Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kamal Anjum, M.D.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-696

Decision No. CR2462

Date: November 7, 2011

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Kamal Anjum, M.D. Petitioner has no right to a hearing to challenge either the determination by First Coast Service Options, Inc. (First Coast), a Medicare contractor, to revoke his participation in Medicare, or its subsequent decision to reinstate Petitioner as a Medicare participant effective February 10, 2011.

I. Background

Petitioner is a physician. He filed a hearing request, which arguably could be construed to challenge either First Coast's determination to revoke Petitioner's participation in Medicare, or its subsequent decision to reinstate Petitioner as a Medicare participant effective February 10, 2011. At my direction, the Centers for Medicare and Medicaid Services (CMS) filed a brief and proposed exhibits that are identified as CMS Exhibit (Ex.) 1 – CMS Ex. 10. In its submission, CMS moved to dismiss Petitioner's hearing request or, alternatively, that I enter summary judgment in CMS's favor. Petitioner replied to the motion and filed four

proposed exhibits. These exhibits are identified as P. Ex. 1 – P. Ex. 4.[1] I receive all of the parties' exhibits into the record.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue in this case is whether Petitioner has a right to a hearing.

B. Findings of Fact and Conclusions of Law

There is no reason to consider the merits of this case, inasmuch as the issue of Petitioner's hearing right is outcome determinative. For that reason, I address that issue only and not the CMS's alternative motion for summary judgment.

Petitioner is the sole owner of Pulmonary & Critical Care Consultants of South Florida, P.A., a Medicare supplier. On December 22, 2009, Petitioner moved his office from its former location to a new location. He contends – and for purposes of this decision, I accept his representation as true – that he communicated with CMS by telephone and by letter concerning the move. However, it is undisputed that Petitioner did not file any of the forms required by CMS to document the change of location until more than a year had transpired from the date of the move. CMS Ex. 4.

On September 22 and October 14, 2010, First Coast made site visits to Petitioner's former business location. First Coast's agent found that Petitioner was not doing business at this location, and, consequently, First Coast determined to revoke Petitioner's Medicare billing privileges effective October 14, 2010. First Coast sent notice of that determination to Petitioner on January 18, 2011. CMS Ex. 2. First Coast informed Petitioner that he could submit a corrective action plan within 30 days, which would serve as a formal request to reopen First Coast's determination. First Coast informed Petitioner that he could also file a request for reconsideration of the determination to revoke his billing privileges within 60 days. *Id.* at 2.

On February 4, 2011, Petitioner wrote to First Coast, advising it that he was submitting a corrective action plan requesting reinstatement as a Medicare participant. CMS Ex. 4. On March 8, 2011, Petitioner re-filed his corrective

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[1] Shortly after Petitioner filed his pre-hearing exchange, Petitioner's counsel called the staff attorney who is assigned to work with me on this case and advised her that he was contemplating supplementing Petitioner's exchange with an affidavit executed by Petitioner. However, Petitioner has not filed that possible exhibit.

action plan. CMS Ex. 5. In neither of these filings did Petitioner request reconsideration. Nor did Petitioner state or suggest in either of these filings that he was objecting to First Coast's determination to revoke his Medicare billing privileges. To the contrary, in his February 4, 2011 letter, Petitioner admitted error, stating that:

> This [the revocation determination] happened due to negligence on my part and my failure to follow up with your office after submitting the application for a change of my practice address.
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> .

CMS Ex. 4. On May 31, 2011, First Coast accepted Petitioner's submission and informed him that his Medicare provider number had been revalidated. CMS Ex. 7. On August 2, 2011, First Coast notified Petitioner that he had been reinstated into the Medicare program effective February 10, 2011, the date when First Coast received Petitioner's February 4, 2011 corrective action plan. CMS Ex. 8.

Separately, CMS sent letters to Petitioner on April 20 and April 22, 2011, advising him that he had been overpaid by Medicare. CMS Ex. 9; CMS Ex. 10. The overpayments were for claims that Petitioner submitted for items or services that he provided during the period when his Medicare provider status was revoked. Each of these letters informed Petitioner that he had the right to appeal CMS's overpayment determinations by requesting redetermination. *Id.*

On June 28, 2011, Petitioner sent a letter to First Coast, captioned with the heading: "Appeal for Reconsideration of the 'Revoke Period' . . . ." CMS Ex. 3 at 1. In this letter, Petitioner acknowledged that he had filed claims for services but that he was "convinced that everything was in order . . . ." *Id.* Petitioner requested that First Coast reconsider its decision and "change the date of revalidation so that there is no gap between it and the date of revocation." *Id.* at 2. The thrust of Petitioner's letter is that he had been misled into believing that there would be no "gap" in the period when he could submit reimbursement claims. In other words, Petitioner argued that he was led to believe that he could continue to claim reimbursement on dates between his receipt of First Coast's revocation notice and his receipt of First Coast's decision to accept his corrective action plan. Petitioner characterized his actions, including filing claims resulting in overpayments, as an honest mistake by him. Petitioner did not argue that that the revocation determination was incorrect or improper. *Id.*

A determination by CMS, or one of its contractors, to revoke a provider's participation in Medicare is an appealable initial determination. 42 C.F.R. § 498.3. A provider has a right to challenge such a determination pursuant to the procedures established by regulations at 42 C.F.R. Part 498. Similarly, a provider

who seeks to participate in Medicare may appeal a determination by a contractor or CMS to certify it as of a particular effective date. 42 C.F.R. § 498.3(b)(15). However, a determination by a contractor or CMS whether or not to reinstate a provider whose participation was revoked is not appealable. *DMS Imaging, Inc.*, DAB No. 2313, at 5-10 (2010).

As I have discussed, Petitioner did not challenge the determination to revoke his Medicare participation at any time prior to filing a hearing request on August 4, 2011. His February communications with First Coast addressed only his intent to correct the problem that caused his participation to be revoked.

One could reasonably construe Petitioner's June 28, 2011 letter as constituting a challenge to the *date of reinstatement* that First Coast decided was appropriate based on Petitioner's corrective action plan. A reinstatement determination is not appealable because it is a discretionary determination by CMS or a contractor. Neither CMS nor a contractor is required to accept a plan of correction from a provider whose participation is revoked. Thus, there is no basis for an appeal where either CMS or a contractor decides as a matter of discretion not to accept a plan of correction. By logical extension, a decision by CMS, or a contractor, to accept a plan of correction *as of a particular date* is not appealable, inasmuch as both CMS and the contractor have the discretion not to accept the plan at all. Thus, First Coast's decision to reinstate Petitioner effective February 10, 2011 is not a reviewable determination because First Coast could have simply rejected the plan.

An administrative law judge may dismiss a request for a hearing where a party has no right to a hearing. 42 C.F.R. § 498.70(b). Dismissal is appropriate here, to the extent that Petitioner's June 28, 2011 letter constitutes a challenge to the date of his reinstatement, inasmuch as Petitioner has no right to challenge First Coast's decision.

Petitioner now characterizes his June 28, 2011 letter to First Coast as a "request for reconsideration on his revocation of billing privileges." Petitioner's Response at 2. In effect, Petitioner now contends that he intended to challenge First Coast's determination to revoke his Medicare participation. That is not an accurate characterization of the June 28, 2011 letter. That letter was plainly a request that First Coast redetermine the overpayments that it had assessed against Petitioner based on the reimbursement claims that Petitioner filed during the period when his Medicare participation was revoked. Petitioner may not now bootstrap a hearing request challenging First Coast's revocation determination onto a letter that he intended to address a different issue.

But, even if that letter could be construed as a challenge to the revocation determination, it is untimely. First Coast notified Petitioner of its determination on January 18, 2011. Petitioner had 60 days to file a request for hearing challenging that determination. 42 C.F.R. §498.40(a)(2). Petitioner filed his June 28, 2011 letter more than five months after he received the initial determination to revoke his Medicare participation. Furthermore, the hearing request that Petitioner filed with the Departmental Appeals Board on August 4, 2011, was filed about seven months after he received the initial determination.

Obviously, what prompted Petitioner's change of position and his current intent to challenge First Coast's revocation determination is the notices of overpayment that he received from CMS. There is an administrative review process by which Petitioner can challenge these overpayments, and, evidently, he has availed himself of that process. *See* P. Ex. 3. That process is, however, separate and apart from a challenge to the determination of noncompliance that underlies the finding of overpayment.

Petitioner has made no showing of good cause for filing a hearing request – whether that request is construed to be Petitioner's June 28, 2011 letter or his August 4, 2011 hearing request – months after the expiration of the 60 day deadline for doing so. *See* 42 C.F.R. §§ 498.40(c), 498.70(c). His arguments are primarily equitable in character. Petitioner essentially contends that he made an honest mistake in failing to file the proper forms notifying First Coast of his office address change and compounded his error by believing, honestly but erroneously, that he had been reinstated retroactively to the date when his enrollment was revoked. From all appearances, Petitioner has acted in good faith and may indeed have made honest errors that put him in his current predicament. Unfortunately, Petitioner's arguments are not a basis for me to grant Petitioner a hearing. Petitioner has not offered evidence to show that he was affirmatively misled into believing that he should not request reconsideration. Although he asserts in his June 28, 2011 letter and in his hearing request that he was led to believe that there would be no problem with his billing, he does not aver that anyone – at First Coast or at CMS – ever told him that he need not request reconsideration of the revocation determination.

/s/
Steven T. Kessel
Administrative Law Judge