Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Susanna West, CRNA,
(NPI: 17503687718),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-399

Decision No. CR2170

Date: June 30, 2010

DECISION

I deny the motion of the Centers for Medicare and Medicaid Services (CMS) to dismiss the hearing request of Petitioner, Susanna West. I also deny CMS's motion for summary judgment. I resolve the appeal based on the written record at the request of Petitioner. Based on the record before me, I conclude that the effective date of Petitioner's enrollment remains August 25, 2009. Thus, pursuant to 42 C.F.R. § 424.521(a), Petitioner may retrospectively bill for services rendered as of July 27, 2009.

I. Background

On January 12, 2010, Petitioner filed a hearing request (HR) accompanied by several documents. I have marked the accompanying attachments as Petitioner's Exhibits 1-5 for reference in this decision.

Petitioner challenges the effective date of her enrollment as a certified registered nurse anesthetist (CRNA) in the Medicare program that TrailBlazer Health Enterprises, LLC (TrailBlazer), a Medicare contractor, assigned. By letter dated September 8, 2009, TrailBlazer notified Petitioner that her Medicare enrollment application 855R was

approved, effective July 27, 2009.[1] CMS Exhibit (Ex.) 2. Petitioner filed a request for reconsideration by letter, stating that an earlier enrollment application first submitted in May of 2009 was "misplaced according to Medicare customer service" and requesting the effective date originally sought in the lost application, which was April 6, 2009. P. Ex. 1, at 3. This reconsideration request was stamped as received by TrailBlazer on October 23, 2009.

No reconsideration decision was issued based on the October reconsideration request. Petitioner asserts that a follow-up call a "couple of weeks later" to TrailBlazer resulted in the information that the reconsideration request was returned, because the request itself was not on letterhead (although a cover letter was on Petitioner's letterhead). HR at 2. Petitioner further asserts that the returned request was not actually received from TrailBlazer until January 14, 2010. *Id.*, P. Ex. 1, at 1-2, 8. Meanwhile, Petitioner sent a second request for reconsideration, on letterhead, which was stamped as received by TrailBlazer on December 22, 2009. P. Ex. 3. TrailBlazer then denied reconsideration on the ground that it was untimely, since it was more than 60 days after the action appealed. This appeal followed.[2]

This case was assigned to Administrative Law Judge (ALJ) Richard J. Smith for hearing and decision on February 26, 2010, and an Acknowledgement and Initial Docketing Order (Order) was issued at his direction. On or about April 5, 2010, CMS filed a motion to dismiss Petitioner's request for hearing, or, in the alternative, a motion for summary disposition, with CMS Exhibits 1 and 2. This case was transferred to me for hearing and decision on or about April 7, 2010, pursuant to 42 C.F.R. § 498.44. Petitioner filed a letter of rebuttal on May 5, 2010, and requested that I decide the case based upon the written record (P. Rebuttal). Neither party objected to any exhibits, so I admit both parties' exhibits as evidence.

II. Issues, Findings of Fact, Conclusions of Law

A. Issues

The issues in this case are:

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[1] In fact, Petitioner's enrollment application was received on August 25, 2009, which is therefore the actual effective date. Pursuant to 42 C.F.R. § 424.520(d), the date that TrailBlazer identified as the "effective" date (July 27, 2009) is actually the date from which Petitioner may retroactively bill for services.

[2] On appeal, CMS did not pursue the question of whether the reconsideration was timely sought, relying instead on its position that "Petitioner has no right to appeal the effective date of enrollment or, in the alternative, there is insufficient evidence to warrant a change of the effective date." CMS Motion at 2-3 n.2.

1. Whether I should dismiss Petitioner's hearing request on the ground that she has no right to appeal;

2. Whether CMS is entitled to summary judgment; and

3. Whether CMS's contractor and CMS properly determined Petitioner's effective date of enrollment to be August 25, 2009.

B. Findings of Fact and Conclusions of Law

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

1. The effective date of a Medicare provider agreement or supplier approval is an appealable initial determination; thus, Petitioner has a right to a hearing.

a. Standard of review

Pursuant to 42 C.F.R. § 498.70(b), I may dismiss a hearing request in the circumstance where a party requesting a hearing "does not otherwise have a right to a hearing."

b. Analysis

CMS argues:

> CMS' decision with respect to enrollment may be appealed only in two situations: where a prospective provider or supplier is denied enrollment in the Medicare program, or where a provider's or supplier's Medicare enrollment has been revoked.

CMS Br. at 5.

Specifically, CMS argues that part 424, subpart P, grants appeal rights only from denials and revocations of enrollment. 42 C.F.R. § 424.545(a). Since an effective date appeal arises after an approval, rather than a denial or revocation, CMS reasons that the regulations do not permit appeals of effective date determinations. CMS Br. at 7-9. CMS thus argues that Petitioner does not have a right to a hearing to appeal the effective date of her enrollment, and this request for review must be dismissed. *Id.* at 9.

In several prior decisions, I have explained why I do not agree with CMS. *See Michael Majette, D.C.*, DAB CR 2142 (2010); *see also Eugene Rubach, M.D.,* DAB CR2125

(2010); *Mobile Vision, Inc.*, DAB CR2124 (2010). I adopt the reasoning explained in my prior decisions, which I summarize briefly here.

The wording of section 498.3(b)(15) appears straightforward in providing that the "effective date of a Medicare provider agreement or supplier approval" is an appealable initial determination and includes no qualifying or limiting language. None of the administrative actions identified in section 498.3 as *not* subject to appeal under Part 498 include the determination of an effective date for a provider or supplier to participate in Medicare.

While subpart P of part 424 unquestionably does grant appeal rights from denials and revocations, as CMS notes, it does so by reference to the provisions of subpart A of Part 498, stating that a prospective provider or supplier whose enrollment is denied or revoked "may appeal CMS' decision in accordance with part 498, subpart A of this chapter." 42 C.F.R. § 424.545(a). Subpart A of Part 498 includes section 498.3(b)(15), yet CMS did not exclude section 498.3(b)(15) or otherwise indicate that effective date determinations would not be proper subjects for these Medicare hearings. When CMS published subpart P of Part 424 in 2006 (71 Fed. Reg. 20,753, 20,776 (Apr. 21, 2006)), it was well-aware of the longstanding provision in section 498.3(b)(15), which it had described in 1997 as granting "appeal rights and procedures for entities that are dissatisfied with effective date determinations." 62 Fed. Reg. at 43,931-32 (Aug. 18, 1997). Yet, section 424.545(a) incorporated section 498.3 without limitation. Hence, the plain language of section 424.545(a) reinforces the plain language of section 498.3(b)(15).

Moreover, the history of section 498.3(b)(15) shows CMS's recognition that: (1) approving participation at a date later than that sought amounts to a denial of participation during the intervening time; (2) effective date appeals generally involve the same kind of compliance issues that arise from initial denials; and (3) the right to appeal an effective date determination, while not previously codified, had already been confirmed by court decisions. 62 Fed. Reg. at 43,933-34 (final rule); 57 Fed. Reg. 46,362, 46,363 (Oct. 8, 1992) (proposed rule). While criteria for determining effective dates adopted at the same time as section 498.3(b)(15) applied only to providers and suppliers subject to certification or accreditation, the rulemaking addressing section 498.3(b)(15) contains no parallel language limiting appeals of effective date determinations to only providers and suppliers that are subject to survey and certification or accreditation. 62 Fed. Reg. at 43,934; 57 Fed. Reg. at 46,363. The rulemakings do not indicate any intent to restrict the scope of appeals by others who might later be granted the right to Medicare hearings.

CMS contends that the reconsideration decision was "misleading" in suggesting that Petitioner could appeal the adverse decision to an ALJ. CMS Motion at 8. CMS states that neither the contractor nor CMS "can confer a right to a hearing on a provider where the provider has no right to a hearing under the applicable regulations," citing two earlier

ALJ decisions. *Id*. I need not decide whether or under what circumstances CMS may provide a hearing when not compelled to do so by regulation, because, as I have concluded, here the regulations do provide appeal rights.

c. Conclusion

Based on the foregoing, I deny CMS's motion to dismiss.

I note, however, that a right to challenge the effective date is not a license to seek an effective date other than that prescribed by law. I turn next, therefore, to what the applicable law provides as to the proper effective date in Petitioner's circumstances.

2. Summary judgment is not appropriate here, because CMS failed to show that no dispute of material fact exists.

a. Applicable standard

CMS's motion makes clear that the summary disposition sought is in the nature of summary judgment. CMS Motion at 6-7. The Departmental Appeals Board (Board) stated the standard for summary judgment as follows:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . 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 – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame*, DAB No. 2291, at 4-5 (2009).

b. Analysis

Petitioner asserts that an enrollment application was mailed on May 12, 2009 to TrailBlazer, the Medicare contractor. HR at 1-2. Petitioner claims that "weeks later, a call was placed to Trailblazer . . . as follow up on the progress of the application. The Trailblazer . . . representative relayed to us that there was not an application on file for CRNA Susanna West…we were then advised to give it a few more weeks in order for it to be scanned and assigned a tracking number." *Id.* at 1. Petitioner then states:

> some weeks later, a call was placed to Trailblazer . . . and we were told again that there was not an application on file for CRNA Susanna West. When Trailblazer was asked to look for the application, the representative stated that without certified or UPS (etc) tracking number, they would not be able to locate the application. The advice from Trailblazer was to submit a second CMS 855R.

Id. According to Petitioner, a second form 855R was submitted to Trailblazer "with a cover letter attached explaining that we had already submitted an 855R in May of 2009 and we would like the effective date requested on the original 855R application honored." *Id*. Petitioner also states that "we sent the applications via UPS Overnight this time around." *Id.* Petitioner asserts that "within 14 days from the second submittal, we received a letter from Trailblazer stating CRNA West's enrollment had been completed…but to our disappointment, the effective date given was 07/27/2009 instead of 04/06/2009, as requested." *Id*.

CMS does not dispute that the contractor's receipt of an earlier approvable application, which was lost without processing, would be a material fact relevant to the correct effective date; however, CMS argues that Petitioner presented "no substantial credible evidence that it submitted" an earlier application. CMS Motion at 9. Specifically, CMS notes that Petitioner did not submit a copy of the May application, a confirmation or tracking number to prove mailing, an affidavit from the person responsible for mailing the application, or any evidence of the calls allegedly made to TrailBlazer to inquire about the status of that application. *Id.* at 9-10.

Petitioner insists that it did submit the May application and that TrailBlazer simply refused to look for the evidence that would have shown its receipt. P. Rebuttal. Petitioner also suggests that TrailBlazer initially denied having received the initial reconsideration request, until Petitioner provided the information that UPS documented delivery on 8:42 AM on October 23, 2009 to a specific individual. P. Ex. 3, at 1. Then, Petitioner reports that TrailBlazer indicated that an acknowledgement should have been sent, but none was received. *Id*. Petitioner points to these events as evidence of TrailBlazer's repeated "misplacement of information." *Id.* The only response to that

reconsideration request appears to be a rejection, dated October 29, 2009, but not received until after the HR was made. P. Ex. 1.

CMS concludes that Petitioner had the burden of proving that it submitted an earlier application and that Petitioner has failed to carry that burden on this record.

On summary judgment, my role is not to weigh conflicting evidence and determine where the preponderance of the evidence lies. My role, instead, is to consider whether any material fact is in genuine dispute. Such a dispute exists where, viewing the evidence in the light most favorable to the non-movant and drawing all reasonable inferences from that evidence in that party's favor, I am not compelled by law to find that the movant prevails.

Here, Petitioner essentially asks that I draw several favorable inferences from the (admittedly skimpy) evidence in the record.[3] Petitioner's claim, if believed, is that an application was mailed in May and that its receipt by TrailBlazer should be inferred from: (1) TrailBlazer's refusal to even attempt to locate or track whether it was received; and (2) TrailBlazer's track record of inefficiency in keeping track of materials, which it can be proven to have received. I would also have to infer that, since the resubmitted application was approved without difficulty, the May application would also be processed to approval, but for Trailblazer's misplacing it through no fault of Petitioner.

I find Petitioner's case weak, but I do not find the inferences, especially those unflattering to TrailBlazer, entirely unreasonable based on this record. I therefore decline to resolve the matter on summary disposition.

c. Conclusion

I therefore deny CMS's motion for summary disposition.

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[3] The Order in this case cites Federal Rule of Civil Procedure 56 in notifying the parties that, in opposing a summary judgment motion, the nonmovant should show material facts in dispute and not rely on "mere allegations or denials." Order at 2. The Order did not require a report of readiness, including identifying any need for testimonial evidence, to be filed until after any dispositive motion was resolved. *Id.* at 3. Given that the Petitioner proceeded through a non-attorney representative, I treat the factual assertions in the HR and Rebuttal with more leeway for purposes of summary judgment than I might otherwise given that they are signed but unsworn.

3. *Based on the written record, I conclude that CMS and contractor properly determined the effective date of Petitioner's enrollment.*

a. Applicable regulations

The determination of the effective date of Medicare billing privileges is governed by 42 C.F.R. §§ 424.520 and 424.521. Section 424.520(d) provides that the effective date for billing privileges for physician, 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." (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. 69,769 (Nov. 19, 2008) (emphasis added). Certain suppliers, including nonphysician practitioners such as Petitioner, may be permitted to bill retrospectively for certain services provided before approval, if they have met all program requirements. Current regulations limit retrospective billing to 30 days prior to the effective date, "if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries," or 90 days in certain disaster situations. 42 C.F.R. § 424.521(a).

b. Analysis

It is undisputed that TrailBlazer received an enrollment application from Petitioner on August 25, 2009. CMS Ex. 1, at 1. Petitioner was given an effective date of enrollment in the Medicare program of August 25, 2009, the date on which TrailBlazer received Petitioner's enrollment forms that were processed to approval. CMS Ex. 2. This evidence is sufficient to set out a prima facie case that the effective date is proper under the applicable regulations.

In resolving the appeal on the written record, I may properly consider whether the evidence that Petitioner presented in requesting an earlier effective date persuasively rebuts this prima facie case. I find that it does not.

As noted above, Petitioner claims an initial application was sent by regular mail service on May 12, 2009. HR at 1. Petitioner further argues:

> Trailblazer . . . has no record of receiving the application and would not look for the application even after repeated calls requesting that they look for the application. We would have immediately sent a new application to Trailblazer if

> the representative had not advised us to wait a few more weeks and call back to see if the application had been screened and given a tracking number.

P. Rebuttal.

In accordance with the above regulations, for me to disturb the effective date determination, Petitioner would at a minimum have to prove that TrailBlazer received an enrollment application prior to August 25, 2009, that was approvable as submitted.[4] Petitioner has not proffered further testimonial evidence beyond the bare assertions in the HR and rebuttal to demonstrate that an application was submitted in May 2009. For example, Petitioner offers no explanation of how it determined that the application was mailed on May 12, specifically. As CMS pointed out, the record does not contain a copy of the first application, or any record of its mailing. Certainly, Petitioner could have sent so important a document by certified mail or other trackable system, or at least could have maintained an internal record of the mailing. Petitioner alleges that follow-up calls were made to TrailBlazer, but, as CMS points out, Petitioner offers no evidence of these calls, such as contemporary notes, the names of representatives, or call reference numbers, even though Petitioner did provide a call reference number for its follow-up calls on the status of its reconsideration request. CMS Motion at 10 n.10. These shortcomings properly detract from the weight of the assertions that Petitioner made.

While the inferences I discussed above favorable to Petitioner were not outside the bounds of reason in the context of summary judgment based on viewing the evidence entirely in Petitioner's favor, I do not find them to be the most reasonable or likely inferences that the evidence supported in the whole record before me. While I find it likely that Petitioner did mail an application prior to August 25, 2009, in light of its contemporary representation to that effect in the second application, I do not find enough evidence to conclude that TrailBlazer actually received it. Even if I accept that TrailBlazer's systems for tracking receipt of mail are unreliable (for which Petitioner has provided some support, and CMS has offered no contrary evidence), I do not find that negative conclusion adequate to support an affirmative finding that this particular item of mail was received but misplaced, rather than, for example, being lost in the regular mail. Furthermore, absent any copy of the May application, or testimony about its contents, I am not willing to simply assume that it was identical to the August application and would therefore have been processed to approval in the same way.

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[4] CMS correctly notes that, even if Petitioner substantiated that Trailblazer received its May application (presumably some time after the date it was allegedly submitted on May 12), that could not support the effective date of April 6, 2009 Petitioner requests. CMS Motion, at 8 n.9. As I conclude above, Petitioner has not proven an approvable application was received at any time prior to August 25, 2009.

Without proof of an earlier date of receipt of an approvable application, I must conclude that the effective date determination is correct pursuant to 42 C.F.R. § 424.520(d). I therefore sustain CMS's determination as to the effective date of Petitioners' Medicare enrollment.

Two other points are worthy of mention. The first is that Petitioner comments that a new application would have been sent to the contractor immediately upon learning that the contractor had no record of receiving the first, "if the representative had not advised us to wait a few more weeks and call back to see if the application had been screened and given a tracking number." P. Rebuttal. Petitioner does not articulate any intended legal effect of this comment, but, to the extent the intent is to argue that the government should be required to pay claims from an earlier date because the government's contractor gave advice that turned out badly for Petitioner, the claim amounts to equitable estoppel. It is well-established by federal case law, and in Board precedent, that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct; and (3) I am not authorized to order payment contrary to law based on equitable grounds. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009).

The second point is that Petitioner's unfortunate situation is partly a result of unlucky timing. When Petitioner submitted the second application in August 2009, the cover letter expressed awareness of "new CMS guidelines" regarding assigning effective dates when the application is received. For many years, the question as to the proper effective date was unlikely to arise, because physicians and non-physician practitioners were permitted to bill for services provided up to 27 months retroactively. *See* 73 Fed. Reg. at 69,766. Contractors were likely, therefore, not to place great weight on the date on which an application was initially received but rather to focus on when services were first provided. Presumably, that explains why Petitioner submitted bills on appeal showing when services were provided even though the applicable rule quoted above sets the effective date based on the **later** of the date of receipt or the date services are first provided at a new location. *See* P. Ex. 5.

CMS became concerned that Medicare not pay for items or services when it could not be certain that the supplier met Medicare eligibility standards at the time those items or services were provided. *See* 73 Fed. Reg. at 69,766. To avoid this problem, CMS considered requiring that billing privileges begin only on the date when the contractor approved the supplier as eligible to receive reimbursement from Medicare, and no retroactive billing be permitted. *Id.* Commenters pointed out that this policy would penalize suppliers who demonstrated their eligibility in their enrollment applications but who were not approved for some time thereafter as a result of processing time by their

contractors. *Id.* at 69,767. CMS addressed the public concern about contractor processing timeliness by adopting the approach of setting the effective date for approval of eligibility to the date of filing of the enrollment application that was ultimately processed to approval (or the date that the applicant is open for business at the new location, if later). *Id.* For those situations where a supplier can not file an application prior to providing some services, CMS explained that it was - -

> finalizing a provision that allows physicians, NPPs (including CRNAs), and physician or NPP organizations to retrospectively bill for services up to 30 days **prior to their effective date of billing** when the physician or nonphysician organization has met all program requirements, including State licensure requirements, where services were provided at the enrolled practice location prior to the date of filing and circumstances, such as, when a physician is called to work in a hospital emergency department which precluded enrollment in advance of providing services to Medicare beneficiaries in § 424.521(a)(1).

Id. at 69,678 (emphasis added). A careful reading of the regulations and preamble discussions makes clear that the grant of a retroactive billing period of up to 30 days does not constitute a change in the effective date of the supplier's approval of eligibility to participate in Medicare and is based on a showing of circumstances precluding timely enrollment, not a determination of an earlier date of eligibility.

Despite the clarity of this rule, confusion has been introduced by a muddling of the effective date for which a supplier is approved as eligible to bill Medicare, governed by 42 C.F.R. § 424.520(d), with the earliest date for which an approved supplier may be permitted to bill retroactively for services provided prior to the effective date, if the contractor finds that certain prerequisites are met, governed by 42 C.F.R. § 424.521(a). The contractor in this matter contributed to this confusion by conflating the two date determinations and setting out as the "effective dates" the earliest date for which it would permit Petitioner to bill retroactively for services provided. CMS Ex. 2, at 1 (letter granting Petitioner's approval to participate in the Medicare program).

Petitioner does not identify any authority for a right to appeal the grant of, or length of, a retroactive billing period. The billing period under section 424.521(a) is retroactive **from the effective date** of approval. It follows that section 498.3(b)(15) does not provide for challenges to the period for retroactive billing beyond an appeal that the effective date of approval itself was wrongly determined. Furthermore, the regulation at section 424.521(a) binds me. I can neither alter nor deviate from its explicit limitation on retroactive billing to the 30 days already granted to Petitioners. Thus, I have no authority to extend the retroactive billing period for Petitioners earlier than July 27, 2009.

d. Conclusion

For the reasons explained above, Petitioner's request for an earlier effective date or for earlier billing privileges must be denied.

/s/

Leslie A. Sussan
Board Member