

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

---

In the Cases of:	)	
	)	
David A. Baker, M.D.,	)	Date: November 20, 2009
Jettie Person, M.D.,	)	
Richard Berger, M.D.,	)	
Christopher Allen Sanford, M.D.,	)	Docket Nos. C-09-729
	)	C-09-730
Petitioners,	)	C-09-731
	)	C-09-732
- v. -	)	Decision No. CR2035
	)	
The Centers for Medicare & Medicaid	)	
Services.	)	

---

**DECISIONS DISMISSING REQUESTS FOR HEARING**

I dismiss the hearing requests of the four Petitioners whose names are recited in the caption of these decisions. None of these individuals has a right to a hearing before me. I consolidate these decisions into a single document for reasons of efficiency. The controlling issue is identical in each case and the same interested entity has filed a hearing request on behalf of each of the Petitioners. 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 in these cases is on the staff of University of Washington Physicians, an entity which describes itself as the largest medical group in the State of Washington. In each case this entity filed a hearing request on behalf of the named Petitioner asking that the Petitioner be given a “retro effective date of enrollment” in the Medicare program. The hearing requests in these cases are in all other respects essentially identical. The cases were assigned to me for a hearing and a decision.

On October 21, 2009 I issued decisions in ten other cases in which University of Washington Physicians had filed hearing requests substantially identical to those under consideration here. *Bradley D. Anawalt, M.D. et als.*, DAB CR2021 (2009). In the *Anawalt* decisions I dismissed the hearing requests because I found that the requests did

not raise any issue of which I had authority to hear and decide. As with the present cases the hearing requests at issue in the *Anawalt* decisions ask that individual physicians be assigned “retro effective” enrollment dates in Medicare.

On October 22, 2009 I sent an order to the parties in each of the present cases advising them that I was contemplating issuing decisions in these cases that are consistent with my decisions in *Anawalt et als.* and giving the parties the opportunity to comment. Order Giving Parties the Opportunity to File a Statement or a Brief, October 22, 2009. None of the individual Petitioners or University of Washington Physicians filed anything in response to my order. Neither did counsel for The Centers for Medicare & Medicaid Services (CMS). On November 16, 2009 I asked the staff attorney at the Civil Remedies Division who was assigned to work with me on these cases to contact counsel for CMS to ascertain whether he intended to file a response to my October 22 order. Counsel advised her that he was not filing anything.

## **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 four hearing requests each state the same complaint. Petitioner in each of these cases recently enrolled in Medicare as a participating physician. University of Washington Physicians complains on behalf of the individual Petitioners that it is prohibited by a recent (January 2009) amendment to Medicare billing regulations from obtaining reimbursement for Medicare claims for covered items or services that the Petitioners may have provided to Medicare beneficiaries prior to the dates of their enrollment. 42 C.F.R. § 424.521(a).

The regulation in question effectuates a policy change. Prior to its enactment Medicare would reimburse newly enrolled physicians for claims for Medicare covered items or services that were provided as far back as 23 months prior to the enrollment date. The new regulation effectively does away with retrospective reimbursement except in narrowly defined instances that are not implicated here. 42 C.F.R. § 424.521(a)(1), (2). By filing hearing requests on behalf of these Petitioners University of Washington

Physicians essentially challenges the regulation and the policy that it implements as being unfair.

I have no authority to hear and decide that assertion. My authority in a case like these is limited by regulations. I may hear and decide a challenge to CMS's determination of an effective date of enrollment. 42 C.F.R. § 498.3(b)(15). And, I may hear and decide a challenge to a determination that a provider is ineligible for enrollment or that his or her enrollment should be revoked. 42 C.F.R. § 498.3(b)(17). But, I do not have authority to question the Secretary's policy determinations or to declare that a regulation is unlawful or ultra vires a statute. Nor do I have the authority to order that a regulation's authority be waived in any case.

Here, University of Washington Physicians has raised no issues on behalf of the four Petitioners that I have authority to hear and decide. The sole argument that it makes on behalf of each Petitioner is that the policy change made by 42 C.F.R. § 424.521(a) is unfair. It has not asserted, for example, that CMS improperly determined the date when each of the four Petitioners qualified for enrollment as Medicare participating providers. Nor has University of Washington Physicians asserted that CMS or its contractor improperly denied enrollment to any of the Petitioners.

Under applicable regulations the "effective date" of enrollment for a physician may only be the *later* of two dates: the date when the physician filed an application for enrollment that was subsequently approved by a Medicare contractor charged with reviewing the application on behalf of CMS; or the date when the physician first began providing services at a new practice location. 42 C.F.R. § 424.520(d). University of Washington Physicians has not asserted in any of these cases that CMS or its contractor erred in determining either a Petitioner's application filing date or the date when the Petitioner began providing services at a new practice location.

***2. I must dismiss Petitioner's 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