Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Donald Dolce, M.D.
Docket No. A-16-14
Decision No. 2685
April 14, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) appeals the August 21, 2015 decision of an Administrative Law Judge (ALJ). *Donald Dolce, M.D.*, DAB CR4150 (2015) (ALJ Decision). The ALJ determined that the effective date of Petitioner Donald Dolce, M.D.'s enrollment in the Medicare program was August 6, 2014, and that CMS and Novitas Solutions, Inc. (Novitas), CMS's Medicare Administrative Contractor, incorrectly assigned September 22, 2014 as the effective date of Petitioner's enrollment.

For the reasons below, the Board reverses the ALJ Decision. We determine that the effective date of Petitioner's enrollment is September 22, 2014, and that the retroactive billing date is August 23, 2014.

Legal Background

A physician or other "supplier" of Medicare services must be enrolled in the Medicare program to receive payment for Medicare-covered items and services. Social Security Act (Act) § 1861(d)[1]; 42 C.F.R. § 424.505. "Enrollment" is the process that CMS and its contractors use to: 1) identify the prospective supplier; 2) validate the supplier's eligibility to provide items or services to Medicare beneficiaries; 3) identify and confirm a supplier's practice location(s) and owner(s); and 4) grant the supplier Medicare billing privileges. 42 C.F.R. § 424.502.

To enroll, suppliers must submit enrollment information on the applicable enrollment application. "Once the provider or supplier successfully completes the enrollment process . . . CMS enrolls the provider or supplier into the Medicare program." *Id.* § 424.510(a). A prospective supplier "must submit a complete enrollment application

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

and supporting documentation to the designated Medicare . . . contractor." *Id.* § 424.510(d)(1). An "enrollment application" is the CMS-approved paper enrollment application or an electronic Medicare enrollment process approved by the Office of Management and Budget. *Id.* § 424.502. The approved enrollment application for physicians is Form CMS-855I. Final rule, 71 Fed. Reg. 20,754, 20,756 (Apr. 21, 2006) (eff. June 20, 2006).

Upon approval of an enrollment application, CMS's contractor sets the effective date of enrollment. The effective date of a physician's enrollment is –

> the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date an enrolled physician . . . first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d) (2014). In the preamble to the final rule, CMS stated that 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." 73 Fed. Reg. 69,726, 69,769 (Nov. 19, 2008).

As relevant here, an enrolled physician who meets all program requirements and has been providing services at the enrolled practice location may bill for services for "up to– . . . 30 days prior" to the effective date of enrollment "if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries . . .[.]" 42 C.F.R. § 424.521(a)(1) (2014). CMS has instructed its contractors to "interpret the phrase 'circumstances precluded enrollment'" in section 424.521(a)(1) "to mean that the supplier meets all program requirements (including state licensure) during the 30-day period before an application was submitted and no final adverse action, as identified in [42 CFR] §424.502, precluded enrollment." Medicare Program Integrity Manual (MPIM), CMS Pub. 100-08, Ch. 15, § 15.17.B (emphasis in original).[2]

A supplier may request reconsideration of the denial of enrollment, or, if enrollment is approved, the assignment of an effective date of enrollment, within 60 days of receipt of notice of the determination, with receipt presumed to occur five days after the date on the notice absent a showing to the contrary. *See* 42 C.F.R. §§ 498.3(a)(1), (b)(15), (b)(17), 498.22. A properly filed request for reconsideration results in a "reconsidered determination, affirming or modifying the initial determination and the findings on which it was based." *Id.* § 498.24(c). A prospective "supplier, or existing supplier dissatisfied with a reconsidered determination under paragraph (1)(l) of this section, or a revised reconsidered determination under [42 C.F.R.] § 498.30, is entitled to a hearing before an

[2] The MPIM is available at http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.

ALJ." *Id.* § 498.5(l)(2); *see also Victor Alvarez, M.D.*, DAB No. 2325, at 3 (2010) (approval of enrollment with a particular effective date is in essence a denial of enrollment on an earlier date and the supplier has a right to a hearing under section 498.5(l) on the determination of the effective date of enrollment). If dissatisfied with the ALJ's decision, CMS, CMS's contractor, or the prospective or existing supplier may seek Board review of the ALJ's decision, and any prospective or existing supplier may seek judicial review of the Board's decision. 42 C.F.R. § 498.5(l)(3).

Case Background[3]

Petitioner is an orthopedic surgeon who enrolled in Medicare in 2014. CMS Ex. 4, at 3-4; CMS Ex. 9, at 4, 8. He began providing services to Medicare beneficiaries at Texas Health Care, PLLC (THC) on August 6, 2014. Petitioner's Pre-Hearing Exchange (P. Br. to ALJ) at 4. By determination dated October 31, 2014, Novitas, acting on CMS's behalf, informed Petitioner that he could begin billing Medicare effective August 23, 2014. CMS Ex. 4, at 4. Petitioner (through THC, which filed the enrollment application for Petitioner) appealed, asking Novitas to assign an "effective date of August 1, 2014 as originally requested." *Id.* at 1.

On February 10, 2015, Novitas issued its reconsidered determination. CMS Ex. 1, at 1-4. Novitas stated that it had received Petitioner's enrollment application on September 22, 2014, and that Petitioner had met the requirements for retrospective billing as of August 23, 2014. *Id.* at 1-2, quoting 42 C.F.R. §§ 424.520(d) and 424.521(a). Petitioner (through THC) appealed, requesting that an ALJ assign an "effective date of August 1, 2014, as originally requested." Request for hearing (RFH) at 1 (not paginated).

The crux of the parties' dispute has been, and still is, the date of filing of Petitioner's enrollment application. Under section 424.520(d) the later of two dates – the date on which Petitioner filed his application or the date on which he began providing Medicare services at THC – is the effective date of enrollment. There is no dispute as to when Petitioner began providing Medicare services. Petitioner himself said that he began providing services at THC on August 6, 2014. P. Br. to ALJ at 4. The date of enrollment, in turn, would be the basis for assigning a date for retroactive billing privileges if certain requirements are met.

On reconsideration and before the ALJ, Petitioner maintained that he filed his application earlier than September 22, 2014, that is, in June 2014. Petitioner (through THC) said that THC initially sent his application (consisting of Form CMS-855I for enrollment and Form CMS-855R for reassignment of Medicare payments for his services to THC) to

[3] The factual information in this section, except where we indicate disagreement between the parties, is drawn from the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal.

Novitas on June 6, 2014. RFH at 1. He took the position that "[t]he filing date is the date it [the June 2014 application] was placed in the mail[,]" and that June 6, 2014 is the mailing and thus the filing date. P. Br. to ALJ at 4. In the course of checking on the status of the application he and THC learned that Novitas had no record of receipt of the June 2014 application (sent by regular U.S. mail) and, therefore, on September 18, 2014, THC mailed Novitas new Forms CMS-855R and CMS-855I (both signed September 16, 2014) as Novitas requested. CMS Ex. 4, at 1 (request for reconsideration); CMS Ex. 10, at 7; CMS Ex. 9, at 27. According to Petitioner, the June 2014 application likely reached Novitas, but Novitas misplaced it. P. Br. to ALJ at 3. Petitioner asserted that the alleged mishandling of his June 2014 application constituted "extenuating circumstances" for which he was not at fault and asked the ALJ to assign an earlier effective date of enrollment. *Id*. at 1.[4]

Petitioner offered the ALJ affidavits of THC employees J.W. and D.R. to support his position that THC mailed his application on June 6, 2014, and mailed another application on September 18, 2014 on Novitas' instructions because THC learned that Novitas had no record of a June 2014 application. P. Exs. E and F. The affiants also communicated that: 1) THC sent two applications, one for Petitioner and one for Dr. C.B., on June 6, 2014, in two envelopes, by first class U.S. mail; 2) THC learned that Novitas received Dr. C.B.'s application on June 10, 2014; and 3) the postal service did not return Petitioner's June 2014 application to THC. *See* P. Ex. E at 2-3; P. Ex. F at 1-2.

According to Novitas, it received Petitioner's application on September 22, 2014. CMS Ex. 1, at 2. Novitas therefore assigned September 22, 2014, the "date of filing" within the meaning of section 424.520(d), as clarified by the preamble to the final rule, as the effective date of enrollment. Novitas also assigned an effective date of Medicare billing privileges of August 23, 2014, finding that "[t]he requirements for retrospective date of Medicare billing . . . as required by . . . [section] 424.521(a)" were met as of that date. *Id.* In support of its position that the effective date of enrollment was September 22, 2014, CMS offered the ALJ the declaration of S.K., the Novitas hearing officer who apparently handled Petitioner's reconsideration request. CMS Ex. 2; CMS Ex. 6. In her declaration the hearing officer stated that she relied on Novitas' enrollment records for Petitioner (CMS Ex. 6, at 1), and that Novitas' search of its enrollment database revealed no application for Petitioner received before September 22, 2014 (*id.* at 2).

[4] Petitioner's submittals to the ALJ included a letter from THC for Petitioner (RFH at 1) and Petitioner's brief (P. Br. to ALJ). The former asked the ALJ to assign an "effective date of August 1, 2014, as originally requested." RFH at 1. In the latter, Petitioner argued that the correct effective date of enrollment was August 6, 2014. P. Br. to ALJ at 4. The effective date of enrollment cannot be August 1, 2014 because this date falls before the undisputed date on which Petitioner began providing Medicare services at THC.

The ALJ determined that Novitas incorrectly assigned an enrollment date of September 22, 2014, and that the correct enrollment date is August 6, 2014. ALJ Decision at 1, 3.[5] The ALJ found Petitioner's position that his application was sent on June 6, 2014 a "credible" one, "buttressed by the testimony of two witnesses [J.W. and D.R.] and by a hard copy of the actual application [sent to Novitas on June 6, 2014]." *Id.* at 3. The ALJ stated that the "weight of the evidence supports [his] conclusion that Novitas actually received Petitioner's application on June 10 or thereabouts" and that he "see[s] no reason why" 42 C.F.R. § 498.22(b)(3), which presumes that a provider or supplier received an initial determination five days after the date of notice of the determination in the absence of evidence of receipt earlier or later, should not be applied to this case. *Id.*, citing 42 C.F.R. § 498.22(b)(3). The ALJ said, "Where a prospective supplier mails an application to the contractor the presumption is that the contractor receives it." *Id.* The ALJ found the Novitas hearing officer's declaration unpersuasive because, the ALJ stated, the hearing officer averred only that Novitas' search yielded no record of a June 2014 application. *Id.* The ALJ said, "That may be, but that result would be entirely consistent with the contractor mishandling and/or misplacing the application after receiving it. If the contractor lost the application then, of course, it would have no record of it in its database." *Id.*

The ALJ then found that the "June 6 and September 22 applications are identical in all respects" and that "the application Novitas 'subsequently approved,' within the meaning of 42 C.F.R. § 424.520(d), was the June 6 application." *Id.* The ALJ assigned August 6, 2014 as the effective date of enrollment. *Id.* at 2 n.1 ("Although Petitioner contends that he filed his application on June 6, he acknowledges that he did not begin providing services until August 6, 2014. Therefore, the earliest effective date to which Petitioner would be entitled is August 6, 2014.") and 3.

CMS appealed the ALJ Decision to the Board, asserting that the effective date of Petitioner's enrollment is September 22, 2014, the date of filing of the application that Novitas approved. CMS's brief (CMS Br.); CMS's reply brief (CMS Reply). Petitioner urges the Board to uphold the ALJ Decision. Petitioner's response brief (P. Response).

[5] CMS moved for summary judgment, asserting that it is undisputed that the application the contractor "subsequently approved" in accordance with section 424.520(d) is the application filed on September 22, 2014, and that Novitas properly assigned a retroactive billing date of August 23, 2014. CMS's motion at 3-5. The ALJ first determined that the parties' disagreement on the date of filing of the application precluded a decision on summary judgment, but also determined that no hearing was needed because neither party asked to cross-examine the other party's witness(es). ALJ Decision at 2.

Standard of Review

The standard of review for disputed issues of law is whether the ALJ's decision is erroneous. The standard of review for disputed issues of fact is whether the ALJ's decision is supported by substantial evidence on the record as a whole. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (*Guidelines*), available at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

Analysis

The Board reverses the ALJ Decision and determines that the effective date of Petitioner's enrollment is September 22, 2014. Our reversal is based on our conclusion that the ALJ did not have before him substantial evidence to support his conclusion that Novitas received the application Petitioner says he, through THC, sent to Novitas on June 6, 2014.

The ALJ found Petitioner's position that he (through THC) mailed his application to Novitas on June 6, 2014 credible. We find no reason to disturb that credibility determination and assume for purposes of our decision that the June 2014 application was mailed. That, however, does not resolve the issue, which is when an application that was subsequently approved by the contractor was filed. When THC checked on the status of that application and learned that Novitas had no record of having received an application, THC mailed new signed Forms CMS-855I and CMS-855R in September 2014 on Novitas' instructions. P. Ex. E at 2-3; P. Ex. F at 1-2. That is precisely why we reverse the ALJ. As THC itself said, it had to send new forms to Novitas in September 2014 because Novitas had no earlier application to review and, therefore, no application to process and approve. While the affidavits of J.W. and D.R. arguably raise concerns about Novitas' handling of the June 2014 application, importantly, they also strengthen CMS's position that, as a factual matter, "the only application Novitas received and processed was the application it received on September 22, 2014." CMS Br. at 1.[6]

[6] The reconsidered determination shows that Petitioner included a copy of his application purportedly mailed on June 6, 2014 with his request for reconsideration. CMS Ex. 1, at 2. Petitioner submitted another copy to the ALJ as part of his request for hearing. But Novitas processed to approval only the September 2014 application.

That plain fact ultimately renders inconsequential Petitioner's arguments that the Novitas hearing officer's (S.K.'s) declaration is "irrelevant,"[7] includes "inadmissible hearsay," and is otherwise unreliable,[8] and that Novitas' computer enrollment database system, too, is unreliable. P. Response at 3-5; *see also id.* at 3 (S.K. "never testifie[d] unequivocally" that Novitas did not receive the application and "[i]nstead . . . simply testifie[d] in a conclusory fashion that Novitas could not find the application in its computer system"), 4 (asserting that Novitas' computer database is prone to showing "false negatives," e.g., it did not reflect the processing of another physician's enrollment whose application THC knew had been received and processed), and 5 (arguing to the effect that S.K. did not establish personal knowledge of the database results or state who performed the database search and how she learned that Novitas had no record of receipt of an earlier application). These arguments are ultimately inconsequential because Petitioner nowhere directly disputes the material statement by CMS that "[t]here is no evidence or testimony that Novitas received or processed Petitioner's June 6, 2014 application." CMS Br. at 1-2. Petitioner merely speculates that Novitas "could have" received the application mailed in June 2014 and simply not have entered it into the computer system. P. Response at 3. Without affirmative evidence to support it, such speculation is not sufficient to establish the material fact at issue.

Importantly, the ALJ did not *affirmatively* find, *based on affirmative evidence of record*, that Novitas received an application on or about June 10, 2014 and that Novitas "subsequently approved" that application. Rather, in arriving at his decision to find error in the assignment of September 22, 2014 as the effective date of enrollment, the ALJ determined it would be reasonable to apply a rule of *presumption* under section 498.22(b)(3) to find that Petitioner's June 2014 application was delivered to Novitas on or about June 10, 2014. Section 498.22(b)(3), as noted earlier, presumes for purposes of determining timeliness of a request for reconsideration that a provider or supplier

[7] As a general matter, in our view, S.K.'s declaration is no more and no less relevant than the affidavits of the THC employees. Weighing of probative value of evidence and assessment of witness credibility are, of course, within the ALJ's purview and we defer to the ALJ's determinations on these matters unless there is a compelling reason not to do so. *See, e.g., Van Duyn Home & Hosp.*, DAB No. 2368, at10-11 (2011).

[8] We note that Petitioner could have addressed his alleged concerns about S.K.'s declaration by asking to cross-examine S.K. as he was informed he could do. *See* ALJ's Acknowledgment and Pre-hearing Order at 5. However, Petitioner did not avail himself of that opportunity. Moreover, hearsay statements are admissible in 42 C.F.R. Part 498 proceedings such as the instant case, even if they would be inadmissible under the rules of evidence applicable to court proceedings, if they are supported by sufficient indicia of reliability. 42 C.F.R. § 498.61; *Florence Park Care Ctr.*, DAB No. 1931, at 10 (2004). Petitioner's blanket statement that hearsay is not admissible in these proceedings is simply wrong, and Petitioner does not argue that the testimony he calls "hearsay" is not supported by sufficient indicia of reliability. Petitioner also points to no affirmative evidence of Novitas' receipt, review, and approval of any application other than the September 2014 application.

received the contractor's initial determination five days after the date of notice of the determination in the absence of evidence of receipt earlier or later.[9] Thus, by its terms, section 498.22(b)(3) addresses only the timely exercise of appeal rights, and does not establish a presumption generally applicable to correspondence between a provider or supplier and CMS or a CMS contractor. Nor, for the same reason, does it establish a presumption of receipt specifically applicable to enrollment applications, the situation here. The ALJ erred in applying section 498.22(b)(3)'s presumed date-of-receipt rule here.

Furthermore, importing a presumed date-of-receipt rule into the present context would not resolve the fundamental problem of proving that receipt occurred at all. Since receipt, rather than mailing, of an application determines the effective date of enrollment, it is essential that receipt of the application be established by affirmative evidence. Only then does the specific date of receipt become relevant. The ALJ's observation that absence of the June 2014 application in Novitas' database could be consistent with loss of that application by Novitas, as much as non-receipt of it, simply does not amount to substantial evidence of the central fact of receipt.

Petitioner suggests that Novitas' receipt of Dr. C.B.'s application on June 10, 2014 establishes its receipt of Petitioner's own application because they were mailed to Novitas on the same day. We do not find this argument persuasive because the applications were mailed in separate envelopes. Therefore, the successful receipt of one application does not explain the fate of the other application.

The ALJ also erred in concluding that the June 2014 application was "subsequently approved" within the meaning of section 424.520(d) simply because it was identical (except for the dated signatures) to the September 2014 application. The regulation is based on the contractor's actual receipt of an actual application it processes to approval. Novitas could not subsequently approve an application it did not actually receive. As discussed above, the ALJ cited no affirmative evidence of actual receipt.

Lastly, we note that the parties do not disagree that if September 22, 2014 is the effective date of Petitioner's enrollment, as we have concluded it is, then August 23, 2014 would be the effective date for retroactive billing.

[9] The regulations also incorporate this presumption in the Part 498 regulations governing the time to request a hearing. *See* 42 C.F.R. § 498.40(a)(2).

Conclusion

Based on the foregoing reasons and bases, the Board reverses the ALJ Decision. The effective date of Petitioner's enrollment in Medicare is September 22, 2014, and the retroactive billing date is August 23, 2014.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member