Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Peter L. Gambacorta, M.D.,
(NPI: 1700089596),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-541

Decision No. CR2424

Date: September 7, 2011

DECISION

I sustain the determination of the Centers for Medicare and Medicaid Services (CMS) to establish an effective date of Medicare participation of January 20, 2011 for Petitioner, Peter L. Gambacorta, M.D.

I. Background

Petitioner is a physician. He applied to participate in the Medicare program and was accepted with an effective date of January 20, 2011. Petitioner contested the effective date of his participation, arguing that he should be assigned an earlier date. Petitioner's argument was denied on reconsideration, and he requested a hearing. The case was assigned to me for a hearing and a decision.

CMS filed a brief and 19 proposed exhibits that it identified as CMS Exhibit (Ex.) 1 – CMS Ex. 19. Petitioner filed a brief and two proposed exhibits that it identified as P. Ex. A and P. Ex. B. I receive the parties' proposed exhibits into the record.

One of Petitioner's two exhibits, P. Ex. A, consists of the affidavit of Rochelle Perrington. CMS would be entitled to cross examine this witness, if it moved to

do so. However, CMS did not request cross examination. Consequently, I find no basis to convene an in-person hearing, and I decide the case based on the parties' written submissions.

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

A. Issue

The issue in this case is whether CMS properly assigned Petitioner an effective date of participation of January 20, 2011.

B. Findings of Fact and Conclusions of Law

There are no significant facts in this case that are in dispute. Petitioner filed a series of applications to participate in Medicare, beginning with an application that he filed on March 22, 2010. National Government Services (NGS), the contractor that was responsible for processing these applications, found each of them to be deficient and returned them to Petitioner. Finally, Petitioner filed an application on January 20, 2011 that NGS determined to be acceptable, and NGS thereupon assigned Petitioner an effective Medicare participation date of January 20, 2011.

Petitioner asserts that NGS and CMS erred in not accepting one or more of the applications that were found to be deficient. He argues that these applications were substantively correct and that they provided NGS and CMS with all of the information required by law and that was necessary to process Petitioner's application. Petitioner argues that his various applications were improperly rejected for bureaucratic and narrow technical reasons that are not supported by law or by regulations.

I disagree with Petitioner's assertion. As I discuss in more detail below, Petitioner was given a choice by NGS to submit his application in one of two formats. He could have submitted a written application using a standardized form supplied by CMS and the contractor. Or, he could have submitted an application electronically using an internet format developed by CMS. What Petitioner opted to do was to submit his application in neither a format that was the approved written application form nor the approved internet format. NGS and CMS were within their rights not to process these applications.

To participate in Medicare, a provider such as Petitioner must enroll in the program. 42 C.F.R. § 424.505. A provider may be enrolled only if he or she completes an acceptable application to participate in Medicare. That application must be submitted on "the applicable enrollment application" form containing all of the information required by CMS. 42 C.F.R. § 424.510(a), (d).

Thus, CMS has the authority to control both the *format* and the *content* of applications for provider participation. That authority entitles CMS to insist that applicants for provider status strictly conform to its requirements for participation. There is an important reason why CMS has the authority to insist on strict conformity with its requirements. I take notice that, annually, CMS and its contractors receive many thousands of applications for provider participation. The sheer volume of paperwork that must be processed each year dictates that there must be nothing in an application that departs, even slightly, in format or in content from that which CMS and the contractors require.

CMS and NGS give providers, including Petitioner, two options for filing applications for provider enrollment. A prospective provider may submit his or her application in writing using the appropriate form generated by CMS. CMS Ex. 4 at 1. Alternatively, a prospective provider may file an application for enrollment electronically, using the internet-based Provider Enrollment, Chain and Ownership System (PECOS). *Id.* Neither CMS nor NGS affords prospective providers other options in terms of format. To have his or her application processed, a prospective provider must use one of the two options that are offered by CMS and NGS. CMS Ex. 1 at 1. A contractor such as NGS must immediately return an application to a prospective provider if: the application is not on the correct written form; or, if the application is internet based, it has not been downloaded from CMS's web site. CMS Ex. 3 at 1-2.

At issue here are four applications that Petitioner submitted for provider enrollment. These, and the reasons why they were not processed by the contractor, are as follows.

- *Application received on March 22, 2010* (CMS Ex. 7). NGS determined that it was unable to process this application because, in that application, Petitioner requested an effective date of participation of August 1, 2010. The contractor, as a matter of policy, does not process applications that request participation dates more than 30 days after the date of the application. On April 28, 2010, NGS advised Petitioner that it was unable to process the application because he requested an effective participation date that was more than 30 days after the application date. CMS Ex. 8.

- *Application received on July 6, 2010* (CMS Ex. 9). Petitioner submitted this application in writing. The format of the application did not consist of the approved CMS form, nor was it a web based application using the PECOS format. Rather, it was submitted in the form of a document that Petitioner had, apparently, downloaded from a CMS site on the internet and that Petitioner then utilized as a written application. *Id.* On August 25, 2010, NGS advised Petitioner that it had closed the application because it

was not submitted in the proper format. CMS Ex. 10 at 1. NGS's notice to Petitioner specifically advised him that he could resubmit his application using either the PECOS format or the appropriate CMS form, available at the CMS web site. *Id.*

- *Application received on August 25, 2010* (CMS Ex. 11). Again, Petitioner submitted this application in writing. The document contains pages that Petitioner appears to have downloaded from the PECOS. In effect, Petitioner printed the electronic PECOS form and then filled it out manually and submitted it as a written document. *Id.* On October 22, 2010, NGS advised Petitioner that it was closing this application because sections were not in an approved format. CMS Ex. 12.

- *Application received on November 2, 2010.* Petitioner also appears to have submitted this application in writing. On December 17, 2010, NGS closed this application because, as with prior applications, it was not submitted on CMS's approved written format, nor was it submitted electronically on the PECOS format. CMS Ex. 14.

As I have discussed above, Petitioner finally submitted an acceptable application on January 20, 2011 and was given that date as an effective enrollment date.

CMS does not contend that any of these four applications was substantively inaccurate. Each of them (with the exception of the March 22, 2010 application) was found to be deficient by NGS because it was not submitted using one of the two formats approved by CMS, either on CMS's written application form or electronically on the PECOS web format.

Petitioner does not deny that the forms were not submitted precisely in the formats demanded by CMS. He avers that the applications were "all submitted using Medicare's paper enrollment process." P. Ex. A at 2. These forms were, according to Petitioner, obtained directly from NGS's website. *Id.* However, Petitioner implicitly concedes that the forms were not CMS's officially approved written forms. Rather, they were printouts from the PECOS format that Petitioner filled out manually and filed by mail.

As I have discussed, CMS has the authority to determine what forms or formats are acceptable to it and its contractors. That authority is plainly delegated to CMS by regulation, and CMS has re-delegated that authority to its contractors. Consequently, NGS's determination to reject the written applications submitted by Petitioner is within the scope of CMS's regulatory authority.

Petitioner argues that CMS is exalting form over substance. He asserts – without any contradiction by CMS – that the information that he provided to NGS was all that NGS demanded of him. So, he contends, the only reason for finding his applications to be deficient was that the applications were not on precisely the forms or in the electronic format that NGS found to be acceptable.

I do not agree with Petitioner's assertion that CMS and NGS are exalting form over substance. As I have explained, CMS and its contractors are inundated with provider applications and must establish rules to govern the volume of documentation that they receive. Requiring prospective providers to use a specific format may be a rigid requirement, but it is one that is authorized by regulation. For that reason, I may not overturn CMS's determination of effective date even if the information that CMS ultimately accepted from Petitioner is not substantively different from that which Petitioner put in his deficient applications.

Printing out the PECOS forms, filling them out manually, and mailing them did not conform to NGS's or CMS's protocol. The PECOS forms are not a substitute for the written forms utilized by CMS. Rather, they are an electronic alternative to those forms that may only be utilized if they are completed online. Allowing Petitoner (or any other prospective provider) to effectively devise his own system for filing a participation application would hinder the process designed by CMS and its contractors for processing applications in volume. Consequently, this deviation is significant, even if it provided the contractor with the identical substantive information that was ultimately accepted by it.

Petitioner also argues that CMS is without legal authority to require a prospective provider to utilize the precise application formats that are at issue here. I disagree. That authority plainly is stated at 42 C.F.R. § 424.510(a). It is not necessary as a matter of law that there be a regulation that describes the precise form that a prospective provider must use to complete an application. All that is required is that the regulation delegate to CMS the authority to establish the forms for application.

/s/
Steven T. Kessel
Administrative Law Judge