

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Tri Pham, M.D., Gail Frances, N.P., and Mandana Shafai, M.D.,

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-11-760

Decision No. CR2470

Date: December 6, 2011

**DECISION**

Tri Pham, M.D., Gail Frances, N.P., and Mandana Shafai, M.D., who are providers affiliated with Metro Medical Centers, Inc. (Metro), requested a hearing to challenge the effective dates assigned to their enrollment in Medicare. For the reasons explained below, I grant summary disposition in favor of the Centers for Medicare and Medicaid Services (CMS) upholding the assigned effective dates.

**I. Background**

On August 29, 2011, Petitioners filed a hearing request and challenged the effective dates of their enrollment in the Medicare program. Petitioners argue that they are entitled to obtain reimbursement for services rendered to Medicare patients prior to the filing of their Medicare applications, *i.e.* covering the period late 2009 through 2010. This case was assigned to me for a hearing and a decision.

CMS submitted a motion for summary disposition and a brief in support of its motion, along with three exhibits identified as CMS Exs. 1-3. Petitioners filed a response, to which they attached copies of CMS Exs. 1-3. In the absence of objection, I admit CMS Exs. 1-3 into the record.

## II. Issue, Findings of Fact, and Conclusions of Law

### A. Issue

The issue in this case is whether:

CMS's contractor and CMS properly determined Petitioners' effective dates of Medicare enrollment.

### B. Findings of Fact and Conclusion of Law

#### 1. *Summary judgment is appropriate in this case as a matter of law.*

CMS argues that it is entitled to summary disposition (*i.e.* summary judgment) because the material facts in this case are undisputed. CMS Brief at 2. The Departmental Appeals Board (Board) has explained that –

[s]ummary 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 Board has further explained that the role of an Administrative Law Judge (ALJ) in deciding a summary judgment motion differs from its 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, Inc.*, DAB No. 2291, at 5 (2009).

Having accepted all of Petitioners' factual assertions as true and having drawn all reasonable inferences in their favor, I find that Petitioners have not disputed any key material facts in this case. Accordingly, for the reasons set forth below, I agree with CMS that summary judgment is appropriate in this case.

***2. CMS correctly determined the effective dates of Petitioners' Medicare enrollment.***

The effective date of enrollment for physicians, nonphysician practitioners, and physician and nonphysician organizations is set as follows:

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). 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. 69,725, 69,769 (Nov. 19, 2008) (emphasis added).

In addition, CMS permits limited retrospective billing as follows:

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 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.]

42 C.F.R. § 424.521(a).

The undisputed facts of this case are as follows. Petitioners filed enrollment applications with Highmark Medicare Services (Highmark), a Medicare contractor operating on CMS's behalf. Highmark received Dr. Pham's CMS-855R application on September 13, 2010; Nurse Practitioner Frances' CMS-855R application on October 25, 2010, and Dr. Shafia's CMS-855R application on March 18, 2011. On February 17, 2011, Highmark approved the applications for Dr. Pham and Nurse Practitioner Frances with effective Medicare enrollment dates of August 14, 2010 and September 25, 2010, respectively. On March 22, 2011, Highmark approved Dr. Shafai's application with an effective date of February 16, 2011. CMS Ex. 3.

The record also reflects that Metro, the group practice with which Petitioners are affiliated, has been enrolled in Medicare with an effective date of September 1, 1989. On December 27, 2010, Metro submitted a CMS-855B enrollment application to Highmark to update its information in the Internet-based Provider Enrollment, Chain and Ownership System (PECOS).<sup>1</sup>

Petitioners were dissatisfied with the effective dates assigned by Highmark and requested reconsideration. On July 5, 2011, Highmark advised Petitioners that their effective dates, which allowed for a 30-day period of retrospective billing, were correctly determined in accordance with 42 C.F.R. §§ 424.520(d) and 424.521(a).

Petitioners do not assert that they filed their enrollment applications on an earlier date nor do they allege that approvable applications were received by the contractor at an earlier date. Instead, Petitioners argue that they were unaware of changes to Medicare regulations and contend that “[they] never received any notification from Highmark that [they] needed to submit a new application for the group and each provider affiliated with our group.” Request for hearing; CMS Ex. 2; see Petitioners’ Response. Petitioners contend that they are a small practice that has “had an ‘effective’ contractual date since 1989” and that each of their physicians had Medicare enrolled effective dates prior to their filings. Petitioners refer to the language of 42 C.F.R. § 424.520(d), claiming that the effective date of enrollment can be “either the date the physician files an enrollment application or the date an already enrolled physician begins practicing at a new location.” In Petitioners’ view, because their physicians were already enrolled in Medicare at other offices, their effective dates should have been the dates they began practicing at a new location. Petitioners’ Response. Petitioners also complain that it took Medicare five months to process Dr. Pham’s application because of a backlog in applications. Petitioners emphasize the notion of “contractual intent” and contend that they acted in good faith when they submitted their claims to Medicare in 2009 and 2010.

Petitioners’ arguments provide no ground for me to grant them earlier effective dates. I note that, in quoting the text of 42 C.F.R. § 424.520(d), Petitioners have omitted the key words “the later of” from the regulation and thus misinterpreted the meaning of 42 C.F.R. § 424.520(d). The full text of the regulation states that the effective date “is *the later of* the date of filing of a Medicare enrollment application that was subsequently approved by

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<sup>1</sup> PECOS is a “web-based enrollment process, which is based off of the information collected on the CMS-855 forms.” CMS Medicare Program Integrity Manual (MPIM), Ch. 10, § 1.2.

a Medicare contractor or the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.” Thus, in determining the effective date within the meaning of 42 C.F.R. § 424.520(d), the question one should ask is – in examining the date of filing of an approvable Medicare enrollment application and the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location, which is the later date? Here, Petitioners have not suggested that they began providing services at a new practice location after they filed their Medicare enrollment applications; hence, the date when each Petitioner filed his or her application must be the controlling date.

Petitioners’ other arguments, such as their complaints of what they see as poor communication from Highmark regarding Medicare enrollment changes and CMS’s alleged delay in processing applications, and what they describe as their own good intentions, are equitable in nature. Equitable claims cannot be a basis to grant Petitioners an earlier date for billing privileges. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“Neither the ALJ nor the Board is authorized to provided equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”); *Oklahoma Heart Hosp.*, DAB No. 2183 at 16 (2008). I have no jurisdiction to hear and decide Petitioner’s equitable arguments.

I find that Petitioners received the earliest possible effective dates of Medicare participation under the applicable regulations. Under 42 C.F.R. § 424.520(d), the effective enrollment date, for each Petitioner in this case, would be the date Highmark received an approvable application from the Petitioner. As stated above, Dr. Pham and Nurse Practitioner Frances submitted valid applications that were received by Highmark on September 13, 2010 and October 25, 2010, respectively, and Dr. Shafai submitted a valid application that was received on March 18, 2011. In assigning effective dates to each Petitioner, Highmark afforded each of them the 30-day period of retrospective billing to which each was entitled pursuant to 42 C.F.R. § 424.521(a)(1). Thus, for Dr. Pham, the date from which he may retrospectively bill for services rendered was properly set at August 14, 2010; for Nurse Practitioner Frances, her retrospective billing period was properly set to begin on September 25, 2010; and for Dr. Shafia, Highmark properly determined that his retroactive billing period was to start on February 16, 2011. I can neither alter nor deviate from the explicit limitations on retroactive billing contained in 42 C.F.R. § 424.521(a)(1). Thus, I have no authority to extend the retroactive billing periods for Petitioners.

### III. Conclusion

Because no genuine issue as to any material fact exists, and for the foregoing reasons, I grant CMS's motion for summary disposition and sustain its determination of Petitioners' effective dates of Medicare enrollment. I have no authority to order CMS to make payment for any claims that were provided by Petitioners outside of their 30-day retroactive billing periods provided by regulation.

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/s/

Richard J. Smith  
Administrative Law Judge