

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bryan James Krajicek, M.D.,
(NPI: 1689654303),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-918

Decision No. CR2672

Date: November 27, 2012

DECISION

Wisconsin Physicians Service (WPS), an administrative contractor acting on behalf of the Centers for Medicare and Medicaid Services (CMS), determined that Petitioner's effective date of enrollment in the Medicare program is February 21, 2012, with a retrospective billing period starting on January 22, 2012. Petitioner appealed. For the reasons stated below, I affirm WPS's determination.

I. Background and Procedural History

On January 20, 2012, WPS received a Medicare supplier enrollment application (Form CMS-855R) from Petitioner in which Petitioner sought to reassign his Medicare billing privileges to Pulmonary Medicine Specialists, P.C., with an effective date of January 1, 2012. CMS Ex. 3, at 4-11. Petitioner indicated a group provider transaction access number (PTAN) of 095774 in the application, which is the PTAN for Pulmonary Medicine Specialists' Nebraska location. CMS Exs. 1, at 4; 3, at 4-11. On March 2, 2012, WPS approved Petitioner's enrollment application and set January 1, 2012, as the "Effective Billing Date." Petitioner did not request reconsideration of this determination.

On February 21, 2012, WPS received a second Medicare supplier enrollment application (Form CMS-855R) from Petitioner in which Petitioner sought to reassign his Medicare billing privileges to Pulmonary Medicine Specialists with an effective date of January 1, 2012. CMS Ex. 2, at 4-14. This application is the subject of this appeal. Petitioner indicated a group PTAN of 52187 in the application, which is the PTAN for Pulmonary Medicine Specialists' Iowa location. CMS Exs. 1, at 4; 2, at 4, 11. On March 3, 2012, WPS approved Petitioner's enrollment application and set January 22, 2012, as the "Effective Billing Date" for Pulmonary Medicine Specialists' Iowa location. CMS Ex. 2, at 1-3.

On March 14, 2012, Petitioner filed a timely request for reconsideration of WPS's March 3, 2012 determination. Specifically, Petitioner requested an effective date of January 1, 2012, for Pulmonary Medicine Specialists' Iowa location so that this date would match the effective date approved for Pulmonary Medicine Specialists' Nebraska location. CMS Ex. 1, at 4. In a May 7, 2012 reconsidered determination, WPS decided that "the effective billing date will remain January 22, 2012." CMS Ex. 1, at 1-3.

On June 12, 2012, Petitioner timely filed a request for hearing (RFH) by an administrative law judge. In response to my June 29, 2012 Acknowledgment and Pre-hearing Order (Order), CMS filed a brief (CMS Br.) and three exhibits (CMS Exs. 1-3). Petitioner filed a response brief, but did not file any exhibits or object to CMS's exhibits. In the absence of an objection, I admit CMS Exs. 1 through 3 into the record.¹

The Order stated that the parties 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 -11; *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). Neither party provided a list of proposed witnesses or written direct testimony. Consequently, I will not hold an in-person hearing in this matter. See *Kate E. Paylo, D.O.*, DAB CR2232, at 9 (2010). The record is closed and I will decide this matter based on the written record. Order ¶ 12.

¹ Although Petitioner did not submit any marked exhibits, Petitioner attached to his request for hearing copies of his request for reconsideration and the reconsidered determination. These documents have been admitted into the record as part of CMS Ex. 1.

II. Discussion

A. Issue

Whether CMS had a legitimate basis for finding that February 21, 2012, is the effective date of Petitioner's Medicare enrollment and that Petitioner could retrospectively bill for services rendered to Medicare beneficiaries on or after January 22, 2012.

B. 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 Medicare 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).

1. WPS received Petitioner's completed and signed Form CMS-855R (Medicare enrollment application for reassignment of Medicare benefits) on February 21, 2012.

Petitioner and a representative of Pulmonary Medicine Specialists signed a Form CMS-855R on February 20, 2012, related to the reassignment of Medicare billing privileges at Pulmonary Medicine Specialists' Iowa location. CMS Ex. 2, 10-14. Petitioner submitted the Form CMS-855R to WPS by Federal Express on February 20, 2012. CMS Ex. 2, at 15. WPS received the Form CMS-855R on February 21, 2012. CMS Ex. 2, at 1, 4. Petitioner does not dispute this date of receipt. *See* CMS Ex. 1, at 4. Therefore, all the evidence of record supports the conclusion that on February 21, 2012, WPS received Petitioner's Form CMS-855R that Petitioner signed on February 20, 2012.

2. WPS properly concluded that Petitioner's reassignment of Medicare benefits was effective on February 21, 2012, with a retrospective billing period commencing on January 22, 2012.

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), 1395x(u); *see also* 42 C.F.R. § 498.2. A "supplier" furnishes services under Medicare and the term applies to physicians or other practitioners that are not included within the definition of the phrase "provider of services." 42 U.S.C. § 1395x(d)).

By letter dated March 3, 2012, WPS notified Petitioner that his Medicare supplier enrollment application, which had been received on February 21, 2012, was approved. CMS Ex. 2, at 1-3. WPS set January 22, 2012, as Petitioner's effective billing date. CMS Ex. 2, at 1. On reconsideration, WPS upheld the January 22, 2012 effective billing date, noting that this date was 30 days prior to the receipt of the application. CMS Ex. 1.

The relevant regulation concerning the effective date of Medicare enrollment 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, 5-7 (2011); *Rizwan Sadiq, M.D.*, DAB CR2401, at 5 (2011). Because WPS received a complete, approvable application from Petitioner on February 21, 2012, WPS properly considered this date the effective date for billing privileges.

Further, under the regulations set forth below, CMS may permit limited retrospective billing if a practitioner 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 the present matter, the earliest effective date for retrospective billing privileges that Petitioner could be granted was 30 days prior to February 21, 2012. Thirty days prior to February 21, 2012, is January 22, 2012. Thus, WPS correctly determined January 22, 2012, as Petitioner's retrospective billing date.

3. WPS's reference to an "Effective Billing Date" means the date on which Petitioner's retrospective billing period begins.

Petitioner, noting that January 22, 2012, was the effective date granted by WPS in its determinations, argues that Petitioner should be allowed under 42 C.F.R. § 424.21, to retroactively bill for services 30 days before January 22, 2012. P. Br. at 4. This argument fails when one considers WPS's determinations in context.

In both of its determinations in this case, WPS erroneously characterized the beginning of the retrospective billing period to be the effective date. However, the initial determination expressly states that "[t]his effective date is based on 30 days prior to the filing date" and the reconsidered determination quotes from 42 C.F.R. § 424.521(a). CMS Exs. 1, at 2; 2, at 1. The regulations, as explained above, do not authorize WPS to grant more than a 30-day retrospective billing period (except in circumstances not relevant to this case), and reviewing WPS's determinations in context, they are meant to be read consistently with the regulations. *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 determinations to mean that the "Effective Billing Date" is the beginning of the retrospective billing period. *Sadiq*, DAB CR2401, at 5-6.

4. Equitable estoppel cannot be applied against the CMS.

In his brief, Petitioner argues that he is entitled to an earlier effective date of January 1, 2012, because WPS representatives gave him incorrect advice as to the number of CMS-855R forms that he needed to complete and file. P. Br. at 3. According to Petitioner, he was told one application could be submitted for both of Pulmonary Medicine Specialists' locations in Nebraska and Iowa, and then discovered this was not the case. RFH at 1; P. Br. at 2. Petitioner argues that had it not been for the inaccurate information he received from WPS staff, he would have submitted two applications at the same time and they would have been processed together, resulting in January 1, 2012, as the date on which Petitioner could bill from either the Nebraska or Iowa locations. P. Br. at 3. Petitioner's argument, in essence, seeks that I equitably estop CMS.

Because Petitioner did not allege any affirmative misconduct by WPS personnel, Petitioner's arguments amount to a claim of equitable estoppel for which I am unable to grant any relief. It is well-established 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, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. It is well settled that those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law. *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); *U.S. Ultrasound*, DAB No. 2303, at 8 (2010). Therefore, Petitioner's equitable estoppel argument must be rejected.

5. The only issue in this case is the effective date for Petitioner's reassignment of Medicare benefits and I do not have jurisdiction to decide whether Petitioner or Pulmonary Medicine Specialists are entitled to bill Medicare based on previously approved enrollment applications.

Petitioner asserts that the application in this matter is only one of "reassignment" of benefits, thus implying that there already was an existing benefit to reassign. P. Br. at 3-4. Petitioner argues that both he and Pulmonary Medicine Specialists were previously enrolled in Medicare and that WPS's established effective date "is arbitrary and denies both parties the right to bill for services furnished to Medicare beneficiaries." P. Br. at 4.

My jurisdiction in this matter is based on WPS's unfavorable May 7, 2012 reconsidered determination. 42 C.F.R. § 498.5(1); *Better Health Ambulance*, DAB No. 2475, at 4 (2012). The sole substantive issue before me is whether WPS and CMS properly determined Petitioner's effective date of enrollment (i.e., reassignment of benefits) based on Petitioner's February 21, 2012 application. Whether Petitioner or Pulmonary Medicine Specialists has any other means to bill Medicare for the services Petitioner provided prior to January 22, 2012, from Pulmonary Medicine Specialists' Iowa location is not an issue I have the authority to decide.

III. Conclusion

For the reasons explained above, I affirm CMS's determination that Petitioner's effective date of enrollment is February 21, 2012, with a retrospective billing period starting on January 22, 2012.

/s/
Scott Anderson
Administrative Law Judge