Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Paramjit Fagoora, M.D.
(PTAN: CA162183),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-248

Decision No. CR4617

Date: May 25, 2016

DECISION

Petitioner's Medicare billing privileges were deactivated as a result of its failure to respond to a revalidation request, and its billing privileges were subsequently reactivated effective June 30, 2015, the date it submitted an internet-based enrollment application to reactivate its billing privileges. Petitioner has appealed the determination that the effective date of its revalidation is June 30, 2015. For the reasons discussed below, I conclude that the effective date of Petitioner's reactivated billing privileges remains June 30, 2015.

I. Background

Petitioner, Paramjit S. Fagoora, M.D., Inc., also known as Clear Vision Medical Center, is a medical practice that is owned by Paramjit Fagoora, M.D. Centers for Medicare & Medicaid Services Exhibit (CMS Ex.) 3 at 2, 4.

On February 24, 2014, Noridian Healthcare Solutions (Noridian), a Medicare Administrative Contractor, sent Petitioner a request for Medicare enrollment revalidation. CMS Ex. 1. The correspondence was mailed to an address on Barstow Avenue in Fresno,

California. CMS Ex. 1 at 1. After Noridian did not receive a response to its revalidation request, it sent a notice on August 27, 2014, informing Petitioner that it had deactivated Petitioner's Provider Transaction Access Number (PTAN) and billing privileges because Petitioner had failed to respond to the February 24, 2014 revalidation request. CMS Ex. 2 at 1. The letter instructed that Petitioner could reactivate its billing privileges by using the internet-based Provider Enrollment Chain and Ownership System (PECOS) to review the information on file, upload any supporting documentation, and electronically sign and submit the revalidation application, or alternatively, it could complete and submit a paper enrollment application. CMS Ex. 2 at 1. More than ten months later, on June 29, 2015, Petitioner submitted a new enrollment application through PECOS that it electronically signed on June 30, 2015, at which time it listed an updated office location and mailing address on Fresno Street in Fresno, California. CMS Ex. 3 at 2. Petitioner stated that the effective date of its office relocation was January 1, 2014. CMS Ex. 3 at 3. On August 28, 2015, Noridian informed Petitioner that it had approved Petitioner's Medicare enrollment application, effective June 30, 2015. CMS Ex. 4 at 1-2. At that time, Noridian assigned Petitioner a new PTAN. CMS Ex. 4 at 1.

In a letter dated October 7, 2015, implying that he did not receive the February 2014 revalidation request, Petitioner's owner explained that he was unaware that Petitioner's billing privileges had been deactivated and requested that the effective date of the reactivation of billing privileges be the date of deactivation. CMS Ex. 5 at 1. Petitioner explained that "I remember that a couple of efforts [were] done on paper to register our change of address but I guess my office did not follow through what were missing on the applications we sent out." CMS Ex. 5. Petitioner further stated that "[w]e will assure you that this will not happen again if we need any changes in the future." CMS Ex. 5. Petitioner did not offer documentation showing that it had notified CMS or its contractor of its new address on Fresno Street.

Noridian construed Petitioner's correspondence as a request for reconsideration, and in a reconsidered determination dated October 22, 2015, explained the following:

> Revocation, Denial, or Effective date reason: 42 [C.F.R. §] 424.520(d)
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> **Carriers and Part A and Part B Medicare Administrative Contractors (A/B MACs) will establish the effective date of Medicare billing privileges (see 42 CFR 424.520(d)) for physicians, non-physician practitioners, and physician or non-physician practitioner organizations. Physicians, non-physician practitioners and physician and non-physician practitioner organizations will no longer be allowed to establish retrospective Medicare effective billing dates.**

> **Carriers and A/B MACs will establish an effective date of Medicare billing privileges for . . . physician and non-physician practitioner organizations (e.g., clinics/group practices).**
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> **The effective date of Medicare billing privileges for the individuals and organizations identified above is the later of the date of filing or the date they first began providing services at a new practice location. Note: The date of filing for Internet-based Provided Enrollment, Chain and Ownership System (PECOS) applications for these individuals and organizations is the date that the contractor received an electronic version of the enrollment application and a signed certification statement that were both processed to completion.**

CMS Ex. 6 at 1 (emphasis in original). Noridian further explained:

> The provider was deactivated due to no response to revalidation on September 4, 2014.[1] The provider has 120 days from the date of deactivation to revalidate and maintain the issued PTAN[s] and effective dates. The application for the provider was received June 30, 2015. This is past the 120 days allowed and was processed as a reactivation and given the effective date of June 30, 2015.
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> According to the [M]PIM 15.27.1.2 the effective date of a reactivation shall be the date the contractor received the application that is processed.
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> DECISION: [*Paramjit] Fagoora MD had not provided evidence to definitely support an earlier effective date. Therefore, Noridian Healthcare Solutions is not granting you access to the Medicare Trust Fund (by way or issuance) of* [*a new*] *effective date.*

CMS Ex. 6 at 2 (emphasis in original).

Petitioner filed a request for hearing on December 17, 2015, that was received at the Civil Remedies Division on January 6, 2016. CMS filed a pre-hearing brief and motion for summary disposition (CMS Br.), along with six exhibits (CMS Exs. 1 to 6). Petitioner filed a response (P. Br.). In the absence of any objections, I admit CMS Exs. 1 to 6 and the parties' briefs into the record.

[1] CMS acknowledged in its brief that the September 4, 2014 date of deactivation is incorrect. CMS Br. at 4. As previously discussed, the date of the letter informing Petitioner of the deactivation of its billing privileges is August 27, 2014. CMS Ex. 2 at 1.

Neither party has offered the testimony of any witnesses, and therefore, a hearing for the purpose of cross-examination of witnesses is not necessary. *See* Acknowledgment and Prehearing Order §§ 8, 9, and 10. I consider the record in this case to be closed, and the matter is ready for a decision on the merits.[2]

II. Issue

Whether CMS had a legitimate basis for establishing June 30, 2015, as the effective date of Petitioner's reactivated billing privileges.

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(15), 498.5(*l*)(2)

IV. Findings of Fact, Conclusions of Law, and Analysis[3]

1. ***Noridian received Petitioner's electronically signed and internet-based enrollment application seeking reactivation of billing privileges on June 30, 2015.***

2. ***Noridian correctly determined that the reactivation of Petitioner's billing privileges was effective June 30, 2015.***

Petitioner is considered a "supplier" for purposes of the Social Security Act (Act) and the regulations. *See* 42 U.S.C. §§ 1395x(d), 1395x(u); *see also* 42 C.F.R. § 498.2. A "supplier" furnishes services under Medicare and the term applies to physicians or other practitioners that are not included within the definition of the phrase "provider of services." 42 U.S.C. § 1395x(d). A supplier must enroll in the Medicare program to receive payment for covered Medicare items or services. 42 C.F.R. § 424.505. The regulations at 42 C.F.R. Part 424, subpart P, establish the requirements for a supplier to enroll in the Medicare program. 42 C.F.R. §§ 424.510 - 424.516; *see also* Act § 1866(j)(1)(A) (authorizing the Secretary of the U.S. Department of Health and Human Services to establish regulations addressing the enrollment of providers and suppliers in the Medicare program). A supplier that seeks billing privileges under Medicare must "submit enrollment information on the applicable enrollment application." 42 C.F.R.

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[2] CMS has argued that summary disposition is appropriate. It is unnecessary in this instance to address the issue of summary disposition, as neither party has requested an in-person hearing.

[3] My findings of fact and conclusions of law are set forth in italics and bold font.

§ 424.510(a). "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), (d).

To maintain Medicare billing privileges, a supplier such as Petitioner must revalidate its enrollment information at least every 5 years. 42 C.F.R. § 424.515. CMS reserves the right to perform off-cycle revalidations in addition to the regular 5–year revalidations, and as in this case, may request that a provider or supplier recertify the accuracy of the enrollment information when warranted to assess and confirm the validity of the enrollment information maintained by CMS. 42 C.F.R. § 424.515. Off-cycle revalidations may be triggered as a result of random checks, information indicating local health care fraud problems, national initiatives, complaints, or other reasons that cause CMS to question the compliance of the provider or supplier with Medicare enrollment requirements. 42 C.F.R. § 424.515(d). When CMS notifies a supplier that it is time to revalidate, the supplier must provide the requested information and documentation within 60 calendar days of CMS's notification. 42 C.F.R. § 424.515(a)(2).

CMS is authorized to deactivate an enrolled supplier's Medicare billing privileges if the enrollee fails to comply with revalidation requirements within 90 days of CMS's notice to revalidate. 42 C.F.R. § 424.540(a)(3). If CMS deactivates a supplier's Medicare billing privileges "[n]o payment may be made for otherwise Medicare covered items or services furnished to a Medicare beneficiary." 42 C.F.R. § 424.555(b). The regulation authorizing deactivation explains that "[d]eactivation of Medicare billing privileges is considered an action to protect the provider or supplier from misuse of its billing number and to protect the Medicare Trust Funds from unnecessary overpayments." 42 C.F.R. § 424.540(c).

The reactivation of an enrolled provider or supplier's billing privileges is governed by 42 C.F.R. § 424.540(b), and the process for reactivation is contingent on the reason for deactivation. If CMS deactivates a provider or supplier's billing privileges due to an untimely response to a revalidation request, such as in this case, the enrolled provider or supplier may apply for CMS to reactivate its Medicare billing privileges by completing the appropriate enrollment application or recertifying its enrollment information, if deemed appropriate.[4] 42 C.F.R. § 424.540(a)(3), (b)(1). In this case, Petitioner was

[4] The Secretary recently proposed rulemaking amending 42 C.F.R. § 424.540(b)(1) and (2). 81 Fed. Reg. 10719, 10738-10739 (March 1, 2016). The proposed revisions state that a deactivated provider or supplier "must recertify that its enrollment information currently on file with Medicare is correct and furnish any missing information as appropriate," and that "CMS may for any reason require a deactivated provider or supplier to submit a complete Form CMS-855 application as a prerequisite for reactivating its billing privileges." 81 Fed. Reg. at 10752. In the proposed rulemaking, the Secretary explained, in part, that the Department was clarifying that a provider or

informed, at the time of its deactivation, that it could use PECOS to review the information on file, upload any supporting documentation, and electronically sign and submit its revalidation application, or alternatively, it could submit a hard copy Form CMS-855 application. CMS Ex. 2 at 1-2.

Noridian deactivated Petitioner's billing privileges more than six months after it requested that Petitioner revalidate its enrollment information. CMS Exs. 1, 2. Approximately 16 months after Noridian initially requested that Petitioner complete the revalidation process through PECOS or by submitting a hard copy application (CMS Ex. 1), Petitioner submitted an application for revalidation through PECOS on June 29, 2015, and electronically signed its application on June 30, 2015. CMS Ex. 3. Noridian accepted Petitioner's application, reactivated its billing privileges, and assigned a new PTAN. CMS Ex. 4 at 1. Noridian granted Petitioner billing privileges effective from June 30, 2015, the date it received Petitioner's signed enrollment application. CMS Ex. 4 at 1-2.

The pertinent regulation with respect to the effective date of reactivation, as cited by Noridian in its reconsidered decision, is 42 C.F.R. § 424.520(d)(1). CMS Ex. 6 at 1; *Arkady B. Stern, M.D.*, DAB No. 2329 at 4 (2010). Section 424.520(d)(1) states that "the effective date for billing privileges . . . 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 first began furnishing services at a new practice location." The corresponding CMS policy, which has been in effect since March 18, 2015, is consistent with section 424.520(d)(1) and instructs that the effective date of the reactivation "shall be the date the contractor received the application or [reactivation certification package] that was processed to completion." Medicare Program Integrity Manual (MPIM), ch. 15 § 15.27.1.2 (rev. 561, issued December 12, 2015, and effective March 18, 2015). The Departmental Appeals Board has explained that the "date of filing" is the date that the Medicare contractor receives a signed provider or supplier enrollment application that the Medicare contractor is able to process to approval. *Tri-Valley Family Medicine, Inc.*, DAB No. 2358 (2010); *but see* 79 Fed. Reg. 72500, 72521 (December 5, 2014) (statement in the Federal Register that the "'date of filing' of a CMS-855 application" is "the date on which the provider or supplier submitted its CMS-855 application via mail or Internet-based PECOS"). Accordingly, based on the date of filing, Noridian reactivated Petitioner's billing privileges effective June 30, 2015.

Petitioner is seeking an effective date of billing privileges dating back to its deactivation in August 2014, but does not identify any authority supporting this retroactive effective date for the reactivation of billing privileges. While Petitioner's failure to respond to the

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supplier "may use recertification—regardless of the deactivation reasons—as a means of reactivation." 81 Fed. Reg. at 10739.

revalidation request for a period of 16 months unfortunately resulted in a 10-month lapse in its billing privileges, only a few years ago such a failure to respond to a revalidation request could have resulted in a revocation of billing privileges and an enrollment bar for a minimum of one year.[5] 42 C.F.R. § 424.535(b), (c) (2010) (stating that "[w]hen a provider's or supplier's billing privilege is revoked, any provider agreement in effect at the time of revocation is terminated effective with the date of revocation" and "[a]fter a . . . supplier . . . has had their billing privileges revoked, they are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar," which is a minimum of one year and no more than three years.) The Secretary's former authority to revoke billing privileges and establish a re-enrollment bar was implemented through a final rule published on June 27, 2008, and the regulatory amendment had a stated purpose "to prevent providers and suppliers from being able to immediately re-enroll in Medicare after their billing privileges were revoked." 76 Fed. Reg. 65909, 65912 (October 24, 2011), citing 73 Fed. Reg. 36448. When the Secretary later determined, in subsequent rulemaking, that this basis for revocation and a re-enrollment bar should be eliminated through removing the pertinent language in 42 C.F.R. § 424.535(c), the Secretary's final rule explained:

> In our October 24, 2011, proposed rule, we proposed to revise § 424.535(c) to eliminate the re-enrollment bar in instances where providers and suppliers have had their billing privileges revoked under § 424.535(a) solely for failing to respond timely to a CMS revalidation request or other request for information. As we explained in the proposed rule, we believe that this change is appropriate because the re-enrollment bar in such circumstances often results in unnecessarily harsh consequences for the provider or supplier and causes beneficiary access issues in some cases . . . Moreover, *there is another, less restrictive regulatory remedy available* for addressing a failure to respond timely to a revalidation request. This remedy was identified in proposed § 424.540(a)(3).

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[5] It is not unnoticed that the evidence before me indicates that Petitioner did not report its new office location until June 30, 2015, which is approximately 18 months after its January 1, 2014 office relocation. While not addressed by Noridian or CMS, I recognize that such delayed notification of Petitioner's relocation, if supported by the evidence, was well in excess of the notification requirements set forth in 42 C.F.R. § 424.516(d), and could have resulted in revocation of billing privileges based on a failure to comply with enrollment requirements. *See* 42 C.F.R. § 424.535(a)(9). A failure to meet this enrollment requirement could have resulted in revocation of billing privileges and, at a minimum, a one-year re-enrollment bar, whereas the total duration of Petitioner's deactivated billing privileges was for approximately 10 months. 42 C.F.R. § 424.535(c). Thus, it is fortuitous for Petitioner that Noridian deactivated its billing privileges rather than revoking its Medicare supplier agreement and establishing a re-enrollment bar.

76 Fed. Reg. at 65912 (emphasis added). The final rule further stated:

> We do not believe that the finalization of our proposed revision to § 424.535(c) will impact our ability to prevent or combat fraudulent activity in our programs. Providers and suppliers that fail to respond once or repeatedly to a revalidation or other informational request *will still be subject to adverse consequences,* including—as explained below—the deactivation of their Medicare billing privileges.

76 Fed. Reg. at 65912 (emphasis added). Finally, in amending section 424.540(a)(3), as referenced above, the final rule stated:

> We proposed to add a new § 424.540(a)(3) that would allow us to deactivate, rather than revoke, the Medicare billing privileges of a provider or supplier that fails to furnish complete and accurate information and all supporting documentation within 90 calendar days of receiving notification to submit an enrollment application and supporting documentation, or resubmit and certify to the accuracy of its enrollment information. While the deactivated provider or supplier would still need to submit a complete enrollment application to reactivate its billing privileges, *it would not be subject to other, ancillary consequences that a revocation entails*; for instance, a prior revocation must be reported in section 3 of the Form CMS-855I application, whereas a prior deactivation need not.

76 Fed. Reg. at 65913 (emphasis added). Thus, while the rulemaking explained that the regulatory amendment was intended to mitigate the "unnecessarily harsh consequences" of revocation and a mandatory enrollment bar for a supplier's failure to respond to a revalidation request, the final rule recognized that there was a "less restrictive regulatory remedy available for addressing a failure to respond timely to a revalidation request" and that a supplier "will still be subject to adverse consequences" that included "the deactivation of their Medicare billing privileges." The final rule implemented section 424.540(a)(3), which specified that deactivation of billing privileges, rather than revocation, was appropriate, and stated that deactivation "does not have any effect on a provider or supplier's participation agreement or any conditions of participation." [6] 42 C.F.R. § 424.540(a)(3), (c).

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[6] A physician or supplier participation agreement can be made through a Form CMS-460. When a physician or supplier enters into such an agreement, it "enters into an agreement with the Medicare program to accept assignment of the Medicare Part B payment for all services for which the participant is eligible to accept assignment under the Medicare law and regulations." Form CMS-460. A supplier such as Petitioner is not subject to conditions of participation. *See* 42 C.F.R. Parts 482 and 485.

While section 424.540(a)(3) indicates that the deactivation does not have any effect on the supplier's participation agreement or conditions of participation, deactivation nonetheless may cause "adverse consequences," most significantly, the loss of billing privileges. The effective date of reactivation of billing privileges is governed by 42 C.F.R. § 424.520, "Effective date of Medicare billing privileges," which states, in pertinent part, that the effective date for billing privileges, as applicable to this case, is "[t]he date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor." 42 C.F.R. § 424.520(d)(1). The October 22, 2015 reconsidered determination explicitly relied on 42 C.F.R. § 424.520(d) in determining that the effective date of Petitioner's reactivated billing privileges was correctly determined to be June 30, 2015. CMS Ex. 6 at 1. The reconsidered determination additionally relied on section 15.27.1.2 of the MPIM, which contains the aforementioned policy guidance that is consistent with section 424.520(d) and indicates that the effective date of a reactivation is the date the enrollment application was submitted. *But see Viora Home Health, Inc.*, DAB No. 2690 at 8 (2016) ("the MPIM provision . . . is sub-regulatory guidance, and as the introduction to chapter 15 of MPIM . . . suggests, chapter 15 provisions are primarily intended as guidance or instructions for CMS fee-for-service contractors"). I conclude that the MPIM is consistent with section 424.520(d), and further, I conclude that Noridian correctly relied on both section 424.520(d) and the policy in determining the June 30, 2015 effective date for the reactivation of Petitioner's billing privileges.

Petitioner has argued that it did not receive any mail correspondence from CMS regarding its revalidation and contended that the correspondence was mailed to an address that was not its current office location. P. Br. In its October 7, 2015 construed request for reconsideration, Petitioner explained that "a couple of efforts [were] done on paper to register our change of address but I guess my office did not follow through." CMS Ex. 5 at 1. Petitioner later stated, in its brief, that a billing company "was the contact person and was doing all the application completion for change of address etc. for [the] office." P. Br. While Petitioner explained that it did not receive any mail correspondence regarding the revalidation request, it did not claim to have notified CMS of its new address, nor did it submit any evidence documenting such notification. Petitioner has not contended that it *actually* notified CMS or its contractor of its new address, and in fact, Petitioner appears to have conceded that it did not properly notify CMS or its contractor of its new office location. *See* CMS Ex. 5 at 1 (stating "[w]e will assure you this will not happen again if we need any changes in the future") and P. Br. (requesting "equitable relief" or "mer[cy] plea"). Since Petitioner has not shown, or even alleged, that it notified CMS or Noridian of its new address, Noridian correctly sent correspondence to Petitioner's former office location on Barstow Avenue; Petitioner's failure to timely respond to the revalidation request is not due to any fault of CMS or Noridian, but rather, its own failure to provide notice of its new address.

To the extent that Petitioner requests "equitable relief or mer[cy] plea for [its] office to be able to bill for the services provided to Part B medicare claims for the period . . . as it has caused a big financial strain [on its] office," I am unable to grant equitable relief. *See US Ultrasound*, DAB No. 2302 at 8 (2010) ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements"). Therefore, the effective date of June 30, 2015 must stand.

V. Conclusion

I uphold the June 30, 2015 effective date of Petitioner's Medicare enrollment reactivation.

/s/
Leslie C. Rogall
Administrative Law Judge