

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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| In the Case of: |) | |
| |) | |
| Blue Plastic Surgery Center, LLC, |) | |
| (NPI No. 1598918526), |) | Date: February 23, 2010 |
| |) | |
| Petitioner, |) | |
| |) | |
| - v. - |) | Docket No. C-10-103 |
| |) | Decision No. CR2075 |
| Centers for Medicare & Medicaid |) | |
| Services. |) | |
| |) | |
| |) | |

DECISION

I grant the motion of the Centers for Medicare & Medicaid Services (CMS) to affirm its determination to establish February 22, 2009 as the effective date of participation in the Medicare program of Petitioner, Blue Plastic Surgery Center.¹

I. Background

On October 28, 2009 Petitioner filed a hearing request and this case was assigned to me for a hearing and a decision. The hearing request sought to challenge a reconsideration determination, dated October 19, 2009, by CIGNA Government Services, an entity operating on behalf of CMS, that Petitioner's effective date of participation in Medicare was February 22, 2009. In its hearing request Petitioner sought an effective date of December 2008.

¹ Blue Plastic Surgery Center is the business name of Dr. Martin Blue. The exhibits and other record documents in this case refer to Blue Plastic Surgery Center and Dr. Blue interchangeably. My decision applies equally to Blue Plastic Surgery Center and to Dr. Blue.

I issued an initial acknowledgement of receipt of the hearing request and a pre-hearing order. However, on November 23, 2009 and on further review of the request I directed the parties to file briefs addressing the issue of whether there was any issue of fact or law in these cases that I may hear or decide. I gave the parties a December 14, 2009 deadline for filing briefs in response to my November 23 order. CMS responded to the order by filing a motion to either dismiss Petitioner's hearing request or for summary disposition of the case. Petitioner did not file anything in response to the November 23 order. I gave Petitioner an opportunity to file a response to CMS's motion, however, Petitioner failed to file a reply.

With its motion CMS filed 14 proposed exhibits which it designated as CMS Ex. 1 – CMS Ex. 14. I receive all of these proposed exhibits into the record.

II. Issue, findings of fact or conclusions of law

A. Issue

The issue in this case is whether CMS correctly established February 22, 2009 as the effective date of Petitioner's participation in Medicare.

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 Petitioner's hearing request.

CMS moved to dismiss Petitioner's hearing request, arguing that a provider such as Petitioner has no right to challenge its effective date of enrollment 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. section 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 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.²

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

Regulations governing the effective date of a provider or a supplier’s enrollment in Medicare state that the effective date of enrollment shall be the later of the following dates: the date when the provider or supplier 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 provider or supplier first began providing services at a new practice location. 42 C.F.R. § 424.520(d). The regulations do not allow for an earlier effective date of enrollment.

The unchallenged facts of this case (Petitioner did not dispute any of the exhibits submitted by CMS) show that Petitioner made several unsuccessful attempts to enroll in Medicare before finally submitting an acceptable enrollment application. Petitioner first applied for enrollment in October 2008. CIGNA, acting on behalf of CMS, returned the

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.

application because Petitioner stated that it would not be treating Medicare beneficiaries. CMS Ex. 1. Petitioner then reapplied. On November 21, 2008, CIGNA informed Petitioner that the application was not complete and that Petitioner must submit revisions and supporting information within 30 days. CMS Ex. 2. Petitioner did not respond to CIGNA's letter and, on December 23, 2008, CIGNA rejected the second application. CMS Ex. 3. On March 23, 2009, Dr. Blue submitted an application, evidently on behalf of Petitioner. CMS Ex. 4. On April 22, 2009, CIGNA advised Petitioner by letter that the application was not complete and that numerous revisions had to be made in order for the application to be completed for processing. CMS Ex. 5. Evidently, Petitioner complied with CIGNA's request and, on June 11, 2009, CIGNA approved the application with an effective enrollment date of February 22, 2009.

Petitioner's hearing request does not explain why it believes that it is entitled to an effective enrollment date of December 2008 except to say that Petitioner treated patients in good faith beginning in December 2008 and that it believes that it should be entitled to compensation for the services that it rendered. That is no basis for me to change the enrollment date. Petitioner has not shown that it filed an acceptable application earlier than February 22, 2009. Moreover, the regulations governing enrollment do not allow enrollment to be made retroactive to a date that is earlier than the date of application nor do they allow for reimbursement of claims that are generated prior to the effective date of enrollment.³ Consequently, I find that Petitioner has provided me with no basis to alter CIGNA's and CMS's determination as to the effective date of its Medicare enrollment.

/s/

Steven T. Kessel
Administrative Law Judge

³ I am aware that CMS changed its reimbursement policy in or about January 2009 effectively to prohibit reimbursement to providers and suppliers for items or services that they provided prior to the dates of their enrollment. However, while a provider or a supplier has a right to challenge the effective date of his or her enrollment he does not have a right to challenge CMS's policy barring reimbursement for items or services provided prior to enrollment.