Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Antonio Silva-Sayago, M.D.,
(PTAN: 002076601)

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-122

Decision No. CR2521

Date: March 29, 2012

DECISION

New England Neurological Associates, P.C. (N.E. Neurological) on behalf of Petitioner Antonio Silva-Sayago, M.D. appeals the effective date assigned to his enrollment as a Medicare provider with N.E. Neurological. For the reasons explained below, I grant the Centers for Medicare and Medicaid Services' (CMS's) Motion for Summary Judgment upholding the March 9, 2011 effective date.

I. Background

On November 16, 2011, Petitioner filed a hearing request, challenging the effective date determination of NHIC, Corp. (NHIC), a Medicare contractor. CMS submitted a Motion for Summary Judgment and a brief in support of its motion (CMS Br.), along with four exhibits identified as CMS Exs. 1-4. Petitioner filed his opposition to the CMS Motion (P. Br.), to which he attached one exhibit (P. Ex. 1).[1] On January 17, 2012, I directed CMS to reply to Petitioner's opposition, and CMS complied on February 1, 2012 (CMS Reply). Petitioner filed his Response to the CMS Reply (P. Response) on February 27,

[1] Petitioner marked his exhibits with his initials "AJSS" preceding the exhibit number. For clarity, I refer to Petitioner's exhibits as "P. Ex." rather than as "AJSS Ex."

2012 and included two additional exhibits (P. Exs. 2-3). In the absence of objection, I admit CMS Exs. 1-4 and P. Exs. 1-3 into the record.

II. Applicable Law

The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers. Act §§ 1102, 1866(j); 42 U.S.C. §§ 1302, 1395cc(j). Under the Secretary's regulations, a provider or supplier that seeks billing privileges under Medicare must "submit enrollment information on the applicable enrollment application. Once the provider or supplier successfully completes the enrollment process . . . CMS enrolls the provider or supplier into the Medicare program." 42 C.F.R. § 424.510(a).

A "provider or supplier must submit a complete enrollment application and supporting documentation to the designated Medicare fee-for-service contractor," and that the application must include "complete . . . responses to all information requested within each section as applicable to the provider or supplier type." 42 C.F.R. § 424.510(d)(1)-(2).

The effective date of enrollment for physicians and nonphysician practitioners is set as follows:

> The effective date for billing privileges for physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations is the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d).

III. Issue

> The issue in this case is whether CMS's contractor and CMS properly determined Petitioner's effective date of Medicare enrollment.

IV. Analysis

My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

A. This case is appropriate for summary judgment.

CMS argues that it is entitled to summary judgment. The Departmental Appeals Board (Board) stated the standard for summary judgment:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehabilitation & Skilled Nursing Center, DAB No. 2300, at 3 (2010) (citations omitted).

The Board has further explained that the role of an Administrative Law Judge (ALJ) in deciding a summary judgment motion differs from its role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Village at Notre Dame, Inc*., DAB No. 2291, at 5 (2009).

I have accepted all of Petitioner's factual assertions as true and drawn all reasonable inferences in his favor. Therefore, I accept Petitioner's claim that he did not receive notice that his application could not be processed by NHIC because it was incomplete or inaccurate. I furthermore accept Petitioner's assertion that had he or N.E. Neurological received the notice, they would have promptly remedied the problem. Hearing Request; P. Br. at 2-3; P. Response at 2. For the purposes of summary judgment, I accept Petitioner's description of events as true. However, this depiction remains unsupportive of a favorable outcome for Petitioner. I find that Petitioner has not disputed any fact material to my resolution of the case. Accordingly, I agree with CMS that summary judgment is appropriate in this case.

B. CMS correctly determined the effective date of Petitioner's Medicare enrollment.

Petitioner is a neurologist employed by N.E. Neurological, a medical practice located in Lawrence, Massachusetts. On October 13, 2010, Petitioner signed a Medicare enrollment application (Form CMS-855R) for participation as a N.E. Neurological group member,

and on October 13, 2010, he began seeing Medicare beneficiaries. CMS Ex. 1, at 15; CMS Ex. 2, at 1. On Petitioner's behalf, N.E. Neurological, through its Contracts Administrator, Helena Silveira-Carlin, filed a Medicare enrollment application that NHIC received on November 29, 2010.[2] CMS Ex.1. Because the name listed on Petitioner's medical license ("Antonio J. Silva-Sayago") did not match the National Practitioner Identifier (NPI) registry ("Antonio Jose Silva,") the contractor was unable to approve his application. CMS Ex. 1, at 4-5. On January 25, 2011, NHIC faxed a notice to Petitioner notifying him that he must submit information correcting the name discrepancy within 15 days or he would be required to complete a new application. Petitioner did not receive this notice and did not respond. P. Ex. 1. Consequently, by letter dated March 1, 2011, NHIC informed Petitioner that his application was denied. CMS Ex. 1, at 1.

On March 8, 2011, N.E. Neurological updated the NPI registry so that Petitioner's name was consistent with his medical license. NHIC received the relevant documentation supporting the change on March 9, 2011. CMS Ex. 2, at 1, 3, 5. NHIC then processed Petitioner's application to approval. By letter dated May 2, 2011, NHIC notified Petitioner that his application was approved and his Provider Transaction Access Number (PTAN) would be effective March 9, 2011. CMS Ex. 3, at 4.

The determination of the effective date of Medicare enrollment is governed by 42 C.F.R. § 424.520. Section 424.520(d) provides that the effective date for enrollment for nonphysicians, among others, is "the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location." The "date of filing" is the date that the Medicare contractor "receives" a signed provider enrollment application that the Medicare contractor *is able to process to approval*. 73 *Fed. Reg.* 69,725, 69,769 (Nov. 19, 2008). It is well settled that the date of filing is the date the Medicare contractor receives an *approvable* application. *Caroline Lott Douglas, PA*, DAB CR2406 (2011); *Rizwan Sadiq, M.D.*, DAB CR2401 (2011); *Jennifer Tarr, M.D.*, DAB CR2299 (2010); *Michael Majette, D.C.*, DAB CR2142 (2010); *Roland J. Pua, M.D.*, DAB CR2163 (2010).

Neither party contends that the contractor was able to process Petitioner's November 29, 2010 application to approval. In fact, Petitioner concedes that there was a discrepancy in the form in which his name was listed on the NPI and the form in which it appeared on his medical license. Hearing Request; P. Br. at 6; *see* CMS Ex. 2, at 3. Petitioner requests in essence that I hold to be controlling the date that he first submitted an

[2] Petitioner further claims that the application was mailed on October 28, 2010 and suggests that the application may have been received by NHIC prior to the November 29, 2010 date. P. Response at 1-2. For purposes of summary judgment, I accept this suggestion as true; however, the date of receipt of this application is irrelevant because this application was inaccurate or incomplete and not able to be processed to approval.

application because although incomplete, its deficiency could have been promptly remedied. Even though Petitioner wishes to have his billing privileges adjusted to the date that NHIC initially received *an* application, Petitioner has pointed to no authority to which allows this. Rather, the regulations are clear that the application submitted must be *approvable*.

It is undisputed that the contractor did not receive a complete and approvable application from Petitioner until March 9, 2011. Therefore, the correct effective date of Petitioner's enrollment remains March 9, 2011. 42 C.F.R. § 424.520(d).

Petitioner's argument is that the effective date should be adjusted because the name discrepancy would have been immediately remedied had Ms. Silveira-Carlin known the content of NHIC's January 25, 2011 communication. However, this is not a basis to adjust Petitioner's enrollment date. Petitioner's argument amounts to a claim of equitable estoppel. It is well-established by federal case law, and in Board precedent, that: (1) estoppel cannot be the basis to require payment of funds from the federal government; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. *See, e.g., Oklahoma Heart Hospital*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009); *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). Although it may be possible to sympathize with some aspects of Petitioner's position, the regulations were promulgated with the understanding that these stricter requirements for enrolling and maintaining enrollment would have possible effects on providers and suppliers, yet the stricter Medicare enrollment requirements — such as those that guide this decision — were understood as a necessary means to further program integrity. *See* 73 Fed. Reg. 69725, 69768 (November 19, 2008).

V. Conclusion

For the reasons explained above, and based on the undisputed fact that NHIC did not receive a completed and approvable enrollment application from Petitioner until March 9, 2011, I conclude that Petitioner's effective date of enrollment was correctly assessed at March 9, 2011.

/s/
Richard J. Smith
Administrative Law Judge