Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	Date: May 16, 2008
Cesar A. Rojas, M.D.,	)	
	)	Docket No. C-08-99
Petitioner,	)	Decision No. CR1789
	)	
v.	)	
	)	
Centers for Medicare & Medicaid Services.	)	

DECISION

Petitioner, Cesar A. Rojas, M.D., did not meet the requirements for enrollment as a supplier in the Medicare program and his application was properly denied.

I. Background

Petitioner requested a hearing by an administrative law judge (ALJ) by a pleading with 18 exhibits filed on November 7, 2007. Petitioner challenges the September 7, 2007 decision of a Centers for Medicare & Medicaid Services (CMS) carrier, National Government Services (contractor),[1] which denied Petitioner's application for enrollment in Medicare as a supplier. Petitioner challenges the denial because, if he is not enrolled, he may not seek reimbursement from the Medicare program for his services to Medicare eligible beneficiaries and he may not reassign a claim for compensation to an employer.[2]

[1] The denial decision was made by a CMS contractor, National Government Services, a carrier for CMS. CMS contracts with private insurance companies called carriers to administer Medicare Part B. Carriers process and pay claims for reimbursement, communicate information related to the administration of the Medicare program, and assist in discharging administrative duties necessary to carry out program purposes. 42 C.F.R. § 421.200-214.

[2] If enrollment is approved, a supplier is issued a National Provider Identifier

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The case was assigned to me for hearing and decision on November 19, 2007. I convened a prehearing conference, by telephone, on December 21, 2007, the substance of which is recorded in my Order dated December 27, 2007. During the conference the parties agreed to waive a hearing because this matter may be resolved on the briefs and documentary evidence without the need for me to receive testimony. CMS also agreed that the regulations at 42 C.F.R. Part 498 apply to this case.

On December 26, 2007, Petitioner's undated letter with a signed copy of his hearing request and exhibits marked Petitioner's Exhibits (P. Exs.) 1 through 18, were received at the Civil Remedies Division (CRD) of the Departmental Appeals Board. CMS filed a memorandum of law on February 4, 2008 (CMS Br.), accompanied by one exhibit (CMS Ex. 1). On March 11, 2008, counsel for Petitioner sent an email to the staff attorney assigned to this case in which he advised that Petitioner had passed his final examination and now met the requirements to obtain an unlimited New York licence to practice medicine and that Petitioner intended to reapply for enrollment in Medicare. Petitioner's counsel also advised that Petitioner instructed him to request that the case be decided upon the current record, without further briefing by Petitioner, as there remains an issue of his eligibility to receive reimbursement based on the application before me. Counsel for Petitioner advised that he had consulted with counsel for CMS who voiced no objection to proceeding as Petitioner requested. Petitioner also notified me by an undated letter received at the CRD on March 18, 2008, that he would file no further response but requested a decision upon the current record. Pursuant to Petitioner's request, I treat his request for hearing as his brief (P. Br.). The parties have filed no objections to any of the exhibits and P. Exs. 1-18 and CMS Ex. 1 are admitted.

II. Discussion

A. Findings of Fact

The following findings of fact are based upon the exhibits admitted and the undisputed statements of fact found in the pleadings of the parties.

1. On November 13, 2006, Petitioner signed his application for enrollment in Medicare as a physician specializing in psychiatry and a separate form for reassignment of his Medicare payments to Psychiatry Practice, P.C. P. Exs. 1 and 2.

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[2](...continued)
(NPI) to use for billing Medicare and a Provider Transaction Access Number (PTAN), an identifier for the supplier for inquiries. Medicare Program Integrity Manual (MPIM), Chapter 10 – Healthcare Provider/Supplier Enrollment, § 6.1.1.

2. From July 20, 2006 through April 12, 2008, Petitioner held a limited permit to practice medicine in New York, issued by the State of New York. P. Exs. 1, at 34, 3, 6-8.

3. Petitioner did not have a license to practice medicine as a doctor of medicine or osteopathy issued by the State of New York at any time relevant to this decision.

4. Petitioner did not qualify for a license to practice medicine as a doctor of medicine or osteopathy at any time relevant to this decision, because he had not completed the examinations required to obtain a license from the State of New York. P. Br. at 13.

B. Conclusions of Law

1. In order to enroll in Medicare as a supplier delivering services to Medicare eligible beneficiaries in the capacity of a physician, the regulations require that the applicant must have a license issued by the state in which the physician seeks to deliver services. Act, § 1861(r); 42 C.F.R. §§ 410.20(b) and 424.510(d).

2. Petitioner did not, at any time relevant to this decision, have a license issued by the State of New York because he did not meet the requirements for licensure. N.Y. Educ. Law § 6524.

3. The permit issued to Petitioner by the State of New York was not a license within the meaning of the New York statutes. N.Y. Educ. Law § 6524-6525.

4. Petitioner did not meet the requirements for enrollment in Medicare as a physician supplier and his enrollment application was properly denied.

C. Law Applicable

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Payment under the program for services rendered to Medicare eligible beneficiaries may only be made to eligible providers of services and suppliers.[3] Act,

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[3] A "supplier" furnishes services under Medicare and includes physicians or other practitioners and facilities that are not a "provider of services." Act, § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes

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§ 1835(a) (42 U.S.C. § 1395n(a)). Administration of the Part B program is through contractors. Act, § 1842(b) (42 U.S.C. § 1395u(b)). The Act requires the Secretary of Health and Human Services (Secretary) to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review in the event of denial or non-renewal. Act, § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare eligible beneficiary. When applying for enrollment, the provider or supplier is required to submit information and documents specified by the regulations, including documents that show that the provider or supplier meets "all applicable Federal and State licensure and regulatory requirements that apply to the specific provider or supplier type that relate to providing health care services . . . ." 42 C.F.R. § 424.510(d)(2)(iii).

Qualified physician services are covered by the program for those enrolled, subject to some limitations. Act, §§ 1832(a), 1861(s)(1) (42 U.S.C. §§ 1395k(a), 1395x(s)(1)). "Physician's Services" means professional services performed by physicians, including surgery, consultation, and home, office, and institutional calls (with certain exceptions). Act, § 1861(q) (42 U.S.C. § 1395x(q)). The term "Physician," when used in connection with the performance of any function or action, means, in part, a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the state in which he or she performs such function or action. Act, § 1861(r) (42 U.S.C. §1395(x)(r)); 42 C.F.R. § 410.20(b). The Medicare program authorizes Medicare Part B payments for services provided by various physicians, including those specializing in psychiatry. *See* 42 C.F.R. § 410.20. A physician who wants to bill Medicare or its beneficiaries for Medicare covered services or supplies must enroll in the Medicare program. 42 C.F.R. § 424.505. Medicare pays a supplier directly for covered services if the beneficiary assigns the claim to the supplier and the supplier accepts it. Medicare may pay a supplier's employer if the supplier is required, as a condition of employment, to turn over the fees for the supplier's services. Medicare will also pay an entity billing for a supplier's services if the entity is enrolled in Medicare and there is a contractual arrangement between the entity and the supplier. Act, § 1842(b)(6) (42 U.S.C. § 1395u(b)(6)); 42 C.F.R. §§ 424.55(a), 424.80(a) and (b). The supplier must be enrolled to reassign Medicare benefits. *See* MPIM, Ch. 10, § 1.2.

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[3](...continued)
hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, or entities subject to section 1814(g) and section 1835 (e) of the Act. Act, § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

To enroll in Medicare, a supplier must submit the required enrollment application and supporting documentation, including all state licensure and regulatory requirements that apply. 42 C.F.R. § 424.510(d). The supplier must submit a copy of all licenses required by a state to function as the supplier type indicated in the supplier's application. While a temporary license is acceptable, CMS instructs its contractors not to accept a temporary permit, defined as "one in which the applicant is not yet fully licensed and must complete a specified number of hours of practice in order to obtain the license . . . ." MPIM, Ch. 10, § 4.2.2.

CMS may deny a supplier's enrollment application if a supplier is not in compliance with Medicare enrollment requirements. 42 C.F.R. § 424.530(a)(1). A supplier enrollment is considered denied when a supplier is determined to be "ineligible to receive Medicare billing privileges for Medicare covered items or services provided to Medicare beneficiaries" for one or more of the reasons listed in 42 C.F.R. § 424.530. 42 C.F.R. § 424.502. CMS's contractor notifies a supplier in writing when it denies enrollment and explains the reasons for the determination and information regarding the supplier's right to appeal. 42 C.F.R. § 498.20(a); MPIM, Ch. 10, §§ 6.2, 13.2. The supplier may submit a written request for reconsideration to CMS. 42 C.F.R. § 498.22(a). CMS must give notice of its reconsidered determination to the supplier, giving the reasons for its determination and specifying the conditions or requirements the supplier failed to meet. 42 C.F.R. § 498.25. If the CMS decision on reconsideration is unfavorable to the supplier, the Act provides for a hearing by an ALJ and judicial review.

D. Issue

Whether Petitioner was properly denied enrollment as a supplier in Medicare.

E. Analysis

On November 13, 2006, Petitioner signed his application for enrollment in Medicare as a physician specializing in psychiatry and, a separate form for reassignment of his Medicare payments to Psychiatry Practice, P.C. P. Exs. 1 and 2. When he applied, Petitioner held a limited permit to practice medicine in New York. Petitioner completed the section of the application requiring a license number and effective date using information from his limited permit to practice medicine. Specifically, Petitioner's limited permit allowed him to practice at New York Presbyterian Hospital and Terence

Cardinal Cooke Health Care Center. P. Ex. 1, at 34; P. Ex. 3.[4] Petitioner also submitted a copy of the permit, which was issued on July 20, 2006 and expired on March 30, 2007. P. Ex. 1, at 34.

The Medicare carrier denied Petitioner's application for enrollment and notified him of the denial by letter dated March 14, 2007. The carrier cited as grounds that Petitioner did not meet the conditions for enrollment or the requirements to qualify as a health care provider because he did not have a license to perform the services he intended to render, citing MPIM 4.2.2 - Licenses and Certifications (Rev. 173; Issued: 11-13-06; Effective/Implementation Dates: 11-15-06). P. Ex. 4. Petitioner requested reconsideration by letter dated April 24, 2007. Petitioner argued in the request for reconsideration that his New York limited permit was the equivalent of a temporary license under MPIM, Chap. 10, § 4.2.2, rather than a temporary permit, because he did not have to complete a specified number of hours of practice to obtain the limited permit. P. Ex. 5.

A reconsideration decision was issued on September 7, 2007, and the denial of the application was affirmed. The conclusion was that Petitioner was not properly licensed at the time the enrollment application was received. The decision states, citing MPIM, Chap. 10, § 4.2.2, that Petitioner had a limited permit because it was valid only at the institutions listed on the permit and Petitioner was only authorized to practice medicine under the supervision of a licensed physician in a public, voluntary, or proprietary hospital. P. Ex. 9.

Petitioner argues before me that he is legally authorized to practice medicine in the State of New York based upon the permit the state issued him and that is all that is required by section 1861(r) of the Act. Petitioner correctly notes that the Act does not require that legal authorization issued by the state be in a specific form. P. Br. at 6-9. Petitioner also argues that, to the extent characterization of the legal authority to practice is important, his limited permit to practice issued by New York should be treated as a temporary license which is acceptable under MPIM, Chap. 10, § 4.2.2. P. Br. at 9-15.

CMS argues, citing section 1861(r) of the Act, 42 C.F.R. § 410.20(b), and MPIM, Chap. 10, § 4.2.2, that to be eligible to enroll a physician must be legally authorized to practice in the state where he provides services and he must be operating within the scope of his license. CMS argues that the MPIM is a policy statement or interpretation of CMS that should be given deference. CMS Br. at 8-14.

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[4] Petitioner's limited permit was re-issued for the period April 12, 2007 through April 12, 2008, and allows him to practice at the Wayne Center for Nursing & Rehab. and at Terence Cardinal Cooke Health Care Center. P. Exs. 6-8.

Based upon the foregoing facts and arguments of the parties, the specific issue before me is whether or not Petitioner's "permit" issued under New York law met the licensure requirements of the Act and regulations. Act, § 1861(r); 42 C.F.R. §§ 410.20(b) and 424.510(d).

1. Petitioner was not "licensed" as a physician in the State of New York.

Petitioner raises an issue as to the adequacy of the notice by the carrier in this case. Petitioner asserts that the letters denying his application fail to clearly state the reason for the denial. P. Br. at 1. After review of the letters providing notice, I find that the notices are adequate. It is clear from the notices that Petitioner's enrollment was denied because it was concluded that Petitioner's limited permit did not constitute a license to practice medicine for purposes of enrollment.[5] I further note that Petitioner apparently had no difficulty understanding the basis for denial and he had adequate opportunity to prepare and present his case. I conclude that the notices were adequate and Petitioner suffered no prejudice.

The issue of whether or not Petitioner's permit was the equivalent of a license must also be resolved against him. Congress defined a physician as a doctor of medicine or osteopathy "legally authorized" to practice medicine and surgery by the state where he or she performs such function. Act, § 1861(r). The statute requires that we determine whether one is legally authorized to practice medicine in the state where he or she practices. The Secretary promulgated regulations for the enrollment of providers and suppliers as Congress directed. Act, § 1866(j). Pursuant to 42 C.F.R. § 410.20, the Secretary has provided that Medicare Part B pays for physician services furnished by specified professions, including a doctor of medicine or osteopathy, if the physician is "legally authorized to practice" by the state in which he or she practices and he or she is acting within the scope of his or her license. This regulation points us to state law for a determination of who is "legally authorized" and the scope of the "license." The

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[5] Petitioner raises another issue that requires no more than mention in a footnote. Petitioner asserts, based upon text he found at the website of another carrier, that the Medicare carrier in this case misinterpreted the nature of the limited permit and that its decision is inconsistent with that of other carriers in New York. P. Br. at 12; P. Ex. 16. Petitioner cites the language allegedly found on the website. His reliance upon the language of the website is misplaced. The language Petitioner quotes clearly applies only to practitioners not physicians. There is a distinction between a physician and a practitioner recognized by the Act and regulation related to the administration of Part B services. Act, §§ 1861(r), 1842(b)(18)(C); 42 C.F.R. § 410.26(a)(6). Petitioner applied as a physician not as a practitioner.

Secretary has specified at 42 C.F.R. § 424.505, the requirements for enrolling in Medicare to receive payment for covered items or services. Pursuant to 42 C.F.R. § 424.510(d)(2), the enrollment application must include documentation that the supplier meets all federal and state licensure and regulatory requirements that apply to the specific provider type. In this case, there is no question there is no federal licensure in issue. Thus, this regulation also points us to state law to determine state licensure requirements. The two regulatory provisions reflect that, pursuant to his delegated authority to administer the Medicare program, the Secretary has determined that the evidence of legal authorization by a state, is a license issued by the state.[6]

It is thus necessary to consider whether Petitioner's permit (P. Exs. 1, at 34, 3, and 6-8) was equivalent to a license to practice medicine under New York law. Reviewing the face of the permits, they are titled "Limited Permit to Practice Medicine," the limitations are that they limit practice to specific hospitals, the permits have a limited duration, and they require that the practice of medicine only be under the supervision of a licensed physician.

Under New York statutes, the practice of medicine includes "diagnosing, treating, operating, or prescribing for any human disease, pain, injury, deformity or physical condition." N.Y. Educ. Law § 6521. To qualify for a license as a physician, New York law requires: (1) an application; (2) a degree as a doctor of medicine or osteopathy, or equivalent; (3) satisfactory experience according to the Commissioner of Education's (the Commissioner's) regulations; (4) evidence of passing an examination according to the Commissioner's regulations; (5) be at least 21 years old, with a limited exception; (6) citizenship or immigration status; (7) good moral character; (8) payment of a fee except under limited circumstances; and (9) payment of a special fee to the professional medical conduct account. N.Y. Educ. Law § 6524. Petitioner admitted in his brief to me that he had not completed the third part of the required examinations. P. Br. 13. Because Petitioner had not completed his required examinations, I conclude that Petitioner did not satisfy the requirements of New York law to receive a license as a physician.

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[6] The CMS instruction to its contractor, in this case its carrier, is that it must verify that each supplier is licensed or certified to furnish services in the state where the supplier is enrolling. The contractor may rely upon the licensure documents submitted by the applicant unless there is an inconsistency. The only licenses that must be submitted with the application are those related to the applicant functioning as the specific supplier type for which enrollment is sought. CMS instructs its contractors that they must follow a special procedure if a temporary license is submitted and, parenthetically, that a temporary permit is not acceptable. MPIM, Chap. 10, § 4.2.2

I further conclude that the permit Petitioner was issued by the State of New York was not a license to practice medicine under the laws of that state. The New York statutes clearly distinguish between a "license" and a "permit." I have already set forth the requirements for receiving a license. An individual may be eligible for a limited permit to practice medicine, which limits an applicant's eligibility, area of practice, and period of time to practice. N.Y. Educ. Law § 6525. A person eligible for a limited permit is,

> (1) A person who fulfills all requirements for a license as a physician except those relating to the examination and citizenship or permanent residence in the United States;
> (2) A foreign physician who holds a standard certificate from the education council for foreign medical graduates or who has passed an examination satisfactory to the state board for medicine and in accordance with the commissioner's regulations; or
> (3) A foreign physician or a foreign intern who is in this country on a non-immigration visa for the continuation of medical study, pursuant to the exchange student program of the United States department of state.

Id. Section 6525 is clear that the permit authorized is not a license and it is only available to those who do not qualify for a license for one of the reasons listed. I conclude that the permit Petitioner was issued was not a "license" within the meaning of the New York statutes.

2. Petitioner did not have a license as physician and he was ineligible for enrollment in Medicare.

Because Petitioner has not shown that he was licensed as a medical doctor or doctor of osteopathy, he was not eligible to participate in Medicare as a psychiatrist. 42 C.F.R. §§ 410.20(b) and 424.510(d)(2). Accordingly, his application for enrollment was properly denied.[7]

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[7] CMS also perceived that Petitioner raised an issue regarding whether he could reassign benefits to his employer, i.e. whether his employer could bill Medicare for his services, even though Petitioner was not enrolled in Medicare. CMS Br. at 15. If Petitioner intended such an argument, it is without merit. The regulation is clear that reassignment is permissible only between a "supplier," i.e. one enrolled in Medicare, and the supplier's employer. 42 C.F.R. § 424.80(b).

III. Conclusion

Petitioner did not qualify for a enrollment in Medicare at the relevant times, and his application was properly denied.

/s/

Keith W. Sickendick
Administrative Law Judge