

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Abundant Health Family Medicine, LLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-465

Decision No. CR3209

Date: April 25, 2014

DECISION

Wisconsin Physicians Service Insurance Corporation (WPS), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), determined that Petitioner's effective date of enrollment in the Medicare program was April 17, 2013, with a retrospective billing period starting on March 18, 2013. Petitioner disputed this determination and requested a hearing before an administrative law judge. For the reasons stated below, I affirm WPS's determination.

I. Background and Procedural History

In 2012, Brian Lumpkin, M.D., an enrolled Medicare supplier, decided to establish Petitioner, Abundant Health Family Medicine, LLC. Petitioner Exhibit (P. Ex.) 2 ¶ 2. Dr. Lumpkin hired Service Resource Group, Inc. (SRG), in July 2012 to assist him in enrolling Petitioner in the Medicare program. P. Ex. 1, at 18-19; P. Ex. 2 ¶ 7. By early August 2012, Petitioner was prepared to submit an application for enrollment in the Medicare program. P. Ex. 1, at 19. However, WPS advised SRG not to submit the application until August 20, 2012, because WPS was in the middle of a transition that might complicate receipt and processing of new enrollment applications. P. Ex. 1, at 19. On August 20, 2012, SRG attempted to electronically submit Petitioner's enrollment

application through the Provider Enrollment, Chain and Ownership System (PECOS) and believed that it had been submitted “despite numerous page errors, and computer glitches from screen to screen.” P. Ex. 1, at 19. Following this attempt, SRG called and spoke with WPS representatives numerous times and was told by WPS that it had a backlog in reviewing enrollment applications and that they could not locate a “control number” for Petitioner’s application. P. Ex. 1, at 19.

On April 16, 2013, SRG submitted another enrollment application on behalf of Petitioner; however, SRG believed, based on its contact with WPS, that this was a resubmission of the August 20, 2012 application. P. Ex. 1, at 19-20. On July 12, 2013, WPS requested addition information from Petitioner. CMS Ex. 4. Because WPS was experiencing problems with PECOS, a WPS representative suggested that Petitioner submit a paper enrollment application, which SRG did on July 12, 2013. P. Ex. 1, at 20, 32-50.

In a July 22, 2013 initial determination, WPS enrolled Petitioner as a Medicare supplier and established March 18, 2013, as the effective date for Petitioner’s Medicare billing privileges. CMS Ex. 1, at 1-2. Petitioner requested reconsideration of the initial determination and sought an effective date of September 7, 2012, for its Medicare billing privileges. P. Ex. 1, at 8-9. In a reconsidered determination, WPS upheld the effective date of March 18, 2013, for Petitioner’s Medicare billing privileges. CMS Ex. 2. WPS stated that it received Petitioner’s enrollment application on April 17, 2013, and that the effective date was determined based on this date of receipt of a valid enrollment application that WPS approved. CMS Ex. 2, at 2. WPS also stated that Petitioner had not provided evidence to support an earlier effective date. CMS Ex. 2, at 2.

Petitioner disputed WPS’s determination and filed a request for hearing with the Departmental Appeals Board (DAB), Civil Remedies Division (CRD). The director of CRD administratively assigned this case to me for hearing and decision. In response to my Acknowledgment and Pre-hearing Order (Order), CMS filed a brief (CMS Br.) and six exhibits (CMS Exs. 1-6) as its pre-hearing exchange. Petitioner filed a brief (P. Br.) and nine exhibits (P. Exs. 1-9) as its pre-hearing exchange.

II. Decision on the Written Record

Neither party objected to any of the proposed exhibits. *See* Order ¶ 7. Therefore, I admit CMS Exs. 1-6 and P. Exs. 1-9 into the record.

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8, 9, 10; *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as

the opposing party has the opportunity to cross-examine those witnesses).¹ CMS did not offer any witnesses that Petitioner could request to cross-examine. Petitioner offered affidavits for two witnesses (P. Ex. 1, at 18-21; P. Ex. 2); however, CMS did not request to cross-examine those individuals. *See* Order ¶ 9. Consequently, I will not hold an in-person hearing in this matter and I will decide this matter based on the written record. Order ¶ 11.

III. Issue

Whether CMS had a legitimate basis for establishing April 17, 2013, as the effective date of Petitioner's Medicare billing privileges and March 18, 2013, as the beginning of Petitioner's retrospective billing period.

I have jurisdiction to decide this issue. 42 C.F.R. § 498.3(b)(15); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis²

The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers.³ 42 U.S.C. §§ 1302, 1395cc(j). Under the Secretary's regulations, a provider or supplier that seeks billing privileges under the Medicare program 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." 42 C.F.R. § 424.510(a). CMS then establishes an effective date for billing privileges under the requirements stated in 42 C.F.R. § 424.520(d) and may permit limited retrospective billing under 42 C.F.R. § 424.521.

1. WPS received Petitioner's signed Medicare enrollment application on April 17, 2013.

Petitioner submitted a Form CMS-855B electronically via PECOS on April 16, 2013. CMS Ex. 3, at 9. Also on April 16, 2013, Dr. Lumpkin physically signed two certification statements and sent them to WPS by Federal Express overnight delivery. CMS Ex. 3, at 1-8. The parties do not disagree that the date of receipt of the certification

¹ Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

² My findings of fact and conclusions of law are set forth in italics and bold font.

³ Petitioner is considered a "supplier" for purposes of the Act and the regulations. *See* 42 U.S.C. § 1395x(d),(u); 42 C.F.R. § 498.2; *see also* 42 C.F.R. § 400.202.

statements was April 17, 2013. CMS Exs. 2, at 2; CMS Br. at 2; P. Br. at 5. Therefore, I find that WPS received Petitioner's signed enrollment application on April 17, 2013.

2. The effective date for Petitioner's Medicare billing privileges is April 17, 2013, because that is the date WPS received Petitioner's Medicare enrollment application that was subsequently approved.

WPS received Petitioner's Medicare enrollment application on April 17, 2013. CMS Ex. 2, at 2. On July 22, 2013, WPS approved Petitioner's Medicare enrollment application. CMS Ex. 1. WPS set March 18, 2013, as Petitioner's "effective date." CMS Ex. 1, at 2. WPS noted that this date was "determined by the receipt date of a valid application that is approved." CMS Ex. 2, at 2.

The relevant regulation regarding the effective date of Medicare billing privileges states:

The effective date for billing privileges for physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations ***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 or nonphysician practitioner first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d) (emphasis added). The "date of filing" is the date that the Medicare contractor "receives" a signed provider enrollment application that the Medicare contractor is able to process to approval. *73 Fed. Reg.* 69,726, 69,769 (Nov. 19, 2008); *see also Caroline Lott Douglas, PA*, DAB CR2406, at 5-7 (2011); *Rizwan Sadiq, M.D.*, DAB CR2401, at 5 (2011). Because WPS received an application from Petitioner on April 17, 2013, that WPS ultimately approved, I conclude that the effective date for Petitioner's Medicare billing privileges is April 17, 2013.

Petitioner disputes this conclusion because it asserts that it submitted its enrollment application on August 20, 2012, through PECOS, and that due to an error on WPS's part, that application was not processed. Petitioner argues that it has proof that it submitted the enrollment application on August 20, 2012, in the form of an affidavit. P. Br. at 7; P. Ex. 1, at 19. Petitioner asserts that PECOS has documented technological deficiencies and Petitioner should not be penalized because of this. P. Br. at 8-10; P. Exs. 6-9.

CMS argues that Petitioner's problems with PECOS on August 20, 2012, probably indicate that Petitioner was not successful in electronically submitting the enrollment application. CMS Br. at 10. Further, CMS notes in support of this theory that Petitioner has not asserted that it received a confirmation receipt and tracking number from PECOS on August 20, 2012, when it submitted the application. CMS Br. at 10. CMS argues, in

any event, that the August 20, 2012 enrollment application was never completed because Petitioner “has neither asserted nor provided evidence that it sent to WPS a signed Certification Statement for its August 2012 electronic submission” CMS Br. at 10.

I am persuaded by CMS’s argument. Petitioner called WPS several times after August 20, 2012, and, significantly, WPS could not locate a “control number” for Petitioner’s application. P. Ex. 1, at 19. It is likely that this meant that Petitioner was unsuccessful in electronically filing the application. However, even if Petitioner successfully submitted the enrollment application through PECOS on August 20, 2012, there is no evidence that Petitioner “[m]ail[ed] the original signed Certification Statement from Internet-based PECOS . . . to the Medicare contractor within 15 days of [Petitioner’s] electronic submission,” as the PECOS website informs users. P. Ex. 5, at 1. Submitting a signed certification statement is an “enrollment requirement” and, in order “[t]o be enrolled, a provider or supplier must meet enrollment requirements specified [in the regulations].” 42 C.F.R. § 424.510(a), (d)(3). Petitioner did not submit a signed certification statement to WPS until April 16, 2013, which was received on April 17, 2013. CMS Ex. 3. Petitioner has provided no evidence of an earlier submission; therefore, the regulations require that the effective date be assigned based on this date since the enrollment application received on April 17, 2013, was ultimately approved. *See Joseph Ravid, M.D.*, DAB CR2539, at 3 (2012).

**3. WPS’s reference to an “effective date” means the date
Petitioner’s retrospective billing period begins.**

Under the regulations set forth below, CMS may permit limited retrospective billing if a physician meets all program requirements.

Physicians, nonphysician practitioners and physician and nonphysician practitioner organizations may retrospectively bill for services when a physician or nonphysician practitioner or a physician or a nonphysician practitioner organization have met all program requirements, including State licensure requirements, and services were provided at the enrolled practice location for up to—

(1) 30 days prior to their effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries, or

(2) 90 days [in certain emergencies not applicable to this case.]

42 C.F.R. § 424.521(a).

In its initial determination, WPS erroneously characterized the beginning of the retrospective billing period to be the effective date. CMS Ex. 1, at 2. This conclusion is based on reading WPS's initial and reconsidered determinations consistently with the regulation quoted above. *See Jorge M. Ballesteros*, DAB CR2067, at 2 (2010) ("CMS apparently sets enrollment effective dates 30 days prior to the date of application, which is what the Medicare contractor did here."). Therefore, I interpret WPS's determination to mean that the "effective date" is the beginning of the retrospective billing period. *Sadiq*, DAB CR2401, at 5-6.

Accordingly, in the present matter, the earliest date for retrospective billing privileges that WPS could grant Petitioner is 30 days prior to April 17, 2013, or March 18, 2013. WPS sent this as the effective date for billing. Therefore, I conclude that WPS granted Petitioner retrospective billing privileges consistent with the requirements in 42 C.F.R. § 424.521.

4. I cannot grant equitable relief to Petitioner.

Petitioner seeks relief in this matter because Dr. Lumpkin used his personal savings to establish Petitioner and Dr. Lumpkin provided services to an underserved area expecting to receive reimbursement from Medicare once Petitioner was enrolled. However, I simply have no authority to grant equitable relief and must apply the regulations as written, despite the part that PECOS and SRG may have played in causing this situation. *See US Ultrasound*, DAB No. 2302, at 8 (2010); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009).

V. Conclusion

For the reasons explained above, I affirm WPS's determination that Petitioner's effective date for Medicare billing privileges is April 17, 2013, and that its retrospective billing date is March 18, 2013.

/s/
Scott Anderson
Administrative Law Judge