

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

**ACTION OF MEDICARE APPEALS COUNCIL
ON REQUEST FOR REVIEW**

In the case of

Claim for

John Handron, Ph.D.

(Appellant)

Attorney Fees and Expenses
under the Equal Access to
Justice Act

Multiple

(Beneficiary)

Multiple (270)

(HIC Number)

Empire Medicare

(Contractor)

(ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued a decision dated February 19, 2008. The ALJ's decision denied the appellant's application for attorney fees under section 203 of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. By letter and an accompanying brief dated March 18, 2008, the appellant has asked the Medicare Appeals Council to review this action. The Council has jurisdiction to consider appellant's request as provided in 45 C.F.R. § 13.27. The Council incorporates the ALJ's decision by reference herein.

The Council has considered the appellant's request for review with enclosures. The Council has based its decision on the appellant's March 18, 2008 submission, as the issue before us is purely an issue of law, which the appellant has fully briefed. Accordingly, the Council has determined that review of the administrative record upon which the ALJ's substantive decision of September 17, 2007, was based, is not necessary to resolve the EAJA issue before us. As set forth below, the Council concludes that the exceptions present no basis for changing the ALJ's action. The Council therefore adopts the ALJ decision.

BACKGROUND

As set forth in the ALJ's decision, this matter arose from a post-payment review of services the appellant provided to 290 Medicare beneficiaries between November 1, 1994, and January 31, 2001. The carrier initially determined that the appellant was overpaid \$604,038. A carrier hearing officer reduced the overpayment to \$602,454.29. In a decision dated September 17, 2007, the ALJ found that the appellant had been overpaid \$5,434.28, that there was no basis to collect a larger overpayment by extrapolating the actual overpayment across the universe of services, and that the appellant was not without fault in connection with the overpayment under section 1870 of the Social Security (SS) Act. Exh. B.

The appellant subsequently filed a timely application for attorney fees and expenses under 5 U.S.C. § 504. Exh. A. The appellant seeks \$59,525 in attorney fees and \$5,848.93 in expenses. The appellant's motion, undated but described by the ALJ as filed on December 13, 2007, asserts that should be awarded attorney fees because he prevailed in an adversary adjudication. The ALJ found under the applicable regulations that the hearing proceeding he had conducted under 5 U.S.C. § 554 was not an adversarial adjudication in which the position of the United States was represented by counsel or otherwise. Exh. C.

DISCUSSION

On appeal, the appellant asserts generally that the ALJ erred in finding that the actions against the appellant did not amount to an adversary adjudication. The appellant raises three specific exceptions to the ALJ's decision. First, appellant asserts that the ALJ applied the regulations too narrowly. Second, the appellant asserts that the ALJ ignored controlling case law. Third, the appellant asserts that, if the ALJ applied the regulations correctly, then the regulations inappropriately subvert the intent of Congress and are due no deference. Request for Review at 6.

We answer this third question first, as the appellant challenges the entire regulatory scheme. Section 203(c)(1) of the EAJA provides that, after consultation with the Chairman of the Administrative Conference of the United States (ACUS), each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of

fees and other expenses. 5 U.S.C. § 504(c)(1). The Chairman of ACUS published model rules for agency implementation of the EAJA on June 25, 1981. 46 Fed. Reg. 32900. The model rules emphasized that Congress only intended that the EAJA cover formal adjudications under section 554 of the Administrative Procedure Act (APA) that are required by statute "to be determined on the record after opportunity for an agency hearing." *Id.* at 32901. The model rules further stated that each agency was in the best position to determine which proceedings were under section 554 of the APA, and thus covered by EAJA. *Id.* at 32901, 32902.

As pertinent herein, the Secretary published a notice of proposed rulemaking on August 13, 2002, to update a notice of proposed rulemaking previously published on June 13, 1987. 67 Fed. Reg. 52696. The final rule that established the Department's EAJA procedures was published on January 21, 2004. 69 Fed. Reg. 2843. Notably, no comments were received in response to the 2002 proposed rule, and only the ACUS commented on the June 1987 proposed rule. *Id.* at 2844, 67 Fed. Reg. at 52697.

The final rule stated that the Secretary "interpreted the EAJA to include certain HHS proceedings for which the statutory entitlement to a hearing rests on a statute tracking the language [of] (sic) Section 205(b) of the Social Security Act (42 U.S.C. 405(b)) or on a statute incorporating that provision by reference and for which the position of the United States is represented by counsel or otherwise." 69 Fed. Reg. at 2845. Section 13.3(b) of the final rule provides that "[i]f the agency's litigating party enters an appearance, Department proceedings listed in Appendix A to this part are covered by these rules." *Id.* The final rulemaking for the procedural rules applicable to hearings before ALJs in 42 C.F.R. part 405, subpart I, stated that the EAJA regulations in 45 C.F.R. part 13, applied to the Medicare claims appeal process. 70 Fed. Reg. 11420, 11430 (Mar. 8, 2005).

The Secretary has therefore published regulations in conformance with the EAJA, and has stated that those regulations are applicable to the Medicare claims appeals process. A regulation promulgated by the Secretary has legal force, and is binding on the ALJ and the Medicare Appeals Council. The Council accordingly will not consider the appellant's challenge to the facial validity of the regulations.

Accepting the regulations as valid, as we must, we turn then to the appellant's first exception. We find no error in the ALJ's analysis. Section 504 of the EAJA applies to adjudications under section 554 of the APA that are required by statute "to be determined on the record after opportunity for an agency hearing." 5 U.S.C. §§ 504(b)(1)(C). In addition, the position of the United States must be represented by counsel or otherwise in that adjudication. *Id.* A hearing before an ALJ is the only Medicare adjudication that is required by statute to be determined "on the record after an opportunity for an agency hearing." See §§ 1869(b)(1)(A) and 205(b) of the SSA Act. See also Melkonyan v. Sullivan, 501 U.S. 89, 94 (1991) ("Section 504 ... is the only part of the EAJA that allows fees and expenses for administrative proceedings conducted prior to the filing of a civil action."). Compare Sullivan v. Hudson, 490 U.S. 877, 892 (1989) (applying EAJA under § 2412 to administrative proceedings before a Social Security ALJ after court remand only because the civil action "remain[ed] pending and depend[ed] for its resolution upon the outcome of the administrative proceedings"). The Council concurs with the ALJ that the position of the United States was not represented at the hearing by counsel or otherwise. Thus, there was no adversary adjudication at the ALJ hearing level, despite what may or may not have transpired previously. In addition, as provided in 45 C.F.R. § 13.3(b), the regulations at 45 C.F.R. § Part 13, Appendix A, do not list the instant proceedings as an adversary adjudication subject to EAJA.

The appellant cites a single federal district court case, Chicago Center Hospital v. Heckler, 1986 U.S. District LEXIS 20797 (N.D. Ill. 1986) as the controlling law which the ALJ and Council must follow. Exh. D. We find this argument unpersuasive. First, that decision predates the issuance of the present regulations, legislative changes to EAJA, and subsequent Supreme Court jurisprudence. The decision does not reflect that the court considered or applied any regulations. In any case, the appellant has not provided any authority for the proposition that a single district court decision in another district and circuit provides controlling precedential effect in this case.

Second, although the court held that an administrative proceeding before HCFA's¹ Provider Reimbursement Review Board (PRRB) was adversarial, and that the government's position was represented "otherwise" than by counsel, the available decisions

¹ Now renamed the Centers for Medicare & Medicaid Services (CMS).

do not further describe the conduct of the administrative proceeding. The decision in the underlying matter was issued on September 9, 1995 (*Chicago Center Hospital v. Heckler*, 1985 WL 2492, N.D. Ill.). Neither decision describes the administrative proceeding before the PRRB. The PRRB's own decision, or any further action that may have been taken on administrative appeal, is not in the record or otherwise available. The court's holding, especially absent further description of the government's representation in that case, does not resolve whether the present case was adversarial as conducted.

Moreover, unlike the Medicare coverage and payment appeals at issue here, proceedings before the PRRB are always adversarial by design and regulation. See section 1878(a) of the Act, and regulations at 42 C.F.R. § 405.1843(a)(identifying parties to the Board hearing as the provider and the intermediary). Indeed, proceedings before the PRRB are included in the list of adversarial adjudications found in 45 C.F.R. § Part 13, Appendix A, while the instant proceedings are not. The court's holding in Chicago Center Hospital is inapposite.

In light of the conclusion that the EAJA does not apply to the matter, the Council concurs with the ALJ that there is no need to determine whether the appellant otherwise qualifies for an award of fees and expenses. Exh. C, ALJ Dec. at 4.

The Council adopts the ALJ's decision.

MEDICARE APPEALS COUNCIL

/s/ Clausen J. Krzywicki
Administrative Appeals Judge

/s/ M. Susan Wiley
Administrative Appeals Judge

Date: May 22, 2008