

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Carlos T.J. Martinez, D.O., Inc.
(NPI: 1346412497),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-892

Decision No. CR4836

Date: April 27, 2017

DECISION

Petitioner, Carlos T.J. Martinez, D.O., Inc. (Petitioner), is a medical practice that is owned by Carlos T.J. Martinez, D.O. Petitioner requested a hearing to challenge the effective date of its Medicare enrollment and billing privileges. Because the Centers for Medicare & Medicaid Services (CMS) has not factually demonstrated that Noridian Healthcare Solutions (herein “Noridian” or “the contractor”), a Medicare Administrative Contractor, rejected Petitioner’s revalidation enrollment application and provided notice of the rejection, and also has not demonstrated that Noridian deactivated Petitioner’s enrollment and billing privileges on November 19, 2015, I have determined that the effective date of Petitioner’s Medicare enrollment and billing privileges that was in effect prior to the date of the revalidation request remains the effective date of Petitioner’s enrollment and billing privileges.

I. Background

Petitioner is a supplier in the Medicare program. CMS contends that on January 20, 2015, Noridian sent Petitioner a request that it revalidate its Medicare enrollment.¹ CMS Brief (Br.) at 3, 8. CMS Exhibit (Ex.) 1 at 2. Petitioner submitted an internet-based enrollment application to revalidate its enrollment on April 10, 2015. CMS Ex. 11. In Section 13 of the application, Petitioner listed a contact person, Amy Martinez, and included a telephone number, email address, and mailing address for this individual. CMS Ex. 11 at 2-3. On June 11, 2015, Noridian sent Ms. Martinez an email entitled, “Request for Corrections for Medicare Enrollment Application . . .,” in which it informed Petitioner that it required additional information in order to complete the processing of the application. CMS Ex. 9 at 1. The message directed Petitioner to complete the electronic funds transfer section of the application and to upload a copy of a voided check or bank verification letter. CMS Ex. 9 at 1. CMS did not receive a response to this request. *See* CMS Ex. 3 at 1.

CMS asserts that on July 20, 2015, “Noridian rejected the April 10, 2015 Form CMS-855B enrollment application because it had not received a response to the June 11, 2015 request for additional information.”² CMS Br. at 3. CMS further asserts that on November 19, 2015, “Noridian deactivated Petitioner’s enrollment for failure to respond to a request for Medicare enrollment revalidation.”³ CMS Br. at 3.

Petitioner continued to submit claims for reimbursement, and Noridian paid its claims through March 2016. CMS Ex. 3 at 1, 8-9; *see* Petitioner (P.) Exs. 1-3. After Noridian stopped paying its claims sometime in March 2016, Petitioner submitted an enrollment application on March 30, 2016.⁴ CMS Ex. 1 at 2. Noridian informed Petitioner, in a

¹ While CMS stated that this is an undisputed material fact, it has not furnished a copy of the revalidation request. Rather, CMS cites to page 2 of the July 12, 2016 reconsidered determination, that was issued 18 months later, as support that Noridian requested Petitioner to revalidate its enrollment. However, Petitioner does not dispute CMS’s statement.

² CMS stated that this was an undisputed material fact. However, CMS did not cite to any evidence in support of this assertion.

³ CMS once again referenced the July 12, 2016 reconsidered determination in support of this assertion. CMS otherwise did not cite to any evidence showing that Petitioner’s Medicare enrollment and billing privileges were deactivated on November 19, 2015, for failure to submit a revalidation application.

⁴ CMS stated that, on March 30, 2016, “Noridian received a Form CMS-855B and supporting documents, which Noridian treated as a reactivation application for Petitioner’s enrollment,” but CMS did not submit a copy of this enrollment application.

letter dated May 9, 2016, that it had approved the revalidation application, at which time it assigned a new Provider Transaction Access Number (PTAN), with an effective date of billing privileges of March 30, 2016, the date of its most recent application. CMS Exs. 3 at 10; 4.

Petitioner requested reconsideration of the effective date of its reactivated Medicare billing privileges, at which time it explained that it did not learn, until March 23, 2016, that the revalidation application it had filed almost a year prior had been rejected. CMS Ex. 3 at 1. Petitioner explained that it was unaware that Noridian had asked it to correct its enrollment application because the email request “went to a SPAM folder and we did not see it.” CMS Ex. 3 at 1. Petitioner discussed that it was unaware of any problem with its Medicare enrollment because it did not receive notice that either its application had been rejected or its enrollment had been deactivated. CMS Ex. 3 at 1-3. To the contrary, Petitioner explained that, based on the May 28, 2015 letter from Noridian accepting a new practice location, it believed that its revalidation was complete. CMS Ex. 3 at 3; *see* CMS Ex. 10. Petitioner explained that it did not receive any notice that it was placed in “pend status” and would not receive payments. CMS Ex. 3 at 1-3. Petitioner explained that rather than having payments suspended, it continued to receive payments through March 23, 2016. CMS Ex. 3 at 1. Petitioner pointed out that its electronic fund transfers did not stop until April 1, 2016, and that it did not have any claims rejected until March 23, 2016. CMS Ex. 3 at 3. Petitioner added that “[w]e were not aware of the termination until March 23, 2016 since letters are not sent out; therefore, we did not have an opportunity to appeal.” CMS Ex. 3 at 3.

In a reconsidered determination dated July 12, 2016, Noridian upheld the March 30, 2016 effective date of Petitioner’s reactivated billing privileges and denied Petitioner’s request for an earlier effective date of its reactivated Medicare billing privileges. CMS Ex. 1. In that determination, Noridian first informed Petitioner, in writing, that its enrollment application “received April 13, 2015” had been rejected on July 20, 2015 and that its enrollment had been deactivated on November 19, 2015.⁵ CMS Ex. 1 at 2.

Petitioner submitted a request for hearing that was mailed via FedEx on September 9, 2016, and received at the Civil Remedies Division on September 13, 2016. CMS filed a

CMS Br. at 3. CMS submitted only an email confirming receipt of Petitioner’s March 30, 2016 application. CMS Ex. 5.

⁵ Noridian received the revalidation enrollment application on April 10, 2015, and not April 13, 2015. CMS Ex. 11.

pre-hearing brief and motion for summary disposition (CMS Br.), along with 13 exhibits⁶ (CMS Exs. 1 - 13). Petitioner filed a brief (P. Br.) and three exhibits (P. Exs. 1- 3). In the absence of any objections, I admit CMS Exs. 1 - 13 and P. Exs. 1 - 3 into the record.

Neither party has offered the testimony of any witnesses, and a hearing for the purpose of cross-examination of witnesses is therefore unnecessary. *See* Acknowledgment and Pre-Hearing Order §§ 8, 9, and 10. I consider the record in this case to be closed, and the matter is ready for a decision on the merits.⁷

II. Issue

Whether CMS had a legitimate basis for establishing March 30, 2016, as the effective date of the reactivation of billing privileges for Petitioner.

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(15), 498.5(l)(2).

IV. Findings of Fact, Conclusions of Law, and Analysis⁸

- 1. CMS asserts that on January 20, 2015, Noridian sent a revalidation request to Petitioner.***
- 2. Petitioner submitted an enrollment application for purposes of revalidation on April 10, 2015.***
- 3. On June 11, 2015, Noridian requested, via email, that Petitioner complete the electronic funds transfer section of the application and submit a copy of a voided check or bank verification letter.***
- 4. Petitioner did not provide a response to the June 11, 2015 email request.***

⁶ In my Order, I directed that CMS file its brief by November 2, 2016. However, CMS filed two certificates of service on November 2, 2016, but did not file its brief until after I issued an Order on March 13, 2017, directing it to file its brief.

⁷ CMS has argued that summary disposition is appropriate. CMS has not provided citations to supporting evidence of all material facts it alleges are undisputed. Further, for the reasons discussed herein, CMS has not shown that the material facts are undisputed.

⁸ My findings of fact and conclusions of law are set forth in italics and bold font.

5. *CMS has not demonstrated that Noridian provided notice that it rejected Petitioner's enrollment application on July 20, 2015, or that it rejected the application on that date.*
6. *CMS has not demonstrated that Noridian provided notice that Petitioner was placed in pend status following Petitioner's failure to respond to the June 11, 2015 request for additional information.*
7. *CMS has not demonstrated that Noridian provided notice that it had deactivated Petitioner's enrollment on November 19, 2015.*
8. *Noridian issued Petitioner payment for approximately 263 separate claims for services rendered between on or about November 20, 2015 and on or about March 17, 2016.*
9. *CMS has not demonstrated that Noridian deactivated Petitioner's Medicare enrollment and billing privileges on November 19, 2015.*
10. *The effective date of Petitioner's Medicare enrollment and billing privileges remains unchanged from the effective date prior to the revalidation request.*

Petitioner is considered to be a "supplier" for purposes of the Social Security Act (Act) and the regulations. *See* 42 U.S.C. § 1395x(d),(u); *see also* 42 C.F.R. § 498.2. A "supplier" furnishes services under Medicare, and the term applies to physicians or other practitioners that are not included within the definition of the phrase "provider of services." 42 U.S.C. § 1395x(d). A supplier must enroll in the Medicare program to receive payment for covered Medicare items or services. 42 C.F.R. § 424.505. The regulations at 42 C.F.R. Part 424, subpart P, establish the requirements for a supplier to enroll in the Medicare program. 42 C.F.R. §§ 424.510 - 424.516; *see also* Act § 1866(j)(1)(A) (authorizing the Secretary of the U.S. Department of Health and Human Services to establish regulations addressing the enrollment of providers and suppliers in the Medicare program). A supplier that seeks billing privileges under Medicare must "submit enrollment information on the applicable enrollment application." 42 C.F.R. § 424.510(a)(1). "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).

To maintain Medicare billing privileges, a supplier must revalidate its enrollment information at least every five years. 42 C.F.R. § 424.515. CMS (or its contractor) reserves the right to perform off-cycle revalidations in addition to the regular five-year revalidations and may request that a provider or supplier recertify the accuracy of the

enrollment information when warranted to assess and confirm the validity of the enrollment information maintained by CMS. 42 C.F.R. § 424.515(d). Off-cycle revalidations may be triggered as a result of random checks, information indicating local health care fraud problems, national initiatives, complaints, or other reasons that cause CMS to question the compliance of the provider or supplier with Medicare enrollment requirements. 42 C.F.R. § 424.515(d). When CMS notifies a supplier that it is time to revalidate, the supplier must provide the requested information and documentation within 60 calendar days of CMS's notification. 42 C.F.R. § 424.515(a)(2).

CMS may reject a provider or supplier's enrollment application for a number of reasons, to include because an applicant "fails to furnish complete information on the provider/supplier enrollment application within 30 calendar days from the date of the contractor request for the missing information."⁹ 42 C.F.R. § 424.525(a)(1). While a provider or supplier does not have a right to appeal a rejected application, the regulation indicates that a provider or supplier may submit a new application with all supporting documentation "after notification of a rejected enrollment application." 42 C.F.R. § 424.525(c). Thus, the regulation contemplates that a provider or supplier will receive notice of a rejected application so that it can submit a new and complete application.

CMS is authorized to deactivate an enrolled supplier's Medicare billing privileges if the enrollee "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." 42 C.F.R. § 424.540(a)(3). If CMS deactivates a supplier's Medicare billing privileges, "[n]o payment may be made for otherwise Medicare covered items or services furnished to a Medicare beneficiary." 42 C.F.R. § 424.555(b). The regulation authorizing deactivation explains that "[d]eactivation 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 Funds from unnecessary overpayments." 42 C.F.R. § 424.540(c). Ordinarily, a petitioner cannot challenge the deactivation of its billing privileges. *See* 42 C.F.R. § 498.3(b); *Willie Goffney, Jr., M.D.*, DAB No. 2763 at 5 (2017) (stating "neither section 424.545(b) nor any other regulation provides appeal rights from the contractor's deactivation determination or any rebuttal determination."). In a deactivation matter, the effective date of reactivation would ordinarily be the date the reactivation enrollment application is received. 42 C.F.R. § 424.520(d).

The Medicare Program Integrity Manual (MPIM) contains policy instructions that are binding on Medicare administrative contractors. *See Viora Home Health, Inc.*, DAB No.

⁹ While the regulation addresses a "prospective" provider or supplier, CMS acknowledges this provision is applicable to Petitioner. CMS Br. at 5.

2690 at 8 (2016) (“the MPIM provision . . . is sub-regulatory guidance, and, as the introduction to chapter 15 of MPIM . . . suggests, chapter 15 provisions are primarily intended as guidance or instructions for CMS fee-for-service contractors”); CMS Br. at 11 (noting the MPIM contains procedural instructions to the contractor); *but see Gloria D. Johnson, NP*, DAB No. CR4803 at 8-9 (2017) (discussing CMS’s position that “[e]ven if the ALJ had jurisdiction over these issues, which it does not, the internal policy guidance set forth in the Medicare Program Integrity Manual (MPIM) is not binding and does not form a legal obligation on the part of [the contractor] or CMS.”). The MPIM provides the following guidance, as relevant to this discussion:

15.8.2 – Rejections

F. Additional rejection policies

* * *

4. **Notice** – If the contractor rejects an application, it shall notify the provider via letter (sent via mail or email) that the application is being rejected, the reason(s) for the rejection, and how to reapply. Absent a CMS instruction or directive to the contrary, the letter shall be sent to the provider or supplier no later than 5 business days after the contractor concludes that the provider or supplier’s application should be rejected.

MPIM, § 15.8.2, Transmittal 689, iss’d December 9, 2016, effective January 9, 2017.¹⁰

15.29.3.2 – Pend Status

If a revalidation application has not been received by days 71-75 of mailing the revalidation notice, the contractor shall place the provider or supplier in a pend status; this will hold all paper checks, Standard Remittance Advices (SPRs), and Electronic Funds Transfers (EFT) from being issued . . . The contractor shall communicate the purpose of the pend status to the individual provider, contact person, or authorized or delegated official of the organization via telephone or letter . . .

MPIM, § 15.29.3.2, Transmittal 578, iss’d February 25, 2015, effective May 15, 2015.

15.29.3.3 Deactivation Actions

If a revalidation application has not been received by days 120 – 125 of sending the revalidation notice, the contractor shall end-date the pend status

¹⁰ It appears that this passage was unchanged in Transmittal 689.

and deactivate the provider's or supplier's enrollment record (including all associated PTANs) in PECOS.

* * *

The contractor shall utilize the sample letter found in section 15.24.5.4 of this chapter to communicate the deactivation action. The letter shall be mailed to the provider's or supplier's special payment or correspondence address within 5 business days of the deactivation action.

MPIM, § 15.29.3.3, Transmittal 578, iss'd February 25, 2015, effective May 15, 2015.

The case presents a situation in which CMS's contractor apparently failed, on multiple occasions, to adhere to CMS's policy instructions to its contractors. Despite the fact that Petitioner, in its reconsideration request and request for hearing, asserted that it was unaware that its application had been rejected and that it had purportedly been deactivated, CMS has not demonstrated otherwise. In failing to carry out specific actions and notice required by policy guidance and the regulations, the contractor failed to adhere to the policy and regulatory guidance. While Petitioner acknowledges that it did not timely respond to the request for additional information for its revalidation application, CMS policies and the regulations direct that a supplier be given several opportunities to be made aware of a rejected application and ultimate deactivation. However, CMS has not shown that Petitioner received any notice during the period from July 20, 2015, the reported date of rejection of its application, through November 19, 2015, the reported date that its enrollment was deactivated. Further, even though CMS states that Petitioner's enrollment application was rejected on July 20, 2015, it has not submitted evidence directly establishing that the application was rejected on that date or that Petitioner was timely notified of the rejection.¹¹ Nor has CMS submitted evidence that the contractor placed Petitioner in pend status or notified Petitioner that it had been placed in pend status. And finally, CMS has not shown that Petitioner was deactivated on November 19, 2015, as Petitioner continued to submit and receive reimbursement for claims after that date and CMS has not asserted that it gave Petitioner timely notice of its deactivation. While Petitioner undoubtedly failed to respond to an email request for additional information regarding its revalidation application, CMS policies and the regulations directed that Petitioner should have been put on notice of this situation well before March 23, 2016.

¹¹ In support of this assertion, CMS relies upon the July 12, 2016 reconsidered determination that was issued more than a year after the request for additional information.

In arguing that summary judgment disposition is appropriate, CMS provided a chronological statement of undisputed material facts that included the following information:

3. June 11, 2015: Noridian sent Petitioner a request for additional information seeking a new electronic funds transfer (EFT) form and voided check or bank verification. CMS Ex. 9.

4. July 20, 2015: Noridian rejected the April 10, 2015 Form CMS-855B enrollment application because it had not received a response to the June 11, 2015 request for additional information.

5. November 19, 2015: Noridian deactivated Petitioner's enrollment for failure to respond to a request for Medicare enrollment revalidation. *See* CMS Ex. 1 at 2.

CMS does not provide any support for its assertions that Noridian rejected Petitioner's April 10, 2015 application on July 20, 2015, even though both 42 C.F.R. § 424.525(c) and Section 15.8.2 of the MPIM explicitly address that notice will be provided if an application is rejected. CMS Br. at 3, 9.

Likewise, policy guidance binding on Noridian required it to place Petitioner in "pend status" if its revalidation application was not received by days 71-75 of mailing the revalidation notice. MPIM, § 15.29.3.2. CMS has not submitted any evidence that it placed Petitioner in pend status, and argues that "even assuming *arguendo* that Petitioner is correct and PEND status was not properly used, Petitioner's arguments are not relevant to the issues before this tribunal." CMS Br. at 11. CMS further contends that "the outcome of this case, indeed this tribunal's jurisdiction, turns on whether CMS determined the proper effective date of the reactivation of billing privileges, not on whether Noridian followed CMS's instructions about how to use PEND status during the revalidation process." CMS Br. at 11. CMS continued that "[t]he alleged failure to use PEND status by Noridian is not an initial determination that gives rise to hearing rights before an ALJ." CMS Br. at 11. If Petitioner had been placed in pend status as required by the MPIM, not only would it have received notice of such, but it would not have received paper checks, Standard Remittance Advices (SPRs), and Electronic Funds Transfer (EFT). MPIM, § 15.29.3.2. Even without written notice, the withholding of payments likely would have put Petitioner on notice that something was amiss, as the withholding of payments in March 2016 ultimately led to Petitioner's discovery that it had not responded to the June 11, 2015 request for additional information.

Further, CMS presents patently incorrect information in its brief regarding the existence of the MPIM's requirement that a supplier be placed in pend status, stating:

“Pend status” refers to a payment hold flag added to a supplier’s PECOS enrollment file as a result of the nonresponse to revalidation activities. *See* MPIM, Ch. 15, § 15.29.3.2. However, at the time of Petitioner’s failure to respond to revalidation activities and the request for additional information in June 2015, this section of the MPIM was not in existence. Section 15.29.3.2 was initially issued on August 5, 2016, and was not effective until September 6, 2016. *Id.* As such, even if the use of pend status was required prior to deactivation as alleged by Petitioner, Noridian was not required to use the Pend status at the time of Petitioner’s failure to timely and completely respond in June 2015.

CMS Br. at 11 n.1. As I explained on pages 7 and 8 of this decision, “pend status” existed in Transmittal 578 of the MPIM, which was effective on May 15, 2015; the date of implementation of this provision was several weeks prior to the purported date that Petitioner’s application was rejected. *See* P. Br. at 2, 4.

Similarly, in support of its statement that Noridian deactivated Petitioner’s enrollment on November 19, 2015, CMS cites to the reconsidered determination dated nearly *eight months later*, on July 12, 2016, that contains a reference to a November 19, 2015 date of deactivation. CMS Br. at 3. CMS does not cite to any contemporaneous evidence directly supporting that Noridian actually deactivated Petitioner’s enrollment on November 19, 2015, and CMS did not submit any evidence that Noridian provided contemporaneous notice of Petitioner’s deactivation, as required by Section 15.29.3.3 of the MPIM. Further, Petitioner has argued, as early as its May 23, 2016 request for reconsideration, that it continued to be paid for approximately four months after its purported deactivation date, and CMS has not refuted that evidence. CMS Ex. 3 at 1-3, 8-9.

In seeking summary judgment, I presume that CMS has submitted the available and necessary evidence to factually support its “Statement of Undisputed Material Facts.” CMS Br. at 3-4. Summary judgment is appropriate and no hearing is required if there are no disputed issues of material fact and the only questions that must be decided involve the application of law to the undisputed facts, or, the moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. The Board has followed the general approach of the federal courts in determining whether summary judgment in lieu of a hearing is appropriate. The movant bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that the movant is entitled to judgment as a matter of law. When confronted with a properly supported motion for summary judgment, the

nonmoving party “may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat’l Bank of Az. v. Cities Serv. Co.*, 391 U.S. 253, 249 (1968)); *see also* Fed. R. Civ. P. 56(c).

CMS has not established that the material facts are undisputed. While CMS contends that Noridian’s compliance with instructions is not a relevant issue, CMS does not acknowledge that Noridian *is* required to abide by the *regulations*. *See* 42 U.S.C. § 1302(a) (giving the Secretary the broad authority to “make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [he] is charged under the Act.”). Noridian sent Petitioner a revalidation request, and Petitioner submitted an application in response. CMS Br. at 3; CMS Ex. 11. While Noridian requested additional information and Petitioner did not respond, CMS has not cited evidence directly supporting that Noridian rejected the application and provided timely notice of a July 20, 2015 rejection. Even though Petitioner has twice raised this issue prior to the filing of the parties’ pre-hearing exchanges, CMS has not submitted any evidence that Noridian *notified* Petitioner that its application had been rejected. CMS Ex. 3 at 1; Request for Hearing, at 2 (“On March 23, 2016 Provider learned for the first time, that the revalidation application was rejected back on July 20, 2015 because of an unanswered request for EFT information and a voided check. This request went to a SPAM folder and Provider did not see it.”); 42 C.F.R. § 424.525(b). And further, if Noridian deactivated Petitioner’s enrollment on November 19, 2015, as CMS alleges, then Noridian was not authorized to continue issuing payments to Petitioner, even though Petitioner continued to submit claims and Noridian continued to pay those claims. CMS Ex. 3 at 8-9; P. Exs. 1-3; 42 C.F.R. § 424.555(b). CMS has therefore not established the following, that, pursuant to regulatory requirements: 1.) Noridian rejected Petitioner’s enrollment application *on* July 20, 2015; 2.) Noridian notified Petitioner that its application had been rejected on July 20, 2015, or 3.) Noridian had deactivated Petitioner’s enrollment *on* November 19, 2015. While CMS argues that the contractor’s compliance with MPIM provisions is irrelevant, to include the provision involving pend status, CMS has not established that Noridian complied with the regulatory requirements for rejection of an application and deactivation. CMS has therefore not factually established that Noridian properly rejected Petitioner’s enrollment application or deactivated its enrollment. As such, CMS has not shown there is a basis to disturb Petitioner’s enrollment status as it existed prior to the revalidation request.

This case raises a concerning situation in which a supplier has credibly asserted that it did not respond to an email sent in June 2015 because that email was received in a spam folder. Petitioner acknowledges its failure to respond. And, Petitioner was entitled, by regulation, to be notified that its failure to respond resulted in the rejection of its application. 42 C.F.R. § 424.525(c). With such notice, Petitioner would have had an opportunity to immediately submit a new application. 42 C.F.R. § 424.525(c). Petitioner has argued it was unaware that its application was rejected; in fact, Petitioner argues that

it reasonably believed that its enrollment status was in good standing at that same time, explaining that “[a]n enrollment letter was sent 5/28/2015 after the revalidation application was received.” P. Br. at 2; *see* CMS Ex. 10. CMS, despite being on notice that Petitioner had argued it was unaware that its application had been rejected or that its enrollment had been deactivated, cites to no evidence directly supporting its statement that the application was rejected on July 20, 2015. CMS Br. at 3, 9. While CMS posits that “whether Noridian followed CMS’s instructions” is not a relevant issue, it is difficult to ignore the contractor’s *repeated* failures to follow both CMS’s instructions and applicable regulations, especially when these repeated failures can lead to financial harm and ultimately caused delay in Petitioner’s filing of a new revalidation application. CMS Br. at 11. Simply stated, since Petitioner did not receive timely notice, and it continued to be paid through March 2016, it had no reason to believe it had failed to respond to an email requesting additional information back in June 2015.¹²

In summary, there were several points at which Petitioner should have learned that its enrollment status was in jeopardy prior to March 2016:

1. First, and most importantly, Petitioner should have received notice that its application had been rejected. 42 C.F.R. § 424.525(c); MPIM, § 15.8.2. CMS does not cite to any evidence directly supporting that Petitioner’s application had been rejected, or that Noridian notified Petitioner of the rejection of its application.
2. Second, after not receiving Petitioner’s completed revalidation application within the time limits allowed by CMS policy, Noridian should have placed Petitioner in pend status. Pend status would have accomplished two things, as relevant here. First, Petitioner would have, once again, received notice that it had not complied with the revalidation request and been on notice that it needed to submit a complete enrollment application for purposes of revalidation. Second, Petitioner would have stopped receiving payments for services to Medicare beneficiaries. MPIM, §15.29.3.2.
3. Third, Noridian should have deactivated Petitioner’s Medicare enrollment and billing privileges and provided Petitioner with notice of the action when it still had not complied with the revalidation request. Just as with placement in pend status, deactivation would have accomplished two things. First, a deactivation notice would have, for a third time, given Petitioner written notice that its revalidation application was incomplete.

¹² Petitioner’s lack of knowledge of the apparent rejection of its application is further evidenced by a February 12, 2016 Form CMS-855I in which Petitioner’s owner explained that he had added information regarding his existing reassignment of benefits to Petitioner. CMS Ex. 8 at 4.

Second, deactivation would have *stopped payments* to Petitioner, and as here, the cessation of payments in March 2016 ultimately put Petitioner on notice of this situation. *See* 42 C.F.R. § 424.555(b) (“No payment may be made for otherwise Medicare covered items or services furnished to a Medicare beneficiary” upon deactivation.) However, despite what CMS argues, Noridian did not deactivate Petitioner on November 19, 2015, as it continued to pay Petitioner’s claims that were submitted for the following four months. Further, even though Section 15.29.3.3 of the MPIM requires notice of deactivation, CMS has not shown that it provided notice to Petitioner of its deactivation.

The contractor’s failure to adhere to multiple policy and regulatory requirements has the potential to lead to an absurdly unjust result. While Petitioner admittedly failed to respond to a single email request from June 11, 2015, Noridian failed to adhere to several requirements over a protracted period of time. Rather than giving Petitioner notice of a rejected application, Noridian continued to pay claims for eight more months. Noridian’s failure to adhere to multiple policies and regulations is the predominant reason why Petitioner did not submit another enrollment application until March 2016 and has been exposed to the possibility of being subject to a lengthy period of overpayment. While CMS argues that Petitioner has no recourse if its contractor fails to adhere to policy instructions, CMS fails to appreciate that its contractor failed to adhere to regulatory requirements, as well. 42 C.F.R. §§ 424.525(c), 424.555(b); *see* CMS Br. at 11; *see also Gloria D. Johnson, NP, DAB No. CR4803*. CMS has not shown that Noridian properly rejected Petitioner’s application, to include providing notice of rejection, or that it actually deactivated Petitioner’s enrollment on November 19, 2015. 42 C.F.R. §§ 424.525(c), 424.540, 424.555(b). Therefore, the effective date of enrollment that was in effect at the time of the revalidation request stands.

V. Conclusion

The effective date of Petitioner’s Medicare enrollment prior to the request for revalidation is unchanged and remains in effect.

/s/
Leslie C. Rogall
Administrative Law Judge