

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Rachel Ruotolo, M.D.,)	Date: November 12, 2009
(NPI: 1447313978),)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-704
)	Decision No. CR2029
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION DISMISSING REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Rachel Ruotolo, M.D., because under the applicable regulations Petitioner does not have a right to a hearing before me.

I. Background

Petitioner filed a hearing request which asked for further appeals rights with respect to the effective date given Petitioner for billing Medicare. Petitioner contends that under previous policy (prior to January 1, 2009), physicians were allowed to retroactively bill Medicare for services provided to Medicare beneficiaries for 27 months from the effective date of enrollment. Petitioner contends that even though she did not begin the enrollment process until early 2009, she began treating patients in November, 2008 based on this previous policy thinking that she would still receive payment for her services. Petitioner was approved for Medicare enrollment effective March 31, 2009 and, thus, under the regulations in effect as of January 2009, her right to bill for services to Medicare beneficiaries became effective as on March 1, 2009.

This case was assigned to me for a hearing and a decision. The Centers for Medicare & Medicaid Services (CMS) moved that I dismiss this hearing request. CMS submitted six exhibits to its motion, CMS Ex. 1-6. I receive those exhibits into the record. Petitioner

responded that CMS's motion was without merit based on 42 C.F.R. § 498.3(b)(15). CMS submitted a reply.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue is whether the Petitioner has a right to a hearing before me.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth my Findings below as separate headings.

1. The Petitioner does not have a right to a hearing.

The Petitioner, a physician, requested a hearing because she is dissatisfied with the policy of the Medicare program governing payment for claims for services generated prior to the dates of their enrollment in Medicare.

Petitioner is newly enrolled in Medicare. CMS Ex. 1. Evidently, Petitioner provided a service or services to one or more Medicare beneficiaries prior to the date of her enrollment and seeks to claim reimbursement for that service or those services. Petitioner argues that new Medicare regulations will bar reimbursement for claims for services that Petitioners provided prior to the effective dates of her enrollment and she is dissatisfied with that likely outcome. She contends that at the time she began the enrollment process the previous policy allowing her to bill back for services rendered 27 months prior to the effective date of her enrollment in the Medicare program was in effect.

At its heart, this case appears to involve a challenge to regulations which govern the time frame for which Medicare will retrospectively reimburse items or services provided prior to the effective dates of enrollment by physicians who are newly enrolled in the Medicare program (or re-enrolled at a point in time after enrollment has lapsed). The regulations are 42 C.F.R. §§ 424.520(d) and 424.521(a). These are relatively newly enacted regulations which became effective in January 2009.

The regulations provide, first, that the effective date for Medicare billing privileges for physicians and certain other practitioners is the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date that an enrolled physician or other practitioner first began furnishing services at a new practice location. 42 C.F.R. § 424.520(d). This regulation establishes the point in

time (effective date) from which Medicare may determine to reimburse retrospectively claims for services provided by an enrolled physician.

Medicare will reimburse retrospectively a claim for services by an enrolled physician for up to 30 days prior to the effective date of enrollment “if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries.” 42 C.F.R. § 424.521(a)(1). It will reimburse retrospectively for up to 90 days prior to the effective date of enrollment in the event that a Presidentially-declared disaster precluded enrollment in advance of providing services. 42 C.F.R. § 424.521(a)(2). There are no other circumstances under which retrospective reimbursement is permitted.¹

Petitioner’s challenge of the regulations and the policies that they embody is not something that I have the authority to hear and decide. As a delegate of the Secretary of this Department, I must apply her policies as are stated in regulations. I have no authority to declare a regulation to be unlawful or ultra vires. Consequently, I may not hear Petitioners’ challenge to the lawfulness of 42 C.F.R. §§ 424.520(d) and 424.521(a). Nor do I have the authority to grant exceptions to this policy. Consequently, I may not direct that it be waived in the case of this Petitioner.

Furthermore, while Petitioner argues that I do have authority to hear and decide this matter pursuant to 42 C.F.R. § 498.3(b)(15); that particular authority is inapplicable here as Petitioner does not contend that she was entitled to an earlier effective date of enrollment; rather she argues about when she may begin billing for her services. *See* 42 C.F.R. § 498.3(b)(15). I agree with CMS that this section does not confer hearing rights with respect to the issue Petitioner here asks me to review. I only have authority to hear cases where Medicare enrollment was denied or revoked but Petitioner’s Medicare enrollment was not improperly denied or revoked. *See* 42 C.F.R. § 498.3(b)(17).²

¹ Petitioner avers that the Medicare program previously gave newly enrolled physicians a 27-month grace period during which claims would be reimbursed retrospectively. Petitioner complains that it is unreasonable for the Medicare program to change its policy from the 27-month period to the periods that are now permitted, under defined circumstances, by 42 C.F.R. § 424.521(a)(1) and (2).

² CMS contends that the applicable regulations do not provide appeal rights for this issue. CMS argues that the regulations only provide review when a provider is denied enrollment or when a provider’s enrollment has been revoked (42 C.F.R. §424.545(a) and 42 C.F.R. § 495.3(b)(17)) and here Petitioner Ruotolo’s Medicare enrollment was neither denied or revoked.

2. I must dismiss Petitioner's hearing request.

I must dismiss a hearing request in the circumstance where a party requesting a hearing has no right to a hearing. 42 C.F.R. § 498.70(b). I conclude that Petitioner has not established a right to a hearing. Consequently, I dismiss this case.

/s/ Richard J. Smith
Administrative Law Judge