

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Steven K. Hwang, MD,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-480

Decision No. CR2152

Date: June 11, 2010

**DECISION REMANDING CASE
TO CENTERS FOR MEDICARE AND MEDICAID SERVICES**

I remand this case to the Centers for Medicare and Medicaid Services (CMS) so that it may develop the record and make a determination based on the facts. I vacate the CMS's determination to grant an effective enrollment date of January 17, 2009 to Petitioner Steven K. Hwang, M.D.

I. Background

Petitioner is a physician practicing in the State of California. On February 9, 2010, he filed a hearing request in which he asserted that Palmetto GBA, a Medicare contractor, had improperly denied him the opportunity to submit claims for Medicare reimbursement covering items or services that he provided to beneficiaries during calendar year 2008. The case was assigned to me for a hearing and a decision.

I issued a pre-hearing order directing the parties to exchange briefs and proposed exhibits, including the written direct testimony of any proposed witnesses. CMS filed a motion for summary judgment. It provided no proposed exhibits. Petitioner failed to reply to the motion or to submit a pre-hearing exchange. I issued an order to show cause to Petitioner in which I warned him that I would dismiss his hearing request if he did not

file a pre-hearing exchange. On May 25, 2010, Petitioner filed a letter, which I accept as his pre-hearing exchange. He filed no proposed exhibits.

II. Issue, findings of fact, and conclusions of law

A. Issue

The issue in this case is whether Palmetto GBA and CMS properly determined Petitioner's effective enrollment date to be January 17, 2009.

B. Findings of fact and conclusions of law

It is impossible for me to decide whether CMS properly determined the effective date of Petitioner's enrollment in the Medicare program. CMS has provided me with no evidence supporting its determination. The brief that counsel for CMS filed in this case is so laconic as not to be a brief at all. Rather, it is simply a series of conclusions that are unsupported by anything.¹

I will not make findings of facts in the absence of evidence supporting them. Petitioner represents that he maintained a practice of medicine through calendar year 2008 and provided reimbursable services to Medicare beneficiaries but that he failed to file claims for reimbursement during that year because of alleged problems he had with his billing service. He has, however, not provided any evidence supporting that assertion. Petitioner contends that his provider enrollment was revoked or discontinued due to his failure to file claims during 2008. However, neither he nor CMS has provided any documentation of that allegation. Petitioner contends also that he was told by someone, presumably, CMS's contractor, that he had to reapply for enrollment and that he did so in early 2009. However, according to Petitioner, he was subsequently shocked to discover

¹ The brief contains a footnote that states:

All referenced documentation was submitted by petitioner in conjunction with his February 9, 2010 hearing request. CMS waives any objection to receipt of these documents into evidence.

CMS Brief at 1 n.1. I have no idea what counsel is talking about. Petitioner did not submit "documentation" with his hearing request. The only documentation that I have in this case is: CMS's brief; Petitioner's hearing request; his May 25, 2010 letter to me; and a copy of the reconsideration determination, which I obtained through a request that I made. In fact, this footnote is boilerplate language, which counsel has used in other briefs. Apparently, he used it here without actually ascertaining whether Petitioner had submitted "documentation."

that CMS would not award him an effective date of enrollment that was earlier than the date of the 2009 application. Thus, according to Petitioner, he lost the opportunity to claim reimbursement for services that he provided to beneficiaries in 2008.

It is unclear to me whether these assertions would support CMS's determination to grant Petitioner an effective enrollment date of January 17, 2009. CMS has not asserted that Petitioner's enrollment was revoked or discontinued. It has not provided me with any legal analysis as to the basis for the revocation or discontinuation if, indeed, that happened. Nor has CMS provided even prima facie proof as to the date of Petitioner's enrollment application.

I caution the parties that I am not suggesting in this decision that I would either sustain or overturn CMS's determination if this case comes back to me at a later date. All that I am saying is that it is impossible for me to decide this case at this time given CMS's failure to provide me with even prima facie evidence of what happened. It is unclear to me, furthermore, whether CMS actually knows the entire history of Petitioner's enrollment and his application status. Therefore, I am remanding this case so that CMS may develop the record and make an informed determination.

/s/

Steven T. Kessel
Administrative Law Judge