

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Michael Nillas, M.D.,  
(NPI: 1649282658),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-177

Decision No. CR2077

Date: February 26, 2010

**DECISION**

I deny the motion by the Centers for Medicare & Medicaid Services (CMS) to dismiss the hearing request of Petitioner, Michael Nillas, M.D. However, I grant CMS's motion for summary disposition.

**I. Background**

Petitioner is a physician. His employer, Alfieri Cardiology, filed a hearing request on Petitioner's behalf, challenging the determination of a Medicare contractor and CMS to assign Petitioner an effective Medicare enrollment date at his current practice location of March 31, 2009. CMS moved to dismiss the hearing request, contending that Petitioner has no right to a hearing to challenge the effective date of his enrollment. Alternatively, CMS moved for summary disposition. Petitioner opposed the motions.

CMS filed 11 proposed exhibits with its motions which it identified as CMS Ex. 1 – CMS Ex. 11. Petitioner filed eight proposed exhibits which he identified as P. Ex. 1 – P. Ex. 6.1. I receive these exhibits into the record. I find all of the facts stated in these exhibits to be true given Petitioner's failure to oppose any of them.

## 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; and
2. CMS is entitled to summary disposition sustaining its determination that the effective date of Petitioner's enrollment at his current practice location is March 31, 2009.

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

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

- 1. Petitioner has a right to a hearing to challenge the effective date of his enrollment.*

CMS makes the same argument concerning Petitioner's hearing rights that it has made in numerous other cases and which I have rejected on numerous occasions. Essentially, CMS contends that the regulations which grant physicians and other clinicians hearing rights concerning Medicare enrollment determinations are limited to hearings to challenge either denials or revocations of enrollment. CMS contends that neither Congress nor the Secretary ever contemplated that providers who were dissatisfied with determinations of the *effective dates* of their enrollments would be entitled to hearings to challenge such determinations.

I will not belabor this issue. As I have held repeatedly, CMS's argument fails to overcome the explicit language of 42 C.F.R. § 498.3(b)(15). That regulation states that initial determinations by CMS which give providers hearing rights include:

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

CMS attempts to limit the reach of this regulation by arguing that it was intended to apply only in the circumstance where a provider or a supplier is certified to participate in Medicare after completion of a certification survey. The evident problem with this argument is that the regulation contains no such limitation.<sup>1</sup>

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<sup>1</sup> I am not suggesting that CMS or the Secretary could not limit a provider's hearing rights to challenge only denials of certification or revocation of certification. However, if CMS or the Secretary intend to limit the reach of 42 C.F.R. § 498.3(b)(15), the obvious solution is to amend the regulation so as to make it more narrow.

**2. CMS is entitled to summary disposition sustaining its determination that the effective date of Petitioner's enrollment at his current practice location is March 31, 2009.**

The effective date of a physician's enrollment in Medicare is governed by regulations at 42 C.F.R. § 424.520(d). The effective date of enrollment for a physician may only be the *later* of two dates: the date when the physician 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 physician first began providing services at a new practice location. *Id.* The regulations do not empower CMS, or me, to grant a provider an earlier effective date nor may I waive the regulations' criteria.

The undisputed facts of this case establish that Petitioner – who had previously been enrolled in Medicare as a participating physician – began furnishing services at a new practice location on November 1, 2008. That was the date when he joined his present employer, Alfieri Cardiology. He was required to file an enrollment application in order to reassign benefits to his new practice location. Pursuant to the requirements of 42 C.F.R. § 424.520(d) the *earliest* effective date that Petitioner could be re-enrolled would be the date after he began practicing with Alfieri Cardiology when he submitted an enrollment application that was subsequently approved by the contractor.

The undisputed facts establish that on January 26, 2009, CMS's contractor received an enrollment application filed on Petitioner's behalf in order to reassign benefits to Alfieri Cardiology. CMS Ex. 3. On that same date the contractor received an application from Petitioner for Medicare participation. The contractor returned these applications on February 10, 2009, because they were incorrectly filled out. It returned the reassignment of benefits form because it failed to contain a signature from an authorized or delegated individual, and was not signed and dated by Petitioner. *Id.* On March 25, 2009, the contractor received revised applications which it again returned on April 2, 2009. CMS Ex. 9. On this occasion the contractor noted that the application was not signed by authorized or delegated officials. *Id.*<sup>2</sup>

Revised applications were filed on behalf of Petitioner on April 29, 2009. On May 28, 2009, the contractor approved these applications with an effective date of April 29, 2009. Subsequently, the contractor revised its effective date determination to approve an effective enrollment date for Petitioner of March 31, 2009.

In his hearing request Petitioner concedes that:

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<sup>2</sup> Another entity, Christiana Health Care Services, Inc., also submitted enrollment applications on behalf of Petitioner in 2009. These applications are not at issue in this case because they do not involve Petitioner's practice with Alfieri Cardiology and Petitioner is not contending that he should have been assigned an effective date based on them.

- An initial enrollment request was filed on his behalf on January 27, 2009.<sup>3</sup> Hearing request, at 2; and
- The contractor subsequently informed Petitioner that the enrollment application contained the signature of a person whose name was “not on file with CMS” and that a corrected signature was not provided to the contractor until April 29, 2009. *Id.*

Petitioner argues, however, that the contractor and CMS nonetheless should have given Petitioner an effective enrollment date of November 2008. He asserts that the contractor evaluated his application based on criteria implemented for a “newly enrolled” physician but that, in fact, he had been previously enrolled as a participating physician. Thus, according to Petitioner, the criteria employed by the contractor and now advocated by CMS are invalid in his case.

But, Petitioner does not deny that he was required to submit a new enrollment application as a consequence of his reassignment of benefits to Alfieri Cardiology. That requirement triggered, in turn, the criteria set forth in 42 C.F.R. § 424.520(d) which govern effective enrollment dates. Those criteria are plainly applicable here.

Petitioner next argues that the contractor, in effect, abused its discretion in determining to return his application. He asserts that this worked hardship on him and on Alfieri Cardiology because, in returning the application, the contractor effectively forced Petitioner to reapply and precluded him from receiving reimbursement for services that he provided to Medicare beneficiaries during the period between the date when he first applied for enrollment and the date when he filed an application that was determined to be acceptable. Petitioner complains that, had the contractor retained the application and required Petitioner to correct it, rather than returning it, Petitioner would have been entitled under Medicare regulations to an earlier effective enrollment date. To support his argument Petitioner cites to CMS policies which, he contends, authorized the contractor to deny Petitioner’s applications rather than returning them. Had the contractor followed this policy, according to Petitioner, he would have ultimately received an earlier effective date of participation than the date ultimately assigned to him by the contractor.

However, this case involves applications that were *incorrect* in that they contained signatures of individuals who were not authorized by CMS or the contractor to sign them. Under the circumstances the contractor had the discretion to do exactly what it did, which was to return the applications. Indeed, and as Petitioner concedes, CMS policies

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<sup>3</sup> CMS asserts that the date Petitioner filed the initial enrollment request was January 26, 2009. CMS Ex. 3. The discrepancy is not material to my decision as neither Petitioner nor CMS has made an issue of it.

authorize a contractor to return an application that lacks a necessary signature or is signed by the wrong person. Petitioner's opposition at 3, citing Chapter 4 of the Medicare Program Integrity Manual.

Nor does Petitioner contend that the contractor erroneously determined that the application lacked necessary information. Thus, Petitioner does not offer any basis for me to conclude that the contractor's action in returning the application was outside of its authority or contrary to applicable regulations.

Consequently, the date when Petitioner submitted an application that was subsequently approved by the contractor was April 29, 2009. The determination to give Petitioner an effective enrollment date of March 31, 2009 was, therefore, entirely consistent with regulatory requirements.<sup>4</sup>

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/s/  
Steven T. Kessel  
Administrative Law Judge

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<sup>4</sup> The effective date of March 31, 2009 appears to be predicated on the contractor's and CMS's interpretation of 42 C.F.R. § 424.521(a), which permits an enrolled provider to claim reimbursement for items or services provided as far back as 30 days from the effective date of enrollment. The contractor appears to have given the March 31 date to Petitioner to assure that he would be able to claim reimbursement for items or services that he provided on that date and thereafter.