

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Carmen Garcia, D.P.M.,
(PTAN: F300352828)
(NPI: 1194169557),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-475

Decision No. CR4919

Date: August 15, 2017

DECISION

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) sustaining the determination of a Medicare contractor to award an effective Medicare participation date of November 21, 2016, to Petitioner, Carmen Garcia, D.P.M.

I. Background

CMS moved for summary judgment, averring that there are no disputed issues of material facts. It filed seven proposed exhibits with its motion, identified as CMS Ex. 1-CMS Ex. 7. Petitioner opposed the motion and filed two proposed exhibits of her own, identified as P. Ex. 1-P. Ex. 2. These included Petitioner's affidavit. P. Ex. 2.

As I discuss in more detail below, the only issue before me in this case is a legal issue, that being whether principles of equity mitigate in favor of establishing an effective date for Petitioner's Medicare participation of September 12, 2016, as Petitioner contends. For purposes of this decision, I accept as true Petitioner's assertion that the contractor's

representatives led her to believe that her September 12, 2016 Medicare participation application was acceptable. However, that assertion is insufficient grounds for me to deny CMS's motion.

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

A. Issue

The issue is whether a Medicare contractor appropriately assigned an effective Medicare participation date of November 21, 2016, to Petitioner.

B. Findings of Fact and Conclusions of Law

Regulations state that the effective Medicare participation date for a physician or a non-physician practitioner is the later of the following:

- (1) The date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor; or
- (2) The date that the supplier first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d). Here, subparagraph (1) controls. It is undisputed that Petitioner filed an application to participate in Medicare as a podiatrist on November 21, 2016, that a contractor subsequently accepted. The contractor's assignment to Petitioner of a November 21, 2016 effective participation date based on that application is consistent with regulatory requirements.

Petitioner contends, however, that the contractor – and CMS – erred by not assigning her an effective participation date of September 12, 2016, based on a previous Medicare participation application that she filed with the contractor on that date. She acknowledges that this application was incorrect. She concedes that the September 12 application was a form for participation in Medicare as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) and not an application for participation as a podiatrist, and that she filed this application in error. CMS Ex. 5 at 1.

Petitioner makes equitable arguments to oppose CMS's motion for summary judgment. Her assertions are that her intent always was to participate in Medicare as a podiatrist and not as a DMEPOS supplier. She asserts that her filing of the wrong application was an honest and good faith error on her part. She contends also that she filed the wrong application based on directions that she received from the contractor's employees and that the contractor's employees subsequently assured her that her application was correct, even if it was not. P. Ex. 2. Petitioner argues also that the substance of her September 12

application was essentially identical to that of her November 21 application, even if the September 12 application was to participate as the wrong type of supplier (DMEPOS).

Petitioner's assertions reduce to the claim that she relied on erroneous advice by an agent of CMS's contractor. That is an insufficient basis for resisting CMS's motion for summary judgment. Principles of equity and equitable estoppel may not direct an action by the Secretary absent a finding of affirmative misconduct by that agency or its representatives. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990); *Wade Pediatrics v. Dep't of Health & Human Servs.*, 567 F.3d 1202, 1206 (10th Cir. 2009).

Here, Petitioner doesn't allege that the contractor's employees engaged in affirmative misconduct. She contends only that they gave her bad advice. Her allegations, assuming them to be true, are not a basis to oppose CMS's motion because I cannot find in her favor based on those allegations. *US Ultrasound*, DAB No. 2302 at 8 (2010).

_____/s/_____
Steven T. Kessel
Administrative Law Judge