

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Donald Dolce, M.D.,  
(PTAN: 372461YKXA),  
(NPI: 1053572925),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2116

Decision No. CR4150

Date: August 21, 2015

**DECISION**

I decide that the effective date of enrollment in the Medicare program of Petitioner, Donald Dolce, M.D., is August 6, 2014, the date that he first began providing services at a new practice location, and a date after which he filed an application for reassignment of benefits that was ultimately approved with Novitas Solutions, Inc., a Medicare contractor authorized by the Centers for Medicare & Medicaid Services (CMS) to review and approve supplier enrollment applications. I decide additionally, that Novitas and CMS determined incorrectly that Petitioner's effective enrollment date was September 22, 2014.

**I. Background**

Petitioner, a physician, filed a hearing request to challenge the September 22, 2014 effective participation date determination. CMS moved for summary judgment and submitted 10 exhibits in support of its motion, which are identified as CMS Ex. 1 – CMS Ex. 10. Petitioner opposed the motion and, in doing so, renewed his request that he

be assigned an earlier effective participation date than that determined by the contractor and CMS. He filed exhibits, which are identified as P. Ex. A – P. Ex. F, in support of his contentions and arguments.

The exhibits filed by the parties identify a disputed issue of material fact, that being the date when Petitioner filed his application for reassignment of benefits. CMS contends that Petitioner filed this application on September 22, 2014. Petitioner asserts that he, in fact, filed it on June 6, 2014. Both parties offered affidavits to support their respective positions. CMS Ex. 6; P. Ex. E; P. Ex. F. The fact dispute precludes entry of summary judgment. However, neither party requested to cross-examine the opposing party's witness or witnesses. Given that, this case is ripe for decision as a case in which the parties request that a fact dispute be resolved based on their written exchanges. I decide this case on that basis. I receive into the record CMS Ex. 1 – CMS Ex. 10 and P. Ex. A – P. Ex. F.

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

### **A. Issue**

The issue is Petitioner's effective date of participation in Medicare.

### **B. Findings of Fact and Conclusions of Law**

The effective date of a physician's participation in the Medicare program is governed by 42 C.F.R. § 424.520(d). This regulation provides that the effective date of a physician's participation is the later of the following: the date when the physician files an application that is subsequently approved by a Medicare contractor; or, the date when the physician first begins providing services at a new practice location.<sup>1</sup>

In this case the determinative question is: when did Petitioner file an application that was subsequently approved by Novitas? CMS argues that this date is September 22, 2014, because that is the date when Petitioner filed an application that Novitas received, processed, and approved. Petitioner contends that he filed an application on June 6, 2014, and that Novitas lost this application. Petitioner argues that he should not be penalized for an omission or error by the contractor that was entirely beyond Petitioner's ability to control.

To support his contention Petitioner produced a copy of an application for participation dated June 5, 2014, which he contends was mailed to Novitas on June 6. P. Ex. A. He

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<sup>1</sup> Although Petitioner contends that he filed his application on June 6, he acknowledges that he did not begin providing services until August 6, 2014. Therefore, the earliest effective date to which Petitioner would be entitled is August 6, 2014.

has also offered the affidavits of two members of his employer's staff, in which the affiants aver that they mailed Petitioner's application to Novitas on June 6, 2014. P. Ex. E; P. Ex. F. In one of these affidavits Dulce Rodriguez avers that on June 6 she simultaneously mailed two applications to Novitas, consisting of Petitioner's application and one for another physician. Novitas received the other physician's application on June 10, 2014, and processed that application. P. Ex. F at 1-2.

CMS produced the affidavit of Shelley Kuhn, an employee of Novitas. CMS Ex. 6. She avers that Novitas searched its databases and it "determined that . . . [Petitioner] did not submit any enrollment or reassignment applications prior to September 22, 2014." CMS Ex. 6 at 2.

I find Petitioner's assertion that he sent an enrollment application to Novitas on June 6, 2014, to be credible. It is buttressed by the testimony of two witnesses and by a hard copy of the actual application. There is no evidence that would lead me to believe that Petitioner is being less than honest about the application date.

Moreover, the weight of the evidence supports my conclusion that Novitas actually received Petitioner's application on June 10 or thereabouts. Regulations governing hearings in cases involving CMS presume that documents that are mailed are received five days from their mailing date absent proof to the contrary. 42 C.F.R. § 498.22(b)(3). I see no reason why that presumption should not apply equally to documents that a prospective enrollee mails to a Medicare contractor. Where a prospective supplier mails an application to the contractor the presumption is that the contractor receives it.

Evidence offered by CMS does not persuade me that Novitas did not receive timely Petitioner's June 6 application. Ms. Kuhn avers only that the contractor searched its database and was unable to find a record of the June 6 application. That may be, but that result would be entirely consistent with the contractor mishandling and/or misplacing the application after receiving it. If the contractor lost the application then, of course, it would have no record of it in its database.

The June 6 and September 22 applications are identical in all respects. I therefore conclude that the application that Novitas "subsequently approved," within the meaning of 42 C.F.R. § 424.520(d), was the June 6 application. Petitioner began providing services at his new practice location on August 6. Petitioner's effective participation date is August 6, 2014.

/s/

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Steve T. Kessel  
Administrative Law Judge