

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Alexander Eugene Istomin, M.D.
(NPI: 1235185778)

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-9

Decision No. CR2346

Date: April 1, 2011

DECISION REMANDING CASE

I deny the motion of the Centers for Medicare and Medicaid Services (CMS) to dismiss this case. In addition, I remand the matter so that either CMS or its contractor, First Coast Service Options, Inc. (First Coast), may continue the enrollment determination process using the correspondence address of record for Petitioner Alexander Eugene Istomin, M.D.

I. Background

On October 6, 2008, First Coast received a CMS-855 Medicare enrollment application from Petitioner dated June 30, 2008. CMS Ex. 1, at ¶ 2. The correspondence address listed on this application was an Old Westbury, New York address (correspondence address). CMS Ex. 3, at 7. By letter dated October 20, 2008, First Coast requested additional information from Petitioner to complete the processing of his Medicare enrollment application. CMS Ex. 5. The letter indicated that Petitioner must provide the

requested additional information by November 20, 2008. *Id.* at 3. For some unexplained reason, First Coast sent the letter to Petitioner at a Hallandale, Florida address (Florida practice address), one of four addresses which were listed under “practice location information” on Petitioner’s enrollment application. CMS Ex. 3, at 17. First Coast did not receive the requested additional information from Petitioner by November 20, 2008. CMS Ex. 1, at ¶ 5. By letter dated November 20, 2008, First Coast informed Petitioner that it was closing his Medicare enrollment application because Petitioner failed to provide the additional information needed to process his application. *Id.* at ¶ 6; CMS Ex. 6.

Petitioner claims that he did not receive the letter dated October 20, 2008, or the letter dated November 20, 2008, because these letters were sent to an invalid mailing address in Florida instead of to Petitioner’s correspondence address in New York. P. Br. 3-4. CMS never disputed that it sent these letters to Petitioner’s Florida practice address rather than to Petitioner’s correspondence address. Petitioner claims that all of his requests for a current status of his enrollment application were ignored until October of 2010. P. Br. at 2.

On October 11, 2010, First Coast received a letter from Petitioner dated October 5, 2010 and a copy of the CMS-855 application dated June 30, 2008. CMS Ex. 1, at ¶ 7; CMS Ex. 8. The letter states: “[w]ould you please update me regarding my application status. The copy of my application is enclosed for your convenience.” CMS Ex. 8, at 1. By letter dated October 15, 2010, First Coast informed Petitioner that his Medicare enrollment application could not be processed because it contained a copied or stamped signature. CMS Ex. 9. First Coast finally sent this letter to Petitioner’s correspondence address. *Id.* However, First Coast apparently treated Petitioner’s status inquiry as a new application.

By letter dated October 6, 2010, Petitioner filed a letter requesting a hearing before an Administrative Law Judge (ALJ) regarding his Medicare enrollment application. An Acknowledgment and Pre-hearing Order was sent to the parties on October 14, 2010. Petitioner submitted an amended hearing request (HR) on October 22, 2010. This case was initially assigned to Board Member Leslie A. Sussan pursuant to 42 C.F.R. § 498.44, which permits a Board Member to hear appeals under 42 C.F.R. part 498.

On November 4, 2010, this case was reassigned to me for hearing and decision. On November 9, 2010, CMS filed a Motion to Dismiss (CMS Br.). On November 17, 2010, CMS filed an Amended Motion to Dismiss and Pre-Hearing Brief (CMS Am. Br.). With its brief, CMS submitted nine exhibits (CMS Exs. 1-9). On December 7, 2010, Petitioner filed his Reply to Amended Motion to Dismiss and Pre-Hearing Brief¹ (P. Br.). In the absence of objection, I admit CMS Exs. 1-9 into the record. On March 18, 2011, I held a

¹ Petitioner also included a copy of CMS Exs. 1-9 with his brief.

telephone conference with Petitioner and CMS counsel to clarify certain issues prior to issuing this decision.

II. Issue

The issue in this case is whether CMS properly processed Petitioner's application such that this appeal should be dismissed for lack of jurisdiction.

III. Analysis

CMS did not properly reject Petitioner's enrollment application; thus I deny CMS's motion to dismiss.

CMS contends that First Coast did not deny Petitioner's Medicare enrollment application in November of 2008, but instead it rejected the enrollment application. CMS also argues that First Coast did not deny Petitioner's Medicare enrollment application in October of 2010, but it simply returned the application as a non-application. Thus, CMS contends that Petitioner did not receive an initial determination that would be appealable to an ALJ. In addition, CMS claims that Petitioner has no appeal rights because his 2008 Medicare enrollment application was rejected and First Coast never processed an enrollment application for Petitioner. CMS Am. Br. at 8. CMS also asserts that, even if Petitioner's October 5, 2010 letter could be construed as a request for reconsideration, such request would be untimely pursuant to 42 C.F.R. § 498.22(b)(3).

Although I may agree with CMS that I lack jurisdiction to hear cases of rejected applications, I do not find here that Petitioner's application was properly rejected. CMS mailed both the October 20, 2008 letter requesting additional information and the November 20, 2008 letter "closing" Petitioner's application to an address listed as of one of Petitioner's practice locations in Florida, rather than to Petitioner's correspondence address in New York. The CMS-855 application states in the correspondence address section to "[p]rovide contact information for the person shown in Section 2A above. Once enrolled, the information provided below will be used by the fee-for-service contractor if it needs to contact you directly." CMS Ex. 3, at 7.

It is reasonable, and really only logical, that an applicant would expect to receive correspondence from CMS at the address he listed as the "correspondence address." At the telephone conference on March 18, 2011, CMS could provide no definitive explanation as to why First Coast sent correspondence to Petitioner to one of four practice locations listed rather than to Petitioner's correspondence address of record in New York.

Without proper notification, Petitioner could not be expected to know what information he was required to send to the CMS contractor. Furthermore, there is no indication in the record indicating that Petitioner ever received the correspondence that CMS sent to his practice address in Florida. When CMS finally started mailing letters to Petitioner's correspondence address of record in October of 2010, I note Petitioner did respond expeditiously.

In the telephone conference on March 18, 2011, CMS counsel noted that Petitioner certified that he saw patients at the practice location address in Florida, listed in his CMS-855 application filed in October of 2008, and questioned why this mailing address for Petitioner would be invalid. However, if CMS is concerned about why Petitioner was not able to receive mail at a practice location, CMS should explore that concern with the Petitioner through other means. CMS may not now use this concern as a sole justification to refuse to properly process Petitioner's application in light of its notification errors.

Notwithstanding the inequity to Petitioner in this case, I do not base this decision on equitable principles. CMS and its contractors have broad authority to process enrollment applications, much of which is not reviewable by an ALJ. But underlying this grant of unreviewable authority is the expectation that CMS will not abuse its authority and will act competently. In this case, the contractor sent Petitioner, a potential Medicare supplier, a notice letter to an address other than that was listed as Petitioner's "correspondence address." Then, the contractor sent another notice to the practice location address indicating that CMS had stopped processing Petitioner's application. CMS now defends its actions by claiming that Petitioner has absolutely no recourse. At a minimum, the CMS contractor is required to properly send accurate notices of its determinations advising potential suppliers of their appeal rights. Its failure to do so is reviewable in this forum. However, I do not reach the ultimate issue of whether CMS's actions in this case are acceptable here; rather, I remand this case to CMS to afford it the opportunity to correct its errors.

I deny the CMS motion to dismiss. I remand this case to CMS to continue the enrollment determination process using Petitioner's correspondence address of record from the application that CMS received on October 6, 2008. I instruct CMS to consider the date of receipt of Petitioner's 2008 application in any effective date determination it makes pursuant 42 C.F.R. § 424.520(d). If CMS is able to subsequently approve this application, it should use CMS's receipt date as Petitioner's effective date for Medicare billing privileges.

