

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rajeon Moseley-Larue, PA-C,
(NPI: 1689602179; PTAN: 33754YYLK),

Petitioner,

v.

Centers for Medicare & Medicaid Services,

Respondent.

Docket No. C-15-234

Decision No. CR4065

Date: July 24, 2015

DECISION

Novitas Solutions (Novitas), an administrative contractor acting for the Centers for Medicare & Medicaid Services (CMS), assigned Petitioner an effective date of December 23, 2013, in response to her Medicare enrollment application to add an employer for direct billing purposes. Upon review, I sustain CMS's determination and find that Novitas had a legal basis to assign that effective date. I also dismiss Petitioner's hearing request related to an apparent untimely appeal of a separate CMS initial determination, over which I have no jurisdiction.

I. Background

The following facts are undisputed unless otherwise noted. On or about December 18, 2013, Petitioner, a certified physician's assistant, submitted a Medicare enrollment application CMS Form 855-R seeking to add an employer, Advanced Spine Solutions PA, also known as Advanced Spine & Orthopedics (Advanced Spine), which would then

be able to bill Medicare directly for Petitioner's covered services. CMS Exhibit (Ex.) 1. Petitioner requested an effective date of March 1, 2011. CMS Ex. 1 at 5. CMS received Petitioner's application on December 23, 2013. CMS Ex. 1 at 9. On an undetermined date, Petitioner also apparently submitted a Medicare enrollment application to add another employer, Ft. Worth Brain and Spine Institute, LLP.¹

In response to her Advanced Spine application, CMS notified Petitioner that she needed to submit CMS Form 855-I instead of Form 855-R. CMS Ex. 2 at 1; *see also* CMS Ex. 1 at 2 (stating that physicians' assistants must use Form 855-I to report employment arrangements). In the Form 855-I enrollment application that Petitioner submitted in response, she requested an effective date of February 1, 2011 for the addition of Advanced Spine as her employer. CMS Ex. 3 at 10. CMS requested additional information from her in order to process her application. CMS Ex. 2 at 3. CMS, through Novitas, notified Petitioner on March 31, 2014, that it had accepted her Form 855-I and the commencement of billing under the new employer would be effective November 23, 2013 (Advanced Spine Initial Determination).² CMS Ex. 4 at 2. Novitas also notified Petitioner, on March 31, 2014, that CMS had accepted her Ft. Worth application and assigned an effective date of December 24, 2013 (Ft. Worth Brain and Spine Initial Determination) to add direct billing privileges for that employer. Request for Hearing in C-15-234, Supplement at 2.

Petitioner requested a hearing by administrative law judge (ALJ) in a letter dated September 8, 2014 (Request for Hearing in C-14-1961). Petitioner sought to challenge the reconsidered determination that Novitas issued on August 25, 2014, in response to Petitioner's request that CMS reconsider the Advanced Spine effective date. CMS Exs. 5, 6. The case was docketed as C-14-1961, assigned to me for hearing and decision on October 6, 2014, and I issued an Acknowledgment and Prehearing Order (Prehearing Order C-14-1961) on that date.

Petitioner requested a second hearing before an ALJ in an undated letter that the Civil Remedies Division received on October 22, 2014 (Request for Hearing in C-15-234). In that letter, Petitioner appeared to challenge both Novitas' August 25, 2014 reconsidered determination and the Ft. Worth Brain and Spine Initial Determination. Along with the second request for hearing, Petitioner submitted additional documents that I identify as

¹ Neither party ultimately proffered any Medicare enrollment applications related to Ft. Worth Brain and Spine.

² In this letter, Novitas appears to have confused the effective date of Petitioner's addition of Advanced Spine and the retrospective billing date. The Hearing Officer, however, correctly explains in the reconsidered determination that the effective date of the addition is December 23, 2013, with retrospective billing privileges starting November 23, 2013. CMS Ex. 6 at 2.

Petitioner's Request for Hearing in C-15-234, Supplement. The case was docketed as C-15-234, assigned to me on November 14, 2014 for hearing and decision, and I issued an Acknowledgment and Prehearing Order (Prehearing Order C-15-234) on that date.

On December 11, 2014, I held a telephonic conference with Petitioner and counsel for CMS to discuss the case statuses and procedural issues that these cases presented. In the interest of judicial economy and absent objection, I ordered the consolidation of the requests for hearing in a Consolidation Order dated December 11, 2014. I ordered docket number C-14-1961 to be dismissed, and the cases were consolidated under docket number C-15-234. CMS had already submitted its prehearing exchange in docket number C-14-1961, and counsel for CMS asked that I consider CMS's prehearing exchange filed in C-14-1961, including a motion for summary judgment (CMS Br.) and CMS exhibits (CMS Exs.) 1-6, as CMS's prehearing exchange in C-15-234. Consolidation Order at 3. I agreed to do so. I set a new deadline for Petitioner to file her prehearing exchange and offered CMS the opportunity to supplement its prehearing exchange if necessary.

Petitioner timely filed her prehearing exchange, including a brief (P. Br.) and Petitioner's exhibits (P. Exs.) 1-15. Petitioner submitted witness statements from six witnesses. P. Ex. 11. CMS filed an objection to Petitioner's exhibits (CMS Objection). CMS argued that Petitioner proposed inadmissible new evidence, Petitioner's Exhibits 1-6, 10, 12-13, and 15, which she should have submitted when she requested reconsideration of the Advanced Spine Initial Determination. CMS additionally argued that P. Ex. 1-6 and 15 were irrelevant because they relate to a dispute Petitioner has regarding the inactions and misrepresentations of her former biller. CMS Objection at 1-2. The challenged exhibits include:

- An email from Petitioner's former biller dated May 1, 2011 (P. Ex. 1);
- An email to Petitioner's former biller dated July 16, 2012, with a voided check (P. Ex. 2);
- An email from Petitioner's former biller asking Petitioner to have an unknown party sign an unidentified CMS form (P. Ex. 3);
- An email dated April 8, 2013, containing a copy of a Federal Express receipt showing that Petitioner submitted unknown documents to her former biller on April 8, 2013 (P. Ex. 4);
- An email from Petitioner's former biller dated October 14, 2013, and an accompanying chart purporting to show various billing numbers and information for Petitioner (P. Ex. 5);
- An email from Petitioner's former biller dated March 23, 2012, and an accompanying chart purporting to show cases for which Petitioner submitted bills to either Medicare or private insurance companies (P. Ex. 6);

A December 15, 2014 letter from a doctor and Advanced Spine Solutions regarding unpaid Medicare claims (P. Ex. 10);

A list of names and dates of service for which Petitioner seeks Medicare reimbursement (P. Ex. 12);

Letters from Novitas to Petitioner regarding Petitioner's enrollment information (P. Ex. 13); and

A series of text messages between Petitioner and her former biller from 2011-2013 (P. Ex. 15).

Petitioner filed a response to CMS's Objection (P. Response). Petitioner provided several reasons why she had not previously submitted the documents, most of which aver that she could not get assistance for her or her biller to understand what to submit and when to submit it. P. Response at 2-3. Petitioner specifically argued that P. Exs. 1-6 and 15 are relevant to:

[S]how that good faith and trust was put into a biller . . . that was representing herself as a medicare employee . . . [and] prove that the previous biller said that the claims were in deed filed with medicare and show that not only was Medicare not filed but hundreds of other insurance claims were not filed as well.

P. Response at 4-5.

In supplier enrollment cases, without good cause I cannot accept new documentary evidence that was not previously submitted to the administrative contractor. *See* 42 C.F.R. §§ 405.803(e), 498.56(e)(1). None of Petitioner's explanations for why she did not submit P. Exs. 1-6 justify or explain why she or her new biller did not submit all documents she wished Novitas to consider with the reconsideration request. P. Response at 2. Petitioner's exhibits 10, 12, and 13 are all dated after she requested reconsideration of the Advanced Spine Initial Determination, and therefore, it is understandable why Petitioner did not originally submit them to Novitas. However, P. Exs. 1-6, 10, 12-13, and 15 do not provide evidence that could assist me in establishing the critical fact of whether Petitioner submitted an enrollment application adding Advanced Spine before December 23, 2013, the date on which Novitas acknowledges receiving an application from Petitioner that it ultimately was able to approve. Therefore, I do not find good cause to admit P. Exs. 1-6, 10, 12-13, and 15.

Petitioner did not object to any of CMS's exhibits. Therefore, I admit P. Exs. 7-9, 11, and 14 and CMS Exs. 1-6 to the record. Petitioner submitted affidavits of direct testimony from six proposed witness as P. Ex. 11. CMS did not request to cross-examine any of Petitioner's witnesses and did not propose any witness testimony. I informed the parties that I would only conduct a hearing if either party submitted affidavits of direct testimony from witnesses, and the opposing party expressed its intention to cross-

examine any witness. Prehearing Order C-15-234 ¶10. Because CMS did not seek to cross-examine Petitioner’s witnesses, an in-person hearing is not necessary, and I decide this case on the full merits of the written record. Prehearing Order C-15-234 ¶11; *Marcus Singel, D.P.M.*, DAB No. 2609, at 4, 5-6 (2014).

On January 12, 2015, CMS moved to dismiss (Motion to Dismiss) Petitioner’s Request for Hearing in C-15-234 and submitted a supporting exhibit (Motion to Dismiss Ex. 1). In that hearing request, Petitioner sought to challenge both the reconsidered determination that Novitas issued on August 25, 2014, and the Ft. Worth Brain and Spine Initial Determination. *See* Request for Hearing in C-15-234; Request for Hearing in C-15-234, Supplement. On February 11, 2015, Petitioner filed an opposition (P. Opposition) to CMS’s Motion to Dismiss.

II. Issues

1. Whether I must dismiss the hearing request Petitioner submitted in docket number C-15-234; and,
2. Whether CMS had a legal basis to establish an effective date of December 23, 2013, for Petitioner’s addition of Advanced Spine as her employer.

III. Findings of Fact and Conclusions of Law

1. I must dismiss the hearing request that Petitioner submitted in docket number C-15-234 because I lack jurisdiction.

My jurisdiction to review actions related to Medicare provider and supplier enrollment is limited to the bases enumerated at 42 C.F.R. § 498.5. 42 C.F.R. § 498.40(a)(1). Suppliers, such as Petitioner,³ are entitled to ALJ hearings if they are dissatisfied with a determination authorized under 42 C.F.R. § 498.5(l)(1). *See* 42 C.F.R. § 498.5(l)(2). CMS’s determination, or that of one of its contractors, of a supplier’s effective date of Medicare participation is an appealable initial determination. 42 C.F.R. § 498.3(a)(1), (b)(15); *Victor Alvarez, M.D.*, DAB No. 2325, at 5 (2010) (“[A] determination about the effective date of supplier approval . . . can reasonably be considered an initial determination within the scope of section 498.5(l) . . .”). The appeal procedures under Part 498 require a supplier dissatisfied with an initial determination to first request reconsideration from CMS or a CMS contractor. 42 C.F.R. §§ 498.5(l)(1), 498.22(a), (b)(1). It is only *after* CMS (or the contractor) then issues a reconsidered determination

³ “Suppliers” include physicians, other practitioners, and “entities (other than providers of services) that furnish[] items or services” 42 U.S.C. § 1395x(d).

that a supplier may request review before an ALJ. 42 C.F.R. § 498.5(l)(2). I may dismiss a hearing request where the party requesting a hearing does not have a right to a hearing. 42 C.F.R. § 498.70(b).

As part of the hearing request she submitted in docket number C-15-234, Petitioner included two Novitas determinations: an initial determination of the effective date of her addition of Ft. Worth Brain and Spine as her employer dated March 31, 2014, and a reconsidered determination related to the effective date of her addition of Advanced Spine Solutions as her employer. *See* Request for Hearing in C-15-234; Request for Hearing in C-15-234, Supplement. I acknowledged this request for hearing and consolidated it with a previous related request for hearing that Petitioner had submitted. Subsequent case development made it clear that Petitioner did not request reconsideration of the Ft. Worth Brain and Spine Initial Determination as required by 42 C.F.R. § 498.5(l)(1). Motion to Dismiss at 2-3; Motion to Dismiss Ex. 1. Therefore, Petitioner is not entitled to ALJ review of that initial determination.

In opposition to CMS's Motion to Dismiss, Petitioner concedes that CMS has not issued a reconsidered determination with respect to the Ft. Worth Brain and Spine Initial Determination. P. Opposition at 2-4. She argues that she would have requested reconsideration, but a Novitas official "specifically told [Petitioner's representative] that the letter asking for reconsideration of backdating the effective date for [Ft. Worth Brain and Spine] . . . should NOT be sent to her, because all correspondence at this point would have to go to the appeals board in Washington DC." P. Opposition at 3. Petitioner explains that she has "exhausted all avenues with CMS" and asks that "the Novitas' March 31, 2014 initial determination be reconsidered or modified by a hearing decision under section 498.78, or revised under section 498.32 or 498.100 (reopening and revision)." P. Opposition at 1-2.

The regulations permitted Petitioner to request reconsideration of the Ft. Worth Brain and Spine Initial Determination by filing a request for reconsideration with CMS or the entity specified in the notice of initial determination (in this case, Novitas) within 60 days of receiving the notice of initial determination. 42 C.F.R. § 498.22(a)-(b). The Ft. Worth Brain and Spine Initial Determination explicitly informed Petitioner that she must submit a request for reconsideration to Novitas at an address listed therein. Request for Hearing in C-15-234, Supplement. Petitioner had 60 days from the date she received the March 31, 2014 Ft. Worth Brain and Spine Initial Determination to request reconsideration. 42 C.F.R. §498.22(b)(3). Therefore, even assuming, as Petitioner asserts, a Novitas official told her in August 2014 that she should send her request for reconsideration to the Departmental Appeals Board (DAB), Petitioner would have submitted the request well after the 60-day deadline. There appears to have been some miscommunication or confusion in whatever discussions Petitioner's representative had with the Novitas representative. The Novitas representative's reported statement was correct in so far as Petitioner should have submitted any documents related to the *Advanced Spine* Initial

Determination (and subsequent reconsidered determination) to the DAB, which Petitioner did. Petitioner, her representative, or the Novitas official may have also attributed that advice to the *Ft. Worth Brain and Spine* Initial Determination, which would have been in error. Nevertheless, in the absence of affirmative misconduct, Petitioner cannot excuse neglecting to follow the instructions in the *Ft. Worth Brain and Spine* Initial Determination to request reconsideration from Novitas, by solely asserting that a Novitas official misinformed her. *See, e.g., Pacific Islander Council of Leaders*, DAB No. 2091, at 12 (2007); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990).

Petitioner had, and in fact still has, the ability to request reconsideration of the *Ft. Worth Brain and Spine* Initial Determination from Novitas because Novitas could still accept that reconsideration request if Petitioner were to establish good cause for submitting it late. *See* 42 C.F.R. § 498.22(d). However, I do not have jurisdiction to consider Petitioner's request for hearing at this level of review as it relates to the *Ft. Worth Brain and Spine* Initial Determination, and therefore I must dismiss Petitioner's hearing request as it relates to that determination.⁴ *See* 42 C.F.R. § 498.70(b).

2. CMS properly identified December 23, 2013, as the effective date of Petitioner's addition of Advanced Spine because that is the earliest date on which Novitas received an enrollment application that it subsequently approved.

Suppliers must enroll in the Medicare program to receive payments for services they render to Medicare beneficiaries. 42 C.F.R. § 424.505. As part of the enrollment process suppliers must identify, and CMS must confirm, the supplier's practice location. 42 C.F.R. § 424.502. In order to bill for services rendered to Medicare patients, a physician or non-physician practitioner⁵ must establish the practice location at which he or she will provide services. 73 Fed. Reg. 69,726, 69,770 (Nov. 19, 2008). A supplier must submit a completed enrollment application in order to enroll in the Medicare program and must update his or her enrollment information within specified timeframes. 42 C.F.R. §§ 424.510(d)(1); 424.515(a); 424.516(d). Suppliers may submit enrollment applications either via a CMS-approved paper application or an electronic process approved by the Office of Management and Budget. 42 C.F.R. § 424.502. Physicians and non-physician practitioners submit CMS Form 855-I if they are currently enrolled and need to make changes to their practice locations. *See, e.g., CMS Ex. 3 at 2. Payment*

⁴ I cannot grant Petitioner's request that I "revise[] [the initial determination] under [42 C.F.R.] section 498.32 or 498.100." P. Opposition at 2. Section 498.32 describes the notice and effect of reopening or revising a determination, while section 498.100 only applies after an ALJ or the Board has issued a decision.

⁵ A physician's assistant is a "non-physician practitioner" for Medicare enrollment effective date purposes. 73 Fed. Reg. 69,726, 69,766; CMS Ex. 3 at 2.

for a physician assistant's services may only be made to the physician assistant's employer, not directly to the physician assistant. Medicare Program Integrity Manual § 15.4.4.12.

The effective date of a physician and non-physician practitioner's Medicare enrollment "is the later of the date of filing" of a subsequently approved enrollment application or "the date an enrolled physician or non-physician practitioner first began furnishing services at a new practice location." 42 C.F.R. § 424.520(d). The date of filing of the enrollment application is the date when the designated Medicare contractor receives the complete enrollment application and supporting documentation. 42 C.F.R. § 424.510(d)(1); 73 Fed. Reg. 69,725, 69,769 (Nov. 19, 2008). A non-physician practitioner may bill retrospectively for up to "30 days prior to their effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries." 42 C.F.R. § 424.521(a)(1).

Petitioner first submitted an enrollment application, CMS Form 855-R, to Novitas on December 18, 2013, to add Advanced Spine as her employer, or practice location, and assign her billing privileges to Advanced Spine. CMS Ex. 1 at 6, 7. Novitas received Petitioner's application on December 23, 2013. CMS Ex. 1 at 9. Novitas instructed Petitioner to submit a different form, CMS Form 855-I, instead and subsequently instructed Petitioner to submit additional information related to the second form. CMS Ex. 2. CMS approved Petitioner's Medicare enrollment and addition of Advanced Spine in a letter dated March 31, 2014. CMS Ex. 4. As the Hearing Officer also found (CMS Ex. 6 at 2), I find Petitioner has not submitted any evidence that she submitted an earlier enrollment application adding Advanced Spine that CMS subsequently approved.

Petitioner requests an effective date of January 1, 2011, when she first began providing services at Advanced Spine, and this is an earlier effective date than she originally requested in her enrollment applications but consistent with the date she sought in her reconsideration request. RFH in C-14-1961; P. Br. at 3; CMS 1 at 5; CMS Ex. 3 at 10; CMS Ex. 5 at 1. In her Brief, her Response, and her Opposition, Petitioner explains how she began working with her previous biller and the degree to which she relied on her biller to submit claims on her behalf. Though I did not admit the evidence, Petitioner offered text messages over a period of more than two years that demonstrate her attempts to solicit information regarding the status of her Medicare enrollment from her former biller, despite that biller's apparent inaction and misrepresentations. If Petitioner's claims are accurate, and I have no reason to believe they are not, her former biller has done Petitioner a great disservice, and I note Petitioner provided documents that show she is pursuing a legal challenge against her former biller. *See* Request for Hearing in C-14-1961, Supplement. However, even if I accept all of those allegations as true, I may not consider them in Petitioner's challenge to the effective date that Novitas properly determined.

Petitioner concedes that she makes a “request for equitable relief,” which Petitioner believes “should serve as a reason to change the effective date.” P. Br. at 3. As an initial matter, I do not have any authority to grant Petitioner equitable relief. *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008) (“Consideration of equitable theories of relief is beyond our scope of review.”); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff’d*, 567 F.3d 1202 (10th Cir. 2009). Moreover, suppliers are responsible for the actions or inactions of their billers. 73 Fed. Reg. 36,448, 36,455 (June 27, 2008) (“[I]t is essential that providers and suppliers take the necessary steps to ensure they are billing appropriately for services furnished to Medicare beneficiaries.”); *Louis J. Gaefke, D.P.M.*, DAB No. 2554 (2013) (“Petitioner as a Medicare supplier is ultimately responsible for the accuracy of his claims for Medicare reimbursement.”). Therefore, I must find that CMS had a legal basis when it established the effective dates of Petitioner’s billing privileges and affiliation with Advanced Spine.

IV. Conclusion

I order Petitioner’s hearing request as it relates to the Ft. Worth Brain and Spine Initial Determination dismissed. I find CMS and its contractor had a legal basis to establish an effective date of December 23, 2013 for Petitioner’s enrollment and affiliation with Advanced Spine and sustain that determination.

/s/
Joseph Grow
Administrative Law Judge