

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Arkady Stern, M.D.,

Petitioner

v.

Centers for Medicare and Medicaid Services

Docket No. C-11-268

Decision No. CR2368

Date: May 5, 2011

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Arkady Stern, M.D. Petitioner forfeited his right to a hearing because he: failed to comply with the pre-hearing order that I issued directing him to submit evidence and a brief supporting his arguments and contentions; failed to reply to the motion of the Centers for Medicare and Medicaid Services (CMS) that I dismiss his hearing request; and failed to provide any documentary evidence supporting his contentions and arguments.

I. Background

This is the second incarnation of this case. In 2009, Petitioner filed a hearing request challenging CMS's determination that he was entitled to participate in the Medicare program with an effective date of May 19, 2009. In that request, Petitioner asserted that he was entitled to an effective date of participation in October 2008. I heard and decided that case, and, on February 26, 2010, I issued a decision that was unfavorable to Petitioner. *Arkady Stern, MD.*, DAB CR2078 (2010). I held that Petitioner failed to produce any documentary evidence to support his contention that he had filed an application for participation in 2008 that would entitle him to a participation date that is earlier than the May 19, 2009 effective date determined by CMS.

Petitioner appealed my decision to the Departmental Appeals Board, and, on September 16, 2010, a Board appellate panel issued a decision remanding the case. *Arkady B. Stern, M.D.*, DAB No. 2329 (2010). The panel held, essentially, that Petitioner had been denied an opportunity to produce documentary evidence supporting his contention that he was entitled to an earlier participation date than May 19, 2009, and it remanded the case so that Petitioner would have the opportunity to come forward with that documentation. The appellate panel did not find that my analysis of the facts before me at the time of my decision was incorrect but, rather, found that Petitioner might be in possession of additional facts and evidence that could change the posture of the case. The panel advised me that I could remand the case to CMS for additional development of the record if I determined that to be appropriate, and so, I remanded the case back to CMS.

Pursuant to my order of remand, CMS afforded Petitioner an opportunity to file additional documentation to support his contentions. On September 22, 2010, CMS determined that Petitioner had not provided such evidence. Petitioner requested reconsideration, and CMS affirmed its determination in a letter that is dated January 6, 2011. Petitioner then requested a hearing, and Petitioner's case was again assigned to me for a hearing and a decision.

On February 17, 2011, I issued an acknowledgment and pre-hearing order that directed the parties to file proposed exhibits, including the written direct testimony of all proposed witnesses, and pre-hearing briefs. On March 11, 2011, CMS complied with my pre-hearing order by filing a motion for summary judgment and brief, along with four proposed exhibits that it identified as CMS Ex. 1 – CMS Ex. 4.

Petitioner's exchange was due no later than April 25, 2011. He filed nothing, neither a pre-hearing exchange, nor a reply to CMS's motion for summary judgment.

I receive into the record CMS Ex. 1 – CMS Ex. 4.

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

A. Issue

The issue in this case is whether Petitioner has forfeited his right to a hearing by failing to file a pre-hearing exchange and failing to respond to CMS's motion for summary judgment.

B. Findings of Fact and Conclusions of Law

I make the following findings of fact and conclusions of law in support of my decision dismissing Petitioner's hearing request.

The case before me constitutes Petitioner's seventh bite at the apple. He has had seven opportunities – his first application for participation, his request for reconsideration from CMS's first determination about that application, his first hearing request before me, his appeal to the Departmental Appeals Board from my first decision in his case, his determination on remand, his request for reconsideration from that determination, and lastly, his current hearing request – to provide documentary proof that he was entitled to a participation date that is earlier than May 19, 2009. In each instance, Petitioner has asserted that he filed an application earlier than May. Yet, and despite all of these opportunities, Petitioner never came forward with any documentation to establish his contentions.

In the latest iteration of his contentions in his most current hearing request, Petitioner asserts that he was a victim of a series of “comedies of errors” in which CMS failed to recognize that he was in active practice throughout 2008.¹ He contends that he attempted to rectify these asserted misunderstandings by filing a new enrollment application in October 2008. He did not offer any documentation of this asserted new application, either with his hearing request, or in response to my pre-hearing order.

He has been given the opportunity, in spades, to offer additional evidence, and he has failed to avail himself of that opportunity. This case stands on exactly the same footing today as it did on February 26, 2010, when I issued my first decision. Petitioner makes the same contentions now that he did then, and these contentions remain unsupported by any documentation.

An administrative law judge may dismiss a party's request for a hearing where that party has no right to a hearing. 42 C.F.R. § 498.70(b). Here, Petitioner forfeited his right to a hearing because he failed to comply with my pre-hearing order, directing that he submit evidence and a brief and failed to file a response to CMS's motion for summary judgment. Additionally, Petitioner failed to file any evidence that would alter in any

¹ Petitioner seems to assert that he maintained an active practice in 2008 and that he should never have been required to submit an application for certification as a Medicare provider. This is apparently the “comedies of errors” that he refers to. In his latest hearing request, he alludes to documents that he filed “previously” that he contends establish the existence of this practice. Evidently, he is referring to documents that were submitted as part of CMS's exhibits in the original case before me (Docket No. C-10-57) or documents he filed with the Departmental Appeals Board in connection with his appeal of my first decision in this case. However, those documents are not relevant to the issues in this case. Petitioner was required to submit a new participation application when he materially changed the circumstances of his practice, something that happened by his own admission in 2008 when he changed his practice location. Petitioner has never offered any documentation that he submitted this application at any time prior to May 19, 2009.

