Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Lindsay Zamis, M.D., a Professional Corporation
Docket No. A-17-27
Decision No. 2802
July 17, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner "Lindsay Zamis, M.D., a Professional Corporation," a California medical practice, has appealed the Administrative Law Judge's (ALJ's) October 21, 2016 decision concerning the effective date of Petitioner's Medicare enrollment. Applying the regulation at 42 C.F.R. § 424.520(d), the ALJ concluded that the Center for Medicare and Medicaid Services (CMS) administrative contractor, Noridian Healthcare Solutions (Noridian), properly determined that the effective date of Petitioner's enrollment was April 1, 2015. *See Lindsay Zamis, M.D., & Lindsay Zamis, M.D. a Professional Corporation*, DAB CR4723 (2016) (ALJ Decision). The ALJ denied Petitioner's request for an earlier effective date based on a rejected Medicare enrollment application. *Id.* The ALJ also found that the Medicare program had allowed Petitioner a "retrospective billing period" beginning on March 2, 2015 (or 30 days prior to the effective date determined under section 424.520(d)). *Id.*

Petitioner's appeal identifies no factual or legal errors in the ALJ's decision. We therefore affirm the ALJ's Decision.[1]

Legal Background

A "supplier"[2] of health care services (such as a physician or physician's practice) must be enrolled in Medicare in order to bill and receive payment from the program for covered items and services. 42 C.F.R. § 424.505. To enroll, a supplier "must submit a complete

[1] We note that, although the ALJ Decision is captioned to reflect both Lindsay Zamis, M.D. (Dr. Zamis) and her medical practice as co-petitioners, no application for Medicare enrollment by Dr. Zamis as a physician supplier was at issue on reconsideration or before the ALJ. Accordingly, only the ALJ's decision upholding the contractor's reconsidered determination regarding the Medicare enrollment of the professional corporation is at issue before the Board and therefore only the medical practice is the petitioner here. *See* Petitioner's Request for Review.

[2] The term "supplier" is defined in Medicare's regulations to mean "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202 (defining terms as used in the Medicare program).

enrollment application and supporting documentation to the designated Medicare . . . contractor." *Id.* § 424.510(d)(1). A Medicare enrollment application can be either the appropriate version of the paper-form CMS-855 (physicians must complete the CMS-855I) or an electronic Medicare enrollment process approved by OMB. *Id.* § 424.502. CMS and its contractors use an electronic enrollment system known as "PECOS" [the Provider Enrollment, Chain and Ownership System].[3]

CMS may reject an enrollment application if the supplier: (1) "fails to furnish complete information on the . . . enrollment application within 30 calendar days from the date of the contractor request for the missing information"; or (2) "fails to furnish all required supporting documentation within 30 calendar days of submitting the enrollment application." 42 C.F.R. § 424.525(a) (1), (2). "CMS, at its discretion, may choose to extend the 30 day period [for furnishing missing information] if CMS determines that the prospective . . . supplier is actively working with CMS to resolve any outstanding issues." *Id.* § 424.525(b). In this context, the term "reject" or "rejected" refers to an instance in which "the provider or supplier's enrollment application was not processed due to incomplete information . . . or . . . additional information or corrected information was not received [by the contractor] from the provider or supplier in a timely manner." 42 C.F.R. § 424.502. In order "[t]o enroll in Medicare and obtain Medicare billing privileges after notification of a rejected 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).

CMS interpretive guidance, as set forth in the Medicare Program Integrity Manual (MPIM),[4] reflects CMS' intention for a provider or supplier to furnish requested follow-up information within 30 calendar days from the date of the initial request, and that "the 30-day clock does not start anew" with each follow-up request; "it keeps running" from the date of the initial request. MPIM, CMS Pub. 100-08, Chapter 15 § 15.8.2.B.

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[3] PECOS is a web-based electronic enrollment process established under OMB System of Records Number (SORN) 09-70-0532. 66 Fed. Reg. 51,961-51,966 (Oct. 11, 2001); *see also* 71 Fed. Reg. 60,536-60,540 (Oct. 13, 2006); Privacy Act Issuances, Office of the Federal Register, 09-70-0532, available at https://www.federalregister.gov/documents/2006/10/13/E6-16954/privacy-act-of-1974-report-of-a-modified-or-altered-system (last visited July 5, 2017). A provider or supplier may use PECOS to apply to enroll in Medicare or make changes to its enrollment information. 42 C.F.R. § 424.502 (definition of "enrollment application"). Petitioner did not use PECOS for its enrollment application in this case

[4] The MPIM is an internet-only manual primarily intended as guidance or instructions for CMS fee-for-service contractors. *Viora Home Health, Inc.*, DAB No. 2690, at 8 (2016) (quoting introduction to MPIM Chapter 15). The MPIM is available on–line at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS019033.html.

When a Medicare enrollment application is approved, CMS (or the Medicare contractor) sets the "effective date for billing privileges" in accordance with 42 C.F.R. § 424.520(d). That provision states that the effective date of a physician's or physician organization's Medicare billing privileges is "the later of . . . [t]he date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor" or "[t]he date that the supplier first began furnishing services at a new practice location."[5]

A physician whose enrollment application has been approved may bill Medicare for services provided up to 30 days prior to the effective date called for under section 424.520(d). 42 C.F.R. § 424.521(a)(1). We refer to those 30 days as the "retrospective billing period."

The determination of a supplier's effective date under section 424.520(d) is an "initial determination" subject to administrative review under 42 C.F.R. Part 498. *See* 42 C.F.R. §§ 498.3(a)(1), (b)(15); *Victor Alvarez, M.D.*, DAB No. 2325, at 3 (2010). A supplier has no right to administrative review of a contractor's decision to reject an enrollment application under section 424.525(a). 42 C.F.R. § 424.525(d); *Experts Are Us*, DAB No. 2322, at 9 n.8 (2010).

Case Background[6]

On April 1, 2015, Dr. Zamis, a physician enrolled in the Medicare program, submitted to Noridian an initial Medicare enrollment application (form CMS-855I) to enroll her medical practice. CMS Ex. 2, at 27-28. Noridian notified Dr. Zamis, by letter dated May 13, 2015, that it had approved the practice's Medicare enrollment application and determined the effective date of enrollment as April 1, 2015 (which Noridian mistakenly identified as March 2, 2015).[7] CMS Ex. 3.

[5] In the preamble to the rulemaking that adopted section 424.520, CMS explained that the term "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, 69,766-69,767 (Nov. 19, 2008). The Board has applied that interpretation in resolving disputes concerning the effective date of a supplier's enrollment. *See Alexander C. Gatzimos, MD, JD, LLC*, DAB No. 2730, at 4 (2016).

[6] Our case summary is based upon facts found by the ALJ and upon undisputed information contained in the parties' documentary evidence. Our summary should not be regarded as supplementing or modifying the ALJ's findings of fact. *Breton Lee Morgan, M.D.*, DAB No. 2264, at 3 n.3 (2009), *aff'd*, *Morgan v. Sebelius*, 2010 WL 3702608 (D. W.Va. Sept. 15, 2010), *aff'd*, 694 F.3d 535 (4th Cir. 2012).

[7] As the ALJ noted in her decision, this was a misnomer by Noridian. By regulation, the effective date of enrollment was April 1, 2015, the date the subsequently approved enrollment application was originally submitted to Noridian. Consequently, March 2, 2015 was the earliest date for which the practice could retrospectively bill Medicare for services, rather than the effective date of enrollment. *See* ALJ Decision at 1, n.1.

Petitioner requested reconsideration of Noridian's initial determination of April 1, 2015 as the effective date of the practice's Medicare enrollment, contending that the effective date of enrollment should have been September 1, 2014, because Petitioner's credentialing specialist [M.S.] "had originally sent [their] application to Medicare mid[-] September of 2014." CMS Ex. 4 at 2. Petitioner blamed Noridian's December 30, 2014 determination to reject its application on "the neglect and lack of provider services [Petitioner] received during the enrollment process" from Noridian. *See* i*d.* at 2, 8. Petitioner argued that the application should not have been rejected because M.S. had furnished responses on January 5, 2015 to Noridian's request on December 20, 2014 for additional information, which was "well within the 30 day window" Noridian had set for responses to its request. *Id*. at 3, 10-12; Pet. Exs. 3, 4.

On reconsideration, Noridian upheld the initial determination of April 1, 2015 as the effective date of enrollment. CMS Ex. 5. In upholding the initial determination, Noridian found that it had correctly rejected Petitioner's September 17, 2014 application because Petitioner failed to respond satisfactorily to letters emailed to Petitioner on October 2, 2014, November 11, 2014, and December 20, 2014 requesting additional information. *Id.* at 2. Noridian also found that the form CMS 855I Petitioner submitted to enroll in Medicare, which was subsequently approved, "was received on April 1, 2015[,]" and that Petitioner had failed to provide evidence to support an earlier effective date. *Id*.

Petitioner requested ALJ review. In its request for hearing, Petitioner argued that the effective date of enrollment should be September 1, 2014, because its earlier enrollment applications "had been mishandled by Noridian Medicare." Request for Hearing. Petitioner contended that Noridian rejected its enrollment application because Petitioner neglected to check the correct box designating Petitioner's practice a corporation rather than a sole proprietorship. *Id*. Petitioner disputed this, stating that Noridian had contacted Petitioner's credentialing specialist, M.S., on October 2, 2014 (seeking information missing from a form CMS-855B application), and had informed Petitioner via telephone on October 17, 2014 that the form CMS-855B application was unnecessary and that Petitioner's form CMS-855I application was missing. *Id*. Petitioner stated that it responded to a request Noridian made on November 11, 2014 for additional information on the form CMS-855I that Petitioner had filed in September, explaining to Noridian that the information Noridian was seeking (a form CMS-588) had been submitted along with the forms CMS-855B and CMS-855I. *Id*. Petitioner further contended that it responded to a request Noridian made on December 20, 2014 for further correction of the business/organizational entity designation. *Id*. Petitioner asserted that it submitted the requested information by fax on December 29, 2014, January 5, 2015, and January 25, 2015, but stated Noridian had rejected the application on December 30, 2014, after Noridian staff "neglected" to inform M.S. that the enrollment application continued to reflect missing or incorrect information. *Id*. Petitioner did not contend that Noridian was able to process the September 17, 2014 enrollment application to approval.

The ALJ concluded that she had no authority to review Noridian's rejection of Petitioner's September 2014 enrollment application. ALJ Decision at 4. Although Petitioner argued that it was not challenging Noridian's rejection of its September 2014 application, and conceded that CMS may reject an incomplete enrollment application (as Noridian had in this case), Petitioner offered several reasons why Noridian erred in rejecting Petitioner's September 2014 enrollment application. According to Petitioner, the additional information Noridian had requested was always evident in the applications already in Noridian's possession; Noridian's requests for information were unclear; M.S. had been in communication with Noridian, "actively working with CMS to resolve any outstanding issues;" and Noridian had "mishandled" the application process. ALJ Decision at 5.

The ALJ noted that Petitioner argued that Noridian had rejected its September 2014 enrollment application before 30 days had elapsed from Noridian's final request for information. *Id*. at 5 n. 5. The ALJ found, however, that Noridian did not reject Petitioner's application until December 30, 2014, after Petitioner failed to provide satisfactory responses to Noridian's November 11, 2014 request for additional information. *Id*. The ALJ further noted that Noridian's November 11, 2014 e-mail informed Petitioner that its application may be rejected if Petitioner failed to submit complete responses within 30 calendar days of the "***initial request.***" *Id*. (Emphasis in original.) The ALJ concluded that this instruction was consistent with the provisions of the MPIM, Chapter 15 § 15.8.2, which expresses CMS's policy that "[i]f the contractor makes a follow-up request for information, the 30-day clock does not start anew; rather it keeps running for the date the pre-screening letter was sent." *Id*. (Citation omitted.)

The ALJ concluded that she could not grant September 1, 2014 as the effective date of enrollment for the practice unless she "set aside Noridian's rejection of Petitioner[']s September 2014 enrollment application[];" that, by regulation, "a rejected enrollment application cannot be the basis for an enrollment effective date;" and that the regulations did not permit her to exercise "authority over Noridian's rejection" of Petitioner's applications. *Id*. at 5-6. The ALJ also concluded that the effective date of Petitioner's Medicare enrollment could not be earlier than April 1, 2015, the date Petitioner submitted an application that Noridian accepted. *Id*. at 6. Citing the regulation at 42 C.F.R. § 424.520(d), as well as Board decisions applying that provision, the ALJ reasoned that, where "the date of filing is the date that the Medicare contractor receives a signed enrollment application that the Medicare contractor is able to process to approval," and "Petitioners do not contend that Noridian received their new enrollment application at any time prior to April 1, 2015, "the effective date of Petitioner's Medicare enrollment is April 1, 2015." *Id*. (Internal quotation marks omitted.)

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it 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 http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/index.html?language=en.

Discussion

The issues before the Board are whether the ALJ's decision was based on substantial evidence in the record and whether the ALJ erred as a matter of law in upholding CMS's effective date determination. We find that substantial evidence in the record supports the ALJ's decision and that it is free of legal error.

1. *The ALJ Decision is supported by substantial evidence in the record.*

Petitioner contends that the ALJ's decision upholding CMS's determination of Petitioner's effective date of Medicare enrollment was not based on substantial evidence in the administrative record. Req. for Rev. at 11. We reject this contention. The ALJ admitted CMS exhibits 1 through 9, and Petitioner's exhibits 1 through 8 into the record. ALJ Decision at 3. The ALJ then based her decision on evidence supporting two main conclusions: 1) that evidence in the record established that Petitioner had filed one Medicare enrollment application which was processed to approval; and 2) that Noridian determined Petitioner's effective date of enrollment based on the date on which the subsequently approved application was submitted. ALJ Decision at 2, 6. The ALJ thus explained her reasoning:

> The "date of filing" is the date that the Medicare contractor "receives" a signed enrollment application that the Medicare contractor is able to process to approval. [Citations omitted.] [. . .] Petitioners do not contend that Noridian received their new enrollment application at any time prior to April 1, 2015. Accordingly, as required by regulation, the effective date of Petitioner[']s Medicare enrollment is April 1, 2015.

Id. at 6.

Having considered the evidence, the ALJ correctly ruled that section 424.525(d) of the regulations prohibits ALJ or Board review of the facts and circumstances surrounding Noridian's rejection of an earlier enrollment application. *See* ALJ Decision at 5-6. Petitioner indicated to the ALJ that it did not intend to challenge Noridian's rejection of

its September 2014 enrollment application (ALJ Decision at 4), and takes the same position on appeal to the Board. *See* Req. for Rev. at 7. Petitioner nonetheless argues that "the Board must examine the record as a whole and take into account what information detracts from the weight of the underlying decision." *Id*. at 11 (citations omitted). In addition, Petitioner contends that the [ALJ] must have "analyzed all evidence and [ ] sufficiently explained the weight he has given to obviously probative exhibits . . ." and that "[t]he Board must consider all evidence presented by a petitioner rather than just adopt the findings of the ALJ, lest a decision be clearly erroneous." *Id*.

The record shows that the ALJ considered all "obviously probative exhibits" and based her decision on them, admitting all proffered exhibits into the record, including CMS Exs. 7-9, over Petitioner's objection.[8] ALJ Decision at 3. The ALJ denied motions for summary judgment and issued her decision based on the written record. *Id*. The ALJ was not persuaded (and neither is the Board) that Petitioner's arguments were anything more than an attempt to challenge Noridian's rejection of the September 2014 enrollment application. However, below we discuss the other evidence in the record which the ALJ determined was not material, and thus of no probative value, to her decision upholding Noridian's effective date determination.

The record in this case shows that Petitioner's September 2014 enrollment application was rejected due to Petitioner's failure to furnish complete information. CMS Ex. 1 at 1. Petitioner was notified by e-mail dated November 11, 2014, of deficiencies in the form CMS-855I application Petitioner filed in September 2014. CMS Ex. 8. The notice states that Petitioner had failed (among other items) to "[i]dentify the type of organizational structure of this provider/supplier," and must have "Lindsay Zamis MD sign and date a new/clean certification statement [. . . .]" *Id*. at 3. The notice also warns Petitioner that Noridian "may reject [Petitioner's] application(s) if [Petitioner does] not furnish complete information within 30 calendar days of the initial request." *Id*. at 1. The deadline, therefore, was December 11, 2014 (30 days from the November 11, 2014 request for information) for Petitioner to provide Noridian information indicating the correct type of organizational structure for the medical practice, and a clean certification signed by Lindsay Zamis, MD.

[8] Along with its Request for ALJ Hearing, Petitioner uploaded a document to the DAB's e-filing system (document # 1b) described only as "Request for Hearing supporting documents," which consists of 47 pages of material. The ALJ appears not to have marked and admitted the document into the record. The parties do not cite the document and it appears to have been the subject of no controversy before the ALJ. Therefore, we conclude that these documents are not material to the outcome of this appeal, and, in the absence of some showing to the contrary (which Petitioner did not make before us), the fact that the ALJ did not consider them constitutes no error.

M.S. responded the same day via e-mail to Noridian's November 11, 2014 notice. P. Ex. 6. In her affidavit, M.S. states that she "responded to Noridian's request as to the CMS Form 855-I, and further explained that this information should be processed in connection with Provider's CMS Form 855-B, both of which were submitted to Noridian together in September 2014." P. Ex. 8 at 3-4 ¶5. However, M.S. pointed out, on October 17, Noridian:

> informed me that the CMS Form 855-B was not necessary in connection with the application Petitioner submitted, but rather the CMS Form 855-I instead. I informed [Noridian's representative], however, that Petitioner submitted Form 855-B and Form 855-I together with the initial application. [Noridian's representative] notified me that the Form 855-I could not be found in Noridian's system.

Id. at 2 ¶4. Although Petitioner offers this testimony to prove that M.S. provided information responsive to Noridian's request, M.S.'s e-mail contains neither Petitioner's type of business organization nor a clean certification bearing the required signature. Even if M.S. believed Petitioner had previously provided information in other documents that was responsive to Noridian's November request, Petitioner remained no less responsible for satisfying that request. Noridian's November request indicated that, notwithstanding the information M.S. thought Petitioner had provided earlier in other documents, Noridian required additional information on the form CMS-855I to process Petitioner's enrollment application to approval. CMS Ex. 8 at 4. Petitioner could not therefore reasonably conclude that information provided in other forms, particularly the form CMS-855B, would be applied to the form CMS-855I Noridian was processing. In her e-mail, M.S. did not ask Noridian to accept information previously provided in the (abandoned) form CMS-855B in lieu of a new submission (assuming that the form contained the information Noridian was seeking) or to transfer information from the form CMS-855B to the form CMS-855I. Moreover, the fact that Noridian informed M.S. that it could not locate the Form 855I that Petitioner said it had submitted further undercuts Petitioner's contention that Noridian had on hand by December 2014 all of the information it needed to approve Petitioner's enrollment application. To the contrary, by October 17, 2014, it was not clear that Noridian had received any form CMS-855I from Petitioner, much less a complete one. None of this evidence "detracts from the weight of" the ALJ's decision.

Nonetheless, despite failing to provide satisfactory responses to Noridian's request for information, Petitioner contends that Noridian's determination on December 30, 2014 to reject its enrollment application was premature. Petitioner argues that it was "working with" Noridian and was not given sufficient time to respond to Noridian's request for information dated December 20, 2014. However, as discussed above, Noridian's

deadline, consistent with the regulations, was 30 days from the November 11, 2014 notice. *See* 42 C.F.R. § 424.525(a)(1). Rather than reflect an unwillingness to "work with" Petitioner outside of its 30-day deadline, the December 20, 2014 notice reflects that Noridian had kept Petitioner's application pending after December 11, 2014 and was willing to accept responsive information to complete the application as late as December 27, 2014, more than two weeks beyond its deadline. CMS Ex. 9. Only when Petitioner failed to respond by December 27, 2014 did Noridian reject Petitioner's application. CMS Ex. 1.

Even if Petitioner's allegations that Noridian "mishandled" its September 2014 application were true (and we reach no such conclusion here), it would not be material to our review, given 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. *Karthik Ramaswamy, M.D.*, DAB No. 2563 at 6, (2014), aff'd, *Ramaswamy v. Burwell*, 83 F. Supp. 3d 846 (E.D. Mo. 2015). In *Ramaswamy*, a contractor approved a physician's May 2012 enrollment application and assigned him a May 21, 2012 effective date. DAB No. 2563, at 3. The physician requested an earlier effective date based on a May 2011 enrollment application that the contractor had "denied" (rather than rejected) in June 2011. *Id.* at 4. The physician argued that the 2011 application was the appropriate basis upon which to set the effective date because while that application was pending, he timely provided the contractor with the information needed to approve it. *Id.* We upheld the ALJ's decision rejecting the physician's argument that his faxed (but unaccounted for) response to the contractor's request for information "should have made it possible for the contractor to continue processing that application to approval," and therefore provide for an effective date of enrollment based on the earlier, rejected application. *See id.* at 6-7.

Here, Petitioner's argument, in essence, is that it submitted an application that could have been processed to approval had Noridian not failed to account for all of the information Petitioner had submitted. This argument, however, has no support in the statute or in the applicable regulations, and the Board rejected such an argument in *Ramaswamy* (where, arguably, the evidence of an unaccounted for, timely submission was more persuasive than it is in this case). As we said in our recent decision in *James Shepard, M.D.*, DAB No. 2793 (2017), we view Petitioner's arguments based upon the alleged "mishandling" of the earlier enrollment application as an indirect or backdoor challenge to a contractor determination – namely, an application rejection – for which there are no administrative appeal rights. *Shepard* at 8. To entertain Petitioner's claim that Noridian improperly rejected its September 2014 application would, as we said in *Ramaswamy*, "ma[ke] a nullity" of section 424.525(d)'s prohibition on appeals relating to rejected enrollment applications. DAB No. 2563, at 7. Neither the ALJ nor the Board has the authority to overturn Noridian's determination to reject an enrollment application because the

processing of an enrollment application (including, for example, the determination that an application is unnecessary, as with Petitioner's form CMS-855B in this case) did not go as the applicant expected or preferred. Though Petitioner denies it, Petitioner's evidence and arguments combine to form nothing more than a collateral attack on Noridian's rejection of the September 2014 application. Petitioner fails to show a lack of evidence in the administrative record to support the ALJ's decision upholding Noridian's determination that Petitioner's effective date of enrollment in Medicare was properly based upon approval of the April 2015 application. Accordingly, we conclude that substantial evidence in the record supports the ALJ's decision and the ALJ was correct to deem immaterial the facts and circumstances surrounding the rejected application.

2. The ALJ Decision is free of legal error.

The regulation at 42 C.F.R. § 424.520(d) states, in relevant part, that a supplier's "effective date for billing privileges" is the "date of filing of a Medicare enrollment application that was *subsequently approved* by a Medicare contractor" (italics added). The ALJ correctly applied the regulation when she found, and there is no dispute, that the enrollment application filed by Petitioner that was "subsequently approved" by a Medicare contractor was the form CMS-855I Petitioner submitted to Noridian on April 1, 2015. ALJ Decision at 6; *see* CMS Ex. 2. For purposes of the effective-date determination, the "date of filing" of an enrollment application is the date the contractor receives the application. *Alexander C. Gatzimos, MD, JD, LLC*, DAB No. 2730, at 4 (2016). On May 13, 2015, Noridian notified Petitioner that it had approved the enrollment application Noridian received on April 1, 2015. CMS Ex. 3.

Petitioner argues that in promulgating the regulation, CMS "adopted the 'date of filing' as the date that the Medicare contractor receives a signed provider enrollment application that the Medicare contractor is able to process for approval." Req. for Rev. at 13, *citing* 73 Fed. R. 69726, 69729 (No. 19, 2008). Further, Petitioner argues that the MPIM "[s]pecifically instructs CMS contractors to develop, rather than return" an application containing defects or missing information. *Id*. (quoting the ALJ decision in *Tri-Valley Family Medicine, Inc.*, DAB No. CR2358 at 6 (2010): "[N]othing in the regulations or the preamble language . . . indicates that the effective date was to be determined by the submission of a *complete* application. Instead, the application refers to an application that is 'subsequently approved' by the contractor. It does not have to be 'approvable' as initially submitted.").

Petitioner is correct that the effective date of enrollment is the date on which an application (which is subsequently approved) is submitted to the Medicare contractor. The Board also addressed this issue in *Shepard*. Shepard argued that the effective date of Medicare enrollment for his professional association should have been the earlier date on

which he filed an application that Noridian mishandled and subsequently rejected. *Shepard* at 7. The Board held that, under the regulation, the earlier 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." *Id*. A supplier has no right to an ALJ hearing when an application is rejected for failure to furnish complete information. *Id.* at 3 (citing 42 C.F.R. § 424.525(d)); *Experts Are Us*, DAB No. 2322 at 9, n. 8 (2010). In other words, an application indeed need not be approvable as initially submitted, and the contractor may, as it did it here, permit more than one opportunity to provide missing information, but the application must ultimately be approvable and approved to form the basis of an effective date.

Here, the enrollment application Petitioner submitted to Noridian in September 2014 was rejected, not subsequently approved. *See* CMS Ex. 1. Moreover, it was rejected, in part, due to a non-conforming or inadequate signature in the certification section of the form, which the regulation at 42 C.F.R. § 424.510(d)(3) requires.[9] *See* CMS Exs. 1, 8, 9. Petitioner's submissions on December 29, 2014 and January 5, 2015 (Pet.'s Exs. 2-5) evidently did not satisfy Noridian's concerns over Dr. Zamis signing the certification statement "Lindsay Whitledge" instead of "Lindsay Zamis" on the September 2014 form CMS-855I. Noridian accepted the signature "Lindsay Whitledge" on the April 1, 2015 form CMS-855I, which Noridian subsequently approved, apparently after noting a change in Dr. Zamis's marital status. CMS Ex. 2 (typewritten margin notes stating "[s]ign must be Zamis not Whitledge; Whitledge – ex-married switch Zamis – maiden"). Nonetheless, Petitioner fails to establish that its September 2014 application and responses to Noridian's requests for information comprised an approvable application.

[9] Section 424.510(d)(3) of the regulation states:

> (3) *Signature(s) required on the enrollment application.* The certification statement found on the enrollment application must be signed by an individual who has the authority to bind the provider or supplier, both legally and financially, to the requirements set forth in this chapter. This person must also have an ownership or control interest in the provider or supplier, as that term is defined in section 1124(a)(3) of the Act, such as, the general partner, chairman of the board, chief financial officer, chief executive officer, president, or hold a position of similar status and authority within the provider or supplier organization. The signature attests that the information submitted is accurate and that the provider or supplier is aware of, and abides by, all applicable statutes, regulations, and program instructions.

As discussed above, Petitioner argues, in essence, that Noridian's "mishandling" of its September 2014 enrollment application – *i.e.*, allegedly failing to account for responsive information already in its possession, failing to provide Petitioner sufficient time to respond to requests for information and rejecting the application on December 30, 2014 while a request for information remained outstanding as Petitioner saw it –was "arbitrary and capricious" and constituted an "abuse of discretion." Request for Review at 11. In addition, Petitioner contends that it was "actively working with CMS to resolve any outstanding issues," and that therefore Noridian was obligated "to act in good faith" and "extend the 30 day period," citing the regulation at "42 C.F.R. § 424.525(c)." *Id.* at 12.

Petitioner's argument is unfounded and irrelevant. Petitioner cites the wrong regulatory provision and the correct provision provides no support for Petitioner's position. Section 424.525(c) pertains to the resubmission of a new Medicare enrollment application after notification of a rejected enrollment application. Section 424.525(b), the provision relating to extension of the 30-day deadline for submission of missing information, states:

> CMS, *at its discretion*, may choose 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.

(Italics added.) The decision to extend the 30-day deadline for responses to requests for information lies solely within CMS's discretion and CMS is not obligated to extend the deadline. The regulation is permissive in that it allows, but does not require, CMS to first consider whether (in its judgment) the applicant is "actively working with CMS," and then to decide whether to extend the response deadline. The *denial* of an enrollment application is an initial determination subject to reconsideration and appellate review. *Victor Alvarez, M.D.*, DAB No. 2325 (2010). However, a determination by CMS not to extend the 30-day period for responses to requests for information is not an initial determination subject to appeal. *See* 42 C.F.R § 498.3. Noridian's decision to extend or not to extend the response deadline is not subject to appeal and we may not consider Noridian's exercise of discretion on that matter in reviewing this appeal. The ALJ correctly declined to examine the facts and circumstances surrounding Noridian's decision not to extend further its previously extended deadline for Petitioner's response to Noridian's request for additional information. The ALJ's legal conclusion was based on uncontroverted evidence that the only Medicare enrollment application Petitioner submitted to Noridian that was processed to approval was submitted on April 1, 2015. Therefore, the ALJ correctly held, in accordance with section 424.520(d), that Petitioner's effective date for billing privileges was April 1, 2015.

Finally, we conclude that the ALJ did not err when she granted CMS's motion for the admission of supplemental evidence.[10] CMS argued that good cause existed for the admission of its proposed exhibits 7 through 9 because Petitioner "raised new issues concerning the rejection of its first enrollment application," and that the proposed exhibits were responsive to those issues. Motion for Admission of Supplemental Exhibits at 2. CMS also argued that the proposed exhibits were e-mails, all of which had been sent to Petitioner during the processing of its September 2014 application, and the admission of which therefore could not prejudice Petitioner. *Id.* Petitioner countered that the motion was procedurally defective (ostensibly because it was a sur-reply filed under the guise of an evidentiary motion), that the motion violated the pre-hearing order then in effect, and in sum, that the exhibits contained irrelevant information. Opposition to Respondent's Motion for Admission of Supplemental Proposed Exhibits (Opposition) at 2, 5. Petitioner conceded that it had prior possession of the proposed exhibits but insisted that they were not relevant to an issue in dispute. *Id*. at 3. The crux of Petitioner's opposition is that CMS, having focused on the "wrong facts" (those relating to the 2015 submission and approval of Petitioner's Medicare enrollment application), was attempting to bootstrap a supplemental reply to the properly framed arguments Petitioner had made centered around the rejected September 2014 application. In its opposition, Petitioner's counsel wrote "[t]hat Respondent chose to focus in its pre-hearing submission only on facts that occurred long after the actual ones in dispute is something CMS cannot rectify now through this untimely law and motion practice." Opposition at 4.

Petitioner wishes to have it both ways with this argument. First Petitioner argued to the ALJ (and, later, to the Board) that it was not contesting the rejection of its September 2014 application. Petitioner then claimed in its Opposition that the facts actually in dispute occurred long before those described in CMS Exs. 1-6 (e.g., in and around April 2015), and therefore CMS was left scrambling to submit documents relating to the "truly relevant" events of September through December 2014. This position contradicted Petitioner's earlier contention. In its Request for Board Review, Petitioner reiterated the arguments it made to the ALJ. *See* Req. for Review at 14-15. Petitioner points to its statement in its Request for Review that it is requesting its "original effective date" of September 1, 2014 and that it alleged the contractor "mishandled" its application. *Id*.

[10] CMS's original exhibits consisted of 1) the December 30, 2014 rejection notice; 2) the May 1, 2015 enrollment application; 3) the May 2015 approval notice; 4) Petitioner's reconsideration request; 5) the unfavorable reconsidered determination; and 6) Petitioner's December 29, 2014 response (certification statement by "LINDSAY WHITLEDGE MD") to Noridian's December 20, 2014 request for information (notifying Petitioner that failure to provide additional information [including certification statement signed by "Lindsay Zamis MD"] could result in rejection of Petitioner's September 2014 enrollment application). *See* CMS Exs. 1-6. Petitioner's exhibits consisted of 1) December 20, 2014 correspondence between M.S. and Noridian; 2) December 29, 2014 correspondence from M.S. to Noridian; 3) January 5, 2015 correspondence from M.S. to Noridian (re: Form CMS-855B); 4) January 5, 2015 correspondence from M.S. to Noridian (re: electronic funds transfer); 5) November 11, 2014 request from Noridian to M.S. for information ; 6) November 11, 2014 correspondence from M.S. to Noridian; and 7) December 30, 2014 correspondence from Noridian to M.S. *See* P. Exs. 1-7.

We do not find this sufficient to notify CMS that the alleged mishandling related to the prior application so as to preclude the ALJ from determining that CMS could provide these exhibits in response to the detailed assertions in M.S.'s declaration, which the ALJ admitted into the record prior to ruling on Petitioner's opposition, marking it Petitioner's Exhibit 8. ALJ Decision at 3. The ALJ reasoned that, since M.S.'s declaration referred to the same e-mails contained in CMS's proposed exhibits 7-9, it was "in the interest of creating a complete record of the communications between Petitioner[] and Noridian" that she found "good cause to admit CMS Exs. 7-9 into the record." *Id*.

"In general, the Board does not disturb the ALJ's evidentiary determinations unless there is compelling reason to do so." *HeartFlow, Inc.*, DAB No. 2781 at 19 (2017) (*citing Community Northview Care Ctr.*, DAB No. 2295, at 28 (2009) and cases cited therein). "In provider/supplier enrollment appeals, a provider or supplier must show good cause to submit new documentary evidence to the ALJ. 42 C.F.R. § 498.56(e).[11] A determination of whether good cause has been established under this regulation is a matter for the ALJ's discretion, to which we defer in the absence of a compelling reason to do otherwise." *Id*. Here, the ALJ's decision to admit the supplementary exhibits was based on the relationship between the exhibits and the declaration provided by Petitioner's witness. Notably, Petitioner's witness's declaration was not submitted in a manner consistent with the pre-hearing order, yet the ALJ admitted it. ALJ Decision at 3. The ALJ's stated purpose for admitting the supplemental exhibits − creating a full and complete administrative record − further belies Petitioner's arguments that the ALJ's decision was not supported by substantial evidence in the record. Therefore, we conclude that the ALJ did not abuse her discretion when she admitted CMS Exs. 7-9 into the administrative record.

[11] Part 498 does not define "good cause," a term used in different contexts within Part 498, e.g., to determine whether there is good cause to extend the deadline for filing a request for hearing under section 498.40. The Board has not set out an "'authoritative or complete definition'" of the term. *Meridian Nursing & Rehab at Shrewsbury*, DAB No. 2504, at 8 (2013) (quoting *Hillcrest Healthcare, L.L.C.*, DAB No. 1879, at 5 (2003)), *aff'd, Meridian Nursing & Rehab at Shrewsbury v. CMS*, 555 F. App'x 177, 2014 WL 350698 (3rd Cir. 2014). The Board does, however, review an ALJ's "good cause" determination for abuse of discretion and does not substitute its judgment for that of the ALJ. *Retail LLC d/b/a Super Buy Rite*, DAB No. 2660, at 9-10 (2015).

Conclusion

For the reasons stated above, we affirm the ALJ's decision upholding CMS's determination that Petitioner's effective date of enrollment in Medicare is April 1, 2015, and that its retrospective billing period began on March 2, 2015.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Christopher S. Randolph
Presiding Board Member