

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mobile Vision, Inc.,
(PTAN: 9382811),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-205

Decision No. CR2124

Date: April 29, 2010

DECISION

I deny the motion of the Centers for Medicare and Medicaid Services (CMS) to dismiss the hearing request of Petitioner, Mobile Vision, Inc. I grant CMS's motion for summary judgment. Consequently, the effective date of Petitioner's enrollment as a provider in the Medicare program remains May 29, 2009, and Petitioner was granted retroactive billing privileges to April 29, 2009.

I. Background

Marlene B. Mowery, OD, filed a hearing request on behalf of Petitioner, in which it challenged the deactivation of Petitioner's Medicare billing number and effective date of Petitioner's enrollment in the Medicare program. Petitioner alleges that its billing number should not have been deactivated, and it should have been enrolled in the Medicare program as of an earlier date than the date when CMS's contractor determined that Petitioner was eligible for enrollment. The case was transferred to me for a hearing and a decision, pursuant to 42 CFR § 498.44.

CMS moved to dismiss Petitioner's hearing request on two grounds and moved, alternatively, for summary judgment. Petitioner opposed CMS's motion. CMS filed

seven proposed exhibits, which it designated CMS Ex. 1 – CMS Ex. 7. Petitioner filed no exhibits. I receive all of CMS' proposed exhibits without objection into the record of this case.

II. Issues, findings of fact, and conclusions of law

A. Issues

The issues in this case are as follows:

1. Whether Petitioner's hearing request satisfies the regulatory requirements regarding the content of appeals;
2. Whether Petitioner has a right to appeal the deactivation of a supplier's Medicare billing number;
3. Whether Petitioner has a right to a hearing to challenge the effective date of its enrollment in the Medicare program; and
4. Whether CMS's contractor and CMS properly determined Petitioner's effective date of enrollment to be May 29, 2009.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law (Findings).

1. I deny CMS's motion to dismiss.

CMS premises its motion to dismiss on two grounds. First, it asserts that Petitioner's hearing request does not satisfy the regulatory requirements regarding the content of appeals. CMS Br. at 7-8. CMS argues that Petitioner's three-sentence request for a hearing does not satisfy 42 C.F.R. § 498.40(b), which requires that a hearing request: "(1) [i]dentify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and (2) [s]pecify the basis for contending that the findings and conclusions are incorrect." Petitioner's request for a hearing reads in full:

Enclosed you will find a letter with the decision on my appeal questioning the time line and notification procedures for suspension of Mobile Vision Medicare Provider Number: 9313011. I believe the decision is wrong and wish to appeal the decision. Would you please send me the appropriate paperwork?"

Petitioner enclosed the October 7, 2009 reconsideration decision of Palmetto GBA (Palmetto), a CMS contractor.

The reconsideration decision upheld the effective date of May 29, 2009 for the new provider number 9382811 and stated Petitioner's right to bill for Medicare services became effective on April 29, 2009. The findings of fact and conclusions of law in the reconsideration decision consist of the following:

Facts: Application received May 29, 2009 and approved July 22, 2009 with an effective date of April 29, 2009.

Rationale: Application was received after effective date of CR 6310.

Summary of Submitted Documentation: Appeal request.

Evaluation of Submitted Documentation: Does not support appeal request, therefore appeal is denied.

Decision: All of the documentation in the file for this case has been reviewed, and the decision has been made in accordance with Medicare guidelines as outlined in 42 CFR §§ 424.520 and 424.521. Specifically, Mobile Vision Inc. has not provided evidence to show you have fully complied with the standards for which your effective date was established. Therefore, we can not grant you access to the Medicare Trust Fund (by way or issuance) of a Medicare number.

CMS Ex. 7.

It is true that Petitioner's request for a hearing did not identify the specific issues, findings of fact, and conclusions of law with which it disagreed and did not specify the basis for contending that the findings and conclusion are incorrect. However, the October 7, 2009 reconsideration decision of Palmetto was almost as terse, and lacked any detail as to the specific issues, findings of fact, and conclusions of law on which the decision maker based the result. CMS Ex. 7. I decline to dismiss Petitioner's case for failing to articulate which findings of fact and conclusions of law it disagreed with and why, when CMS's contractor offered so little explanation of its decision. I therefore deny CMS's motion to dismiss on the basis that Petitioner's hearing request does not satisfy the regulatory requirements regarding the content of appeals.

Second, CMS argues that the Medicare Act and CMS regulations do not permit a supplier

to appeal either the deactivation, or effective date, of a supplier's billing privileges and that Petitioner has no right to challenge the effective date of its participation in Medicare. CMS Br. at 4, 8-9. CMS asserts that that a supplier's appeal rights are limited solely to denials of enrollment applications or revocations of billing privileges. CMS Br. at 8-9.

I have no authority to review Petitioner's deactivation of billing privileges, because the regulations provide only for the submission of a rebuttal to the contractor. If privileges are deactivated, a supplier may submit a rebuttal under 42 CFR § 424.545(b), in accordance with 42 CFR § 405.374. To the extent that Petitioner is challenging the deactivation itself, therefore, I agree with CMS that the issue is not properly before me. I do not dismiss the appeal, however, because Petitioner is also challenging the determination of the effective date of its approval.

The regulations at 42 C.F.R. Part 498 that govern appeals procedures for determinations affecting participation in Medicare (and certain Medicaid determinations) set out a list of initial determinations by CMS that are subject to appeal and specify administrative actions that are not subject to appeal under Part 498. One of the initial determinations listed as subject to appeal is as follows:

The effective date of a Medicare provider agreement or supplier approval.

42 C.F.R. § 498.3(b)(15). None of the administrative actions identified as not subject to appeal under Part 498 refers to the determination of an effective date for a provider or supplier to participate in Medicare.

ALJs who have considered this jurisdictional question have been divided in their conclusions. In a number of recent cases, ALJs have concluded that the plain language of section 498.3(b)(15) creates a right for any provider or supplier to challenge the effective date of enrollment, that is, of a provider agreement or of supplier approval. *Victor Alvarez, M.D.*, DAB CR2070 (2010) (ALJ Kessel); *Romeo Nillas, M.D.*, DAB CR2069 (2010) (ALJ Kessel); *Jorge M. Ballesteros, CNRA*, DAB CR2067 (2010) (ALJ Hughes); *Vincent Pirri, M.D.*, DAB CR2065 (2010) (ALJ Smith). On the other hand, one ALJ recently accepted CMS's argument that the regulatory history of section 498.3(b)(15) should be understood to restrict appeals of effective dates to those suppliers and providers subject to survey and certification or accreditation. *Mikhail Paikin, DO*, DAB CR2064 (2010). The Departmental Appeals Board (Board) has not yet addressed this issue.

It is well established that both the Board and all ALJs are bound by applicable statute and regulations. Where a regulation speaks clearly on its face and applies to the question before me, I am bound to follow it. ALJs who have found a right to appeal the effective dates assigned to all suppliers and providers who are accepted for enrollment in Medicare

have relied on this principle. Thus, ALJ Kessel states:

CMS would have me ignore the plain meaning of the regulation. It contends that this regulation predates the Part 424 regulations and was intended to confer hearing rights only in situations not covered under Part 424. That argument is unpersuasive. The regulation is plain and unambiguous.

Andrew J. Elliot, M.D., DAB CR2103, at 3 (2010).

I agree. The wording of section 498.3(b)(15) appears straightforward in providing that the “effective date of a Medicare provider agreement or supplier approval” is an appealable initial determination and includes no qualifying or limiting language. CMS argues that regulations granting rights to suppliers to appeal denials and revocations of billing privileges should be read as limiting supplier appeals of enrollment decisions to only these situations. CMS Br. at 5.

Since an effective date appeal arises after an approval, rather than a denial or revocation, CMS reasons that the regulations do not permit appeals of effective date determinations. CMS Br. at 4-5, 8. Part 424 unquestionably does grant appeal rights from denials and revocations, but it does so by reference to the provisions of subpart A of Part 498. In adopting 498.3(b)(15) CMS recognized that approving participation at a date later than that sought amounts to a denial of participation during the intervening time and generally involves the same kind of compliance issues that arise from initial denials. 62 Fed. Reg. 43,931, 43,933 (Aug. 18, 1997); 57 Fed. Reg. 46,362, 46,363 (Oct. 8, 1992). The same reasoning applies whether the denial of an earlier effective date results from a survey and certification process or an enrollment process.

I am thus bound to follow the regulations in permitting an appeal by any provider or supplier dissatisfied with a determination as to the effective date of its provider agreement or supplier approval. I therefore deny CMS’s motion to dismiss on the basis that a supplier’s appeal rights are limited solely to denials of enrollment applications or revocations of billing privileges.

I note, however, that a right to challenge the effective date is not a license to seek an effective date other than that prescribed by law. It is only the effective date of supplier approval that may be challenged. CMS regulations permit certain suppliers, including physicians, to bill retroactively for certain services provided before approval, if they have met all program requirements. Current regulations limit retroactive billing to 30 days prior to the effective date, “if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries” or 90 days in certain disaster situations. 42 C.F.R. § 424.521(a). This billing period is retroactive **from the effective date** of their

approval. It follows that section 498.3(b)(15) does not provide for challenges to the period for retroactive billing beyond an appeal that the effective date of approval itself was wrongly determined.

2. I grant CMS's motion for summary disposition.

The undisputed facts of this case are as follows. Petitioner became a Medicare supplier in 1996 and was assigned Medicare billing number 9313011. CMS Ex. 3. On June 21, 2008, Petitioner's billing privileges under billing number 9313011 were automatically deactivated in accordance with 42 C.F.R. § 424.540(a)(1), after Petitioner had not billed Medicare for over one year. *Id.* On May 29, 2009, to reactivate its billing privileges, Petitioner filed a new enrollment application with Palmetto. CMS Ex. 4. On July 22, 2009, Palmetto advised Petitioner that its application had been approved and that the effective date of its billing privileges was April 29, 2009. CMS Ex. 5. The new billing number assigned to Petitioner was 9382811. *Id.*

On September 18, 2009, Petitioner sent Palmetto a letter indicating that it was dissatisfied with this determination and requested that Petitioner's former billing number be reinstated, or that Palmetto back date the new billing number. CMS Ex. 6. Although Palmetto's July 22, 2008 letter granting Petitioner's enrollment application had not included appeal rights, Palmetto treated Petitioner's September 18, 2009 letter as a request for reconsideration. On October 7, 2008, Palmetto denied Petitioner's request for reconsideration (CMS Ex. 7), and this appeal ensued.

Petitioner argues that CMS should not be permitted to automatically deactivate a billing number, without any prior notice, solely because Petitioner had not billed Medicare for a twelve month period. Petitioner's Br. at 7. It is clear that CMS may deactivate a supplier's Medicare billing privileges if the supplier "does not submit any Medicare claims for 12 consecutive calendar months." 42 C.F.R. § 424.540(a)(1). After 12 consecutive calendar months pass without the submission of claims for billing, the Medicare database automatically deactivates the subject billing number. CMS Ex. 1. The regulations do not provide for notifying suppliers regarding the deactivation under these circumstances. A supplier may reactivate its billing privileges, however, it must do so under a new billing number. CMS Ex. 2.

As I discussed above, Petitioner's opportunity to challenge the deactivation was limited to submitting a rebuttal. In any case, Petitioner's argument that CMS cannot automatically deactivate a billing number lacks any legal support. Pursuant to 42 C.F.R. § 424.540(a)(1), CMS had the authority to deactivate Petitioner's Medicare billing number. CMS's published guidance provides that when a supplier's billing privileges have been deactivated for non-billing, privileges may only be reactivated under a new

billing number. Medicare Program Integrity Manual, Chapter 10, § 13.1, CMS Ex. 2.

In addition, the undisputed facts establish that the earliest date when CMS could have approved Petitioner's new application for enrollment was May 29, 2009. 42 C.F.R. § 424.520(d). Petitioner does not dispute that it filed an application to reactivate its billing privileges on May 29, 2009, and Petitioner does not assert that there are any facts that would entitle it to an earlier effective date for billing number 9382811, pursuant to the requirements of 42 C.F.R. § 424.520(d).

Petitioner appears to claim that CMS's actions in deactivating its previous billing number and assigning a new effective date of enrollment of May 29, 2009 were unconstitutional and violated Petitioner's due process rights. However, Petitioner also fails to identify the specific regulation it is challenging and fails to assert specific facts to support its argument.

I have no authority to invalidate applicable regulations on the basis of constitutional arguments. It is "well established that administrative forums, such as [the] Board and the Department's ALJs, do not have the authority to ignore unambiguous statutes or regulations on the basis that they are unconstitutional." *Sentinel Med. Labs., Inc.*, DAB No. 1762, at 9 (2001), *aff'd*, *Teitelbaum v. Health Care Fin. Admin.*, 32 F. App'x 865 (9th Cir. 2002).

For the reasons explained above, I conclude that CMS properly determined that the effective date of approval of enrollment was May 29, 2009. CMS regulations permit suppliers to retrospectively bill Medicare for 30 days prior to the effective date of enrollment. 42 CFR § 424.521(a). I have no authority to order CMS to make payment for claims that were provided outside of the 30-day retroactive period provided by regulation.

Thus, for the reasons set forth above, I grant CMS' motion for summary judgment.

/s/

Leslie A. Sussan
Board Member