

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kevin E. Sadowski, APRN, LLC
(PTAN: D100367572),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-736

Decision No. CR4933

Date: August 31, 2017

DECISION

I sustain the determination of a Medicare contractor, as affirmed on reconsideration, to award an effective Medicare participation date of January 23, 2017, with authority to claim retroactively for services provided beginning December 24, 2016, to Petitioner, Kevin E. Sadowski, APRN, LLC.

I. Background

Petitioner requested a hearing, alleging that his effective Medicare participation date should be September 9, 2016. The Centers for Medicare & Medicaid Services (CMS) moved for summary judgment. With its motion CMS filed ten proposed exhibits that it identified as CMS Exhibit (Ex.) 1 - CMS Ex. 10. Petitioner opposed the motion and filed three exhibits that he identified as P. Ex. 1 - P. Ex. 3. I note that two of Petitioner's proposed exhibits, consisting of Petitioner's hearing request (P. Ex. 1) and the contractor's reconsidered determination in this case (P. Ex. 2) are documents that either duplicate some of CMS's proposed exhibits or are of record in this case.

It is unnecessary that I decide whether the criteria for summary judgment are met here. Neither CMS nor Petitioner offered the testimony of witnesses, so an in-person hearing

would be pointless. I decide the case based on the written record. I receive CMS Ex. 1 - CMS Ex. 10 and P. Ex. 3 into the record. It is unnecessary that I receive P. Exs. 1 and 2 because they duplicate other exhibits or documents that are part of the case record.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether a Medicare contractor correctly assigned a Medicare participation effective date of January 23, 2017 to Petitioner.

B. Findings of Fact and Conclusions of Law

The relevant facts are not in dispute. Petitioner filed an application to participate in Medicare that the contractor received on September 9, 2016. CMS Ex. 2. In that application Petitioner sought to change his Medicare identifying information. *Id.* The contractor reviewed the application and found it to be incomplete in critical respects. On October 5, 2016, the contractor notified Petitioner by letter that it had received Petitioner's application. It also requested Petitioner to submit additional information in order to complete his application. CMS Ex. 3.

Petitioner failed to respond to this letter within 30 days. After 30 days elapsed the contractor rejected Petitioner's September 9 application, telling him that it had not received requested information. CMS Ex. 4.

Petitioner filed a second Medicare enrollment application on January 23, 2017. CMS Ex. 1. The contractor processed this application and on March 13, 2017, it notified Petitioner that it had approved it. CMS Ex. 10.¹

As is relevant here, Medicare regulations state that the *earliest* effective date that a contractor or CMS may award to an applicant for participation is the date when it receives a participation application that it is able to process to completion. 42 C.F.R. § 424.520(d). In this case the contractor did not receive an application from Petitioner that it was able to process until January 23, 2017. That date is the effective date of his participation in Medicare. There exists no basis under operative regulations for me to award Petitioner an earlier effective participation date.

¹ The contractor's March 13, 2017 letter contained a harmless error. CMS Ex. 10. It advised Petitioner that his effective participation date was December 24, 2016. In fact, December 24, 2016 is the earliest date of Medicare items or services for which CMS will reimburse Petitioner. CMS policy allows reimbursement for items or services provided and claimed 30 days prior to the effective date of participation. *See* 42 C.F.R. § 424.521. The actual effective participation date that the contractor awarded was January 23, 2017.

Petitioner has no legal basis to contend that he should be awarded an effective participation date based on his September 9, 2016 application. The contractor rejected that application because it was incomplete and because Petitioner did not timely provide the contractor with necessary and requested information. Petitioner may not appeal the contractor's decision to reject the September 9 application because a rejection is not an initial determination under 42 C.F.R. § 498.3(b) that gives the applicant appeal rights. Regulations explicitly state that a rejected application may not be appealed. 42 C.F.R. § 424.525(d).

Moreover, the record establishes that on October 5, 2016, the contractor gave notice to Petitioner that his September 9 application was incomplete and that Petitioner had to supply the contractor with additional information if he wanted his application to be processed. The contractor explicitly told Petitioner on October 5 that its notice to him was the only notice that he would receive and that his failure to respond to the contractor's request within 30 days might result in rejection or denial of his application. CMS Ex. 3. Petitioner failed to respond timely.

Petitioner makes a series of equitable assertions to justify his contention that his effective Medicare participation date should be September 9, 2016. He contends that he or his authorized representative engaged in numerous conversations with the contractor's representative over a six-week period prior to the contractor's rejection of the September 9 application. According to Petitioner, the contractor committed errors that prejudiced him and abused its discretion by failing or refusing to extend the 30-day deadline for receiving requested additional information relevant to the September 9 application.

These are arguments that I lack authority to address. First, as Petitioner concedes, the decision to extend or not extend a deadline for filing supplemental information relating to a participation application is a matter that is within the contractor's and CMS's discretion. The decision to exercise or not exercise that discretion is non-reviewable.

Second, Petitioner's arguments are, as I have said, equitable. He asserts that the contractor or its employees denied him the opportunity to participate as of September 9, 2016, due to some errors that he contends injured him in some way. This is essentially a claim of equitable estoppel. As a matter of law, equitable estoppel will not apply against CMS absent proof that CMS or its agents engaged in affirmative misconduct such as fraud. *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 461 U.S. 51, 63 (1984); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009);

US Ultrasound, DAB No. 2302, at 8 (2010). There is neither an assertion of affirmative misconduct in this case nor evidence from which I could find it. Consequently, I may not hear Petitioner's estoppel claim.

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