Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of: Victor Alvarez, M.D., Petitioner, - v. - Centers for Medicare & Medicaid Services.	)	Date: February 22, 2010 Docket No. C-10-134 Decision No. CR2070

DECISION DENYING MOTION TO DISMISS AND REMANDING CASE FOR RECONSIDERATION

I deny the motion of the Centers for Medicare & Medicaid Services (CMS) to dismiss this case or, in the alternative, for summary disposition and I remand the case so that either CMS or its contractor, Palmetto GBA (Palmetto), may conduct a reconsideration.

I. Background

Petitioner, Victor Alvarez, M.D., is a physician. His apparent employer, HCA Physician Services (HCA), filed a hearing request on Petitioner's behalf challenging the effective date of Petitioner's enrollment as a participating physician in the Medicare program. The case was assigned to me for a hearing and a decision. I issued an initial pre-hearing order which I superseded with a subsequent order. I directed the parties to brief issues relating to whether Petitioner had a right to a hearing before me. CMS responded by moving to dismiss Petitioner's hearing request. CMS moved in the alternative for summary disposition. Petitioner opposed CMS's motions. CMS filed 10 proposed exhibits in

support of its motions, which it identified as CMS Ex. 1 – CMS Ex. 10. Petitioner filed two exhibits which he identified as P. Ex. 1 and P. Ex. 2. I receive CMS Ex. 1 – CMS Ex. 10 and P. Ex. 1 and P. Ex. 2 into the record.[1]

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. A basis exists for me to dismiss Petitioner's hearing request; and

2. Remand of this case to CMS is appropriate.

B. Findings of fact and conclusions of law

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

1. There exists no basis for me to dismiss the hearing request.

CMS makes three arguments to support its motion to dismiss.

First, CMS contends that the real party in interest is HCA, not Petitioner, and that HCA has no right to a hearing because it is not the subject of the Medicare enrollment determination that is at issue here.

CMS is correct in asserting that an employer of an affected provider has no right to a hearing. The right to a hearing in this case extends uniquely to Petitioner. However, Petitioner has offered evidence showing that HCA is serving only as Petitioner's representative and not seeking relief in its own right. P. Ex. 1. For that reason I conclude that it is Petitioner, and not HCA, who seeks a hearing and a decision in this case.

Second, CMS asserts that Petitioner has no right to a hearing to challenge the effective date of his enrollment. 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

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[1] CMS filed its motion and exhibits on December 18, 2009. On January 14, 2010, it moved to supplement its exchange with a more complete version of CMS Ex. 1. Petitioner did not oppose this motion. I accept the version of CMS Ex. 1 that it filed on January 14, 2010 in substitution for the December 18, 2009 version of the same exhibit.

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 its 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 the 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 on this ground.[2]

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[2] 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.

CMS's third argument is that Petitioner has no right to a hearing because he never sought reconsideration of the determination that he now seeks to challenge. That is true, but on the other hand, neither CMS nor Palmetto ever extended the opportunity to request reconsideration to Petitioner. Indeed, it is apparent from the documentation concerning Petitioner's applications to enroll in Medicare that Palmetto failed to provide Petitioner with information that he would have needed in order to decide whether to request reconsideration. For that reason, CMS's argument for dismissal must fail.[3]

The undisputed facts establish the following history. Petitioner initially applied to enroll as a physician in Medicare on or about November 13, 2008. By e-mail dated November 24, 2008, Petitioner's then-representative was informed that Petitioner's application had been reviewed and no additional information would be required at that time. Petitioner's representative was also informed that he would receive written notification once the "process" was complete. P. Ex. 2. On January 22, 2009, Palmetto sent a letter to Petitioner's representative. Palmetto advised the representative that it had sought certain information concerning Petitioner's application but that it had not received it to date. It stated that, therefore, it had closed the application without enrolling Petitioner. CMS Ex. 1, at 1. It then advised Petitioner that, in order to enroll in Medicare, he must complete an application, must add the name of a specified individual to the application (apparently, the chief executive officer of Petitioner's employer) as an authorized official, and must resubmit his application.

Petitioner filed a second application for enrollment on February 16, 2009. CMS Ex. 2. On February 25, 2009, Palmetto corresponded with Petitioner's then-representative. Palmetto advised him that it was unable to process the application because a person who signed the application was not listed in its files as an authorized or delegated official. *Id.*, at 1.

Petitioner appears to have filed a third application on March 13, 2009. On April 23, 2009, Palmetto sent an additional letter to Petitioner's representative informing him that it had not received requested information and was, therefore, closing the application. CMS Ex. 3, at 1.

Petitioner then submitted yet an additional application on June 17, 2009. Palmetto returned this application to Petitioner because the application contained a signature that was copied. CMS Ex. 4.

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3 In Finding 2 I explain that I am remanding this case in order to allow Palmetto or CMS to make a reconsideration determination.

Finally, Petitioner applied again on August 10, 2009. CMS Ex. 5. On October 5, 2009, Palmetto advised Petitioner's representative that this application was approved and that Petitioner was assigned an effective Medicare participation date of July 8, 2009.

None of the letters sent by Palmetto to Petitioner's representatives contained any language advising Petitioner of a right to request reconsideration from Palmetto's actions. Nor did the October 5 letter contain an explanation as to why July 8, 2009 – as opposed to some other date – was selected by Palmetto as the effective date of participation.

Petitioner did not seek reconsideration from any of Palmetto's letters. His representative requested a hearing on November 9, 2009, asserting that Palmetto failed to apply applicable guidelines in determining whether to accept Petitioner's applications and in establishing the effective date of his Medicare enrollment. CMS Ex. 6, at 1. In the hearing request Petitioner's representative also made arguments effectively challenging a policy that CMS implemented via a regulation effective January 1, 2009. That regulation effectively precludes a newly enrolled physician from obtaining reimbursement for items or services provided to Medicare beneficiaries more than 30 days from the effective date of the physician's enrollment. 42 C.F.R. § 424.521.

The evident flaw in Palmetto's review of Petitioner's numerous applications for enrollment is that it never advised Petitioner of his right to disagree with Palmetto's actions. At no point did Palmetto so much as suggest to Petitioner that he could seek review of them. Consequently, Petitioner was cut off from the opportunity to challenge the several instances in which Palmetto deemed applications to be "closed" or where Palmetto refused to process Petitioner's application.

Thus, although Petitioner never requested reconsideration, that is no basis to grant CMS's motion to dismiss. I would dismiss Petitioner's hearing request had Palmetto or CMS informed Petitioner that he could request reconsideration, and had Petitioner failed to avail himself of that right. But, in the absence of notice, Petitioner cannot be held accountable for failing to exercise a right of which he was not apprised.

2. ***I remand this case to Palmetto and CMS in order that the determination to establish July 8, 2009 as Petitioner's effective date of participation may be reconsidered.***

I am electing to treat Petitioner's November 9, 2009 hearing request as a request for reconsideration inasmuch as reconsideration is a mandatory intermediate prerequisite for requesting a hearing and reconsideration did not occur here.

On reconsideration, Palmetto and/or CMS should explain why July 8, 2009 (or any other date that may result from reconsideration) is the correct effective date of Petitioner's enrollment in Medicare. If Palmetto and/or CMS determine not to make Petitioner's enrollment effective the date of any of the applications for enrollment that Petitioner filed prior to his August 10, 2009 application, Palmetto and/or CMS should explain why they have determined not to do so.

As I have discussed, Petitioner has a right to challenge Palmetto's and CMS's determination of the effective date of his participation in Medicare. That right is limited. Regulations governing enrollment of physicians and non-physician practitioners in Medicare specify that the effective date of participation shall 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). Any hearing that I might eventually hold in this case will thus be limited to deciding the issue of when Petitioner filed an application "that was subsequently approved" by a Medicare contractor (Palmetto) or, if applicable, the date when Petitioner first began furnishing services at a new practice location. Petitioner has no right to challenge regulatory policy governing reimbursement for items or services provided prior to enrollment. *See* 42 C.F.R. § 498.3(b)(15).

I caution the parties that I make no findings at this time as to the merits of this case. In particular, I have not made any finding as to whether any of the applications that Petitioner made prior to August 10, 2009 constitutes an application "that was subsequently approved" by Palmetto and/or CMS. *See* 42 C.F.R. § 424.520(d).

/s/

Steven T. Kessel
Administrative Law Judge