

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Jorge M. Ballesteros, CNRA,)	Date: February 16, 2010
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-682
)	Decision No. CR2067
Centers for Medicare & Medicaid)	
Services.)	

DECISION

The Centers for Medicare and Medicaid Services (CMS) granted the Medicare enrollment application of Petitioner, Jorge M. Ballesteros, CNRA, effective March 8, 2009. Petitioner now challenges that effective date. CMS has moved to dismiss, arguing that Medicare regulations do not allow a supplier whose Medicare enrollment has been granted to appeal the effective date of his billing privileges. In the alternative, CMS seeks summary judgment.¹

Regulations governing these proceedings explicitly allow for review of “the effective date of a Medicare provider agreement or supplier approval,” so I decline to dismiss. 42 C.F.R. §§ 498.3(b)(15); 498.5(d).² However, since the *only* evidence in this record establishes that Petitioner’s enrollment application arrived at the offices of the Medicare contractor no earlier than April 7, 2009, I find that CMS appropriately granted Petitioner’s enrollment effective March 8, 2009. 42 C.F.R. §§ 424.520(d); 424.521(a). I therefore grant CMS’s motion for summary judgment.

¹ With its motion, CMS submits 15 exhibits (CMS Exs. 1-15). With its response (which was not timely filed), Petitioner submits five exhibits (P. Exs. 1-5).

² I am not persuaded by CMS’s jurisdictional arguments, but, since I decide this matter on other grounds, and in the interest of administrative economy, I do not address those arguments in this decision.

CMS is entitled to summary judgment because the only evidence in this record establishes that Petitioner filed his enrollment application no earlier than April 7, 2009, and he may not bill the Medicare program for services provided more than 30 days prior to that date.³

CMS recently amended its regulations governing the effective date for provider/supplier enrollment in and billing to the Medicare program. 73 Fed. Reg. 69940 (Nov. 19, 2008). The effective date for billing privileges “is the *later* of the date of filing” a subsequently approved enrollment application or “the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.” 42 C.F.R. § 424.520(d). Nevertheless, if a practitioner meets all program requirements, CMS allows him to bill retrospectively for up to “30 days prior to their effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries.” 42 C.F.R. § 424.521(a)(1). Based on these provisions, CMS apparently sets enrollment effective dates 30 days prior to the date of application, which is what the Medicare contractor did here. CMS Exs. 1, 4.

Summary judgment is appropriate if a case presents no genuine issue of material fact. “To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact. . . .” *Livingston Care Center*, DAB No. 1871 (2003). The moving party may show the absence of a genuine factual dispute by showing that the non-moving party has presented no evidence “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Livingston Care Center v. Dep’t of Health and Human Services*, 388 F.3d 168, 173 (6th Cir. 2004). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986). See also *Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

Petitioner here is a certified registered nurse anesthetist (CRNA) who works for an organization called Regional Anesthesia Group, Inc. CMS has come forward with evidence showing that Petitioner signed his Medicare enrollment applications (Forms CMS-855I and 855R) on April 6, 2009, and the Medicare contractor (National Government Services, Inc.) received them on April 7, 2009. CMS Ex. 1. In a letter dated April 14, 2009, the contractor notified Petitioner that his enrollment was approved with an effective date of March 8, 2009. CMS Ex. 4.

³ I make this one finding of fact/conclusion of law.

Petitioner, however, claims that his employer, Regional Anesthesia Group, sent his enrollment applications “on or around October 22, 2008.” P. Br. at 2. In support of his position, Petitioner points to a document that purports to be his original application, which is signed and dated October 7, 2008. CMS Ex. 7, at 32-36. Petitioner claims, without any supporting documents or declarations, that Regional Anesthesia Group submitted this application in October 2008, along with the applications of another Regional Anesthesia Group employee, CRNA Linda Buck, and charges that CMS failed to “show proof that Jorge M. Ballesteros application was not in the envelope.” P. Br. at 2.

First, CMS does not bear the burden of establishing that a prospective provider or supplier failed to file enrollment applications; rather, the prospective provider or supplier must show affirmatively that he filed his enrollment application.

Moreover, in this case CMS has submitted compelling evidence to establish that Petitioner Ballesteros’s enrollment applications were not in the envelope containing CNRA Buck’s applications. CMS submits the declaration of Jerry Yohler, a business analyst for National Government Services, Inc., who explains in considerable detail the contractor’s procedures for processing enrollment applications. As Analyst Yohler explains, these procedures assure that an application filed would leave both a paper and an electronic trail. Analyst Yohler searched all of the filings for the day CRNA Buck’s applications were received, and found no evidence of any application from Petitioner Ballesteros. CMS Ex. 11.

Analyst Yohler also located the original mailing envelope for CRNA Buck’s applications. Postage for those documents was \$1.85. CMS Ex. 8, at 37. He then consulted the Indianapolis, Indiana Post Office as well as the contractor’s “mailing and distribution hub” in Indianapolis. Postage of \$1.85 is consistent with the cost of mailing one set of applications. An envelope containing both CRNA Buck’s and Petitioner Ballesteros’s applications would have required postage of \$2.92. CMS Ex. 11 at 3 (Yohler decl. ¶ 8).

Petitioner offers no evidence suggesting a dispute over any of these facts.

Because CMS has come forward with evidence establishing that Petitioner first filed his enrollment applications on April 7, 2009, and Petitioner has not responded with any evidence of specific facts establishing that a dispute exists, CMS is entitled to summary judgment. I therefore sustain CMS’s determination as to the effective date of Petitioner’s Medicare enrollment.

/s/
Carolyn Cozad Hughes
Administrative Law Judge