

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

East Tennessee Pulmonary Associates, PC
(NPI: 1992717599, PTAN: 103G700928)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-906

Decision No. CR4763

Date: December 16, 2016

DECISION

I affirm the reconsideration determination, ratified by the Centers of Medicare & Medicaid Services (CMS), of the Medicare contractor to assign an effective date of March 14, 2016, for reactivation of the Medicare billing privileges of Petitioner, East Tennessee Pulmonary Associates, PC.

I. Background

Petitioner filed a hearing request in order to challenge the determination of the effective date of reactivation of its billing privileges. CMS moved for summary judgment and Petitioner opposed the motion. With its motion, CMS filed 11 proposed exhibits that it identified as CMS Ex. 1-CMS Ex. 11. In opposition, Petitioner filed three proposed exhibits that it identified as P. Ex. 1-P. Ex. 3.

I receive CMS Ex. 1-CMS Ex. 11 into the record. I receive P. Ex. 1- P. Ex. 3 into the record as well. P. Ex. 1 is a Medicare policy statement that is part of the public record. P. Exs. 2 and 3 are letters from CMS to Petitioner that, if not part of the public record, are noncontroversial.

It is unnecessary for me to decide whether the criteria for summary judgment are met in this case even though CMS styled its motion as a motion for summary judgment. Neither

CMS nor Petitioner offered witness testimony. Consequently, there is no need to convene an in-person hearing. I decide the case based on the parties' arguments and their exchange of exhibits.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether a Medicare contractor correctly assigned an effective date of March 14, 2016, to Petitioner for reactivation of its Medicare billing privileges.

B. Findings of Fact and Conclusions of Law

This case addresses the consequences of deactivation of a Medicare supplier's billing privileges. A Medicare contractor deactivated Petitioner's billing privileges effective February 4, 2016, because the contractor found that Petitioner had not supplied requested information within 90 days of the request in compliance with Medicare participation requirements. CMS Ex. 8 at 1.

Deactivation is not an appealable initial determination made pursuant to 42 C.F.R. § 498.3 and no hearing rights arise from deactivation. In opposing CMS's motion, Petitioner argues at some length that the deactivation of its billing privileges was improper and that it can prove that it was at all times in compliance with Medicare participation requirements. Petitioner's response to CMS's motion for summary judgment at 4-10 (Response). These arguments are irrelevant, as I have no authority to hear and decide them.

Section 424.540 of Title 42 of the Code of Federal Regulations provides for deactivation of a Medicare supplier or provider's billing privileges. In relevant part the regulation states:

- (a) *Reasons for deactivation.* CMS may deactivate the Medicare billing privileges of a provider or supplier for any of the following reasons: . . .
 - (3) The provider or supplier does not furnish complete and accurate information and all supporting documentation within 90 calendar days of receipt of notification from CMS to submit an enrollment application and supporting documentation, or resubmit and certify to the accuracy of its enrollment information.
- (b) *Reactivation of billing privileges.* (1) When deactivated for any reason other than nonsubmission of a claim, the provider or supplier must complete and submit a new enrollment application to reactivate its

Medicare billing privileges or, when deemed appropriate, at a minimum, recertify that the enrollment information currently on file with Medicare is correct. . . .

The regulation plainly tells a provider or supplier that it will be deactivated by CMS if CMS requests information from it and the provider or supplier fails to provide the requested information within 90 calendar days. Additionally, it puts the onus on the deactivated provider or supplier to submit a new Medicare enrollment application if it desires to reactivate its participation.

Here, the contractor deactivated Petitioner's Medicare billing privileges because Petitioner failed to submit requested information to it within 90 days of the contractor's request for information. CMS Ex. 6-CMS Ex. 8. That non-appealable deactivation put the burden squarely on Petitioner to submit a new Medicare enrollment application.

CMS has published guidance to its contractors concerning what effective participation date to assign to a supplier or provider that seeks to reactivate its participation. That date shall be the date when that the contractor receives a re-enrollment application that the contractor processes to completion. Medicare Program Integrity Manual (MPIM), § 15.27.1.2. That guidance is consistent with regulatory requirements governing the effective date of participation of newly participating suppliers and providers. 42 C.F.R. § 424.520(d). In this case, Petitioner submitted a re-enrollment application to the contractor on March 14, 2016, and the contractor reactivated Petitioner's billing privileges effective that date. That is entirely consistent with regulatory requirements as interpreted by the MPIM.

Petitioner doesn't deny that the contractor's effective date determination is consistent with the manual. Rather, it contends that the manual contradicts an applicable regulation and is therefore invalid guidance. Petitioner cites 42 C.F.R. § 524.540(c), which states:

Effect of deactivation. Deactivation 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 Fund from unnecessary overpayments. The deactivation of Medicare billing privileges does not have any effect on a provider or supplier's participation agreement or on any conditions of participation.

Petitioner argues that this regulation means that a provider or supplier that is remiss in providing requested information to CMS or its contractor gets a free pass. It argues, in effect, that even if it is deactivated for failing to provide requested information, it is entitled to continue filing claims for services provided during the period of its deactivation, just so long as it eventually provides the contractor or CMS with the information requested originally.

I disagree with that interpretation. The section cited by Petitioner means only that a deactivated provider or supplier is not required to start the application process over again by going through all of the steps necessary to qualify as a participant. That part of its participation agreement that is valid remains valid during a period of deactivation. The deactivated supplier or provider must, in order to become reactivated, provide the information whose absence led to the deactivation.

But, this regulation says nothing about a claimed right to keep billing for services during a period of deactivation. I see no language in this regulation that offers a supplier or a provider a free pass for failing to provide requested information to a contractor or to CMS. Indeed, if I were to read this regulation to mean that, it would render deactivation meaningless. The Secretary has determined that it is important that providers and suppliers render requested information to CMS or its contractor within 90 days of a request. It makes no sense to undercut that requirement by allowing a provider or supplier to nonetheless claim reimbursement for its services during the period of deactivation that results from its failure to provide requested information timely.

_____/s/_____
Steven T. Kessel
Administrative Law Judge