**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Beth A. Edwards, P.A.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-860

Decision No. CR3339

Date: August 20, 2014

# DECISION

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, National Government Services (NGS), determined that the effective date of enrollment for Beth A. Edwards, P.A. (Petitioner) as a Medicare supplier was June 24, 2013, with a retrospective billing period starting on May 25, 2013. Petitioner disputed this determination and requested a hearing before an administrative law judge. For the reasons stated below, I reverse NGS's determination and set April 1, 2013, as Petitioner's date of enrollment and effective date of Medicare billing privileges.

## I. Background and Procedural History

On March 19, 2013, NGS received an application (Form CMS-855I) from Petitioner to enroll in the Medicare program as a physician assistant. CMS Exhibit (Ex.) 3. Petitioner's application was the version approved in February 2008. CMS Ex. 3, at 2-11. Petitioner indicated on the enrollment application that her employment would begin April 1, 2013. CMS Ex. 3, at 1, 7.

In a June 19, 2013 letter, NGS confirmed receipt of Petitioner's enrollment application, but stated that her application would be rejected if, within 30 days from the postmark on the letter, she failed to complete and submit the July 2011 version of the Form CMS-855I. CMS Ex. 4. On June 24, 2013, NGS received a completed July 2011 version of the Form CMS-855I from Petitioner. CMS Ex. 5. In a July 19, 2013 letter, NGS informed Petitioner that it was closing and returning Petitioner's enrollment application that NGS received on March 19, 2013, because NGS received Petitioner's second enrollment application filed on June 24, 2013. CMS Ex. 6.

On October 1, 2013, NGS issued an initial determination in which it established May 25, 2013, as the effective date for billing privileges.[1] CMS Ex. 7. On November 1, 2013, Petitioner requested reconsideration of the effective date for billing privileges. CMS Ex. 8. In the request, Petitioner argued that NGS should not have considered Petitioner's second application as a new enrollment application because Petitioner timely submitted the correct version of the enrollment application in response to NGS's June 19, 2013 letter. CMS Ex. 8, at 2. Petitioner therefore concluded that her effective date for billing privileges should be April 1, 2013. CMS Ex. 8, at 2. NGS issued an unfavorable reconsidered determination on March 10, 2014, in which the entire substantive discussion of Petitioner's case was: "Physician Assistants follow a 30 day [sic] effective date from the day application was received. Application was received on 06/24/2013 so thirty days prior would be 05/25/2013." CMS Ex. 9, at 1.

In response to the unfavorable reconsidered determination, Petitioner requested a hearing before an administrative law judge. In response to my April 4, 2014 Acknowledgment and Pre-hearing Order (Order), CMS filed a motion for summary judgment (CMS Br.), exhibit list,[2] and 11 exhibits (CMS Exs. 1-11). Petitioner filed a brief (P. Br.), exhibit list, and four exhibits (P. Exs. 1-4).

## II. Decision on the Written Record

Neither party objected to any of the proposed exhibits. *See* Order ¶ 7. Therefore, I admit CMS Exs. 1-11 and P. Exs. 1-4 into the record.

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[1] This effective date for Medicare billing privileges is in fact a retrospective billing period that may be set 30 days prior to the day that CMS received an enrollment application. *See* 42 C.F.R. § 424.521(a)(1); *Jorge M. Ballesteros*, *CNRA*, 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.").

[2] Petitioner objects to the CMS's exhibit list because the case caption on that document provided incorrect information. P. Br. at 3. Subsequently, CMS requested leave to submit a corrected exhibit list. I grant CMS's unopposed request.

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).[3] Neither party offered any witnesses. Consequently, I will not hold an in-person hearing in this matter and I will decide this matter based on the written record.[4] Order ¶ 11.

## III. Issues

Whether CMS had a legitimate basis for establishing June 24, 2013, as the effective date of Petitioner's Medicare billing privileges and, if not, what is the proper effective date for Petitioner's Medicare billing privileges.

## IV. Jurisdiction

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

## V. Findings of Fact, Conclusions of Law, and Analysis[5]

The Social Security Act authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers.[6] 42 U.S.C. §§ 1302, 1395cc(j). Under the Secretary's regulations, a provider or supplier seeking billing privileges under the Medicare program must "submit enrollment information on the applicable enrollment application. Once the provider or

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[3] Departmental Appeals Board decisions cited in this decision are accessible on the Department of Health and Human Services' website at: http://www.hhs.gov/dab/decisions/index.html.

[4] Because I am reversing CMS's determination in this case, I am implicitly denying CMS's motion for summary judgment.

[5] My findings of fact and conclusions of law are set forth in italics and bold font.

[6] Petitioner is considered a "supplier" for purposes of the Medicare program. *See* 42 C.F.R. § 498.2 (definition of *Supplier*); *see also* 42 C.F.R. §§ 400.202 (definition of *Supplier*); 410.74(c).

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 and may permit limited retrospective billing under 42 C.F.R. § 424.521.

1. ***Petitioner filed a completed Form CMS-855I (February 2008 version) to enroll as a supplier in the Medicare program, which NGS received on March 19, 2013. CMS Ex. 3.***

2. ***NGS informed Petitioner by letter that she filed an outdated version of the Form CMS-855I and warned Petitioner that if she did not submit a completed Form CMS-855I (July 2011 version) within 30 days of NGS's June 19, 2013 letter, NGS would reject Petitioner's application. CMS Ex. 4.***

3. ***Petitioner timely filed a completed Form CMS-855I (July 2011 version), which NGS received on June 24, 2013. CMS Ex. 5.***

4. ***NGS subsequently approved Petitioner's enrollment application (i.e., the Form CMS-855I (July 2011 version) and established an enrollment date of June 24, 2013, and a retrospective billing effective date of May 25, 2013. See CMS Exs. 7; 9.***

5. ***The proper effective date for Petitioner's enrollment as a supplier in the Medicare program and Medicare billing privileges is April 1, 2013.***

The relevant regulation that controls the effective date for 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).

At issue in this case is whether the date that Petitioner filed her first or second Form CMS-855I should control the effective date for Petitioner's Medicare billing privileges. Petitioner argues that NGS properly treated her mistaken filing of an outdated enrollment application as a potential reason to reject the application and thus correctly afforded Petitioner 30 days to file a current version of the CMS-855I. P. Br. at 2-3; CMS Ex. 4. CMS argues that NGS's action in "returning" Petitioner's outdated Form CMS-855I meant that it was as if Petitioner had never filed the first application; therefore, NGS properly set the effective date for billing privileges based on the date of receipt of the second Form CMS-855I. CMS Br. at 9-11; CMS Ex. 6.

The regulations provide that CMS may reject a provider or supplier's enrollment application if a provider or supplier fails to provide complete information on the enrollment application or complete documentation with the enrollment application within 30 days from the date the CMS contractor requests the missing information. 42 C.F.R. § 424.525(a)(1)-(2). CMS's instructions to its contractors clearly direct contractors to treat the filing of an outdated enrollment application under the rejection provision in order to give providers or suppliers 30 days to file the most recent version of the Form CMS-855.

> In accordance with 42 CFR § 424.525(a)(1) and (2), the contractor (including the National Supplier Clearinghouse) may reject the provider's application if the provider fails to furnish complete information on the enrollment application - including all necessary documentation - within 30 calendar days from the date the contractor requested the missing information or documentation. For purposes of this policy, this includes situations in which the provider submitted an application that falls into one of the following categories . . . .
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> . . . .
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> (2) The submitted paper application is an outdated version of the Form CMS-855.
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> . . . .
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> The applications described in (1) through (8) above shall be developed, rather than returned.
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> . . . .
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> The provider must furnish all missing and clarifying data requested by the contractor within the applicable timeframe.

> If the provider furnishes some, but not all, of the requested data, the contractor is not required to contact the provider again to request the remaining data. It can simply reject the application at the expiration of the aforementioned 30-day period. Consider the following examples:
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> . . . .
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> • The provider submits an outdated version of the Form CMS-855B. On July 1, the contractor requests that the provider resubmit its application using the current version of the Form CMS-855B. On July 15, the provider submits the correct version, but section 4B is blank. The contractor is not required to make a follow-up request regarding section 4B. It can reject the application on July 31.[7]

Medicare Program Integrity Manual (MPIM) § 15.8.2(A), (C).[8]

In addition to the plain language of the provision quoted above (which expressly prohibits contractors from returning an application on an outdated form) it should be noted that the procedure CMS relies on to substantiate its return of Petitioner's enrollment application does not appear in the regulations and is expressly limited to certain specified situations, none of which include the filing of an outdated application. MPIM § 15.8.1 (CMS Ex. 11).

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[7] This section of the MPIM only uses the word "provider" and does not use "supplier." However, this MPIM section has been applied to suppliers. *Bird's Song of North Carolina*, DAB CR3243 (2014); *Neurology Care Consultants, LLC*, ALJ Ruling 2014-29 (HHS CRD April 9, 2014); *Medical Services of Suffolk County PC*, DAB CR3149 (2014). Further, it is obvious that CMS's failure to include the word "supplier" is simply an oversight because, in the example when to reject an application quoted above, it refers to an outdated Form CMS-855B; a Form CMS-855B is filed by suppliers, and not providers, to enroll. MPIM § 15.1.2 (CMS Ex. 1 at 2). The Form CMS-855B can be found on CMS's website at: http://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/CMS-Forms-Items/CMS019476.html.

[8] The only version of this MPIM section available on CMS's website appears to have been issued on July 5, 2013 (http://www.cms.gov/Regulations-and-Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS019033.html?DLPage=1&DLSort=0&DLSortDir=ascending. However, a review of the transmittal for the July 5, 2013 changes shows that those changes did not affect MPIM § 15.8.2(A), (C). CMS Manual System, Transmittal 474 (July 5, 2013) (http://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/index.html?redirect=/Transmittals/01_overview.asp).

Because NGS properly processed Petitioner's application under the rejection procedures and gave Petitioner an opportunity to submit a current application, and NGS approved that application, NGS ought to have assigned an effective date for Medicare billing privileges that was consistent with the filing date of the original application. *See Bird's Song of North Carolina*, DAB CR3243, at 3 (2014); *Medical Services of Suffolk County, PC*, DAB CR3149, at 2-3 (2014). Although Petitioner's application was received on March 19, 2013, Medicare billing privileges should have been made effective April 1, 2013, because that is the first date Petitioner began furnishing services at her practice location (P. Br. at 4; CMS Exs. 3, at 1, 7; 5, at 1, 7; 8, at 2). 42 C.F.R. § 424.520(d).

## VI. Conclusion and Order

For the reasons stated above, I REVERSE CMS's determination regarding the effective date of Petitioner's billing privileges. Petitioner's date of enrollment as a supplier in the Medicare program and Petitioner's effective date for Medicare billing privileges is April 1, 2013.

/s/

Scott Anderson
Administrative Law Judge