

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Kate Suskin, LICSW,)	Date: February 22, 2010
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-665
)	Decision No. CR2072
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION

I deny the motion of the Centers for Medicare & Medicaid Services (CMS) that I dismiss the hearing request filed by Petitioner, Kate Suskin, LICSW. I grant CMS's motion for summary disposition.

I. Background

Petitioner is a clinical social worker. She filed a hearing request challenging the effective date of her enrollment in the Medicare program. CMS moved to dismiss Petitioner's hearing request, arguing that Petitioner had no right to a hearing. CMS moved for summary disposition in the alternative. Petitioner did not respond to CMS's motions.

CMS filed four proposed exhibits with its motion which it designated as CMS Ex. 1 – CMS Ex. 4. I receive these exhibits into the record absent any opposition from Petitioner.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. I should dismiss Petitioner's hearing request; and

2. The undisputed material facts establish that CMS is entitled to summary disposition.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law (Findings).

1. There is no basis for me to dismiss Petitioner's hearing request

CMS asserts that Petitioner has no right to a hearing to challenge the effective date of her enrollment. The gravamen of CMS's argument is that the regulations which grant providers hearing rights concerning determinations about their enrollment eligibility, at 42 C.F.R. Part 424, grant only limited hearing rights to challenge *denials* of enrollment applications or determinations to *revoke* Medicare enrollment. CMS reasons that a challenge of the *effective date* of enrollment – as is the case here – is neither a challenge of a denial nor of a revocation and thus, a party making such a challenge is not entitled to a hearing.

CMS asserts that the hearing rights it grants to providers to challenge enrollment determinations effectuate Congress' intent expressed in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, codified at 42 U.S.C. §1395cc(h)(1)(A). It asserts that it was never the intent of Congress, nor of CMS, to allow providers to challenge the effective dates of their enrollment as opposed to determinations to either deny or revoke Medicare enrollment.

However, there is a regulation which, on its face, explicitly confers appeal rights on all providers who challenge the effective dates of their enrollment in Medicare. That regulation is 42 C.F.R. § 498.3(b)(15), which defines an "initial determination" for which hearing rights are granted as including:

The effective date of a Medicare provider agreement or supplier approval.

This language is explicit and, on its face, it confers hearing rights in precisely the circumstance that is at issue here, a challenge by Petitioner to the effective date of her enrollment in the Medicare program.

CMS contends that 42 C.F.R. § 498.3(b)(15) predates the more recently published regulations governing provider enrollment hearings and is superseded by them. It asserts that the Secretary never intended the broad language of 42 C.F.R. § 498.3(b)(15) to apply to provider enrollment hearings and that the regulation's language – admittedly sweeping – was not intended to apply in such situations.

The problem with this argument is that it fails to address the very plain language of the regulation. There is nothing in 42 C.F.R. § 498.3(b)(15) to suggest that it is limited as CMS urges. Nor is there any language in the Part 424 regulations that suggests that 42 C.F.R. § 498.3(b)(15) is inapplicable. I therefore deny CMS's motion to dismiss.¹

2. The undisputed facts establish that CMS is entitled to summary disposition.

By regulation the effective date of participation of an enrolled physician or other practitioner must be the *later* of the following dates: 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. 42 C.F.R. § 424.520(d).

In this case the undisputed facts establish that Petitioner filed an application to enroll in Medicare on March 9, 2009. CMS Ex. 1, at 1; CMS Ex. 2. There is no evidence showing that Petitioner filed an application at an earlier date. A Medicare contractor subsequently approved Petitioner's enrollment application with an effective date of March 3, 2009. CMS Ex. 3, at 1.

The *earliest* effective date when Petitioner could have been enrolled is the date when she submitted an enrollment application that was "subsequently approved" by a Medicare contractor. That would have been March 9, 2009. The undisputed facts of this case establish that Petitioner received an effective date that predated her application date by a few days.² But, assuming that to be so, there is simply no basis in law to order that she be given an earlier effective enrollment date.

/s/

Steven T. Kessel
Administrative Law Judge

¹ I do not mean to suggest that CMS could not limit hearings in provider enrollment cases to hearings over determinations to deny or revoke enrollments. The obvious fix would be for the Secretary to publish a regulation that specifies that 42 C.F.R. § 498.3(b)(15) does not apply to such cases.

² The March 3 effective date may actually be erroneous in that it appears that it is several days earlier than the date when Petitioner submitted her application. CMS does not explain the reasons for giving Petitioner what appears to be an incorrect effective date. I do not disturb it, however, inasmuch as CMS hasn't asserted error.