

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Thomas Macari, D.O.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-550

Decision No. CR3155

Date March 14, 2014

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to deny Petitioner early termination of his opt-out status.

I. Background

Petitioner is a physician located in Lynnfield, Massachusetts. It is undisputed that in July 2012 he spoke with a Medicare representative regarding enrollment in the Medicare program. The representative advised him that he could either enroll in the Medicare program or “sign up for the opt-out list.” Petitioner asserts he was not advised that he had the option of becoming a non-participating physician. CMS Exhibit (Ex.) 1 at 1 (Petitioner’s September 6, 2013 request for hearing).

On July 10, 2012, Petitioner signed and submitted an “opt-out affidavit” to NHIC, Corp. (a Medicare contractor). CMS Ex. 2. In this document, Petitioner affirmed:

I promise that I will not submit any claim to Medicare for any item or service provided to any Medicare beneficiary during the 2-year period beginning on the

following effective date July 10, 2012 nor will I permit any entity acting on my behalf to submit a claim to Medicare for services furnished to a Medicare beneficiary, except as specified in 42 C.F.R. [§] 405.440.

CMS Ex. 2.

After signing the affidavit, Petitioner began independent contract work in order to supplement the income of his newly established medical practice. In April 2013 his employer informed him that he could not perform this independent contract work because his name was on Medicare's opt-out list. CMS Ex. 1 at 1. On April 23, 2013, Petitioner wrote NHIC requesting early termination of his opt-out status. NHIC transmitted his request to CMS. *See* CMS Ex. 3 at 1.

On August 26, 2013, CMS issued an initial determination denying Petitioner's April 23, 2013 request for early termination of his opt-out status. CMS Ex. 3. On September 6, 2013, Petitioner requested reconsideration. CMS Ex. 1 at 1-2. On December 6, 2013, National Government Services (NGS), on behalf of CMS, denied Petitioner's reconsideration request. NGS stated that "[b]ased on section 1802(b) of the Social Security Act (the Act), and 42 CFR § 405.445(b) you are not eligible for early termination of your opt-out status." NGS also stated that:

Physicians and practitioners who have not previously submitted an opt-out affidavit under section 1802(b)(3) of the Act, may choose to terminate their opt-out status within 90 days after the effective date of the opt-out affidavit, if the physician or practitioner satisfies the requirements of 42 CFR § 405.445(b). No other method of terminating opt-out status before the end of the two year period is available.

CMS Ex. 4 at 1. Petitioner filed a timely hearing request and the case was assigned to me for hearing and decision. CMS filed a motion for summary judgment and brief accompanied by proposed exhibits that it identifies as CMS Exs. 1 – 4. Petitioner opposed CMS's motion (P. Brief). Petitioner did not file any exhibits, although he filed attachments to his hearing request which CMS incorporated into its exhibits. Petitioner did not object to CMS's proposed exhibits. I receive CMS Exs. 1 – 4 into the record.

I am electing to treat CMS's motion for summary judgment and Petitioner's opposition to that motion as final briefs addressing the merits of the case given that neither party desires to offer testimony. I base my decision on the parties' arguments and the exhibits CMS filed.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether CMS properly denied Petitioner early termination of his opt-out status.

B. Findings of Fact and Conclusions of Law

1. CMS properly denied Petitioner early termination of his opt-out status.

The Medicare program covers physician services as a Part B benefit. A physician is a supplier to the Medicare program. Social Security Act (Act), §§ 1832 (42 U.S.C. § 1395k); 1861(d) (42 U.S.C. § 1395x(d)); and 1861(s)(1) (42 U.S.C. § 1395x(s)(1)). A physician has three options regarding Medicare reimbursement for his or her services. The physician can elect to: (1) participate in the Medicare program and take assignment on all Medicare claims and accept Medicare's approved amount as payment for services; (2) become a non-participating physician and, on a case-by-case basis, either accept assignment from Medicare or bill a Medicare beneficiary a Medicare-limited amount. Act, §§ 1833(a)(1) (42 U.S.C. § 1395(l)(a)(1)); 1842(h)(1) (42 U.S.C. § 1395u(h)(1)); 1842(j)(1)(A) (42 U.S.C. § 1395u(j)(1)(A)); 1848(a)(3) (42 U.S.C. § 1395w-4(a)(3)); and 42 C.F.R. § 400.202; or (3) "opt out" of Medicare and contract privately with Medicare beneficiaries. Act, §§ 1802(b)(3) (42 U.S.C. § 1395a(b)(3)); 1851 (42 U.S.C. § 1395w-21)); and 42 C.F.R. § 405.405.

In the event that a physician elects to opt out, Medicare makes no payment for the services he or she provides to beneficiaries except in emergency or urgent care circumstances. 42 C.F.R. §§ 405.405; 405.440. To opt out, a physician must sign an affidavit attesting that, during the two-year opt-out period, the physician will provide services to Medicare beneficiaries only through private contracts and will not submit claims for payment to Medicare or allow any entity to submit a Medicare claim on his or her behalf. 42 C.F.R. § 405.420. The opt-out period is the two-year period beginning on the effective date of the affidavit.¹ 42 C.F.R. § 405.400.

For a physician to properly terminate an opt-out status early, the regulation at 42 C.F.R. § 405.445(b) requires that a physician must:

- (1) Not have previously opted out of Medicare.

¹ The reconsideration determination states that the effective date of Petitioner's opt-out status is July 16, 2012. However, CMS now asserts that the effective date is the date Petitioner signed his affidavit, July 10, 2012. CMS Br. at 1 n.1.

- (2) Notify all Medicare carriers, with which he or she filed an affidavit, of the termination of the opt-out no later than 90 days after the effective date of the opt-out period.
- (3) Refund to each beneficiary with whom he or she has privately contracted all payment collected in excess of:
 - (i) the Medicare limiting charge (in the case of physicians); or
 - (ii) The deductible and coinsurance (in the case of practitioners).
- (4) Notify all beneficiaries with whom the physician or practitioner entered into private contracts of the physician's or practitioner's decision to terminate opt-out and of the beneficiaries' right to have claims filed on their behalf with Medicare for services furnished for the period between the effective date of the opt-out and the effective date of the termination of the opt-out period.

42 C.F.R. § 405.445(b).

CMS's determination that a physician failed to properly terminate an opt-out status is an initial determination that the physician may appeal pursuant to the review procedures at 42 C.F.R. § 498. 42 C.F.R. §§ 405.450; 405.803. A physician dissatisfied with an initial determination may request reconsideration. 42 C.F.R. § 498.22. A physician dissatisfied with a reconsidered determination is entitled to a hearing before an administrative law judge. 42 C.F.R. § 498.40.

Petitioner does not dispute that he signed an opt-out affidavit and admits that he did not seek to terminate his opt-out status within 90 days of its effective date or otherwise fulfill any of the requirements of 42 C.F.R. § 405.445(b). CMS Ex. 1 at 1-2; P. Brief. The evidence shows that Petitioner signed his opt-out affidavit on July 10, 2012 attesting that he would not submit any claims to Medicare for services provided to a Medicare beneficiary, or allow another entity to do so on his behalf, for two years starting on July 10, 2012. CMS Ex. 2. Petitioner did not request termination of his opt-out status until April 23, 2013, more than 90 days after his July 10, 2012 effective date. CMS Ex. 3 at 1. Accordingly, I find that Petitioner is bound by the terms of the opt-out affidavit he signed and that there is no basis under the statute or regulations for early termination of his opt-out status.

2. Petitioner's equitable argument is unavailing.

Petitioner argues that he should be allowed to terminate his opt-out status early because he relied on "incorrect and incomplete" information supplied by a CMS representative which led him to sign the opt-out affidavit. Petitioner argues also that denying him an early opt-out means he is unable to do the contract work that supplements his income, which has placed a "significant financial hardship" on his family. CMS Ex. 1 at 1-2. Petitioner notes CMS's argument that it was Petitioner's responsibility to familiarize himself with Medicare regulations prior to choosing to opt out of Medicare, and that

Petitioner has an affirmative duty to know the laws and regulations surrounding Medicare. Petitioner argues, however, that because he was not informed by a CMS representative that he had the option of becoming a non-participating physician prior to signing his opt-out affidavit, his opt-out status should be terminated early despite any duty he might have to familiarize himself with Medicare law. Petitioner asserts that:

As an individual practitioner who has not dealt with Medicare/Medicaid previously, I attempted to familiarize myself with said regulations by directly contacting the source at CMS. According to [CMS counsel] government employees are not capable of providing accurate information. If this is the case, they should not be providing any information or commentary on my options regarding Medicare enrollment. They should be exclusively directing me to the CMS website, which [CMS counsel] states has the necessary information. It is unreasonable to expect anyone who calls CMS to know that their employee's [sic] are not privy to the complete and accurate information regarding job [sic]. Their inability to do their job or direct me to the CMS website led me to circumstances I am currently facing. [CMS counsel] also states that it is acceptable to use the AMA [American Medical Association] or AAFP [American Academy of Family Physicians] as more reliable sources of information than CMS'[s] own representatives. It is also incomprehensible that I would seek out information regarding CMS at any other location than CMS.

P. Brief at 1-2.

In making this argument, Petitioner is asking for equitable relief, in essence arguing that CMS should be estopped from denying him early termination of his opt-out status based on the misinformation he received.

I am not authorized to provide Petitioner the equitable relief he seeks. First, I am unsympathetic to Petitioner's argument that he was in effect misled by a federal employee into believing that opting out of Medicare would be in his self interest. As a professional dealing with the program he has the duty to familiarize himself with the regulations that govern his interactions with Medicare. Petitioner has not alleged that the regulations that govern participation and opting out are vague or difficult to understand (and, in fact, they are clear on their face). He could have and should have read the regulations before making his election.

Second, I do not have the authority to reimburse or enroll in Medicare a physician who does not meet statutory or regulatory requirements (which I would be doing here by providing Petitioner an avenue not recognized by statute or regulation to terminate his opt-out agreement early). Finally, even if I could consider Petitioner's equitable argument, however, it would not provide Petitioner justification for an early termination of his opt-out status. Equitable estoppel cannot lie against the government (if at all)

absent a showing of affirmative misconduct, such as fraud. Petitioner has not alleged such affirmative misconduct on behalf of CMS's representatives in this instance.

/s/
Steven T. Kessel
Administrative Law Judge