

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Cases of:	)	Date: October 21, 2009
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Bradley D. Anawalt, M.D.,	)	Docket Nos. C-09-546
Jason A. Dominitz, M.D.,	)	C-09-547
Trevin Thurman, M.D.,	)	C-09-548
Timothy R. Watkins, M.D.,	)	C-09-549
Mark Zaros, M.D.,	)	C-09-551
Jane H. Buckner, M.D.,	)	C-09-552
Sheila B. Dunaway, M.D.,	)	C-09-553
Shu Ching Hu, M.D.,	)	C-09-554
Sarita A. Lobo, M.D.,	)	C-09-555
Jan L. Hillson, M.D.,	)	C-09-556
	)	Decision No. CR2021
Petitioners,	)	
	)	
- v. -	)	
	)	
The Centers for Medicare & Medicaid	)	
Services.	)	

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**DECISIONS DISMISSING REQUESTS FOR HEARING**

I dismiss the hearing requests of the 10 Petitioners whose names are recited in the caption of these decisions. None of these individuals has a right to a hearing before me.<sup>1</sup>

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<sup>1</sup> I am consolidating my decisions in these 10 cases into a single document because the issue is the same in each of them and because it is more efficient that I do so rather than to issue 10 separate decisions. However, each of these Petitioners has an individual and independent right to appeal my decision in his or her case.

## **I. Background**

Each of the Petitioners filed a hearing request in which he or she contends that he or she should be assigned a “retro effective date of enrollment” in the Medicare program.<sup>2</sup> The cases were assigned to me for a hearing and a decision. The Centers for Medicare & Medicaid Services (CMS) moved that I dismiss these hearing requests. None of the Petitioners replied to the motion.

CMS attached one exhibit to its motion which it designated as CMS Ex. 1. I receive that exhibit into the record.

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

### **A. Issue**

These cases all have the identical issue, that being whether the Petitioner in each of them has a right to a hearing before me.

### **B. Findings of fact and conclusions of law**

I make findings of fact and conclusions of law (Findings) to support my decisions in these cases. I set forth my Findings below as separate headings.

#### ***1. The Petitioners do not have a right to a hearing.***

The Petitioners in these cases, all of whom are physicians, have not provided me with a detailed explanation of the specific issues that they are raising in their hearing requests. Nor have they made any arguments in response to CMS’s motion to dismiss. However, it appears that they have requested hearings because they, or the entity which filed hearing requests on their behalf, are dissatisfied with the policy of the Medicare program governing payment for claims for services generated prior to the dates of their enrollment or re-enrollment in Medicare.

It appears that each of Petitioners either is newly enrolled in Medicare or has re-enrolled in the program. CMS Ex. 1. Evidently, each of them may have provided a service or services to one or more Medicare beneficiaries prior to the date of his or her enrollment or re-enrollment in the program and seeks to claim reimbursement for that service or those services. Petitioners, or the entity which filed hearing requests on their behalf, have

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<sup>2</sup> The hearing request in each case appears to have been filed on behalf of the Petitioner by an entity known as “UW Physicians” in Washington State. This entity is not a party to these cases.

concluded that Medicare regulations will bar reimbursement for claims for services that Petitioners provided prior to the effective dates of their enrollment and they are dissatisfied with that likely outcome.

At its heart, then, each of these cases appears to involve a challenge to regulations which govern the time frame for which Medicare will retrospectively reimburse items or services provided prior to the effective dates of enrollment by physicians who are newly enrolled in the Medicare program (or re-enrolled at a point in time after enrollment has lapsed). The regulations are 42 C.F.R. §§ 424.520(d) and 424.521(a). These are relatively newly enacted regulations which became effective in January 2009.

The regulations provide, first, that the effective date for Medicare billing privileges for physicians and certain other practitioners is the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date that an enrolled physician or other practitioner first began furnishing services at a new practice location. 42 C.F.R. § 424.520(d). This regulation establishes the point in time (effective date) from which Medicare may determine to reimburse retrospectively claims for services provided by an enrolled physician.

Medicare will reimburse retrospectively a claim for services by an enrolled physician for up to 30 days prior to the effective date of enrollment “if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries.” 42 C.F.R. § 424.521(a)(1). It will reimburse retrospectively for up to 90 days prior to the effective date of enrollment in the event that a Presidentially-declared disaster precluded enrollment in advance of providing services. 42 C.F.R. § 424.521(a)(2). There are no other circumstances under which retrospective reimbursement is permitted.<sup>3</sup>

Petitioners’ challenge of the regulations and the policies that they embody is not something that I have the authority to hear and decide. As a delegate of the Secretary of this Department I must apply her policies as are stated in regulations. I have no authority to declare a regulation to be unlawful or ultra vires. Consequently, I may not hear Petitioners’ challenge to the lawfulness of 42 C.F.R. §§ 424.520(d) and 424.521(a). Nor do I have the authority to grant exceptions to this policy. Consequently, I may not direct that it be waived in the case of any of these Petitioners.

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<sup>3</sup> Each of Petitioners avers that the Medicare program previously gave newly enrolled physician a 23-month grace period during which claims would be reimbursed retrospectively. Petitioners complain that it is unreasonable for the Medicare program to change its policy from the 23-month period to the periods that are now permitted, under defined circumstances, by 42 C.F.R. § 424.521(a)(1) and (2).

Furthermore, none of the Petitioners makes allegations that address issues that I do have authority to hear and decide. None of them, for example, assert that they should have been given an earlier effective date of enrollment. *See* 42 C.F.R. § 498.3(b)(15). Nor do Petitioners allege that their Medicare enrollment was improperly denied or revoked. *See* 42 C.F.R. § 498.3(b)(17).<sup>4</sup>

***2. I must dismiss Petitioners' hearing requests.***

I may dismiss a hearing request in the circumstance where a party requesting a hearing has no right to a hearing. 42 C.F.R. § 498.70(b). None of these Petitioners has established a right to a hearing. Consequently, I dismiss these cases.

/s/ Steven T. Kessel  
Administrative Law Judge

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<sup>4</sup> In its motion CMS argues that some of the Petitioners may be attempting to challenge their deactivation as enrolled providers. CMS argues that a provider has no right to challenge deactivation of provider status. I do not disagree. However, there is nothing in any of the hearing requests that suggests that any of the Petitioners is alleging that he or she was improperly deactivated. Rather, all of Petitioners are protesting the regulations' policy that limits retrospective enrollment for newly enrolled physicians or for those physicians who re-enroll after a lapse in their enrollment.