

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Arkady Stern, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-57

Decision No. CR2078

Date: February 26, 2010

DECISION

I find that Petitioner has offered no substantive grounds for me to find that CMS and its contractor incorrectly determined the effective date of his participation in the Medicare program.

I. Background

Petitioner is a physician. He filed a hearing request challenging a reconsideration determination by Palmetto GBA, a Medicare contractor (Palmetto). In that determination the contractor sustained its previous determination that the effective date of Petitioner's participation in Medicare is May 19, 2009. In Petitioner's hearing request he contends that his effective date of participation should be an unspecified date that is earlier than May 19. He now asserts that his effective participation date should be October 10, 2008.

CMS moved to dismiss Petitioner's hearing request, arguing that Petitioner had no right to a hearing to challenge the effective date of his participation. On December 15, 2009, I issued a ruling in which I denied that motion. I directed CMS to file a pre-hearing exchange addressing the merits of the case. CMS complied with this order on December 22, 2009, filing a brief and six proposed exhibits which it designated as CMS Ex. 1 – CMS Ex. 6. On January 14, 2010, Petitioner filed his pre-hearing exchange which

included a brief and several unlabeled documents. I identify the declaration of Arkady Stern as P. Ex. 1, the declaration of Milana Kalika as P. Ex. 2, a January 7, 2010 letter to Petitioner from Palmetto as P. Ex. 3, and an October 2, 2009 letter from Palmetto to Petitioner as P. Ex. 4. I receive into the record CMS Ex. 1 – CMS Ex. 6 and P. Ex. 1 – P. Ex. 4.

Counsel for CMS advised me that he does not wish to cross examine either Dr. Stern or Ms. Kalika. There is, therefore, no need for me to conduct further proceedings before I decide this case.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether Palmetto and CMS properly determined the effective date of Petitioner's participation in Medicare to be May 19, 2009.¹

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law.

- 1. The effective date of a physician's participation in Medicare must be the later of the following: the date when the physician files an application for enrollment that is subsequently approved by a Medicare contractor; or the date when the physician first begins providing services at a new practice location.*

The effective date of a physician's enrollment in Medicare is governed by regulation. That date must be the *later* of: the date when the physician files an application for enrollment that is subsequently approved by a Medicare contractor; or the date when the physician first begins providing services at a new practice location. 42 C.F.R. § 424.520(d). The regulation allows for no discretion. I have no authority to order CMS to award an effective date of participation to a physician that is earlier than that which the regulation directs.

¹ Palmetto informed Petitioner by letter dated August 10, 2009 that his effective date was May 19, 2009. CMS Ex. 2. On January 7, 2010, Palmetto sent a letter to Petitioner informing him that his effective date was May 17, 2009. P. Ex. 3. I make no finding as to this apparent discrepancy as neither Petitioner nor CMS has made an issue of it.

2. The effective date of Petitioner's participation in Medicare derives from the date when he submitted an application that was subsequently approved by Palmetto. Petitioner has offered no evidence to establish that he is entitled to an earlier effective date of participation.

The undisputed facts of this case are that Petitioner filed an application for enrollment in Medicare on May 19, 2009. CMS Ex. 6. The application contained an error. Petitioner requested an effective date of participation of "October 10, 2009," a date that comes after the application date, and for that reason Palmetto returned it to Petitioner. *Id.*, at 17; CMS Exs. 3, 5. Petitioner then filed a revised application on June 19, 2009. CMS Exs. 3, 4. Palmetto approved that application and granted Petitioner an effective date of May 19, 2009, the date of his original application. CMS Ex. 1.

Petitioner may not receive an earlier effective date of participation. The *earliest* effective date that he could have received, consistent with the requirements of 42 C.F.R. § 424.520(d), was his application date of May 19, 2009, and that is precisely the date that Palmetto established.

Petitioner has offered no evidence to show that he should be granted an earlier effective date. He has not offered persuasive evidence establishing that he filed an application for enrollment earlier than May 19 that was accepted by the contractor. In his brief and in his declaration (P. Ex. 1), Petitioner contends that he established his present practice location in October 2008. He asserts that he immediately "contacted Medicare by phone and instructed my billing service Advanced Billing Management to submit all required documentation." P. Ex. 1, at 1. According to him, this was done in October 2008. As allegedly corroborating evidence Petitioner offers the declaration of Ms. Kalika (P. Ex. 2) in which she contends that in October 2008 she submitted a "change of address" application for Petitioner. *Id.* She asserts that she was subsequently advised by the contractor in March 2009 that this application had been lost and that she immediately followed up on this information by filing a new application on Petitioner's behalf. *Id.*

But, notwithstanding these assertions, Petitioner has come forward with no documents showing that he filed an application for enrollment that is dated earlier than May 19, 2009. He has not produced a copy of the alleged prior application. Nor has he produced copies of any correspondence between GBA and him showing that he filed a prior application or supporting his assertion that GBA told him in March 2009 that the alleged prior application was lost. I do not find either his or Ms. Kalika's assertions that an earlier application was filed with the contractor to be credible in the absence of any corroborating documents.

I find also that Dr. Stern's and Ms. Kalika's assertions are belied in important respects by the documents that Petitioner did file with Palmetto. The application that Petitioner filed on May 19, 2009 is dated May 11, 2009. CMS Ex. 6, at 27. That is hardly an immediate follow up to an alleged notification of Petitioner by Palmetto in *March 2009* that a prior application had been lost. Moreover, none of the documents submitted by Petitioner to Palmetto which are in evidence in this case make any reference to an alleged October 2008 application.

/s/

Steven T. Kessel
Administrative Law Judge