

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Arkady B. Stern, M.D.,
(CCN: 09260011100766),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-979

Decision No. CR2246

Date: September 20, 2010

**DECISION REMANDING CASE
TO CENTERS FOR MEDICARE AND MEDICAID SERVICES**

I remand this case to the Centers for Medicare and Medicaid Services (CMS) consistent with the Departmental Appeals Board's (Board) remand of this case to me in *Arkady Stern, M.D.*, DAB No. 2329 (2010). On remand, CMS or the contractor must determine whether Petitioner, Arkady Stern, M.D., is entitled to an effective date of participation in Medicare that is earlier than May 19, 2009. If that date is inconsistent with the date requested by Petitioner (October 2008), CMS or the contractor must afford Petitioner a right of reconsideration. If Petitioner is dissatisfied with the reconsideration determination, then he will have a right to request a hearing before me.

This case was originally before me as a hearing request by Petitioner challenging the effective date of his enrollment in Medicare. Petitioner contended that he should have been granted an effective date of enrollment in October 2008, whereas CMS argued that the effective date of enrollment is May 19, 2009. In my first decision in this case, I sustained CMS's determination. The Board has now remanded the case so that I may redecide it or that, alternatively, CMS or its contractor may make a new determination.

A basis for the Board's remand was its concern that CMS and its contractor had not responded to Petitioner's implicit contention that either of them may possess documentary evidence supporting his argument that he filed an application for enrollment in October 2008. Additionally, the Board was concerned that Petitioner – who is appearing pro se – may not have understood that he could present documentary evidence to support the contentions that he and his supporting witness made via declaration.

The Board gave me the option of re-hearing the case or of remanding it to CMS for a new determination that is consistent with its decision. I find that it would be more efficient for CMS and the contractor to make a new determination. They control the documentary record of Petitioner's application, and, furthermore, the contractor has expertise in determining whether an application is acceptable. For that reason, I have decided to remand this case rather than simply to re-hear it.

However, I am concerned that the contractor and CMS faithfully address the concerns stated in the Board's decision. It will be a waste of time if this case is re-determined based on a cursory review of the record already created. I anticipate, therefore, that CMS or its contractor will conduct the record search that the Board's decision clearly envisions and that, furthermore, they will give Petitioner all of the rights he is entitled to exercise under law to present evidence and to argue his contentions.

In its decision, the Board speculated that CMS or its contractor might possess documents that establish that Petitioner filed an enrollment application in October 2008. I direct these entities to search their records to determine whether documents pertaining to an October 2008 enrollment application exist. These documents may include: (1) whatever Petitioner filed or caused to be filed; and (2) whatever record the contractor or CMS made of the evaluation of these documents. If such documents do not exist, then CMS or its contractor must explain what their search consisted of. If such documents do exist, then CMS or its contractor must determine whether these documents constitute an acceptable application for enrollment and must decide what effective date of participation would be justified based on that determination. CMS or its contractor must also afford Petitioner the opportunity to provide them with whatever documentation he may possess that corroborates his assertion that he filed an application for enrollment in October 2008. CMS or its contractor must document its offer to Petitioner. Any determination that CMS makes concerning Petitioner's effective date of enrollment must reference specifically the supporting documentation on which that determination relies and must explain why that documentation supports the effective date that is determined.

 /s/
 Steven T. Kessel
 Administrative Law Judge