

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Paul L. Daniels, Psy.D.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-619

Decision No. CR2640

Date: October 5, 2012

DECISION

Wisconsin Physicians Service Insurance Corporation (WPS), an administrative contractor acting on behalf of the Centers for Medicare and Medicaid Services (CMS), denied Petitioner's application for enrollment in the Medicare program because he did not meet the regulatory qualifications for clinical psychologists under 42 C.F.R. § 410.71(d). Petitioner appealed. For the reasons stated below, I reverse CMS's determination to deny Petitioner's enrollment application.

I. Case Background and Procedural History

Petitioner, Paul L. Daniels, Psy.D., originally enrolled in the Medicare program in 1997. CMS Exhibit (Ex.) 2, at 4. At that time, Petitioner's highest degree was a master's degree and Petitioner was a Licensed Masters Level Psychologist (LMLP) in Kansas. CMS Ex. 2, at 6. Petitioner subsequently completed a doctoral degree in psychology in 1998. CMS Ex. 2, at 5. In 1999, Petitioner became a Temporary Licensed Psychologist; however, that license expired in 2003. CMS Ex. 7. In 2000, Petitioner became a Licensed Clinical Psychotherapist (LCP) in Kansas. CMS Ex. 2, at 7.

WPS deactivated Petitioner's Medicare billing privileges effective November 26, 2011. P. Ex. 2. Petitioner then reapplied for Medicare enrollment and billing privileges. CMS Ex. 1. In a December 15, 2011 letter, WPS denied Petitioner's application for enrollment because Petitioner did not qualify as a clinical psychologist under 42 C.F.R. § 410.71. CMS Ex. 1, at 1.

By letter dated December 31, 2011, Petitioner requested reconsideration. CMS Ex. 2. WPS issued an unfavorable reconsideration determination on March 26, 2012, again concluding that Petitioner did not satisfy the regulatory requirements to enroll as a clinical psychologist under 42 C.F.R. § 410.71(d). CMS Ex. 3.

Petitioner timely filed a request for a hearing (RH) with the Departmental Appeals Board, Civil Remedies Division. Following the issuance of my May 2, 2012 Acknowledgment and Pre-hearing Order, CMS filed a motion for summary judgment and supporting memorandum (CMS Br.), a list of proposed exhibits, seven proposed exhibits (CMS Exs. 1-7), and a list of proposed witnesses. Petitioner filed a motion for a decision on the written record, a memorandum in support of Petitioner's motion (P. Br.), a list of proposed exhibits, ten proposed exhibits (P. Exs. 1-10), and a list of proposed witnesses. CMS construed Petitioner's filing as a motion for summary disposition and filed a reply brief (CMS Reply). Petitioner filed an objection to the CMS reply brief and requested an opportunity to submit a response. I granted Petitioner's request. Petitioner submitted a reply brief (P. Reply) and one additional exhibit (P. Ex. 11). Because neither party has objected to any of the proposed exhibits, I admit CMS Exs. 1-7 and P. Exs. 1-11 into the record.

In their respective witness lists, the parties indicated that they did not have any witnesses to propose. CMS stated on its witness list that "it does not believe that an in-person hearing would serve any purpose in this case." Further, Petitioner stated: "I waive my right to an oral hearing and move for Case Decision on the Written Record." P. Br. at 2. Therefore, the record is closed and I will not hold an in-person hearing. 42 C.F.R. § 498.66(b). I have considered the entire written record when rendering this decision.

II. Discussion

In order to participate in the Medicare program as a supplier,¹ individuals and entities must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. A supplier who seeks to provide "qualified psychologist services" under the Medicare program must be a "clinical psychologist," as that term is defined by the Department of Health and Human Services. 42 U.S.C. § 1395x(ii); *see also* 42 U.S.C.

¹ A "supplier" is "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services." 42 U.S.C. § 1395x(d).

§ 1395u(b)(18)(C)(v). The regulations define a “clinical psychologist” as an individual who:

- (1) Holds a doctoral degree in psychology; and
- (2) Is licensed or certified, on the basis of the doctoral degree in psychology, by the State in which he or she practices, at the independent practice level of psychology to furnish diagnostic, assessment, preventative, and therapeutic services directly to individuals.

42 C.F.R. § 410.71(d).

A. Issue

The issue in this case is whether Petitioner satisfied the necessary requirements to enroll in the Medicare program as a clinical psychologist under 42 C.F.R. § 410.71(d).

B. Findings of Fact, Conclusions of Law, and Analysis²

1. Petitioner holds a Doctor of Psychology Degree.

Petitioner has provided proof that he holds a Doctor of Psychology degree awarded in 1998. CMS Ex. 2, at 5. CMS does not dispute this. CMS Reply at 2. Therefore, I find that Petitioner has a doctoral degree in psychology that satisfies the requirement of section 410.71(d)(1).

2. Petitioner is licensed to independently practice psychology and furnish diagnostic, assessment, preventative, and therapeutic services directly to individuals.

Section 410.71(d)(2) requires a clinical psychologist to be licensed “at the independent practice level of psychology to furnish diagnostic, assessment, preventative, and therapeutic services directly to individuals.” Petitioner argues that both of his licenses, the LMLP and the LCP, satisfy this requirement in the regulations. P. Reply at 1-2. To support this argument, Petitioner cites Kansas statutes and regulations, and a state attorney general opinion. P. Exs. 6-9. CMS argues that the LMLP license is statutorily limited to “employment settings” and holders of an LMLP must practice under the direction of another licensed healthcare practitioner. CMS Reply at 2-3. CMS asserts that the LCP license does not permit the independent practice of psychology because an

² My findings of fact and conclusions of law are set forth in italics and bold font.

LCP is not permitted, under statute, to use the title “licensed psychologist or psychologist.” CMS Reply at 3.

I agree with CMS that the LMLP license does not authorize an individual to practice “at the independent practice level of psychology” as required by section 410.71(d)(2). An LMLP:

shall have the right to practice psychology only insofar as such practice is part of the duties of such person’s paid position and is performed solely on behalf of the employer, *so long as such practice is under the direction of* a licensed clinical psychotherapist, a licensed psychologist, a person licensed to practice medicine and surgery or a person licensed to provide mental health services as an independent practitioner and whose licensure allows for the diagnosis and treatment of mental disorders.

Kan. Stat. Ann. § 74-5362(a) (emphasis added).

Despite the clear language of the statute, Petitioner disputes that the phrase “under the direction of” means that an LMLP does not engage in independent practice. However, the regulation that Petitioner cites to support his argument further confirms that an LMLP does not practice independently because “the directing individual provides . . . [p]rofessional monitoring and oversight” of the LMLP. Kan. Admin. Regs. § 102-4-1a(z). Significantly, a court has characterized LMLPs as being “supervised.” *Matter of Anderson*, No. 95,441, 2007 WL 1175848, at *4 (Kan. Ct. App. Apr. 20, 2007).

When promulgating section 410.71(d), CMS stated emphatically that a clinical psychologist must be licensed to practice independently. 63 Fed. Reg. 20,110, 20,117 (Apr. 23, 1998) (“Therefore, in this final rule we amend this requirement to specify that an individual who seeks qualification as a [clinical psychologist] under Medicare must be licensed or certified at the independent practice level of psychology by the State in which he or she practices.”). Petitioner’s LMLP license in Kansas is insufficient to meet this requirement.

However, I agree with Petitioner that his LCP license authorizes him to engage in the independent practice of psychology, including the ability to furnish diagnostic, assessment, preventative, and therapeutic services directly to individuals as required by section 410.71(d)(2). Kansas law expressly states that “[a] licensed clinical psychotherapist may engage in the *independent practice* of masters [sic] level psychology and is authorized to diagnose and treat mental disorders of the American [P]sychiatric [A]ssociation designated by the Board rules and regulations.” Kan. Stat. Ann. § 74-5363(c)(3) (emphasis added); Kan. Stat. Ann. § 74.5361(d); Kansas Att’y Gen. Op. No. 2000-36 (2000) (P. Ex. 8, at 1). Those rules and regulations specify that LCP practice means:

the *independent practice* of master's level psychology and the application of psychology theory and methods to the treatment and prevention of psychosocial dysfunction, disability, or impairment, including behavioral, emotional, and mental disorders. Clinical psychotherapy shall include the following:

- (1) Assessment;
- (2) diagnosis of mental disorders;
- (3) planning or treatment, which may include psychotherapy and counseling;
- (4) treatment intervention directed at interpersonal interactions, intra-psychic dynamics, and life management issues;
- (5) consultation; and
- (6) evaluation, referral, and collaboration.

Kan. Admin. Regs. § 102-4-1-a(d) (emphasis added).

Further, an LCP's authority to practice includes:

the application by persons trained in psychology of established principles The application of these principles may include the following activities and services:

- (1) Counseling and the use of psychological remedial measures with persons having adjustment or emotional problems in the areas of work, family, school, and personal relationships, whether those services are provided to individuals or in groups;
- (2) the measuring of testing of personality, intelligence, aptitudes, attitudes, and skills;
- (3) the teaching of the subject matter; and
- (4) the conducting of research on problems relating to human behavior

Kan. Admin. Regs. § 102-4-1-a(q).

Finally, as previously quoted above, an LMLP can practice under the direction of an LCP, thus evidencing that an LCP is not only qualified to practice independently, but may supervise others in their practice of psychology. Kan. Stat. Ann. § 74-5362(a).

CMS argues that an LCP may not use the title "licensed psychologist" or "psychologist" and that only a "licensed psychologist" may engage in the independent practice of psychology in Kansas. CMS Reply at 3. However, CMS's argument does not take into account that the statutory definition of "Practice of psychology" and the statutory definition of "Licensed clinical psychotherapist" (in conjunction with other LCP provisions) provide nearly identical authority to practice. *Compare* Kan. Stat. Ann. § 74-5361(d) and Kan. Stat. Ann. § 74-5363(c)(3) with Kan. Stat. Ann. § 74-5302(a).

Significantly, the state regulations implementing these statutes define the “Practice of psychology” and the “practice of master’s level psychology or clinical psychotherapy” together and in exactly the same way. Kan. Admin. Regs. § 102-4-1-a(q). Further, the Kansas Court of Appeals has held that even “a person licensed as a master’s level psychologist can ‘practice psychology.’” *Anderson*, 2007 WL 1175848, at *4.

I am not persuaded that CMS’s argument that an LCP cannot use the titles “licensed psychologist” or “psychologist” is relevant. As Petitioner argues, section 410.71(d) does not require an individual to have a certain title to be considered a clinical psychologist for Medicare enrollment purposes. In its final rule promulgating section 410.71(d), CMS made it clear that it was most concerned with an individual’s authority under his or her license to practice psychology rather than with labels:

the key element is the scope of practice authorized by State licensure or certification. Therefore, we are clarifying in this final rule that the individual must be licensed to furnish diagnostic, assessment, preventive, and therapeutic services directly to individuals.

63 Fed. Reg. at 20,117. Therefore, the specific scope of practice as provided in state law is controlling as to who is qualified to be a clinical psychologist under section 410.71(d)(2). There is no doubt, regardless of title, that an LCP can independently provide diagnostic, assessment, preventive, and therapeutic services directly to individuals.

3. *Petitioner’s LCP license was issued by Kansas, the state in which Petitioner practices.*

The State of Kansas issued Petitioner’s LCP license. CMS Ex. 2, at 7. Petitioner’s business address is in Kansas and Petitioner asserts that he practices in Kansas. RH at 1-2; CMS Ex. 2, at 1-2. CMS has not disputed this assertion. Therefore, I find that Petitioner meets the requirement in section 410.71(d) that he is licensed to practice psychology in the state in which he practices.

4. *Petitioner’s LCP license was issued on the basis of his doctor of psychology degree.*

The reconsideration determination states that Medicare enrollment is only granted to an individual who “hold[s] a doctoral degree in psychology and is licensed or certified on the basis of the doctoral degree in psychology, by the state in which he or she practices” CMS Ex. 3. CMS contends that Petitioner “does not possess the requisite doctoral level license.” CMS Br. at 4. CMS argues that beginning in 1998, “CMS required that all clinical psychologists enrolled in the Medicare program be degreed and licensed at the doctorate level.” CMS Br. at 3. CMS cites to *Kirtis Thomas*, DAB CR1452 (2006) and

contends that this regulatory “change was made based on the regulators views that ‘it is prudent for these practitioners to have a level of education that is close to that which physicians receive if they are going to perform in this capacity . . . we want to ensure that only those practitioners with the highest level of education, knowledge, and experience furnish services to Medicare beneficiaries.’” CMS Br. at 4; 63 Fed. Reg. at 20,112.

CMS’s position, that Petitioner must have a “doctoral level license,” is an interpretation of the clause in section 410.71(d)(2) that a clinical psychologist be “licensed or certified, on the basis of the doctoral degree in psychology” CMS’s reading of this clause means that the only licenses that will qualify under section 410.71(d)(2) are licenses that only holders of a doctoral degree in psychology can qualify to receive.

Petitioner contends that he possesses a doctoral degree in psychology and is licensed as an LCP on the basis of that doctoral degree. P. Br. at 3. Specifically, Petitioner has consistently asserted that he obtained his doctoral degree in 1998 and used this degree as the basis for obtaining his LCP license. P. Reply at 3; RH at 2; CMS Ex. 2, at 2. As support, Petitioner points out that his LCP license acknowledges his doctoral degree. CMS Ex. 2, at 7. In contrast to CMS’s argument, Petitioner’s argument is one based on fact and a plain reading of the regulation.

Section 410.71(d), as originally proposed,³ did not include the requirement that a clinical psychologist be licensed or certified “on the basis of the doctoral degree in psychology.” 58 Fed. Reg. 68,829, 68,832, 68,839 (Dec. 29, 1993). In the final rule, CMS did not state why it added this clause, nor did CMS indicate that the clause meant that a clinical psychologist must have a “doctoral level license.” See 63 Fed. Reg. at 20,111-20,113, 20,115-20,119. Further, none of the Medicare manuals indicate that the clause has the narrow meaning that CMS now urges I adopt. See Medicare Program Integrity Manual, Chapter 10, § 12.4.6, Chapter 15, § 15.4.4.6; Medicare Benefit Policy Manual, Chapter 15, § 160; Medicare Claims Processing Manual, Chapter 12 § 170. The manuals merely republish the regulatory language in section 410.71(d)(2).

CMS’s reliance on the quotation in the *Kirtis Thomas* decision, which is itself a quote from the final rule promulgating section 410.71(d), does not support CMS’s position. This quotation relates to the discussion about the proposed requirement that clinical psychologists have doctoral degrees and not master’s degrees. 63 Fed. Reg. at 20,115. Therefore, the quotation assists in the interpretation of the degree requirement in section 410.71(d)(1), but not the licensing requirement in 410.71(d)(2). The *Kirtis Thomas* decision demonstrates this because the quote supported denial of reactivation for a psychologist who had a master’s degree. DAB CR1452 (2006). In the present matter, Petitioner has a Doctor of Psychology degree.

³ The current section 410.71(d) was originally proposed as section 410.71(e)(1); however, it was designated as section 410.71(d) in the final rule. 63 Fed. Reg. at 20,119.

Perhaps CMS is concerned that licensed psychologists in Kansas are likely to have more extensive practice rights than LCPs. However, even if LCPs have a more limited scope of authority it does not mean that an LCP license obtained on the basis of a doctoral degree is insufficient to meet the requirements in section 410.71(d)(2). To the extent that an LCP may not be permitted to perform all the same functions as a licensed psychologist, an LCP simply would limit his or her practice to the parameters of the LCP license. *See 42 C.F.R. § 410.71(a)* (limiting services furnished by a clinical psychologist for Medicare purposes to those that are within the scope of the clinical psychologist's license). In the final rule promulgating section 410.71(d), CMS understood that clinical psychologists would not all be able to provide the same services and decided to defer to state licensing authorities to determine and enforce the extent to which clinical psychologists could practice:

State licensure or certification laws are broadly based and, in combination with regulatory requirements for licensing or certifying psychologists, limit the scope of psychologists' activities to those for which they have received appropriate education, training, and experience. Additionally, the licensing law of every State either incorporates an ethics code or a State board's disciplinary code that makes it illegal for a psychologist to practice in an area for which he or she has not received training. Accordingly, to the extent that a psychologist, regardless of the type of doctorate possessed, were to provide services for which he or she had not received appropriate education and training, that psychologist would be practicing outside the scope or [sic] his or her competence and would be subject to both legal and ethical sanctions.

63 Fed. Reg. at 20,117.

CMS's position in this case fails to defer to Kansas' determination to create a license that permits the independent practice of psychology because it can be obtained by individuals who have either a master's or doctoral degree. Simply because individuals with master's degrees can become an LCP does not change the fact that the LCP license otherwise meets the requirements in section 410.71(d)(2). The degree requirement in section 410.71(d)(1) ensures that none of the master's degree holders of an LCP license will be able to enroll as a clinical psychologist. *See Douglas L. Clore, LMLP, ALJ Ruling No. 2012-1, at 2* (DAB CRD July 17, 2012) (applying section 410.71(d)(1) to conclude that a Kansas LCP with a master's degree "is not qualified to enroll in the Medicare program as a clinical psychologist.").

Because there is no legal authority that interprets the relevant clause in section 410.71(d)(2), I will apply the plain meaning of the regulatory text to the facts in this case. Petitioner received his doctoral degree in psychology in 1998. Petitioner states that he applied for the LCP license using his doctoral degree to obtain that license. Petitioner

obtained the LCP license in 2000. Petitioner's licensing certificate acknowledges Petitioner's doctoral degree. CMS does not dispute this. Therefore, I find that Petitioner obtained his LCP license on the basis of his Doctor of Psychology degree.

5. *Petitioner satisfies the requirements in 42 C.F.R. § 410.71(d) to enroll in the Medicare program as a clinical psychologist.*

Based on the foregoing, I find that Petitioner's Doctor of Psychology degree and Kansas issued LCP license satisfy the qualification requirements in section 410.71(d) to enroll in the Medicare program as a clinical psychologist.

III. Conclusion

CMS's determination denying Petitioner enrollment in the Medicare program as a clinical psychologist is hereby reversed.

/s/
Scott Anderson
Administrative Law Judge