

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

LeKeytra Washington, NP,
(NPI: 1518395268 / PTAN: 450950ZJP8),
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-379

Decision No. CR4634

Date: June 17, 2016

DECISION

The effective date of Medicare enrollment and billing privileges of Petitioner, LeKeytra Washington, NP, is October 29, 2015, with retrospective billing privileges beginning September 29, 2015.

I. Background and Procedural History

Petitioner submitted two internet-based enrollment applications, Form CMS-855I and Form CMS-855R, on October 29, 2015. Centers for Medicare & Medicaid Services (CMS) Exhibits (Exs.) 1, 2. Novitas Solutions (Novitas), a Medicare administrative contractor, notified Petitioner by letter dated November 14, 2015, that it had assigned her a Provider Transaction Access Number (PTAN) and approved her reassignment of benefits to Life Line Community Healthcare, with an “effective date” of September 29, 2015. CMS Ex. 3 at 1-2. In a November 16, 2015 letter that was received by Novitas on November 30, 2015, Petitioner requested reconsideration of the November 14, 2015 determination and requested that the effective date be changed to September 25, 2015, the date Petitioner first began providing services to Medicare beneficiaries at Life Line Community Healthcare. CMS Ex. 4. Novitas issued a reconsidered determination on February 19, 2016, at which time it determined that an effective date of September 29, 2015 was warranted. CMS Ex. 6. In determining that September 29, 2015 was the correct effective date, Novitas explained that Petitioner had submitted her enrollment

applications on October 29, 2015, and that there was no documentation that Petitioner's internet-based applications were received prior to October 29, 2015. CMS Ex. 6 at 2. Novitas further explained that pursuant to 42 C.F.R. § 424.521(a), a September 29, 2015 effective date was established based on a 30-day retrospective billing period from October 29, 2015, the date Novitas received Petitioner's internet-based applications.

Petitioner submitted a request for a hearing by an administrative law judge (ALJ) that was dated February 26, 2016 and received via FedEx on March 8, 2016. I issued an Acknowledgment and Pre-Hearing Order (Order) on March 11, 2016, in which I directed the parties to file their respective pre-hearing exchanges, to include briefs and supporting exhibits, by specified deadlines. I also gave the notice in Section 4(c.)(i.) of my Order that a party may file a motion for summary judgment with its pre-hearing exchange.

CMS filed a motion for summary judgment and a pre-hearing brief, along with CMS Exs. 1 through 6, on April 13, 2016. Petitioner failed to file a response to CMS's pre-hearing exchange, and I issued an order on June 2, 2016, directing Petitioner to show cause why this case should not be dismissed. Petitioner submitted a document styled as a pre-hearing exchange in an apparent response to the show cause order, but Petitioner's response did not include any discussion of the merits of her case or a substantive response to CMS's motion for summary judgment. Petitioner contemporaneously submitted three exhibits (a copy of her approved enrollment application, which she identified as P. Ex. 1; a copy of her November 16, 2015 letter to Novitas, which she identified as P. Ex. 2 and which is a duplicate of CMS Ex. 4; and, a document showing that Petitioner provided services on September 25, 2015, which she identified as P. Ex. 3).

In the absence of any objections, I admit CMS Exs. 1 to 6 and P. Exs. 1 and 3. P. Ex. 2 is a duplicate of CMS Ex. 4, and is therefore not admitted into evidence. Neither party has requested a hearing for the purpose of presenting live testimony. The matter is ready for a decision.

II. Jurisdiction

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

III. Discussion

A. Issues

The issues in this case are:

Whether summary judgment is appropriate; and

Whether the effective date of Petitioner's Medicare enrollment and billing privileges is October 29, 2015, with a retroactive effective date of billing privileges of September 29, 2015.

B. Background law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers. Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Petitioner is a "supplier" of services under the Act and the regulations. A "supplier" furnishes services under Medicare, and the term "supplier" applies to physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The effective date of enrollment in Medicare of a physician, nonphysician practitioner, and physician and nonphysician practitioner organizations is governed by 42 C.F.R. § 424.520(d). Pursuant to section 424.520(d), the effective date of enrollment for a physician or nonphysician practitioner may only be the later of two dates: the date when the practitioner filed an application for enrollment that was subsequently approved by a Medicare contractor charged with reviewing the application on behalf of CMS; or, the date when the practitioner first began providing services at a new practice location. As applicable here, an enrolled physician or nonphysician practitioner may retrospectively bill Medicare for services provided to Medicare-eligible beneficiaries up to 30 days prior to the effective date of enrollment, if circumstances precluded enrollment before the services were provided. 42 C.F.R. § 424.521(a).

C. Findings of Fact, Conclusions of Law, and Analysis¹

1. Summary judgment is appropriate.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010); *see Anderson*

¹ Findings of fact and conclusions of law are set forth in bold and italics.

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must “come forward with ‘specific facts showing that there is a genuine issue for trial’” *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). “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.” *Senior Rehab.*, DAB No. 2300 at 3. In determining whether there are genuine issues of material fact for hearing, an ALJ must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party’s favor. *Id.*

The standard for deciding a case on summary judgment and an ALJ’s decision-making in deciding a summary judgment motion differs from resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Departmental Appeals Board (Board) also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party’s evidence would be sufficient to meet that party’s evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary of Health and Human Services has not provided for the allocation of the burden of persuasion or the quantum of evidence in 42 C.F.R. pt. 498. However, the Board has provided analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff’d*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App’x 181 (6th Cir. 2005).

The material facts in this case are not disputed and there is no genuine dispute as to any material fact that requires a hearing. Specifically, Petitioner does not contend in her request for hearing that she filed an enrollment application prior to October 29, 2015, and admits that “[t]he responsibility of the delay [in filing her enrollment application] falls solely on the credentialing department.” The issues in this case that require resolution are issues of law related to the interpretation and application of the regulations that govern enrollment and billing privileges in the Medicare program to the undisputed facts of this case. Accordingly, summary judgment is appropriate.

2. Pursuant to 42 C.F.R. § 424.520(d), Petitioner's effective date of Medicare enrollment was October 29, 2015, the date of filing of the Medicare enrollment applications that Novitas was able to process to approval.

3. Petitioner was authorized, pursuant to 42 C.F.R. § 424.521(a)(1), to bill Medicare for services provided to Medicare-eligible beneficiaries up to 30 days prior to her effective date of enrollment, i.e., beginning on September 29, 2015.

Petitioner seeks a September 25, 2015 effective date for the reassignment of benefits for services she provided to Medicare beneficiaries at Life Line Community Healthcare. See CMS Exs. 4 and 6; Request for Hearing. Petitioner has not presented evidence or arguments supporting that an effective date of September 25, 2015 is warranted, and she has acknowledged that the effective date assigned is due to delay by her credentialing department, rather than any error on the part of CMS or its contractor. CMS Ex. 4; Request for Hearing.

There is no dispute that Petitioner submitted enrollment and reassignment applications to Novitas on October 29, 2015, which is more than 30 days after Petitioner began providing services at Life Line Community Healthcare. Therefore, the earliest possible effective date for Petitioner's Medicare enrollment and billing privileges was October 29, 2015, the date the applications were filed. 42 C.F.R. § 424.520(d). The regulation further provides that it is the later of the date of filing a Medicare enrollment application that was subsequently approved or the date services were first provided that controls. 42 C.F.R. § 424.520(d). Retrospective billing is permitted for 30 days prior to the effective date of enrollment and billing privileges, except in a situation not presented in this case. 42 C.F.R. § 424.521.

Accordingly, I conclude that, pursuant to 42 C.F.R. § 424.520(d), the effective date of Petitioner's Medicare enrollment and billing privileges is October 29, 2015. Pursuant to 42 C.F.R. § 424.521(a)(1), Petitioner may retrospectively bill beginning September 29, 2015.

In her request for hearing, Petitioner urged that “[w]e ask that you reconsider the effective date as to not punish the provider and her services, for the mistake of the [credentialing] department.” Petitioner's plea may be viewed as a request for equitable relief. However, I do not have the authority to grant equitable relief in the form of an earlier effective date of enrollment. *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.”). Petitioner points to no authority by which I may grant her relief from the applicable regulatory requirements, and I have no authority to declare statutes or regulations invalid

or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (“[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.”).

IV. Conclusion

For the foregoing reasons, I conclude that the effective date of Petitioner’s Medicare enrollment and billing privileges is October 29, 2015, with a 30-day period for retrospective billing beginning on September 29, 2015.

/s/
Leslie C. Rogall
Administrative Law Judge