Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Romeo Nillas, M.D.,	)	Date: February 19, 2010
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-10-136
	)	Decision No. CR2069
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I deny the motion of the Centers for Medicare & Medicaid Services (CMS) to dismiss the hearing request of Petitioner, Romeo T. Nillas, M.D. I grant CMS's motion for summary disposition. Consequently, the effective date of Petitioner's enrollment as a provider in the Medicare program remains December 30, 2008.

I. Background

HCA Physician Services (HCA) filed a hearing request on behalf of Petitioner, a physician, and apparently, an employee of HCA in which it challenged the effective date of Petitioner's enrollment in the Medicare program. In seeking a hearing HCA alleged that Petitioner should have been enrolled as of an earlier date than the date when CMS's contractor determined that Petitioner was eligible for enrollment, December 30, 2008. The case was assigned to me for a hearing and a decision.

I directed the parties to brief several issues. Both CMS and HCA filed briefs. CMS moved to dismiss Petitioner's hearing request and moved, alternatively, for summary disposition. HCA opposed CMS's motion. CMS filed 10 proposed exhibits which it designated CMS Ex. 1 – CMS Ex. 10. Petitioner filed an exhibit, which it designated as P. Ex. 1. I receive all of the parties' proposed exhibits into the record of this case.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner has a right to a hearing to challenge the effective date of his enrollment in the Medicare program; and

2. CMS's contractor and CMS properly determined Petitioner's effective date of enrollment to be December 30, 2008.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law (Findings).

1. I deny CMS's motion to dismiss.

CMS premises its motion to dismiss on two grounds. First, it asserts that Petitioner has no right to a hearing because HCA, which filed the hearing request, is not an affected party and has no right to challenge Petitioner's effective date of participation.

I agree with CMS that HCA has no standing to file a hearing request, either on its own behalf, or as the employer of Petitioner. Petitioner is the affected party in this case and he, and he alone, has a right to a hearing. However, HCA and Petitioner have clarified that HCA is serving as Petitioner's representative in this case. I therefore conclude that Petitioner is the true party in interest.

Second, CMS argues that Petitioner has no right to challenge the effective date of his participation in Medicare. The gravamen of CMS's argument is that the regulations which grant providers hearing rights concerning determinations about their enrollment eligibility, at 42 C.F.R. Part 424, grant only limited hearing rights to challenge *denials* of enrollment applications or determinations to *revoke* Medicare enrollment. CMS reasons that a challenge of the *effective date* of enrollment – as is the case here – is neither a challenge of a denial nor of a revocation and thus, a party making such a challenge is not entitled to a hearing.

CMS asserts that the hearing rights it grants to providers to challenge enrollment determinations effectuate Congress' intent expressed in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, codified at 42 U.S.C. § 1395cc(h)(1)(A). It asserts that it was never the intent of Congress, nor of CMS, to allow providers to challenge the effective dates of their enrollment as opposed to determinations to either deny or revoke Medicare enrollment.

However, there is a regulation which, on its face, explicitly confers appeal rights on all providers who challenge the effective dates of their enrollment in Medicare. That regulation is 42 C.F.R. § 498.3(b)(15), which defines an "initial determination" for which hearing rights are granted as including:

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

This language is explicit and, on its face, it confers hearing rights in precisely the circumstance that is at issue here, a challenge by Petitioner to the effective date of his enrollment in the Medicare program.

CMS contends that 42 C.F.R. § 498.3(b)(15) predates the more recently published regulations governing provider enrollment hearings and is superseded by them. It asserts that the Secretary never intended the broad language of 42 C.F.R. § 498.3(b)(15) to apply to provider enrollment hearings and that the regulation's language – admittedly sweeping – was not intended to apply in such situations.

The problem with this argument is that it fails to address the very plain language of the regulation. There is nothing in 42 C.F.R. § 498.3(b)(15) to suggest that it is limited as CMS urges. Nor is there any language in the Part 424 regulations that suggests that 42 C.F.R. § 498.3(b)(15) is inapplicable. I therefore deny CMS's motion to dismiss.[1]

2. I grant CMS's motion for summary disposition.

This is yet another of a myriad of cases filed by a physician challenging the effective date of his or her enrollment in the Medicare program. This and many similar hearing requests appear to have been generated by a Medicare regulation that became effective on January 1, 2009 and which, in most cases, allowed physicians and nonphysician practitioners to claim reimbursement for items or services only for the 30-day period that predated their enrollment in the Medicare program. 42 C.F.R. § 424.521. Up until the effective date of

[1] I do not mean to suggest that CMS could not limit hearings in provider enrollment cases to hearings over determinations to deny or revoke enrollments. The obvious fix would be for the Secretary to publish a regulation that specifies that 42 C.F.R. § 498.3(b)(15) does not apply to such cases.

this regulation newly enrolled physicians had been eligible to claim reimbursement for services that were provided beyond the 30-day limit. Petitioner, as is the case with so many others, is dissatisfied with the limitation imposed by the new regulation.

I have no authority to order CMS to make retroactive reimbursement for claims that were generated outside of the period permitted by regulation. Nor may I accomplish through the back door what I may not do directly. Under no circumstance may I order CMS to establish an earlier effective date of participation than that which is directed by a controlling regulation. By regulation the effective date of participation of an enrolled physician must be the *later* of the following dates: 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).

The undisputed facts of this case are as follows. On January 28, 2009, Petitioner filed an enrollment application with Palmetto GBA (Palmetto), a Medicare contractor operating on CMS's behalf. CMS Ex. 1. Palmetto determined that it was unable to process the application because the person who signed the application on Petitioner's behalf was not authorized to do so. *Id.* On May 4, 2009, Petitioner submitted a second application. Once again, the person who signed the application was, in Palmetto's judgment, not authorized to do so, and thus, Palmetto again informed Petitioner that it was unable to process the application. CMS Ex. 2. On July 2, 2009, Palmetto evidently became satisfied with whatever corrections Petitioner had made to the application and it informed Petitioner that he was enrolled in Medicare effective April 5, 2009. CMS Ex. 3. Petitioner was dissatisfied with this determination and requested reconsideration. On October 1, 2009, Palmetto advised Petitioner that his effective date of enrollment was adjusted to December 30, 2008, 30 days prior to the date Petitioner initially applied for enrollment. CMS Ex. 5.

The undisputed facts establish that the *earliest* date when CMS could have approved Petitioner's application for enrollment was the date of his initial application, January 28, 2009. That is the filing date of the application that Palmetto "subsequently approved" and it is the evident basis for Palmetto's and CMS's eventual determination to enroll Petitioner effective December 30, 2008. 42 C.F.R. § 424.520(d).[2]

[2] CMS has not explained to me how Palmetto came up with the December 30, 2008 enrollment date. I am speculating but it appears that Palmetto may have intended to assure that Petitioner could claim reimbursement for services provided up to 30 days prior to the date of his application, consistent with 42 C.F.R. § 424.521. That determination of an effective date that is 30 days prior to the actual application date is not consistent with what the regulations specify and would appear to be unnecessary inasmuch as Petitioner could claim reimbursement for

(continued…)

Petitioner does not assert that there are any facts that would entitle him to an earlier enrollment date pursuant to the requirements of 42 C.F.R. § 424.520(d). He does not contend that he filed an application on any date prior to January 28, 2009.

Petitioner's sole argument is that he should be permitted to claim reimbursement retroactively for items or services he provided outside of the 30 day period prior to the filing date of his application because, according to him, the new reimbursement regulations that bar retroactive claims beyond the 30 day period were not in effect on the date that he applied to enroll. According to Petitioner: "Medicare contractors were not notified to apply the 30-day minimum until receipt of CMS Change Request 6310 that was released to contractors on March 13, 2009 and re-released on April 15, 2009, indicating an implementation date of April 1, 2009."

This is an argument that I have no authority to address. As I have stated, I have no authority to order CMS to make payment for claims that were provided outside of the 30-day retroactive period provided by regulation. Nor do I have authority to consider a challenge to the way in which this Department implements regulations.[3]

/s/
Steven T. Kessel
Administrative Law Judge

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[2](…continued)
services provided as early as December 30, 2008 even with a January 28, 2009 enrollment date. However, I am not adjusting the effective date of enrollment based on Palmetto's apparent misreading of the regulation because neither Petitioner nor CMS has asserted that Palmetto's action *in this respect* is incorrect.

[3] 42 C.F.R. §§ 424.520 and 424.521 were published by the Secretary on November 19, 2008 and became effective on January 1, 2009. 73 Fed. Reg. 69726 (Nov. 19, 2008). Thus, the regulation governing retroactive payment for claims generated prior to enrollment was in effect when Petitioner filed his application for enrollment and would govern Petitioner's claims even if contractors had not received implementation guidance by that date.