appropriate.

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[4] Subparts C, D, and E are titled "Claims for Payment," To Whom Payment is Ordinarily Made," and "To Whom Payment is Made in Special Situations," respectively. The requirements for enrollment are in subpart P, titled "Requirements for Establishing and Maintaining Medicare Billing Privileges."

RR at 12. The key allegations in the Hufstetler Declaration on which WSIS relies are that EmCare discussed the application of section 1395u(b)(6)(A)(ii) with CMS in 2004, that CMS decided "to approve EmCare's business model, which is the same organizational structure that was used when WSIS submitted its CMS-855B enrollment application form on October 25, 2011," and that "CMS approved the enrollment of multiple entities using the same organization [.]" RR at 11; WSIS Reply at 9.

The ALJ alluded to these allegations below, stating:

> Whether CMS or its agents at some point gave some sort of tacit or expressed approval to Petitioner's business structure does not create a material fact at issue. Similarly, although Petitioner asks for equitable relief based on the actions of other Medicare contractors, '[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.' *US Ultrasound*, DAB No. 2302 (2010) . . . . As a matter of law, Petitioner does not meet the definition of Medicare supplier and cannot be enrolled in the Medicare program. . . .

ALJ Decision at 7.

We conclude that the ALJ did not err in determining that these allegations did not raise a genuine dispute of material fact and in proceeding to grant summary judgment in CMS's favor. Any advice CMS gave EmCare in 2004 that entities with the same business structure as WSIS were entitled to enroll in Medicare pursuant to section 1395u(b)(6)(A)(ii) was moot once regulations were issued in 2006 requiring that an entity furnish health care services and be operational in order to enroll in Medicare as a supplier. Since it is undisputed that WSIS did not meet these requirements, its enrollment application was properly denied based on 42 C.F.R. § 424.530(a)(5). That other Medicare contractors may have at some time approved enrollment applications from entities similarly situated to WSIS is not a basis for ignoring the clear requirements of the regulations.

Conclusion

For the foregoing reasons, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member