Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Hartford County Cardiology, PC,
(PTAN: D100202572),
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-3222

Decision No. CR4400

Date: November 4, 2015

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to assign Petitioner, Hartford County Cardiology, PC, an effective participation date in the Medicare program of February 23, 2015.[1]

I. Background

Petitioner filed its hearing request in order to challenge its effective date of participation in Medicare. It asserts that it should be assigned an effective participation date of November 10, 2014. CMS filed a pre-hearing exchange that included a brief and a proposed exhibit (CMS Ex. 1). The brief addressed the merits of the case and, alternatively, CMS moved for summary judgment. Petitioner filed a pre-hearing exchange that included a brief in opposition and three proposed exhibits (P. Ex. 1 – P. Ex. 3).

[1] The case caption lists only Hartford County Cardiology, PC as a Petitioner. Petitioners filed their hearing request on behalf of the corporate entity and Dr. Thomas Freund, who is evidently a principal in the corporate entity. However, neither CMS nor Petitioners have provided me with evidence or argument concerning the effective date of Dr. Freund's participation in Medicare. Given the parties' silence as to his effective participation date and the absence of any evidence whatsoever addressing that issue, I conclude that Petitioner abandoned the issue of the effective date of Dr. Freund's participation and I dismiss the hearing request to the extent that it demands a hearing on Dr. Freund's behalf.

Neither CMS nor Petitioner filed written direct testimony of any proposed witnesses. Thus, each side rested its case based on documentary evidence. I find it unnecessary to decide whether summary judgment is appropriate. I am deciding this case based on the parties' written exchanges inasmuch as a hearing would not develop the record additionally. I receive into the record CMS Ex. 1 and P. Ex. 1 – P. Ex. 3.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether CMS had authority to assign an effective Medicare participation date of February 23, 2015 to Petitioner.

B. Findings of Fact and Conclusions of Law

The effective date of participation for a participating Medicare physician or that physician's practice group is:

> the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date an enrolled physician or nonphysician practitioner first began providing services at a new practice location.

42 C.F.R. § 424.520(d). The effective date of participation is a critical date for every provider or supplier that is subject to this regulation because it determines the earliest date on which the Medicare program will reimburse that provider's or supplier's items or services. CMS allows participating providers and suppliers to claim reimbursement for covered items or services that were provided only up to 30 days prior to the effective participation date. Medicare will not reimburse items or services provided prior to that 30-day grace period even if they would otherwise qualify for reimbursement.

There is no dispute that Petitioner filed an application to participate in Medicare on November 10, 2014. Nor is there any dispute that the application failed to provide the Medicare contractor with all mandatory information that was a prerequisite to processing it. Petitioner admits that the November 10 application contained several statements that either were or subsequently became inaccurate. Petitioner acknowledges that, on January 5, 2015, its representative called the contractor to inquire about changing the name of the prospective provider, from Hartford County Cardiology, Inc., to Hartford County Cardiology, PC. Additionally, information in the November 10 application concerning Petitioner's

practice location, its telephone number, and its fax number, was incorrect. On January 22, 2015, the contractor sent Petitioner a letter in which it requested additional information from it – including a copy of an Internal Revenue Service filing from Petitioner, an updated certification form, and a completed CMS Form 588 EFT in the practice's lawful business name – as a prerequisite to processing Petitioner's application. CMS Ex. 1 at 35.

By letter dated February 12, 2015 but received on February 23, 2015, Petitioner voluntarily withdrew its November 10 application, citing errors and incomplete information in that application. Petitioner's hearing request at 3; CMS Ex. 1 at 36. The contractor confirmed that withdrawal by letter dated February 26, 2015. Petitioner filed a new application on February 23, 2015. The contractor eventually accepted that application, and the contractor assigned Petitioner an effective date of participation of February 23, 2015.

That effective participation date plainly conforms to regulatory requirements. The February 23 application is the application "that was subsequently approved" by the contractor. Thus, the *earliest* effective date that the contractor could assign to Petitioner was February 23, 2015. There is no basis in law or in the facts as I have described them that would allow for the establishment of an earlier effective participation date.

Petitioner argues that there are equitable grounds for assigning it an effective participation date of November 10, 2014. It contends that it never would have withdrawn the November 10 application but for misleading information that allegedly was provided to it by a contractor's representative. The crux of Petitioner's argument is that a contractor's representative told Petitioner that the errors and omissions in the November 10 application necessitated that Petitioner resubmit the application. Petitioner contends that, had it not been told that, it would simply have amended its November 10 application to provide the contractor with whatever information the contractor required. Then, according to Petitioner, the contractor would have approved Petitioner's November 10 application and Petitioner would have been entitled to an effective participation date based on that application rather than on the February 23, 2015 application. Petitioner characterizes the allegedly incorrect instructions given to it by the contractor as constituting "affirmative misconduct."

I find Petitioner's arguments to be unpersuasive both as a matter of law and as a matter of fact. To begin with, the equitable doctrine of estoppel generally does not apply to an act or omission by CMS or one of its representatives. *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51 (1984). Perhaps more pertinent, nothing in the regulations governing cases involving CMS gives me the authority to override regulatory requirements on equitable grounds. Indeed:

> (N)either the . . . [administrative law judge] nor the [Departmental Appeals] Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.

Pepper Hill Nursing & Rehab. Ctr., DAB No. 2395, at 10 (2011). Thus, Petitioner has not provided any legal basis for me to order CMS to grant it an earlier effective participation date than February 23, 2015, even assuming its fact assertions are true.

Moreover, the fact assertions made by Petitioner – when taken on their face – do not add up to the kind of equitable claim that might qualify for relief in some forum other than this one. Petitioner's assertions notwithstanding, it has not offered facts that – if true – establish "affirmative misconduct" by the contractor's representative. Assuming Petitioner's narrative to be correct, all that it has asserted is that a contractor's representative supplied Petitioner with information that is arguably misleading. Put simply, Petitioner is claiming that the contractor's representative advised it to withdraw its application when, in fact, it could simply have amended it and preserved the November 10 filing date for purposes of later establishing an effective participation date. I make no findings as to whether Petitioner would have been able to amend its application as it contends. But, what is obvious is that the contractor's representative did not engage in "affirmative misconduct." Petitioner has offered nothing to show that the contractor's representative deliberately provided false information to Petitioner. At most, what the representative might have told Petitioner arguably was incorrect. That does not add up to a case of affirmative misconduct, even if true.

Finally, Petitioner has adduced no proof whatsoever to support its contentions. Its contentions are naked assertions that are unsupported either by documents or testimony. I afforded Petitioner the right to provide written direct testimony and documents to support its arguments. But, it has not provided me with any evidence that shows that a contractor's representative said anything to Petitioner about what Petitioner must do respecting its November 10 application. The record is devoid of anything that evidences the purported statements of the contractor's representative. I make no findings of fact that accept Petitioner's assertions as true, given the total absence of supporting evidence.

/s/
Steven T. Kessel
Administrative Law Judge