Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Horatio Aldredge, M.D., et al.,
(PTANs: 8L26845, 8L26830, 8L26821, 8L26838),

Petitioners

v.

Centers for Medicare and Medicaid Services.

Docket Nos. C-10-980, C-10-981, C-10-984, C-10-985

Decision No. CR2351

Date: April 8, 2011

DECISION DISMISSING REQUESTS FOR HEARING

I dismiss Petitioners appeals pursuant to 42 C.F.R. § 498.70(b) because Petitioners do not have a right to a hearing on the deactivation of their Medicare billing privileges. So that Centers for Medicare and Medicaid Services (CMS) may properly address their deactivations, Petitioners may file a rebuttal under 42 C.F.R. § 424.545(b), in accordance with 42 C.F.R. § 405.374.

I. Background

Petitioners Horatio Aldredge, M.D., John Bertelson, M.D., Andrea Raymond, M.D., and Jason Reichenberg, M.D., (Petitioners) are neurologists who work in a group medical practice and are enrolled as suppliers in the Medicare program. On approximately December 19, 2009, the Medicare contractor deactivated Petitioners' Medicare billing privileges for not billing Medicare during a twelve-month period. CMS does not dispute that it did not provide Petitioners any notice of either the basis for deactivation or the dates on which the deactivations occurred until this appeal at the Administrative Law Judge (ALJ) level.

On March 5, 2010, Petitioners learned that their billing privileges were deactivated. Therefore, Petitioners submitted the CMS forms (CMS 855I and CMS 855R) for reactivation of their Medicare billing privileges on March 12, 2010. Petitioners requested the reactivation date be effective November 30, 2009. CMS processed the reactivation applications to approval and notified Petitioners that their Medicare billing privileges were reactivated, effective February 14, 2010.[1]

On September 9, 2010, Petitioners filed individual hearing requests challenging the deactivation of their Medicare billing privileges. Petitioners contend that they were erroneously deactivated, were not provided notice of the deactivations, and as a result are entitled to reactivation enrollment dates effective prior to the deactivations.

This case was initially assigned to Board Member Leslie A. Sussan pursuant to 42 C.F.R. § 498.44, which permits a Board Member to hear appeals under 42 C.F.R. Part 498. An Acknowledgment and Pre-hearing Order (Order) was sent to the parties on September 23, 2010. The Order noted that the cases would be automatically consolidated in ten days if no objection was filed. Neither party objected to consolidation, therefore, the cases were consolidated with the lead docket number C-10-980.[2] On October 25, 2010, this case was reassigned to me for hearing and decision.

Consistent with the Order, on October 25, 2010, CMS filed for summary judgment. With its brief (CMS Br.), CMS submitted eight exhibits (CMS Exs. 1-8). On November 23, 2010, Petitioners filed their objection to the CMS motion for summary judgment and related argument (P. Br.) accompanied by one proposed exhibit (P. Ex. 1).

On March 9, 2011, I conducted a telephone conference where I directed the parties to submit supplemental briefing addressing whether CMS provided Petitioners an opportunity to submit a rebuttal to their deactivations pursuant to federal regulations 42 C.F.R. § 424.545(b) and 42 C.F.R. § 405.374. CMS filed its supplemental briefing on March 16, 2011. Petitioners submitted its supplemental briefing on March 22, 2011

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[1] I note that in the reconsideration decisions, the contractor ignored Petitioners' deactivation challenges and focused entirely on effective date regulations. The contractor also incorrectly informed Petitioners that no right exists to appeal an effective date determination in Medicare enrollment. *See Victor Alvarez, M.D.*, DAB No. 2325 (2010).

[2] At Petitioner's request, on November 30, 2010, I dismissed the appeal of *Charles Brown, M.D.* (C-10-982). On March 10, 2011, I dissolved the previous consolidation in relation to Petitioner Smitha Murthy, M.D. only, whose case retained the original docket number, C-10-983. At Petitioner's request, I subsequently dismissed the case of *Smitha Murthy, M.D.*, (C-10-983), on March 29, 2011.

which was accompanied by three proposed exhibits (P. Supp. Ex. 1-3). In the absence of objection, I admit CMS Exs. 1-8, P. Ex. 1, and P. Supp. Exs. 1-3, to the record.[3]

II. Issue

The issue in this case is whether Petitioners have a right to ALJ review of the deactivation of their supplier Medicare billing numbers.

III. Findings of Fact, Conclusions of Law, and Supporting Discussion

My finding of fact and conclusion of law is set out below followed by supporting discussion.

Petitioners do not have a right to ALJ review of the deactivation of their supplier Medicare billing numbers.

Petitioners argue that they should be provided earlier effective dates of their reactivations because they were incorrectly deactivated and not provided notice of the deactivations. P. Br. at 1-2; P. Supp. Br. at 1-2. Petitioners assert that they were erroneously deactivated for non-billing and provide evidence of billing submitted within the twelve-month period described in CMS briefing. P. Br. at 1-2; P. Supp. Br. at 1-2; P. Supp. Exs. 1-3; CMS Br. 5-9.

CMS may deactivate a supplier's Medicare billing privileges if the supplier "does not submit any Medicare claims for 12 consecutive calendar months." 42 C.F.R. § 424.540(a)(1). "The 12 month period will begin the 1st day of the 1st month without a claims submission through the last day of the 12th month without a submitted claim." *Id*. Although this issue is not properly before me, I note CMS has not explained how CMS

[3] The CMS briefing in this matter outlined Petitioners deactivations as effective March 16, 2010 (Petitioners Aldredge and Bertelson), December 19, 2009 (Petitioner Raymond), and March 5, 2010 (Petitioner Reichenberg). During this pending litigation, Petitioners relied upon this CMS representation as the only documented deactivation dates and submitted argument and evidence in reliance thereof. However, on March 28, 2011, after briefing and supplemental briefing concluded, CMS filed what it termed a "Notice of Clerical Errors" in which CMS changes the dates of all Petitioners' presumed deactivations to December 19, 2009. CMS did not explain the reason for the change other than stating it does not believe that these "clerical errors are material to the issues of law involved." Petitioners objected to this CMS "Notice" explaining their reliance on the previous dates throughout their appeal. Although I am unable to address the substantive details of their deactivations, this filing further evidences some fairness concerns regarding Petitioners' deactivations.

was able to properly deactivate Petitioners' billing privileges during the middle of a month.

CMS moves for summary judgment arguing that the effective dates for reactivation were properly determined according to 42 C.F.R. § 424.520(d) (the date of filing of a Medicare enrollment application (or reactivation in this case) that was subsequently approved by the contractor). CMS Br. 9-10. CMS acknowledges that "[i]t is unclear as to whether Petitioners et. al are appealing their deactivations" and "[t]o the extent that they are, it is CMS' position that such matters are not properly before the ALJ as they are not initial determinations." CMS Br. at 5. CMS asserts that because deactivations are not appealable actions and Petitioners base their request for earlier effective dates on the fact that their deactivations occurred without notice, CMS is entitled to judgment as a matter of law. CMS Br. at 9-10.

Deactivation of a provider or supplier's Medicare billing privileges is distinct from revocation of Medicare enrollment and billing privileges. *Compare* 42 C.F.R. § 424.540 (conditions for deactivation) *with* 42 C.F.R. § 424.535 (conditions for revocation). Section 424.502 defines "deactivate" to mean that "the . . . supplier's billing privileges were stopped, but can be restored upon the submission of updated information."

A provider or supplier "deactivated for nonsubmission of a claim" is "required to recertify that the enrollment information currently on file with Medicare is correct and furnish any missing information as appropriate." 42 C.F.R. § 424.540(b)(2). Section 424.540(b)(2) further provides that for reactivation of billing privileges "[t]he provider or supplier must meet all current Medicare requirements in place at the time of reactivation, and be prepared to submit a valid Medicare claim."[4]

The effect of deactivation was specifically addressed by regulation:

[4] Effective January 1, 2009, CMS modified the Medicare Provider Integrity Manual (PIM) to state that, for purposes of 42 CFR §§ 424.520(d) and 424.521(a), a CMS-855 reactivation application is treated as an initial enrollment application. This means that a reactivated provider will have a new effective date (*i.e.*, the later of the date of filling or the date it first began furnishing services at a new practice location) and, per section 424.521(a), limited ability to bill retrospectively. *See* PIM Rev. 289, issued April 15, 2009, effective January 1, 2009; *Arkady B. Stern, M.D.*, DAB No. 2329, at 4 n.5 (2010). The PIM is issued by CMS to provide instructions to its contractors. Unlike the Medicare statute and regulations, however, the PIM does not have the force and effect of law and is not binding on me. *See Fady Fayad, M.D.*, DAB No. 2266, at 10 n.6. (2009) (*citing Massachusetts Executive Office of Health and Human Servs.*, DAB No. 2218, at 12 (2008)); *Foxwood Springs Living Ctr.*, DAB No. 2294, at 8-9 (2009).

> Deactivation of Medicare billing privileges is considered an action to protect the provider or supplier from misuse of its billing number and to protect the Medicare Trust Funds from unnecessary overpayments. The deactivation of Medicare billing privileges does not have any effect on a provider or supplier's participation agreement or any conditions of participation.

42 C.F.R. § 424.540(c). The regulation is consistent with congressional intent as contained in the preamble discussing deactivation. 71 *Fed. Reg.* 20,761, 20,769 (Apr. 21, 2006) (mirroring the regulatory language and stating that deactivation "is considered a temporary action"). The preamble further supports this intent in stating that "[o]nce notified, [CMS] would give all reactivations of Medicare billing numbers priority handling to ensure expedient payment of claims." *Id*.

Creating deactivation as a separate action from revocation, Congress did not afford deactivated parties the right to an ALJ hearing on deactivation. *See* 42 C.F.R. § 424.545(b). Instead, Congress provided an opportunity for the deactivated party to file a rebuttal. 42 C.F.R. § 424.545(b); *see* 42 C.F.R. § 405.374.

I agree with CMS that I have no authority to review the deactivations of Petitioners' billing privileges. As explained, the regulations provide only for the submission of a rebuttal to the contractor. The rebuttal process remains available Petitioners. *See* 42 C.F.R. § 405.374(b)(2) (stating CMS may for good cause extend the time within which a rebuttal may be submitted); *see also* 42 C.F.R. § 405.372(b)(2) (noting CMS ***must*** provide a deactivated supplier an opportunity to submit a rebuttal when notice is not required).

By statute and regulation, CMS has broad discretion with respect to provider/supplier enrollment, and its actions are subject to limited review. But underlying this grant of unreviewable authority is the expectation that the agency will not abuse its authority and will act competently. CMS should carefully review Petitioners' cases particularly considering that Petitioners have presented billing evidence suggesting that they may not have been properly deactivated within the one-year period that CMS originally claimed that the suppliers had been inactive. I also remind CMS in its handling of these cases that the purpose of deactivation for non-billing is to protect both the Medicare Trust Fund and the provider/supplier enrollees and is not a punitive measure.

Although I dismiss this case, it is my hope that the contractor will properly address Petitioners' concerns about an improper deactivation through the rebuttal process. If CMS does not properly address Petitioners deactivations through the regulatory process, Petitioners may file a request to vacate this dismissal within 60 days, pursuant 42

C.F.R. § 498.72. I will then consider the issue of whether CMS has, in effect, improperly revoked Petitioners' billing privileges as opposed to deactivating them.

/s/
Joseph Grow
Administrative Law Judge