

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jerry K. Pearson, M.D.,
(NPI: 1043252166),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-1278

Decision No. CR2750

Date: April 8, 2013

DECISION

Wisconsin Physicians Service (WPS), an administrative contractor acting on behalf of the Centers for Medicare and Medicaid Services (CMS), determined that Petitioner was not eligible for enrollment in the Medicare program earlier than March 20, 2012, and that Petitioner could not submit claims for payment of services performed or delivered earlier than February 19, 2012. Petitioner appealed. For the reasons stated below, I affirm WPS's determination.

I. Case Background and Procedural History

On March 20, 2012, WPS received Petitioner's Medicare enrollment application. CMS Ex. 1, at 1; CMS Ex. 2, at 1. On June 11, 2012, WPS approved Petitioner's Medicare enrollment application with an effective date of March 20, 2012 and a retrospective billing date of February 19, 2012. CMS Ex. 2.

By letter dated June 30, 2012, Mecosta Health Services (MHS), on behalf of Petitioner, requested reconsideration of his effective date. CMS Ex. 3. In an August 21, 2012 reconsideration determination, WPS affirmed its initial decision concerning Petitioner's effective date and explained that Petitioner's valid approvable application was received on March 20, 2012, and that 30 days prior to receipt was February 19, 2012. CMS Ex. 5,

at 2. By letter dated September 6, 2012, Petitioner timely filed a request for a hearing with the Departmental Appeals Board, Civil Remedies Division.

Following my October 5, 2012 Acknowledgment and Initial Docketing Order, CMS filed seven exhibits (CMS Exs. 1-7), listed two witnesses, and provided declarations from these witnesses. Petitioner filed nine exhibits (P. Exs. 1-9), listed four witnesses, and provided declarations from two of its witnesses. I convened a prehearing conference by telephone on February 12, 2013. During the conference, the parties agreed to submit this case on the written briefs and I set a briefing schedule.

The parties filed their Initial Briefs on March 8, 2013. Along with Petitioner's Initial Brief, Petitioner attached a document labeled Exhibit A. Answer Briefs were timely filed. CMS objects to P. Exs. 1, 2, 8, 9, and P. Ex. A. I rule on CMS's objection below. I decide this case based on the written record.

II. Discussion

A. Issue

Whether CMS had a legitimate basis for finding that March 20, 2012, was the effective date for Petitioner's Medicare enrollment and that Petitioner could retrospectively bill for services rendered to Medicare beneficiaries only on or after February 19, 2012?

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

The Social Security Act authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers in the Medicare program.² 42 U.S.C. §§ 1302, 1395cc(j). Under the Secretary's regulations, a provider or supplier who 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).

¹ My findings of fact and conclusions of law are set forth in italics and bold font.

² A "supplier" furnishes services under Medicare, and the term supplier applies to physicians and other nonphysician practitioners and facilities that are not included within the definition of the phrase "provider of services." 42 U.S.C. § 1395x(d).

1. WPS received Petitioner's completed applications on March 20, 2012.

MHS, on behalf of Petitioner, sent in completed and signed enrollment and reassignment application forms on March 16, 2012. P. Ex. 8, at ¶ 5. WPS acknowledged receiving these application forms on March 20, 2012. CMS Ex. 1, at 1; CMS Ex. 2, at 1. Therefore, the evidence of record supports the factual finding that WPS received Petitioner's enrollment and reassignment applications on March 20, 2012.

2. WPS properly concluded that Petitioner's enrollment and reassignment of Medicare benefits was effective on March 20, 2012, with a retrospective billing period commencing on February 19, 2012.

WPS determined that Petitioner's effective billing date or retrospective billing period was February 19, 2012. CMS Ex. 2, at 1. WPS indicated that "[t]his effective billing date is based on 30 days prior to the filing date [of March 20, 2012]." CMS Ex. 2, at 1; *see also* CMS Ex. 5, at 1-2.

The Secretary's regulations provide that the effective date of enrollment of physicians 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 . . . first began furnishing services at a new practice location." 42 C.F.R. § 424.520(d) (emphasis added). The "date of filing" is the date that the Medicare contractor "receives" a signed provider/supplier enrollment application that the Medicare contractor is able to process to approval. 73 Fed. Reg. 69,726, 69,769 (Nov. 19, 2008); *see also* *Caroline Lott Douglas, PA*, DAB CR2406, at 5-7 (2011); *Rizwan Sadiq, M.D.*, DAB CR2401, at 5 (2011). Because WPS received a complete, approvable application from Petitioner on March 20, 2012, WPS properly determined this date as Petitioner's effective date.

The regulations applicable to this case permit limited retrospective billing for physician services provided to Medicare beneficiaries for up to 30 days before the effective date of enrollment. 42 C.F.R. § 424.521(a). Thus, WPS correctly determined, based on a March 20, 2012 date of filing, that the enrollment effective date is March 20, 2012, and Petitioner could retrospectively bill for services provided to beneficiaries beginning on February 19, 2012.

3. Petitioner's presentation of new evidence is precluded by 42 C.F.R. §§ 498.56(e) and 405.874(c).

Petitioner does not dispute that 42 C.F.R. § 424.520(d) means that the effective date for a Medicare enrollment application is the date of filing. P. Br. at 5. However, Petitioner

asserts that he submitted a completed earlier Form CMS-855I and CMS-855R on December 5, 2011. P. Br. at 4. Petitioner argues that the earlier submission date should entitle him to an earlier enrollment.

Petitioner provided the following factual summary and chronology in support of his case. MHS is wholly owned by Mecosta County Medical Center (MCMC). MHS also does business as MHS Surgical Specialists. MHS Surgical Specialists employs Dr. Pearson. On October 1, 2011, MHS and MHS Surgical Specialists submitted change-of-ownership forms to CMS in order to bring those entities under the umbrella of MCMC. As a result of the change of ownership all the physicians working for these entities, including Dr. Pearson, had to file new reassignment forms, Form 855Rs. In October 2011, most of the physicians submitted their Form 855Rs to CMS. However, Dr. Pearson was on vacation and was unavailable to sign his reassignment form. Dr. Pearson signed the reassignment form on November 8, 2011. P. Ex. 1. Terri Underhill, a coder at MHS, states in her affidavit that she received Dr. Pearson's reassignment form in late November or early December 2011. Ms. Underhill does not explain the lengthy delay between the date Dr. Pearson signed the reassignment form and her receipt of the form other than to state that Dr. Pearson was located in another building and all correspondence was sent through internal mail. Ms. Underhill states that she was "anxious" to receive the reassignment form since it had not been sent with all the other physician's forms in October of 2011. Upon receipt of Dr. Pearson's form, Ms. Underhill placed it in a certified mail envelope and sent it to WPS by placing it in MHS's internal mail system to be posted. She states she posted another mailing to WPS also in late November or early December 2011.

Ms. Underhill attaches two certified mail receipts from WPS to her affidavit as evidence of her mailings. P. Ex. 2; P. Ex. 8. She states that she is confident that Dr. Pearson's application was in one of those two mailings. P. Ex. 8; P. Ex. 9. As Petitioner states in his brief, "WPS admittedly misplaced *something* from Dr. Pearson's employer and there are no documents missing other than Dr. Pearson's original application." P. Br. at 12 (emphasis in original).

Laurie Schafer, the Executive Director of MHS, states that CMS initially rejected almost all the physician's October 2011 reassignment forms because CMS did not recognize that the reassignment forms were linked to the change of ownership forms. On March 16, 2012, the change of ownership was approved by CMS. Therefore, in March 2012, a second set of applications were submitted for all the physicians, including Dr. Pearson. CMS ultimately approved all the physicians, except Dr. Pearson, with effective dates of October 1, 2011, the date of the original submissions. P. Ex. 9.

CMS provides two affidavits. Kim Richmond, the Manager of the Provider Enrollment Department at WPS, states that the first application that WPS received from Dr. Pearson was on March 20, 2011. Mr. Richmond asserts that there is no record of receiving an earlier application from Dr. Pearson signed November 8, 2011. Mr. Richmond agrees

that two certified mail packages were received from MHS on December 5, 2011. It is agreed by the parties that one package had documents not relevant to Petitioner. A second certified mail package from MHS was received by the WPS mail room but was never received by the WPS Provider Enrollment Department; its contents and final whereabouts are unknown. CMS Ex. 6. Shawn Cook is the hearing officer who issued the reconsideration decision related to Dr. Pearson's application. Mr. Cook states that that he received only a one-page letter requesting reconsideration and no other materials connected with the reconsideration request. CMS Ex. 7. Therefore Petitioner's November 8, 2011 application, the certified mail receipt dated December 5, 2011, Ms. Schafer affidavit, and Ms. Underhill's affidavit were not provided to the Hearing Officer.

Section 498.56(e) precludes an ALJ from considering documentary evidence that had not been presented to CMS prior to requesting a hearing, absent a showing of good cause for submitting the new evidence for the first time at the ALJ-hearing level. Petitioner has made a very weak attempt to demonstrate good cause for its failure to present such evidence to CMS previously, which I find meritless.³ Further, 42 C.F.R. 405.874(c)(5) provides that the provider or supplier is precluded from introducing new evidence at higher levels of the appeals process. Petitioner does not claim that it provided any new documentary evidence with its reconsideration request even though it knew that the effective date determination was based on the March 20, 2012 receipt of application date. Indeed, the WPS hearing officer, Mr. Cook, affirmatively asserts that Petitioner did not provide any new documentary evidence with its reconsideration request. It is clear that the two certified mail receipts — and Petitioner's argument based on them — are being presented for the first time at the ALJ-hearing level.

Even if I were to consider the two certified mail receipts and the affidavits submitted by Petitioner, this evidence merely shows that WPS received two packages from MHS on December 5, 2011. One package definitely did not contain Dr. Pearson's application. The second package was received by the WPS mail room but it did not reach the WPS Provider Enrollment Department. The contents of the second package are unknown. It is only speculation that the second package contained Dr. Pearson's approvable application signed November 8, 2011. MHS itself has no independent record of what was in the second package. Ms. Underhill explains that the purported initial application had Dr. Pearson's November 8, 2011 signature on it but that she did not receive it until late November or early December. Ms. Underhill does not adequately explain the lengthy delay in receiving the application from Dr. Pearson especially since she characterizes

³ In a weak attempt to establish good cause, Petitioner does argue that it was not aware that the June 11, 2012 letter granting Dr. Pearson an effective date of March 20, 2012 was based on the receipt of Dr. Pearson's application on March 20, 2012. Petitioner's argument is meritless because CMS's June 11, 2012 letter states clearly in the first sentence that "[w]e have approved your CMS 855 Medicare enrollment application, *which we received on 03/20/2012.*" CMS Ex. 2.

herself as “anxious” to send it to WPS. The extended and unexplained delay between the date of Dr. Pearson’s signature, November 8, 2011, and the date WPS received the misplaced package on December 5, 2011, makes Petitioner’s claim doubtful in light of the significant attenuation of any link between the two events. Additionally, I conclude that the language used by Ms. Underhill in her affidavit is less than definite and is merely speculative. Ms. Underhill concludes that she has “no reason to doubt” that Dr. Pearson’s application was sent to WPS in late November or December 2011 and that WPS’s receipt of two certified mail packages on December 5, 2011 “is consistent with when I mailed Dr. Pearson’s application and I am confident that one of these two certified mail envelopes contained” his application. P. Ex. 9, at 3. These statements by Ms. Underhill are far from definite and do not show that WPS received an approvable application from Dr. Pearson on December 5, 2011.

4. I am unable to grant Petitioner’s request for an earlier effective date based on equitable estoppel.

Petitioner essentially argues that WPS lost his application that was mailed in 2011. It is undisputed that MHS sent two packages to WPS and the two packages were received by the WPS mail room as evidenced by the certified mail receipts, however only one package was received by the Provider Enrollment Department. Petitioner asserts that the contents of the missing or lost package must contain his application.

Petitioner’s arguments amount 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 fisc; (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., Armin Aalami Harandi*, DAB CR2682 (2013); *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler* 467 U.S. at 51; *Oklahoma Heart Hosp.*, 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). Petitioner does not allege any affirmative misconduct here and I cannot grant the relief that Petitioner requests.

III. Conclusion

WPS’s determination that Petitioner’s effective date of enrollment is March 20, 2012, with a 30-day retrospective billing period commencing on February 19, 2012, is affirmed.

/s/
Richard J. Smith
Administrative law Judge