

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

**ACTION AND ORDER OF MEDICARE APPEALS COUNCIL
ON REQUEST FOR REVIEW
Docket Number: M-2010-82**

In the case of

Claim for

Y.H.

(Appellant)

Entitlement to Supplementary
Medical Insurance Benefits
(Part B)

(Beneficiary)

(HIC Number)

SSA Northeastern Program
Service Center

(Contractor)

(ALJ Appeal Number)

The Medicare Appeals Council has carefully considered the request for review of the Administrative Law Judge's (ALJ's) decision dated October 13, 2009. The ALJ decision concerned appellant's claim for equitable relief from a premium surcharge for late enrollment in the Medicare Supplementary Medical Insurance (SMI or Part B) program. The ALJ found that the appellant was not entitled to relief from the surcharge. The appellant, through counsel, requested review of the ALJ decision in a request for review dated December 11, 2009.

The regulations provide that the Medicare Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the ALJ; (2) there is an error of law; (3) the ALJ's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may affect the general public interest. The regulations also provide that if new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Council finds that the ALJ's action, findings or conclusion is contrary to the weight of the evidence currently of record. See 20 C.F.R.

§ 405.900(b)(1).

The appellant first argues that the ALJ erred in finding that the record lacked sufficient evidence to corroborate the testimony of the beneficiary's husband that an employee of the administrative office in the U.S. Post Office in which he worked had told him that his wife did not need to enroll in Medicare Part B upon her 65th birthday, as she would be covered under his postal health insurance plan. RR at 3. The appellant asserts that this Federal employee did not advise her husband that there would be a premium surcharge if she enrolled in Part B at a later date. *Id.* at 3.

Social Security Administration (SSA) administrative authority states that there are three elements to a claim for equitable relief of a premium surcharge: (1) government error, misrepresentation, or inaction; (2) prejudice to the individual's SMI rights; and (3) evidence of the error. SSA Program Operations Manual Systems (POMS) HI 00805.170.B,¹ *citing* HI 00805.175. SSA policy states that allegations of Federal government error "must be substantiated." POMS HI 00805.175.B. The government employee or agent who provided the misinformation must report his or her recollection of the event. *Id.* If the specific employee or agent cannot be identified, then "a statement should be made by the supervisor or other person in authority as to the likelihood of such an error." *Id.* The record contains no such employee report or supervisor/superior statement. The Council sees no basis for ALJ error on this issue.

The appellant also argues that the ALJ erred in "conjecture that even if the postal employee did not mention the surcharge," the beneficiary and her husband would have received additional information concerning Medicare concerning enrollment and penalties for delayed enrollment. RR at 3. The beneficiary's claims file contains a Master Beneficiary Record (MBR) which indicates that she began receiving Social Security benefits upon reaching age 62. Exh. 3, at 21. An individual is "deemed" enrolled for SMI when the individual has previously filed an application for SSA benefits that establishes entitlement to Hospital Insurance. POMS HI 00805.040.A.1. SSA sends notices

¹ The SSA POMS can be located through the link to "Program Operations Manual System" found in the "Employee Operating Instructions" section of the SSA website at <http://www.ssa.gov/regulations>. While the Council and the ALJ are not bound by the POMS, these provisions would have been applicable to SSA personnel who handled eligibility and enrollment determinations.

of deemed SMI enrollment to "persons receiving any social security benefits, in the third month before the month of attainment of age 65." POMS HI 00805.055.A. An individual who receives notice of deemed enrollment may file a notice of refusal of SMI benefits. POMS HI 00805.055.B. The ALJ's statements concerning notice of SMI enrollment are consistent with applicable law. The Council sees no basis for reversal on this issue.

Finally, the appellant argues that the ALJ erred in finding that the equitable relief provisions of the Social Security Act (Act) were meant to apply to errors of SSA employees. RR at 3. The appellant argues that the employee of the administrative office of the U.S. Post Office in which the beneficiary's husband worked satisfies the statutory and regulatory requirements of a Federal employee who provides misinformation concerning Part B enrollment. *Id.* The POMS indicates that for a claim for equitable relief to succeed, the record evidence must show that "because of administrative fault, delay, or erroneous action or inaction by an employee or agent of **SSA/HCFA**² or another Federal Government instrumentality," the beneficiary's enrollment or premium rights would be impaired. POMS HI 00805.170.D. SSA qualifies this provision by a "note," which states that an "agent of the Federal Government is one who is authorized to act on behalf of the Federal Government in matters pertaining to Medicare, such as a social security employee or an employee of a Medicare carrier." *Id.*

The Council agrees with the ALJ that the purported statements of an employee in the administrative office of a U.S. Post Office are insufficient, standing alone, to warrant equitable relief under section 1837(h) of the Act and its implementing regulations and administrative authority. The POMS language, while arguably imprecise, focuses on error by employees of SSA, HCFA, or federal government instrumentalities responsible for administering the Medicare program. The POMS provides no basis for determining that any erroneous statement by any employee of the Federal government, including the U.S. Post Office, or any of its myriad instrumentalities provides a basis for equitable relief from a Part B premium surcharge. The POMS further speaks of specific cases and actions taken "where the Government errors that occurred were made by another agency of the Federal Government and not SSA/HCFA." HI 00805.190, *citing* HI 00805.720

² The Health Care Financing Administration (HCFA) formerly had responsibility for administering the Medicare program. HCFA is now known as the Centers for Medicare & Medicaid Services (CMS).

- HI 00805.731. The cases discussed involve error by federal insurance programs (CHAMPUS and CHAMPVA) and military hospitals. The Council sees no indication that either SSA or HCFA sought to expand the list to the extent asserted by the appellant. The relevant authority clearly focuses on SSA and federal entities responsible for the Medicare program. The Council sees no basis for reversal on this issue.

The Council further notes that the decision to include the beneficiary on her husband's group health insurance after his retirement does not warrant a special enrollment period (SEP) for the purposes of Medicare Part B. RR at Tab 3. The insurance coverage that the beneficiary had until her husband attained age 65 was not based on her spouse's "current employment." Section 1837(i)(1)(A) of the Act. Further, the POMS provides that the failure to enroll in Medicare Part B because an individual was covered under "non-employment-based health insurance, which was later terminated" does not constitute "good cause" for not enrolling in Part B earlier and does not justify equitable relief. POMS HI 00805.170.E.

The Council has considered the contentions in the request for review. The ALJ decision is supported by substantial evidence and is consistent with applicable law. The Council therefore concludes that there is no basis for granting the request for review. Accordingly, the request for review is denied. The ALJ's decision stands as the final decision of the Secretary.

MEDICARE APPEALS COUNCIL

/s/ Susan S. Yim
Administrative Appeals Judge

Date: February 22, 2010