

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Jerilyn Mitchell,	)	Date: September 24, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-292
	)	Decision No. CR1657
Centers for Medicare & Medicaid	)	
Services.	)	
_____	)	

**DECISION**

This matter is before me on the Centers for Medicare & Medicaid Services' (CMS's) Motion for Summary Affirmance. I find that the Medicare Part B Hearing Officer (Hearing Officer) correctly determined that Petitioner Jerilyn Mitchell did not meet all requirements to be considered a clinical nurse specialist, in that she did not possess a master's degree in a "defined clinical area of nursing." For that reason I affirm the February 7, 2007 determination of the Hearing Officer to uphold the denial of Petitioner's application for a Medicare billing number by the Medicare Part B contractor, Wisconsin Physicians Service (WPS).

**I. Procedural History**

Petitioner is a health-care professional who has, at all relevant times, practiced her profession in the State of Minnesota. She is certified as a Registered Nurse by the Minnesota Board of Nursing, as a Clinical Specialist in Adult Psychiatric and Mental Health Nursing by the American Nurses Credentialing Center (ANCC), and is licensed by the State of Minnesota's Board of Psychology. She earned her Bachelor of Arts *magna cum laude* from a respected Minnesota university in 1981, and her Master of Science degree from that institution in 1983. Her *curriculum vitae* demonstrates a high level of professional education and experience extended over several decades.

On October 2, 2006, Petitioner submitted an application for a Medicare billing number as a clinical nurse specialist. Assignment of a Medicare billing number would allow Petitioner to bill Medicare directly for, and receive direct payment for, services eligible for payment by the Medicare program. The application was sent to the regional Medicare Part B contractor, WPS.

WPS asked for more information in clarification of Petitioner's application, and part of WPS's query focused on the details of Petitioner's course of study toward her Master of Science degree. When it had received and reviewed the additional information, WPS notified Petitioner on December 12, 2006, that her application was denied, and explained that the controlling regulation "requires that clinical nurse specialists have a Master's degree in a defined clinical area of nursing. Because your Master's degree is in counseling, you do not meet this requirement."

Petitioner timely sought reconsideration of WPS's decision, but on February 7, 2007, the WPS Medicare Part B Hearing Officer affirmed the denial of her application. The rationale of the Hearing Officer's decision was substantially identical to that relied on by WPS: "The academic record [of Petitioner's Master of Science program] further indicates your course studies were in counseling. A Masters degree in counseling is not a Masters degree in nursing. In the absence of a Masters Degree in an area of nursing, you have not met the qualifications as Clinical Nurse Specialist as identified in 42 CFR 410.76."

Petitioner perfected this appeal by her February 14, 2007 *pro se* Request for Hearing. I convened a prehearing conference with the parties by telephone on Wednesday, March 28, 2007, pursuant to 42 C.F.R. § 498.47. A summary of that conference appears in my Order of March 30, 2007. It should be noted that although Petitioner filed her Request for Hearing *pro se*, she was represented by counsel during the conference and has been represented by that counsel at all subsequent stages of this litigation.

The evidentiary record on which I decide this case consists of 22 exhibits. The parties were able to agree on the submission of Joint Exhibits 1-10 (Jt. Exs. 1-10), and they are admitted as designated. CMS proffered 12 additional exhibits, CMS Exhibits 1-12 (CMS Exs. 1-12), to which Petitioner has not objected, and which are admitted as designated. Petitioner has proffered no additional exhibits of her own.

## II. Issue

The issue before me in this case is whether Petitioner satisfied the requirements necessary to obtain a Medicare billing number as a clinical nurse specialist, as set out at 42 C.F.R. § 410.76(b).

## III. Controlling Statutes and Regulations

Section 1866(j)(1) of the Social Security Act (Act), 42 U.S.C. § 1395cc(j)(1), authorizes the Secretary of Health and Human Services (Secretary) to establish a process for the enrollment in the Medicare Part B program of providers of services and suppliers. Section 1866(j)(2) of the Act, 42 U.S.C. § 1395cc(j)(2), gives providers and suppliers appeal rights for certain determinations involving enrollment, using the procedures that apply under section 1866(h)(1)(A) of the Act, 42 U.S.C. § 1395cc(h)(1)(A). These procedures are set out at 42 C.F.R. Part 498, *et seq.*, and provide for hearings by Administrative Law Judges (ALJs) and review of ALJ decisions by the Departmental Appeals Board (Board).

In provider appeals under 42 C.F.R. Part 498, the Board has determined that CMS must make a *prima facie* case that an entity has failed to comply substantially with federal requirements. *See MediSource Corporation*, DAB No. 2011 (2006). “*Prima facie*” means that the evidence is “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.” *Rosalyn L. Olian*, DAB CR1472, at 2 (2006); *see also Hillman Rehabilitation Center*, DAB No. 1611, at 8 (1997), *aff’d*, *Hillman Rehabilitation Ctr. v. U.S. Dep’t. of Health and Human Services*, No. 98-3789 (GEB) (D.N.J. May 13, 1999). To prevail, the entity must overcome CMS’s showing by a preponderance of the evidence. *Batavia Nursing and Convalescent Center*, DAB No. 1904 (2004), *aff’d*, *Batavia Nursing and Convalescent Center v. Thompson*, 129 Fed. Appx.187 (6th Cir. 2005); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Center*, DAB No. 1665 (1998).

Section 1861(s) of the Act, 42 U.S.C. § 1395x(s), defines a broad range of medical and other health services that are eligible for Medicare reimbursement, including services provided by a non-physician practitioner or an allied health professional. Under section 1842(b)(18)(C) of the Act, 42 U.S.C. § 1395u(b)(18)(C), eligible “practitioners” include the following: physician assistants, nurse practitioners, clinical nurse specialists, certified nurse-midwives, certified registered nurse anesthetists, clinical social workers, and clinical psychologists. The Act further defines “clinical nurse specialist” as an individual who –

(i) is a registered nurse and is licensed to practice nursing in the State in which the clinical nurse specialist services are performed; and

(ii) holds a master's degree in a defined clinical area of nursing from an accredited educational institution.

Act, section 1861(aa)(5)(B), 42 U.S.C. § 1395x(aa)(5)(B).

Regulations define the credentialing requirements and criteria for providers and provider eligible services at 42 C.F.R. §§ 410.69 - 410.78. The regulation at 42 C.F.R. § 410.76(b) sets out the qualifications required to be enrolled in the Medicare program as a clinical nurse specialist. According to that regulatory definition, in order to be granted a Medicare billing number as a clinical nurse specialist and thereby receive direct payment for Medicare Part B services, an applicant must:

(1) Be a registered nurse who is currently licensed to practice in the State where he or she practices and be authorized to perform the services of a clinical nurse specialist in accordance with State law; and

(2) Have a master's degree in a defined clinical area of nursing from an accredited educational institution; and

(3) Be certified as a clinical nurse specialist by a national certifying body that has established standards for clinical nurse specialists and that is approved by the Secretary.

42 C.F.R. § 410.76(b).

#### **IV. Findings and Conclusions**

I find and conclude as follows:

1. Petitioner Jerilyn Mitchell applied for a Medicare billing number as a clinical nurse specialist under the Medicare Part B program on October 2, 2006. Jt. Exs. 5, 6.

2. Eligibility for a Medicare billing number as a clinical nurse specialist under the Medicare Part B program requires, *inter alia*, that the applicant must hold a master's degree in a defined clinical area of nursing from an accredited educational institution. Act, section 1861(aa)(5)(B)(ii), 42 U.S.C. § 1395x(aa)(5)(B)(ii); 42 C.F.R. § 410.76(b)(2).

3. Petitioner earned and was awarded a Master of Science degree in counseling from an accredited educational institution in 1983. Jt. Ex. 3; Jt. Ex. 6, at 50-52.
4. Petitioner's Master of Science degree in counseling does not meet the statutory and regulatory requirement set out in Finding 2 above, because it was not earned and awarded in a defined clinical area of nursing.
5. Petitioner is not entitled, on the basis of her October 2, 2006 application, to a Medicare billing number as a clinical nurse specialist.

## **V. Discussion**

CMS has moved for summary judgment in its favor by its Motion for Summary Affirmance. While FED. R. CIV. P. 56 is not directly applicable to proceedings under 42 C.F.R. Part 498, it does provide guidance for the standard of review for motions seeking summary disposition. Summary judgment is generally appropriate when the record reveals that no genuine dispute exists as to any material fact and the undisputed facts clearly demonstrate that one party is entitled to judgment as a matter of law. *White Lake Family Medicine, P.C.*, DAB No. 1951 (2004). Here, as set forth below, the parties do not disagree concerning the material facts of the case. Their disagreement lies in the application of the law to the facts. A dispute between the parties over the correct legal conclusion to be drawn from undisputed facts is not an impediment to the entry of summary judgment, and in truth may be understood as the precise procedural context in which summary disposition is most appropriate.

The parties agree that Petitioner is a Registered Nurse, and that she is currently so licensed in Minnesota. They agree that she is authorized by Minnesota law to perform services in that state as a clinical nurse specialist, that she has been certified as a clinical nurse specialist by a national certifying body (ANCC) since 1993, and that she has earned and has been awarded a Master of Science degree from an accredited educational institution. They agree that her Master of Science degree was awarded in the specific field of counseling, with emphasis on rehabilitation counseling. What they do not agree about is whether Petitioner's Master of Science in counseling is a "master's degree in a defined clinical area of nursing" within the terms of the Act, section 1861(aa)(5)(B)(ii), and the regulation, 42 C.F.R. § 410.76(b)(2). In explaining its position, each party has placed its own gloss on that critical phrase, with Petitioner bluntly denying that the phrase requires that the master's degree have been *awarded in the field of nursing at all*, and CMS maintaining that the phrase means in effect a master's degree *in nursing* with emphasis on a *defined clinical area of nursing practice*.

Those two glosses rely on somewhat selective readings of the critical phrase to compel different results. Petitioner's gloss is summarized this way:

The regulation permits a master's in "defined clinical areas" of nursing, rather than limiting enrollment only to those applicants holding master's degrees in nursing. Courts are expected to interpret each word in a statute or regulation as having meaning. The phrase "master's degree in a defined clinical area of nursing" must mean something other than a "master's degree in nursing," or the words "defined clinical area" would not appear in the rule.

P. Answer Brief, at 4.

CMS, on the other hand, staunchly argues that the phrase is currently understood by ANCC, among others, as requiring that the master's degree be exactly that: "a master's degree in nursing in a specialty area of practice." CMS Reply Br., at 2; *see* CMS Ex. 2, at 1, 3, 5, 6. The CMS gloss is heavily indebted to ANCC's current interpretation of its credentialing requirements, but it is buttressed by the views of other professional organizations of nurses. CMS Ex. 4, at 4; CMS Ex. 5, at 2; CMS Ex. 6, at 2; CMS Ex. 9, at 4. The American Association of Colleges of Nursing explicitly interprets the critical phrase as equivalent to "a graduate program in nursing." CMS Ex. 8, at 2.

Petitioner attempts to deflect the importance of ANCC's current view by reminding CMS that she holds a current ANCC certification as a clinical nurse specialist. That she holds such certification cannot be disputed, but neither can the plain fact that when she earned her clinical nurse specialist certification in 1993, ANCC's certification standards simply did not require that an applicant's master's degree be in nursing. Under the ANCC standards then in effect, other combinations of formal education and clinical experience were sufficient to support certification as a clinical nurse specialist. *Jt. Ex. 3*, at 3. Moreover, the Minnesota statutory standard for clinical nurse specialist practice does not require a master's degree of any kind, so long as the applicant is "certified by a national nurse certification organization . . . ." MINN. STAT. § 148.171, subd. 3; *see* MINN. STAT. § 148.121. In Petitioner's case the national nurse certification organization was ANCC applying its 1993 standards.

In company with the Board, the ALJs of this forum have adhered to the rule that the plain language of a statute or regulation is always the best evidence of the meaning of that statute or regulation. *Florence Peters, D.P.M.*, DAB No. 1706 (1999); *Tennessee Department of Human Services*, DAB No. 1054 (1989); *Muhamad Salah Zoobi*, DAB CR1324 (2005); *Joseph S. Scheidler, D.O.*, DAB CR1143 (2004). The ALJs of this

forum have read and applied the relevant statutes and regulations narrowly in appeals such as this one, and have required strict compliance with the literal terms of those statutes' and regulations' credentialing standards. *Revathi Bingi, Ed.D.*, DAB CR1573 (2007); *Roger Aveyard*, DAB CR1558 (2007); *Susan Stevens*, DAB CR1511 (2006); *Rosalyn L. Olian*, DAB CR1472 (2006); *Dorothy Rose Hrynyk*, DAB CR1444 (2006). The suggestion that credentialing requirements can be satisfied by the demonstration of “functionally equivalent” qualifications has been rejected. *Revathi Bingi, Ed.D.*, DAB CR1573. It is therefore appropriate now to ask whether the statute and regulation are clear in what they demand, and if they are, to apply their demand rigorously.

The statute and regulation are both clear in what they demand, particularly when read in the context of the uniform views of the professional nursing organizations. The statute and the regulation demand a master's degree in nursing with emphasis on a defined clinical area of nursing practice. CMS's position in this litigation is essentially correct, and Petitioner's position — that the regulation does not require that the master's degree even have been awarded in the field of nursing at all — is manifestly incorrect. Although able to present an impressive array of professional and educational credentials, and although authorized by Minnesota law to practice her profession in the very manner she seeks to do under the Medicare program, Petitioner does not meet the Medicare Part B standard for provider status as a clinical nurse specialist pursuant to section 1861(aa)(5)(B)(ii) of the Act, 42 U.S.C. § 1395x(aa)(5)(B)(ii), and 42 C.F.R. § 410.76(b)(2).

One other point requires brief mention here. Petitioner has argued that under regulations applicable to the Public Health Service (PHS), she would be considered a clinical nurse specialist under the PHS definition of “psychiatric nurse” at 42 C.F.R. Part 5, App. C (Part I) (B)(3)(b)(v). The PHS regulations apply to functions quite distinct from provider status in the Medicare Part B program, and are derived from different statutory schemes. The PHS regulations are irrelevant to this discussion.

**VI. Conclusion**

For the reasons set out above, I grant CMS's Motion for Summary Affirmance. Having determined as a matter of law that Petitioner Jerilyn Mitchell is not entitled to the relief she seeks, I conclude that the determination of the Medicare Part B Hearing Officer to uphold the Medicare Part B contractor's denial of Petitioner's application for a Medicare billing number as a clinical nurse specialist should be, and it is, AFFIRMED.

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/s/  
Richard J. Smith  
Administrative Law Judge