Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

South Nassau Oncology Practice, P.C.,
(PTAN: A100117587)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-3497

Decision No. CR4412

Date: November 6, 2015

DECISION

I enter summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) sustaining the determination of its contractor, National Government Services, to grant Petitioner, South Nassau Oncology Practice, P.C., an effective Medicare participation date of January 5, 2015.

I. Background

Petitioner is a physicians' practice and a Medicare supplier. It requested a hearing to challenge the effective date determination that I recite in the opening paragraph of this decision. CMS moved for summary judgment. Petitioner opposed the motion and filed a cross-motion for summary judgment. With its motion CMS filed exhibits that are identified as CMS Ex. 1 – CMS Ex. 22. Along with its response Petitioner filed exhibits that are identified as P. Ex. 1 – P. Ex. 12. Petitioner also attached 15 exhibits to its

hearing request, many of which duplicate the exhibits that Petitioner filed with its response to CMS's motion for summary judgment. I am receiving all of these exhibits into the record for purpose of deciding the parties' motions.[1]

Petitioner moved also that I issue a subpoena for certain documents in CMS's possession. I deny that motion. I am grounding my decision on undisputed material facts. Nothing sought by Petitioner by way of subpoena would even potentially change the outcome of this case. As I explain, the undisputed facts establish that neither the contractor nor CMS committed any error that I may order be rectified.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether CMS's contractor correctly determined the effective date of Petitioner's Medicare participation to be January 5, 2015.

B. Findings of Fact and Conclusions of Law

The effective date of participation of a Medicare supplier such as Petitioner is governed by a regulation at 42 C.F.R. § 424.520(d). The regulation states that the effective date of participation is the later of the following:

> 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 furnishing services at a new practice location.

The regulation does not allow for exceptions.

The undisputed material facts of this case are as follows. On September 26, 2014, Petitioner submitted an application (first application) to CMS's contractor to participate in Medicare. The contractor determined that the application was missing certain required information and Petitioner does not assert that the application was, in fact, complete. On

[1] CMS objected to my receiving one of Petitioner's exhibits into evidence on the ground that Petitioner did not present it at reconsideration and has not shown good cause for its failure to do so. I make no findings at this time that any of the parties' exhibits are admissible evidence. It is unnecessary for me to do so inasmuch as I grant CMS's motion for summary judgment based on undisputed material facts. Receiving the exhibits into the record is not the same as determining whether they would be admissible as evidence in the event I were to hold a hearing.

October 8, 2014, the contractor sent an e-mail to Petitioner with an attachment. CMS Ex. 6. The contractor addressed the e-mail to Mary Ann Vavas, an employee of Petitioner whose responsibilities include preparing and sending applications for Medicare participation. There is no dispute that the contractor sent the e-mail to Ms. Vavas' correct e-mail address.

The attachment to the e-mail is a letter that is also addressed to Ms. Vavas. The letter, containing the contractor's logo, identifies the deficiencies in the first application and advises Petitioner that, the contractor may reject Petitioner's first application if the identified deficiencies are not corrected within 30 days.

The contractor did not send a hard copy of its October 8 letter to Petitioner via regular mail, instead, relying on its e-mail as the sole vehicle for giving notice to Petitioner of the deficiencies in its first application.

Ms. Vavas asserts – and for purposes of this decision I accept her assertion as true – that she did not receive the contractor's October 8 letter when it was sent. P. Ex. 1 at 2. Rather, she received a series of blank e-mails from the contractor, none of which had any content. Ms. Vavas also asserts – and for purposes of this decision I also accept this assertion as true – that she called representatives of the contractor more than once about the blank e-mails and that the representatives told her that they were unable to provide her with any explanation of the blank e-mails.

However, it is also undisputed that Petitioner actually received the October 8 e-mail and attachment letter. Ms. Vavas may not have seen the e-mail in readable form but the e-mail and the attachment did arrive and were saved on Petitioner's computer system, both on Petitioner's server and the server used by Ms. Vavas' office. Ms. Vavas acknowledges that on June 15, 2015, Petitioner retrieved the October 8 e-mail and the attachment letter from its own computer archives. P. Ex. 1 at 2.

Petitioner did not supply the contractor with the requested information within 30 days. On December 15, 2014, the contractor sent an e-mail to Ms. Vavas with an attached letter, rejecting Petitioner's first application on the ground that Petitioner had not provided the information that the contractor requested on October 8, 2014. CMS Ex. 4; CMS Ex. 7 at 1.

On January 5, 2015, Petitioner filed a new enrollment application with the contractor (second application). The contractor found some deficiencies in this application and sent e-mails to Ms. Vavas – at the same e-mail address as was sent the October 8 e-mail – with attached letters requesting additional information. CMS Ex. 12 at 2, 13, 15. Ms. Vavas timely replied to these requests and supplied the asked-for additional information. On April 1, 2015, the contractor advised Petitioner that it had accepted the second

application with an effective participation date of January 5, 2015. It advised Petitioner that it could claim reimbursement for Medicare items or services that Petitioner provided, beginning December 7, 2014. CMS Ex. 3 at 1.[2]

These undisputed material facts establish that Petitioner's second application was the application that the contractor "subsequently approved," within the meaning of 42 C.F.R. § 424.520(d). The *earliest* effective participation date that the contractor could have assigned to Petitioner consistent with the regulation was January 5, 2015. That was the date that the contractor determined to assign. The contractor could not approve Petitioner's first application because that application was, and remained, incomplete.

Petitioner argues that it was deprived of the opportunity to participate in Medicare at an earlier date – September 26, 2014, the date of the first application – through no fault of its own. It contends that had Ms. Vavas received the October 8, 2014 letter from the contractor she would have timely provided the contractor with the requested information and the first application would have been processed to completion. It asks that I remand this case to CMS and its contractor in order to correct this asserted unfairness, with directions that the contractor redetermine the effective date of participation based on Petitioner's first application.

The essential problem that Petitioner faces with this argument is that neither the contractor nor CMS has committed any reviewable error. Indeed, from the undisputed material facts it is evident that the contractor did everything by the book. It identified undeniable deficiencies in Petitioner's first application, deficiencies that prevented the application from being processed. It notified Petitioner of the existence of those deficiencies and gave Petitioner the opportunity to correct them within 30 days. The method of notification used by the contractor – an e-mail with a letter sent as an attachment – is consistent with the instructions contained in CMS's Medicare Program Integrity Manual (MPIM). MPIM, Section 15.7.1.4.3B; CMS Ex. 22 at 3. The contractor sent the e-mail to Ms. Vavas' correct e-mail address and it arrived on Petitioner's computer system, where Petitioner's employees located it in June 2015. The contractor allowed Petitioner 30 days to correct the deficiencies in the first application. Only then did it reject the application. That is entirely consistent with Medicare policy and regulatory requirements.

Petitioner argues that, but for Ms. Vavas' failure to receive the contractor's October 8, 2014 e-mail it would have been eligible to receive reimbursement for over $500,000 in Medicare items or services. But, that misfortune was not caused by anything that the

[2] CMS allows suppliers and providers who participate in Medicare a grace period of 30 days prior to their effective participation dates within which they may claim reimbursement for Medicare items or services.

contractor did or failed to do. That inability to claim reimbursement came about as a consequence of a problem that Ms. Vavas had with her e-mails, a problem that is not attributable to any contractor error.

Moreover, Petitioner never had a right to expect that it would be reimbursed for those services. Medicare regulations are explicit. No provider or supplier is entitled to reimbursement for services that it provides if the provider or supplier is not certified to participate in Medicare. Providing items or services during a period when an application for participation is pending is a risk that a prospective provider or supplier assumes without any guarantee of eventual reimbursement for those items or services. Petitioner assumed a risk that its services would not be reimbursed when it began to provide them without being certified. It is unfortunate, of course, that Ms. Vavas' problems with her e-mails may have in the end prevented Petitioner from being able to claim reimbursement for those items or services, but that does not impose any obligation on CMS or the contractor aside from the obligations stated in the regulations.

It is also undeniable that Petitioner never would have faced the problems it encountered had it simply filed a complete application to begin with. The undisputed facts are that Petitioner's first application was deficient in several respects. Had it not been so, it would have been approved. Petitioner bears responsibility for the problems it created by filing an application that was not complete.

The arguments that Petitioner makes are essentially equitable in nature although Petitioner attempts to characterize them as legal arguments.[3] At bottom, it asserts that it is unfair that it is denied an effective participation date based on its first application and it asks me to do something to rectify that asserted unfairness. It makes a kind of equitable estoppel argument in which it contends that principles of fairness should deny the contractor and CMS the authority to certify Petitioner based on the second application and should compel them to use the first application as the basis for certification.

As a matter of law, the doctrine of equitable estoppel generally does not apply against the government. *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:

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[3] Petitioner asserts that the contractor committed a *legal* error by failing properly to notify Ms. Vavas of the defects in the first application. But, that assertion simply is not supported by any facts. As I have discussed, the undisputed facts show that the contractor sent notice consistent with regulatory requirements, a notice that Petitioner, if not Ms. Vavas, actually received in readable form. That reduces Petitioner to complaining that it wasn't treated fairly by the contractor, an equitable argument at its core.

> [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).

There may be an exception to these rules – in the case of willful wrongdoing by a government entity. But, there are no facts here that suggest that the contractor did anything wrong, much less willfully so.

There have been a few instances where administrative law judges remanded determinations to CMS for additional review by CMS or a contractor. But, in those instances, the remands were predicated on a failure by the contractor to apply applicable regulations or policy guidelines. In other words, the cases were remanded to address clear errors committed by contractors. In *Alexander Eugene Istomin*, DAB CR2346 (2011), for example, an administrative law judge remanded a case where the evidence proved that the contractor sent a notice letter to an incorrect address. But, that is clearly not what happened here. Here, the contractor sent its notice to the correct address – to Ms. Vavas' e-mail address – and for some unknown reason she did not receive it (although Petitioner did receive the e-mail on its computer system). Those undisputed facts establish no error that I have the authority to rectify.

Petitioner contends that the contractor "ineffectively communicated" with Ms. Vavas. It contends also that the contractor "repeatedly rebuffed" Ms. Vavas' good-faith requests for assistance. Petitioner's pre-hearing brief at 1. These characterizations are an attempt by Petitioner to characterize the contractor's actions in this case as comprising some wrongdoing that might merit relief. However, Petitioner has adduced no facts that support these assertions.

Petitioner repeatedly asserts that there was some error committed by the contractor, that it sent an e-mail to Petitioner on October 8, 2014, that was in some sense defective or unreadable. But, there is no basis to conclude that. As I have explained, the contractor did everything correctly, sending an e-mail in a manner that is consistent with Medicare policy to Ms. Vavas' correct e-mail address. Petitioner received that e-mail in readable form. That, for reasons unknown, Ms. Vavas did not receive it in a readable form on her desktop computer suggests no error or wrongdoing by the contractor. Indeed, the only facts that are of record show that any problems with receiving a readable e-mail lay with Ms. Vavas' computer inasmuch as the contractor's October 8 e-mail was subsequently found on Petitioner's archives and on the server in Ms. Vavas' office.

Moreover, the undisputed material facts do not suggest that the contractor or its employees "rebuffed" Ms. Vavas' attempts to obtain more information about the e-mails she was receiving. All that they show is that the contractor was unable to discern what Ms. Vavas was expressing concern about and that its employees told that to Ms. Vavas.

But, even if the contractor's employees had said something that was arguably misleading to Ms. Vavas, that would create no basis for me to remand this case. As I have explained, I have no authority to overturn a determination of an effective date based on general equitable principles. Petitioner certainly has adduced no facts suggesting conscious wrongdoing by anyone.

Thus, a remand would be pointless in this case inasmuch as there is no error that I can direct CMS or the contractor to correct. Remanding the case would leave it on the identical footing as it is now and there would be no legal basis for the contractor to assign an effective date to Petitioner based on its first application.

/s/
Steve T. Kessel
Administrative Law Judge