Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Wishon Radiological Medical Group, Inc.
Docket No. A-18-77
Decision No. 2941
May 21, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Wishon Radiological Medical Group, Inc. (Petitioner) appeals the April 4, 2018 decision by an Administrative Law Judge (ALJ) determining that the effective date of Petitioner's Medicare enrollment and billing privileges is March 4, 2016, with retrospective billing privileges beginning February 3, 2016. *Wishon Radiological Medical Group, Inc.*, DAB CR5066 (2018) (ALJ Decision). For the reasons explained below, the Board affirms the ALJ Decision.

Legal Authorities

A supplier of Medicare services, such as a physician practice like Petitioner, must enroll (and maintain its enrollment) in the Medicare program to receive payment for Medicare-covered items and services furnished to Medicare beneficiaries. 42 C.F.R. §§ 400.202 (defining "Supplier"), 424.500, 424.502, 424.505, 424.510, 424.516. The Medicare enrollment process includes: (1) identifying a supplier; (2) validating the supplier's eligibility to provide items or services to Medicare beneficiaries; (3) identifying and confirming the supplier's practice locations and owners; and (4) granting the supplier Medicare billing privileges. *Id.* § 424.502 (defining "Enroll/Enrollment").

CMS may reject a supplier's enrollment application if the "supplier fails to furnish complete information on the . . . enrollment application within 30 calendar days from the date of the contractor request for the missing information." *Id.* § 424.525(a)(1). After CMS rejects an enrollment application, "the . . . supplier must complete and submit a new enrollment application and submit all supporting documentation for CMS review and approval." *Id.* § 424.525(c). A supplier whose enrollment application has been rejected has no right to appeal the rejection. *Id.* § 424.525(d) ("Enrollment applications that are rejected are not afforded appeal rights.").

If CMS approves an enrollment application, the effective date of a supplier's billing privileges is the later of either: "(1) The date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor; or (2) The date that the supplier first began furnishing services at a new practice location." *Id.* § 424.520(d). The "date of filing" means "the date that the Medicare . . . contractor receives a signed . . . enrollment application that the Medicare . . . contractor is able to process to approval." 73 Fed. Reg. 69,726, 69,766-67 (Nov. 19, 2008). *Accord Alexander C. Gatzimos, MD, JD, LLC d/b/a Michiana Adult Medical Specialists*, DAB No. 2730, at 5 (2016).

A supplier "may retrospectively bill for services" if the supplier "has met all program requirements . . . and services were provided at the enrolled practice location for up to . . . [t]hirty days prior to the[] effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries." 42 C.F.R. § 424.521(a)(1).

Unlike the rejection of an enrollment application, a determination of the effective date of a supplier's billing privileges is an "initial determination" subject to review under 42 C.F.R. Part 498. 42 C.F.R. § 498.3(a)(1), (b)(15). A supplier whose enrollment application was approved with a particular effective date of enrollment may request reconsideration of the effective date. *See Victor Alvarez, M.D.*, DAB No. 2325, at 3 (2010) (approval of enrollment with a specific effective date is in essence a denial of enrollment with an earlier effective date and the supplier has a right to reconsideration review of the effective date of enrollment under section 498.5(*l*)). If dissatisfied with the reconsidered determination, the supplier may request a hearing before an ALJ and thereafter may request review by the Departmental Appeals Board (Board). 42 C.F.R. §§ 498.5(*l*), 498.5(f).

Case Background[1]

In July 2015, Petitioner filed an application for Medicare enrollment with Noridian Healthcare Solutions, Inc. (Noridian), a CMS Medicare Administrative Contractor. ALJ Decision at 1; CMS Ex. 3, at 1. On July 24, 2015, Noridian emailed Petitioner's office manager and informed her that additional documents and information were needed to complete processing of the application and that Noridian "may reject" the application if Petitioner did not furnish "complete information within 30 calendar days of the initial

[1] The background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for her findings.

request." CMS Ex. 2, at 1. Noridian also asked Petitioner to submit the additional documents and information "before 08/06/2015."[2] *Id.*; ALJ Decision at 1-2. Petitioner did not respond to this email or submit the additional documents and information. *See* CMS Ex. 7, at 11.

On August 24, 2015, Noridian rejected the enrollment application because it remained incomplete and advised Petitioner that it must submit a new enrollment application if it still wished to pursue enrollment. CMS Ex. 3, at 1.

Petitioner submitted a new enrollment application, which Noridian received on March 4, 2016. CMS Ex. 5, at 1. By letter dated March 31, 2016, Noridian informed Petitioner that its application had been approved, and that Petitioner was "[p]articipating [e]ffective February 3, 2016." CMS Ex. 6, at 1; *see also* CMS Ex. 4, at 3 (Noridian's email informing Petitioner that February 3, 2016 is the "retrospective billing date"). Petitioner requested reconsideration, seeking an effective enrollment date of May 20, 2015, the date on which Petitioner says it began providing services, or, alternatively, June 15, 2015, which Petitioner asserted was thirty days before the date of submittal of its initial (July 2015) application. CMS Ex. 7, at 13. CMS denied Petitioner's request for reconsideration and determined, pursuant to 42 C.F.R. § 424.520(d), that the effective date of enrollment was March 4, 2016, with retrospective billing privileges beginning February 3, 2016. CMS Ex. 8, at 5.

Petitioner requested a hearing before an ALJ. CMS moved for summary judgment in its favor. Petitioner opposed that motion. The ALJ decided not to convene a hearing since neither party sought to cross-examine any witness, and proceeded to decision based on the written record. ALJ Decision at 4, 4 n.5.

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[2] Noting that the enrollment application was "signed and dated" on July 16, 2015, the ALJ stated that Petitioner "incorrectly argue[d]" that it had submitted its application on July 15, 2015. ALJ Decision at 1 n.1 (citing Petitioner's Pre-Hearing Brief (P. Br.) at 2 and CMS Ex. 7, at 14). However, the record includes a July 15, 2015 email from CMS to Petitioner acknowledging the electronic submittal of an enrollment application through the Provider, Enrollment, Chain and Ownership System, or PECOS. CMS Ex. 7, at 36; *see also* CMS Ex. 3, at 1 (CMS's email notifying Petitioner that its application, received on July 15, 2015, was being rejected). The July 16, 2015 date to which the ALJ referred appears to be a reference to the date on which individuals acting for Petitioner signed parts of the paper form of the enrollment application (included in CMS Exhibit 1), which possibly was submitted sometime after the electronic submittal on July 15, 2015. In any case, Noridian determined that the July 2015 application remained incomplete as of July 24, 2015, and sent Petitioner a request for additional information that day. Before the Board, the parties do not dispute that Petitioner's incomplete initial application was filed on July 15, 2015.

The ALJ concluded that, "[p]ursuant to 42 C.F.R. § 424.520(d), Petitioner's effective date of Medicare enrollment is March 4, 2016, the date of filing of the Medicare enrollment application that Noridian was able to process to approval." *Id*. at 5 (bold and italics omitted). The ALJ also concluded that, pursuant to 42 C.F.R. § 424.521(a)(1), "Petitioner was authorized . . . to bill Medicare for services provided to Medicare-eligible beneficiaries up to 30 days prior to its effective date of enrollment, i.e., beginning on February 3, 2016." *Id*. (bold and italics omitted).

The ALJ rejected Petitioner's argument that Noridian improperly rejected its July 2015 application because Petitioner had no right to appeal the rejection of that application. ALJ Decision at 6-7 (citing 42 C.F.R. § 424.525(d) and *James Shepard, M.D.*, DAB No. 2793, at 8 (2017)). However, the ALJ noted Petitioner's concession that its July 2015 application was incomplete because it did not include a reassignment of benefits form (Form CMS-855R). *Id*. at 6 n.8 (citing P. Br. at 13). The ALJ also noted that Petitioner did not assert or prove that it called Noridian to verify its addresses and telephone numbers as Noridian had asked Petitioner to do. *Id*. at 6-7 n.8 (citing CMS Ex. 2, at 1). Also, rejecting the assertion that Noridian gave conflicting deadlines for responding to the information request, the ALJ observed that there was no "ambiguity" about the response due date of August 6, 2015 given by Noridian. *Id*. at 7 n.8. The ALJ further noted that Noridian rejected the July 2015 application on August 24, 2015, after 30 days had elapsed, consistent with its statement in its information request that it may reject the application if Petitioner did not submit the requested information "within 30 days of the initial request." *Id*. (citing CMS Ex. 2, at 1).

Lastly, the ALJ rejected Petitioner's argument that it "suffered tremendous hardship" and so CMS should have exercised its discretion to assign an earlier effective date. *Id.* at 7 (quoting P. Br. at 14). The ALJ stated that her review was limited to whether CMS had a legitimate basis for its action and, to the extent Petitioner's argument could be understood as an appeal for equitable relief, she was without authority to grant such relief. *Id.* (ALJ's citations to Board decisions omitted here).

Petitioner filed a timely request for review with the Board.

Standard of Review

The Board's "standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence on the record as a whole." The Board's "standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous." *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (accessible at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html).

Analysis

A. The effective date of Petitioner's enrollment is March 4, 2016, with a retrospective billing date of February 3, 2016.

By regulation, the effective date of billing privileges is the later of either the date on which the enrollment application that was approved was filed with (that is, received by) the contractor, or the date on which the supplier first began providing services at a new practice location (if the latter is applicable). 42 C.F.R. § 424.520(d). In accordance with section 424.520(d), the effective date of Petitioner's enrollment in Medicare is the date on which Petitioner filed (i.e., the date that Noridian received) the enrollment application that Noridian subsequently approved. *See Gatzimos* at 5. The record demonstrates that the date of filing, or receipt, of the only enrollment application that Noridian was able to and did process to approval for enrollment was March 4, 2016. CMS Ex. 5, at 1. Accordingly, Petitioner was enrolled as a Medicare supplier effective March 4, 2016.

A supplier "may retrospectively bill for services" if the supplier "has met all program requirements . . . and services were provided at the enrolled practice location for up to . . . [t]hirty days prior to the[] effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries." 42 C.F.R. § 424.521(a)(1). CMS permitted Petitioner to retrospectively bill beginning February 3, 2016, 30 days before the effective date of enrollment.[3] CMS Ex. 8, at 5.

The ALJ did not err in affirming CMS's determination that the effective date of Petitioner's enrollment was March 4, 2016, and CMS's assignment of February 3, 2016, 30 days before March 4, 2016, as the retrospective billing date. The effective enrollment date and retrospective billing date were correctly set in accordance with sections 424.520(d) and 424.521(a)(1).

Petitioner does not dispute that, after its initial enrollment application, which Petitioner never completed, was rejected in 2015, it submitted another application that Noridian states it received on March 4, 2016 and approved. Petitioner has not argued or offered any proof that it ever filed an enrollment application before March 4, 2016 that Noridian was able to process to approval or did approve before that date, which could then be the basis for assigning an earlier effective enrollment date and a retrospective billing date

[3] CMS apparently decided, favorably to Petitioner, that circumstances precluded Petitioner's enrolling in Medicare before beginning to provide services to Medicare beneficiaries even though Petitioner previously had started to enroll but did not complete the enrollment process. That decision was within CMS's discretion and is not subject to our review. *See Decatur Health Imaging, LLC*, DAB No. 2805, at 8-9 (2017) ("The Board has held that it does not review CMS's exercise of discretion to take other actions the regulations authorize relating to the enrollment of suppliers and providers" (internal citations omitted).).

earlier than February 3, 2016. Petitioner nevertheless raises numerous arguments concerning its initial (July 2015) application, seeking to establish an earlier effective enrollment date and, by application of the retrospective billing provision, an earlier billing date. Petitioner's arguments, in essence, amount to an impermissible challenge to the rejection of its initial application and an attempt to circumvent the enrollment regulations which, as applied to the evidence of record, results in an effective enrollment date of March 4, 2016. We reject Petitioner's arguments.

B. Petitioner impermissibly challenges the rejection of its initial (July 2015) application.

1. The ALJ correctly determined that the rejection of the initial application was not reviewable.

Petitioner asserts that it appealed below, and is now seeking Board review of, the issue of the effective date of enrollment. Petitioner insists that it is not seeking to appeal CMS's decision to reject its initial application, and that the ALJ failed to recognize that it was instead seeking review of CMS's determination not to assign an effective enrollment date earlier than March 4, 2016. Brief in support of request for review (RR) at 3, 10-11.

The ALJ did not err. The ALJ properly reviewed CMS's determination that the effective date of Petitioner's enrollment is March 4, 2016 and correctly determined that Petitioner had no right to appeal the rejection of its July 2015 application. ALJ Decision at 5-7. Petitioner effectively is seeking to collaterally challenge the rejection of an earlier application in an attempt to obtain billing privileges on an earlier date, pegged to the date of submittal of its initial, July 2015 application, which Petitioner never completed and the contractor rejected. The Board has previously rejected similar efforts by other suppliers as impermissible under the regulations by which the ALJ and the Board are bound. *Lindsay Zamis, M.D.*, DAB No. 2802, at 9-10 (2017); *Shepard* at 7-8. First, section 424.525(d) expressly provides that the rejection of an enrollment application is not appealable. If Petitioner could challenge Noridian's rejection of its initial application through an appeal of the effective date of a subsequently approved new application, section 424.525(d) would be rendered null. *Zamis* at 9 ("To entertain Petitioner's claim that Noridian improperly rejected its . . . application would . . . 'ma[ke] a nullity' of section 424.525(d)'s prohibition on appeals relating to rejected enrollment applications." (citation omitted)). Second, 42 C.F.R. § 424.520(d) plainly states that the effective date of enrollment, as relevant here, is "[t]he date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor." Accordingly, the effective date of enrollment is, and must be, based on the date of receipt of an application that was actually approved, not one that was rejected. *Zamis* at 9 (rejecting the argument that the contractor had "mishandled" an earlier application and stating that "section

424.520(d)'s 'plain language' required the effective date to be based on an application that was 'subsequently approved' by the Medicare contractor" (citation omitted)); *Shepard* at 7 ("Under [42 C.F.R. § 424.520(d)], the [initial application] cannot be the basis for Petitioner's effective date because it was not 'subsequently approved' by [the contractor] but instead 'rejected,' necessitating the filing of a new application upon which his enrollment is based.").

Thus, that a supplier has the right to appeal a determination of the effective date of enrollment does not mean that, through such an appeal, a supplier may also indirectly challenge what it cannot directly challenge – here, the rejection of an earlier enrollment application – to circumvent section 424.520(d), which sets the effective date of enrollment based on the date of filing of an application that was actually filed and approved. That date, in Petitioner's case, is March 4, 2016, the date of filing of the *only* application that Noridian processed to approval. Accordingly, March 4, 2016 is the effective date of Petitioner's enrollment in Medicare.

2. *The effective date of enrollment is and must be based on the March 2016 application that was actually approved, and not the initial, rejected application.*

Petitioner argues that, regardless of the rejection of the July 2015 application, the effective date of enrollment is or should be July 15, 2015 because "the application Noridian eventually accepted was essentially the same as the July 15, 2015 application." RR at 14. Petitioner would have us equate a prior application that was rejected with a subsequent, purportedly similar application that was approved. As we have stated elsewhere herein, pursuant to the plain language of 42 C.F.R. § 424.520(d)(1), the effective date of enrollment must be based on an application that was actually approved, not on one which, according to Petitioner, could have been approved had the contractor not rejected it. *Cf. Donald Dolce, M.D.*, DAB No. 2685, at 8 (2016) (reversing ALJ's conclusion that an earlier application that was mailed but never received was subsequently approved when a later, purportedly "identical" application was approved because "[t]he regulation is based on the contractor's actual receipt of an actual application it processes to approval") (underlining removed). Here, it was the March 4, 2016 application that "was subsequently approved" (42 C.F.R. § 424.520(d)(1)), not the July 2015 application, and, therefore, the effective date must be based on the March 2016 application. As we have said elsewhere in our decision, there is no evidence of any enrollment application filed before March 4, 2016 that was subsequently approved.

Petitioner cites *Tri-Valley Family Medicine, Inc.*, DAB No. 2358 (2010), as support for its argument that the effective date of enrollment may be based on the filing date of an earlier application – even if it was incomplete – so long as an "identical" application is subsequently approved, and asserts that the regulation does not require that an application be "approvable" as initially submitted. RR at 15-16. *Tri-Valley* does not provide a basis

for Petitioner's position. *Karthik Ramaswamy, M.D.*, DAB No. 2563, at 9 (2014), *aff'd, Ramaswamy v. Burwell*, 83 F. Supp. 3d 846 (E.D. Mo. 2015). In rejecting the supplier's reliance on *Tri-Valley* in *Ramaswamy,* the Board held that *Tri-Valley* was limited to its "unique factual circumstances." *Id*. Petitioner has not shown that the "unique" facts involved in *Tri-Valley* are duplicated here, and they are not. In *Tri-Valley*, the rejected application was missing the authorized physician's signature certifying the accuracy of the information in the application form. (The Board questioned whether the contractor properly returned the form for lack of a signed certification where the physician signature appeared elsewhere on the form. DAB No. 2358, at 9.) Also, the contractor in *Tri-Valley* rejected the unsigned application, without allowing an opportunity to submit the missing component. *Id*. Here, by contrast, the evidence shows that Petitioner's rejected application was incomplete in at least some of the respects stated by the contractor (*see* CMS Exs. 2, 7), and the contractor did give Petitioner an opportunity to submit the missing information, an opportunity Petitioner did not use.

Moreover, in *Tri-Valley*, the Board read the hearing officer's[4] decision to derive from, at least in part, regulatory language and history that were not in effect at the time the application was submitted, and also rejected the use of sub-regulatory guidance in the hearing officer's decision. *See* DAB No. 2563 at 1, 8. Neither the regulatory language nor the manual provisions in effect at the time the uncertified application was submitted in the *Tri-Valley* situation were applicable when Petitioner filed its application. There is thus no applicable authority allowing a supplier to seek review of an unappealable rejection of an incomplete application by the "back door" route of challenging the effective date of a later application which was processed to approval. In subsequent decisions, such as *Zamis* and *Shepard*, to which section 424.520 does apply, the Board has made it clear that the effective date cannot be determined by reference to the filing date of an application not subsequently approved by the contractor, thus effectively mooting *Tri-Valley*.

C. Petitioner's remaining arguments are meritless.

Petitioner asserts that the ALJ "failed to consider that Noridian failed to exercise its discretion by refusing to consider modifying [Petitioner's] enrollment date." RR at 16 (bold type removed). Petitioner states that, pursuant to 42 C.F.R. § 424.525(b), CMS has the discretion to modify deadlines to supplement enrollment applications, but that "CMS failed to consider whether [Petitioner's] case is one in which it should have exercised its discretion to extend the period during which Noridian requested more information from

[4] Pursuant to 42 C.F.R. § 498.44, a member of the Board was designated to hear enrollment appeals under the regulations in 42 C.F.R. Part 498, and was assigned to decide Tri-Valley's appeal as the hearing official. *Tri-Valley* at 1 n.1.

[Petitioner]" with respect to its July 2015 application. *Id.* Petitioner then contends that "CMS should issue a revised determination that [Petitioner's] billing privileges were effective on June 16, 2015, thirty days prior to the date [Petitioner] submitted its initial Medicare enrollment application" and that "[t]his exercise of discretion is warranted because [Petitioner] has suffered tremendous hardship." *Id.* at 16-17.

While CMS may extend the 30-day response period, "[t]he decision to extend the . . . deadline . . . lies solely within CMS's discretion and CMS is not obligated to extend the deadline" and a decision not to extend the deadline is not an initial decision subject to review. *Zamis* at 12 (citing 42 C.F.R. § 498.3). It is undisputed that Noridian rejected Petitioner's initial application after the 30-day period, having received no return communication from Petitioner concerning the requested information. The determination to reject the application after the 30-day period, as we have said, is not subject to review.

In any case, CMS may exercise such discretion to extend the 30-day period "if CMS determines that the prospective provider or supplier is actively working with CMS to resolve any outstanding issues." 42 C.F.R. § 424.525(b). The regulation thus contemplates communication between the prospective provider or supplier and CMS (or its contractor), and a mutual understanding between them that there remain unresolved issues concerning a pending enrollment application that could be and are in the process of being resolved. CMS or its contractor cannot reasonably be expected to know that a prospective provider or supplier wants to work with it to resolve any outstanding issues and needs more time to submit whatever additional information was requested unless the prospective provider or supplier communicates with CMS or the contractor, at which point CMS or the contractor could decide whether to extend the 30-day response period. But Petitioner admitted that it never provided the additional information Noridian requested. RR at 8-9; P. Br. at 6. It does not assert or show that it even returned Noridian's communication, let alone asked for more time to respond, so Noridian had no reason to even consider whether to exercise discretion to extend the response period.[5]

Lastly, we note that Petitioner again recounts in some detail the "tremendous hardship" it has experienced because it has been unable to bill for any services furnished before February 3, 2016. RR at 17-18. The Board is bound by the Part 424, subpart P enrollment regulations. Application of those regulations here establishes that the effective date of Petitioner's enrollment is March 4, 2016. *Shepard* at 9 (quoting

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[5] Petitioner attempts to reprise arguments about Noridian's July 24, 2015 request for information, specifically, that the request was confusing, included misleading statements and factual errors, and did not clearly state the response due date. RR at 12-14. The ALJ appropriately addressed these arguments. *See* ALJ Decision at 6-7 and 6-7 n.8. Moreover, Petitioner cannot now reasonably argue that the information request was not clear as to what additional information was being requested or when the response was due because Petitioner admittedly never even responded to the request. RR at 8-9; P. Br. at 6. It does not assert that it ever asked Noridian for clarification about what needed to be submitted and when, or that it contacted Noridian's call center as Noridian's information request instructed.

Vijendra Dave, M.D., DAB No. 2672, at 8 (2016) and citing *Cent. Kan. Cancer Inst.*, DAB No. 2749, at 10 (2016), *appeal dismissed, Cent. Kan. Cancer Inst. v. Dep't of Health & Human Servs.*, No. 2:17-cv-02012 (D. Kan. June 2, 2017) (The Board "is bound by the regulations, and may not choose to overturn the agency's lawful use of its regulatory authority based on principles of equity.")). Moreover, we have no authority to afford equitable relief in these proceedings, as the ALJ Decision correctly stated. ALJ Decision at 7 (citing *US Ultrasound*, DAB No. 2302, at 8 (2010)); *Amber Mullins, N.P.*, DAB No. 2729, at 6 (2016) (citing *US Ultrasound* at 8; *Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395, at 11 (2011); and *UpturnCare Co.*, DAB No. 2632, at 19 (2015)).

Conclusion

The Board affirms the ALJ Decision and concludes that the effective date of Petitioner's Medicare enrollment is March 4, 2016, with retrospective billing privileges beginning February 3, 2016.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Presiding Board Member
Susan S. Yim