

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Andrew J. Elliott, M.D.  
(NPI No. 1649356486)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-21

Decision No. CR2103

Date: April 02, 2010

**DECISION**

I deny the motion of the Centers for Medicare & Medicaid Services (CMS) to dismiss the hearing request of Petitioner, Andrew J. Elliott, M.D. On the merits, I grant summary disposition in favor of CMS, deciding that CMS's contractor, National Government Services (NGS), and CMS correctly determined that the effective date of Petitioner's participation in the Medicare program is February 13, 2009.

**I. Background**

Petitioner is a physician. He filed a hearing request to challenge the determination that the effective date of his enrollment in Medicare was February 13, 2009. Petitioner appears to contend that he should be reimbursed for claims for Medicare covered items or services dating back to 2006.

CMS filed a pre-hearing exchange consisting of a brief, ten proposed exhibits (CMS Ex. 1 – CMS Ex. 10), and a motion to dismiss. Petitioner filed a pre-hearing exchange consisting of a letter, dated March 16, 2010, signed by Marina J. Zamminer (Petitioner's March 16, 2010 Letter), and several attachments. Some of these attachments have exhibit numbers affixed to them, others do not. I identify Petitioner's proposed exhibits as follows:

- Letter from NGS to Petitioner, dated October 21, 2008, plus pages excerpted from an application for Medicare enrollment – P. Ex. 1.
- Fax from Shelter Rock Orthopedic Group, P.C., dated November 6, 2008 – P. Ex. 2.
- Application for Medicare enrollment – P. Ex. 3.
- Letter from NGS to Petitioner, dated September 18, 2008 – P. Ex. 4.

I receive all of the parties' proposed exhibits into the record.

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

### **A. Issues**

The issues in this case are whether:

1. Petitioner is entitled to a hearing on the merits; and
2. NGS and CMS correctly determined the effective date of Petitioner's participation in Medicare to be February 13, 2009.

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

I make the following findings of fact and conclusions of law.

#### ***1. Petitioner is entitled to a hearing on the merits.***

CMS's motion to dismiss is identical to motions that it has filed in many of these cases involving the issue of effective date of a provider's participation in Medicare. The gravamen of CMS's motion is that the regulations that govern a provider's enrollment in Medicare at 42 C.F.R. Part 424 do not allow a provider a hearing to challenge his or her effective date of enrollment. According to CMS, these regulations allow only a challenge to a denial of enrollment or a revocation of enrollment and not to a determination as to effective date of enrollment.

I have addressed this issue on numerous occasions and, on each of them, have denied CMS's motion to dismiss. The problem with CMS's argument is that there is a regulation, 42 C.F.R. § 498.3(b)(15), which plainly gives a provider a right to a hearing to challenge the effective date of his or her enrollment. The regulation states that initial determinations that confer hearing rights include:

The effective date of a Medicare provider agreement or supplier approval.

CMS would have me ignore the plain meaning of the regulation. It contends that this regulation predates the Part 424 regulations and was intended to confer hearing rights only in situations not covered under Part 424. That argument is unpersuasive. The regulation is plain and unambiguous.

***2. NGS and CMS correctly determined Petitioner's effective date of enrollment to be February 13, 2009.***

There are no disputed material facts in this case. On June 30, 2007, Petitioner's Medicare billing privileges were deactivated, because he had failed to submit any Medicare reimbursement claims for a period of 12 consecutive months. On August 21, 2008, an individual named Marina Zamminer filed a Medicare enrollment application with NGS on behalf of Petitioner. CMS Ex. 2; CMS Ex. 3. NGS concluded that there were problems with the application. On September 18, 2008, NGS wrote to Petitioner advising him that it had received the August 21 application but that it was closing the application and returning it due to NGS's conclusion that the application was incomplete and lacked necessary information. CMS Ex. 4.

Specifically, NGS advised Petitioner that the application lacked an authorization agreement for electronic funds. It told Petitioner that he must file a copy of a voided check along with his application. And, it told him that the application must be signed personally by Petitioner and not by his office manager on his behalf. CMS Ex. 4 at 2.

On October 6, 2008, a new enrollment application was filed on Petitioner's behalf with NGS. CMS Ex. 2. On October 21, 2008, NGS informed Petitioner that this application was missing necessary information and that additional information was required. *Id.* On November 13, 2008, Petitioner submitted additional information. However, NGS concluded that this information was either wrong or incomplete. On November 20, 2008, NGS rejected the October 6, 2008 application and closed its file. *Id.*

A third enrollment application was filed with NGS on Petitioner's behalf on February 13, 2009. On March 30, 2009, NGS informed Petitioner that this application was approved with an effective date of February 13, 2009, the filing date of the third application. CMS Ex. 6.

These undisputed facts plainly establish that NGS correctly established an effective date of enrollment for Petitioner of February 13, 2009. As a matter of law, NGS could not permit Petitioner to claim reimbursement for items or services that he provided earlier than that date.

Regulations provide that the effective date of enrollment of a physician shall be the later of the following:

The date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d). Additionally, a physician may not claim reimbursement for items or services that were provided more than 30 days from the effective date of his or her enrollment. 42 C.F.R. § 424.521(a)(1).

Petitioner filed an application for enrollment on February 13, 2009 that was subsequently approved by NGS effective that date. By operation of 42 C.F.R. § 424.520(d), February 13, 2009 was the earliest date on which the enrollment application could be approved. And, by operation of 42 C.F.R. § 424.521(a)(1), claims for items or services provided by Petitioner could only be reimbursed for those items or services provided by him on January 13, 2009, or thereafter. NGS thus correctly gave Petitioner an effective date of enrollment of February 13, 2009.

Petitioner contends that the first two applications that were filed on his behalf were mishandled. Petitioner's March 16, 2010 Letter. But, Petitioner has not supplied facts that show that these applications were, in fact, complete and that NGS should have accepted them. Petitioner has provided no basis for me to conclude that NGS improperly rejected and closed the first two enrollment applications that were filed on his behalf.

In a letter to the New York Attorney General, dated June 11, 2009, signed by Ms. Zamminer and made part of Petitioner's hearing request, Petitioner contended that his original application (the August 21, 2008 application) was "complete." However, Petitioner did not deny that the original application was not signed by him personally (Ms. Zamminer did contend that she had supplied NGS with an authorization agreement for electronic funds and with a voided check).

Nothing that Petitioner asserts undercuts my conclusion that NGS correctly determined Petitioner's effective date of enrollment to be February 13, 2009. Petitioner has made no showing that NGS should have accepted one of the previous applications that were filed on Petitioner's behalf. Although he contends that the first application – the August 21 application – was "complete," Petitioner does not deny that it, in fact, lacked his

