

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Stephen M. Robins, M.D., P.A.,
(PTAN: 0435000001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-852

Decision No. CR3769

Date: April 8, 2015

DECISION

Petitioner, Stephen M. Robins, M.D., P.A., submitted an application to revalidate his enrollment in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). With his application, Petitioner requested a hardship exception from paying the 2013 application fee of \$532. The Centers for Medicare & Medicaid Services (CMS) denied Petitioner's request, and Petitioner appealed. I affirm CMS's determination finding CMS had a legitimate basis to deny Petitioner's request because Petitioner has not proven an applicable hardship to qualify for the fee exception.

I. Background and Procedural History

Petitioner is a licensed optician and a supplier of DMEPOS in Boynton Beach, Florida, who does business as "Boynton Optics." CMS Exhibit (Ex.) 3 at 6, 13, 15, 16. Petitioner was enrolled in the Medicare program as a supplier of DMEPOS for contact lenses, eyeglasses, and prosthetic cataract lenses. CMS Ex. 3 at 16. The National Supplier Clearinghouse of Palmetto GBA (NSC) serves as the Medicare contractor that processes enrollment applications for suppliers of DMEPOS. In 2013, NSC requested Petitioner to revalidate his enrollment as a DMEPOS supplier in the Medicare program. CMS Ex. 2.

The NSC revalidation request advised Petitioner of the \$532 revalidation fee but also advised that he could alternatively submit a request if he believed he qualified for a hardship exception waiver. CMS Ex. 2 at 2. On October 21, 2013, Petitioner submitted a revalidation application, CMS Form 855S, with a letter requesting a hardship exception to the requirement to pay the \$532 application fee. CMS Ex. 3. Petitioner stated that his annual sales for the post-operative cataract surgical eyeglasses he provided to patients were “very small,” and that “no profit for them is generated after expenses.” CMS Ex. 3 at 1. Petitioner explained that the optical section of his practice is provided only as an accommodation for his elderly patients, and given the “annual sales are only a few thousand dollars,” he maintained “the revalidation fee is a burden.” CMS Ex. 3 at 1. Petitioner attached financial documentation including income data for 2012 and for the first two and a half quarters of 2013 (through August 7, 2013) outlining the sales and expenses incurred by the optical section of his business. CMS Ex. 3 at 2-5.

NSC notified Petitioner on November 20, 2013, that it was denying his request for a hardship exception. CMS Ex. 4. NSC cited Chapter 15 of the Medicare Provider Integrity Manual (PIM),¹ which addresses the criteria for determining a hardship exception and advised Petitioner that he had not presented a strong argument with “comprehensive documentation” to support his request for a hardship exception. CMS Ex. 4; PIM, ch. 15, § 15.19.1.C. NSC further advised Petitioner that he could request reconsideration of the denial. CMS Ex. 4.

On December 23, 2013, Petitioner requested reconsideration and provided additional financial documentation for 2013 with his request. CMS Ex. 5. NSC received Petitioner’s request on December 30, 2013. CMS Ex. 1 at 1. A hearing officer notified Petitioner, by letter dated January 24, 2014, that on reconsideration the hearing officer considered all of the documentation available in the case file, and Petitioner did not meet the requirements for a hardship exception from the application fee. CMS Ex. 1.

Petitioner filed a timely appeal for an administrative law judge determination, and I was assigned this case. Following the issuance of my Acknowledgment and Pre-Hearing Order (Order), CMS moved for summary judgment and filed a supporting brief (CMS Br.) with five exhibits (CMS Exs. 1-5). My Order required the parties to provide comprehensive pre-hearing exchanges, including a brief addressing all issues of law and fact and any motion for summary judgment the party might make. In accordance with my Order, I construe CMS’s motion for summary judgment as its pre-hearing brief. Petitioner submitted his pre-hearing brief and opposition to CMS’s motion for summary judgment (P. Br.) with one exhibit, Petitioner Exhibit (P. Ex.) 1. CMS filed

¹ Although the NSC letter cited to section “15.9.1C” of the PIM as support for its denial of Petitioner’s request, the reference is a typographical error, and it appears that NSC intended to cite to section “15.19.1C.” of the PIM, which contains the language NSC referenced in its letter. CMS Ex. 4.

a reply brief (CMS Reply) and an objection to P. Ex. 1. Petitioner then filed a sur-reply (P. Sur-reply).

Absent any objection, I admit CMS Exs. 1-5 into the record. For the reasons discussed in my finding below, I also admit P. Ex. 1 into the record. Neither party requested the opportunity to cross-examine any direct witness testimony, which I directed to be submitted with a party's pre-hearing exchange by sworn affidavit or declaration; therefore, in accordance with my Order, a hearing in this matter is not necessary. Order at ¶ 10. I issue this decision on the full merits of the written record.

II. Background Law

The Patient Protection and Affordable Care Act of 2010, in relevant part, required DMEPOS suppliers to pay an application fee when they revalidate their Medicare enrollments. Social Security Act (Act) § 1866(j)(2)(C)(i) (42 U.S.C. § 1395cc(j)(2)(C)(i)). These fees cover the cost of screening providers and suppliers and also fund Medicare program integrity efforts. Act § 1866(j)(2)(C)(iii) (42 U.S.C. § 1395cc(j)(2)(C)(iii)). If the payment of the enrollment fee creates a hardship, an applicant may request an exemption. 42 U.S.C. § 1866(j)(2)(C)(ii) (42 U.S.C. § 1395cc(j)(2)(C)(ii)); 42 C.F.R. § 424.514(b).

The PIM provides criteria that may be considered when making a hardship determination. These factors, although not all inclusive, are: (a) considerable bad debt expenses; (b) significant amount of charity care/financial assistance furnished to patients; (c) presence of substantive partnerships (whereby clinical, financial integration are present) with those who furnish medical care to a disproportionately low-income population; (d) whether an institutional provider receives considerable amounts of funding through disproportionate share hospital payments, or (e) whether the provider is enrolling in a geographic area that is a Presidentially-declared disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. PIM, ch. 15, § 15.19.1(C)(2). Under "Criteria for Determination," the PIM directs that the comprehensive documentation in support of the request ". . . may include, without limitation, historical cost reports, recent financial reports such as balance sheets and income statements, cash flow statements, tax returns, etc." *Id.*

Although the preamble to the final rule relating to the application fee states that hardship requests "will be considered on a case-by-case basis" (76 Fed. Reg. 5862, 5909 (Feb. 2, 2011)), the final rule also reflects the Secretary's intention that "exceptions will only be approved infrequently." 76 Fed. Reg. at 5955. CMS is not required to present evidence "contravening the allegations in the [hardship exception] request" or "to investigate the allegations in a . . . request." *Dr. S.A. Brooks, DPM*, DAB No. 2615 at 17 (2015).

III. Discussion

A. Issue

Whether CMS had a legitimate basis to deny Petitioner a hardship exception from paying the \$532 Medicare enrollment fee for the revalidation application he submitted on October 21, 2013.

B. Findings of Fact and Conclusions of Law

1. There is good cause to not exclude Petitioner Exhibit 1 because this information was not available to Petitioner when he submitted his request for reconsideration.

An applicant may appeal CMS's determination concerning a hardship exception to an enrollment application fee in the same manner as an applicant would appeal a denial of enrollment or a revocation of Medicare billing privileges.² 42 C.F.R. § 424.514(h)(2). Such appeals must follow the procedures in 42 C.F.R. Part 498. 42 C.F.R. § 405.803(a). At the levels of appeal above reconsideration, a supplier is precluded from submitting new evidence absent good cause. 42 C.F.R. §§ 405.803(e), 498.56(e).

CMS objects to Petitioner's Exhibit 1, arguing that the exhibit constitutes prohibited new evidence under 42 C.F.R. § 498.56(e). CMS Reply at 3. CMS argues I should not admit the exhibit because Petitioner has not provided good cause establishing why he did not provide the evidence at the reconsideration level of review. CMS Reply at 3. CMS maintains that the documents in the exhibit were likely either in Petitioner's possession or accessible to Petitioner. CMS Reply at 3.

Petitioner's Exhibit 1 is comprised of a one-page copy of a website printout from the State of Florida showing the credentials of the optician he employs along with a copy of a W-2 Wage and Tax Statement that shows the wages Petitioner paid to the optician in 2013. When Petitioner submitted his reconsideration request on December 23, 2013, he included documentation that consisted of income and expense data for both 2012 and 2013 (through December 2013). CMS Ex. 5 at 3-10. However, considering the calendar year was not yet over, Petitioner has good cause for filing this new evidence because he would not have had access to the optician's 2013 W-2 Wage and Tax Statement at the

² Providers and suppliers have appeal rights in hardship exception cases as provided in "[42 C.F.R.] § 405.874." 42 C.F.R. § 424.514(h)(2). In 2012, when the U.S. Department of Health and Human Services replaced the provisions at 42 C.F.R. § 405.874 with 42 C.F.R. §§ 405.800-.818, it did not update the cross-reference in 42 C.F.R. § 424.514(h)(2). 77 Fed. Reg. 29,002, 29,016-17 (May 16, 2012). Petitioner's appeal rights are now found in 42 C.F.R. § 405.803.

time he submitted his December 23, 2013 reconsideration request. Considering that this exhibit contains information relating to Petitioner's expenses for 2013 and that fee exceptions relate to some financial hardships, I find it relevant, and I admit it finding Petitioner has shown good cause. *See* 42 C.F.R. §§ 498.56(e)(2), 498.60(b). Although part of the one-page exhibit contains some information relating to Petitioner's optician's credentials that were likely available to Petitioner when he submitted his request for reconsideration, I do not exclude that portion of the exhibit considering its inclusion does not prejudice CMS.

2. NSC had a legitimate basis to determine Petitioner was not entitled to an exception to the \$532 Medicare enrollment application fee because a showing of non-profitability alone does not qualify as an applicable hardship.

According to Petitioner, the number of post-operative eyeglasses that he provides to his elderly Medicare patients is a small number (less than a few thousand dollars in sales per year), and his optical business runs at a net loss; however, he continues to operate that section in order to accommodate and better serve the elderly patients he treats. CMS Ex. 5 at 1-2; P. Br. at 3; P. Sur-reply at 1; Request for Hearing.

Petitioner's hardship reasons do not comport with the examples that the PIM lists as acceptable justifications. Petitioner does not specifically maintain that he provides services to disadvantaged program beneficiaries nor do I find any evidence in the record to support this. Further, Petitioner does not maintain, nor do I find evidence, that he has bad debts, that he has had a challenge collecting payment from his patients, that his patients are disproportionately low-income, or that he furnishes significant charity care. Instead, Petitioner maintains that he provides the post-operative cataract eyeglasses as an accommodation to a small number of his elderly patients and that the operation of the optical section of his business, considering both Medicare reimbursed and non-Medicare reimbursed expenses, operates at a net loss. CMS Ex. 5 at 2; P. Br. at 3; P. Sur-reply at 1.

A review of the financial documentation Petitioner submitted shows the 2012 and 2013 income and expense figures include expenses for supplies, lab costs, and the salary for the licensed optician he employs. CMS Ex. 3 at 2-5; CMS Ex. 5 at 3-10; P. Ex. 1. The financial documentation suggests that for 2012, the optical section's net sales were less than \$6,000, with a net loss of \$16,000. CMS Ex. 3 at 2-4; CMS Ex. 5 at 1-2. In 2013, the net sales for the optical section of Petitioner's business were less than \$3,000. CMS Ex. 5 at 1. Petitioner also projects lower net sales trends in the future. CMS Ex. 5 at 1. According to Petitioner, a fee of hundreds of dollars on top of ongoing losses should satisfy the requirements of a hardship exception. P. Br. at 3; P. Sur-reply. Petitioner does not dispute that for 2012 and 2013, Petitioner's Medicare payments were in excess of the application fee; however, Petitioner maintains that CMS must instead consider the optical section's net profitability. P. Br. at 3; P. Sur-reply.

I note that the financial documentation Petitioner provided is specific to the optical section of his practice. Petitioner is a licensed optician and operates a full-time optician practice that is open five days per week. P. Br. at 3; CMS Ex. 3 at 13, 15. Petitioner did not submit any financial information pertaining to the overall company and indicated that he does not file a separate tax return for the optical section of his practice. P. Br. at 3. Petitioner chose not to submit tax returns for his overall company at the initial or reconsideration levels of review, which might have demonstrated relevant allocations for charitable care that I could further consider. Instead, Petitioner has only presented evidence that the optical section of Petitioner's business was operating at a loss in 2012 and 2013, and even if I were to determine that his assessments were accurate, a showing of non-profitability for one section of Petitioner's business, which is sustained for the convenience of customers, is not sufficient for me to reverse CMS's determination and find an applicable fee exception.

IV. Conclusion

I affirm NSC's reconsidered determination and find that NSC had a legitimate basis to determine that Petitioner is not entitled to a hardship exception from paying the \$532 Medicare enrollment fee for his revalidation application submitted on October 21, 2013. If Petitioner opts to remain a DMEPOS supplier eligible for reimbursement of his sales to Medicare beneficiaries, Petitioner must pay the required fee.

/s/
Joseph Grow
Administrative Law Judge