

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Island Endoscopy Center, LLC,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-554

Decision No. CR2460

Date: November 3, 2011

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request filed by Petitioner, Island Endoscopy Center. Petitioner has no right to a hearing inasmuch as it did not timely request reconsideration from the April 22, 2010 determination by the Centers for Medicare and Medicaid Services (CMS) certifying Petitioner to participate in the Medicare program as an ambulatory surgery center effective March 22, 2010.

I. Background

Petitioner is an ambulatory surgery center that participates in Medicare. Petitioner requested a hearing to challenge CMS's determination to certify Petitioner as a participating provider effective March 22, 2010. In subsequent correspondence, Petitioner clarified its hearing request to assert that it desired to be certified effective February 24, 2010.

The case was assigned to me for a hearing and a decision. CMS filed a motion to dismiss and, in the alternative, for summary judgment, along with 23 proposed exhibits that it identified as CMS Exhibit (Ex.) 1 – CMS Ex. 23. Petitioner initially failed to reply to CMS's motion. I then sent an order to show cause to Petitioner, directing it to reply to the motion. Petitioner responded by filing a copy of a letter dated April 22, 2010, and signed by Steven Blaum, which was sent to

Petitioner by CMS notifying Petitioner that its effective date of participation in Medicare would be February 24, 2010. Petitioner did not identify this letter as an exhibit. I identify this letter as P. Ex. 1. I then directed CMS to provide me with an affidavit, or other documentation, explaining this letter. CMS responded with an October 26, 2011 declaration by Sherry Mohamed, a CMS employee, along with three attachments identified as CMS Exs. 24-26. I receive into evidence CMS Ex. 1 – CMS Ex. 26, P. Ex. 1, and the declaration of Sherry Mohamed, which I identify as CMS Ex. 27.

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

A. Issue

The issue in this case is whether Petitioner has shown good cause for untimely requesting reconsideration from CMS's initial determination.

B. Findings of Fact and Conclusions of Law

It would be an understatement to say that this case has a tortured history. Petitioner has made multiple filings with CMS and with National Government Services (NGS), a Medicare contractor to which CMS has delegated the authority to review applications for provider and supplier participation in the Medicare program. Only some of these filings are relevant to this case. However, for purposes of clarity, I summarize all of Petitioner's filings as follows.

- On April 22, 2009, Petitioner submitted an application to NGS for participation in Medicare. On May 8, 2009, NGS acknowledged receiving this application. However, in a letter to Petitioner on that date, NGS told Petitioner that the application was incomplete and that Petitioner would have to submit revisions and additional supporting documentation. NGS told Petitioner that it would be obligated to reject Petitioner's application, unless Petitioner complied with NGS's request for supplemental information and documentation by June 5, 2009. CMS Ex. 4.
- On June 11, 2009, Petitioner submitted a new participation application to NGS. CMS Ex. 5.
- On June 12, 2009, NGS advised Petitioner that it was closing its processing of Petitioner's April 22, 2009 participation application because Petitioner had failed to provide the supplemental information and documentation requested by NGS. CMS Ex. 6.

- On June 19, 2009, NGS informed Petitioner that Petitioner's June 11, 2009 application could not be processed because it was missing information or was materially incomplete. NGS advised Petitioner to correct and resubmit its application. CMS Ex. 7.
- On July 27, 2009, Petitioner filed a third application for participation. CMS Ex. 8.
- On August 10, 2009, NGS notified Petitioner that it was denying Petitioner's July 27, 2009 application. NGS told Petitioner that it was denying the application because Petitioner had not complied with New York State licensing and registration requirements. CMS Ex. 9. Additionally, CMS advised Petitioner that it could request reconsideration of this determination by filing a request for reconsideration within 60 days. Petitioner did not request reconsideration.
- Petitioner filed a fourth application for participation on October 5, 2009. CMS Ex. 12.
- On October 13, 2009, NGS informed Petitioner that it could not process the October 5 application because it was missing information or was materially incomplete. NGS again informed Petitioner that it had 30 days to complete its application. CMS Ex. 13.
- On October 26, 2009, Petitioner filed a fifth application for participation. CMS Ex. 14.
- On November 11, 2009, NGS notified Petitioner that it was rejecting Petitioner's October 26, 2009 application. CMS Ex. 15.
- On November 16, 2009, Petitioner filed a sixth application for participation. CMS Ex. 16.
- On April 22, 2010, CMS notified Petitioner that its application (evidently, the November 16, 2009 application) was approved. CMS sent two letters to Petitioner on that date. One letter advised Petitioner that its effective date of participation was February 24, 2010. P. Ex. 1. Another letter is identical, with the exception of the signature, but advised Petitioner that its effective date of participation was March 22, 2010. CMS Ex. 17.

- On June 9, 2010, NGS sent a letter to Petitioner confirming approval of the November 16, 2009 application and stating that Petitioner's effective date of participation is March 22, 2010. CMS Ex. 18.
- On October 4, 2010, Petitioner submitted yet another application for participation. In an accompanying letter, Petitioner requests that its effective date of participation in Medicare be established as September 10, 2009, the date when Petitioner first began seeing Medicare beneficiaries at its facility. CMS Ex. 19.
- On April 27, 2011, NGS rejected the October 4, 2010 application. NGS treated the October 4 application as a reconsideration request but denied it on the ground that Petitioner's application had been approved on June 9, 2010. CMS Ex. 20.
- On May 2, 2011, NGS received a letter from Petitioner dated April 8, 2010, in which Petitioner formally requested reconsideration of the determination that March 22, 2010 is its effective date of participation. CMS Ex. 21.
- On May 24, 2011, NGS notified Petitioner that it was rejecting Petitioner's request on the ground that it was untimely filed. CMS Ex. 22.

As I have stated, much of this procedural history is irrelevant. Petitioner did not request reconsideration of any of NGS's or CMS's actions prior to the April 22, 2010 CMS determination establishing March 22, 2010 as Petitioner's effective date of participation in Medicare. Consequently, all of the actions taken by NGS or CMS prior to April 22, 2010 are administratively final and non-reviewable.

That leaves open the issue of CMS's April 22, 2010 determination (confirmed by NGS on June 9, 2010). Petitioner did not take issue with that determination until October 4, 2010, when it submitted an application for participation and requested that Petitioner's effective date of participation be September 10, 2009 rather than March 22, 2010, the date established by CMS. If one interprets this October 4 application to be a request for reconsideration of CMS's determination, then it was filed by Petitioner more than five months after the April 22 notification and nearly four months after NGS's June confirming letter. Treating the request for reconsideration that was received by NGS in May 2011 as a separate request, that request was sent by Petitioner about a year after CMS sent its April 22, 2010 notice, and nearly a year after NGS sent its June 9, 2010 confirmation.

All of these requests for reconsideration were untimely filed. A party has a right to reconsideration of an adverse initial determination only if it files that request within 60 days of receiving notice of the determination. 42 C.F.R. § 498.22(b)(3).

The 60-day time period may be extended in the case of an untimely filing but only on a showing of good cause for a failure to file timely. If the request for reconsideration is not timely filed, or if the deadline for filing is not extended, then the adverse initial determination becomes administratively final and may not be appealed.

Petitioner made no showing of good cause for untimely filing its reconsideration requests. Indeed, it has not provided me with any explanation for its untimely filing. CMS's brief moving for dismissal of this case explicitly asserted that Petitioner filed its hearing requests untimely and put Petitioner on notice that it had to show good cause if Petitioner sought to prove a reasonable basis for delaying its filings. Despite that, Petitioner produced nothing in response.

I have considered whether the two letters that CMS sent to Petitioner on April 22, 2010 may have misled Petitioner into not filing its request for reconsideration timely. CMS Ex. 17; P. Ex. 1. The letters were confusing in that they are identical except that they give Petitioner different effective dates of participation. One letter states that Petitioner's effective participation date is March 22, 2010, and the other states February 24, 2010 as the effective date.¹

However, as confusing as these two letters may have been, they were not materially misleading, and they are no basis for finding good cause for Petitioner's untimely filing. Petitioner was plainly dissatisfied with *both* of the effective dates stated in the two letters because, in October 2010, when Petitioner finally asked for reconsideration, it requested a September 2009 effective participation date.² Given that dissatisfaction, there is nothing in either of the two letters – or in NGS's June 9, 2010 confirming letter – that would have induced a reasonable entity to delay filing a reconsideration request.

Petitioner's failure to show good cause for its untimely finding means that the determination of a March 22, 2010 effective participation date is administratively final. Petitioner has no right to a hearing in this case, and, therefore, I dismiss its hearing request.

/s/
Steven T. Kessel
Administrative Law Judge

¹ CMS explains the discrepancy to my satisfaction as an administrative error that was immediately corrected. CMS Ex. 27.

² Now, Petitioner says it would be content with February 24, 2010.