Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Nicola Pike, D.P.M.,

Petitioner,

v.

Centers for Medicare and Medicaid Services

Docket No. C-11-79

Decision No. CR2363

Date: April 27, 2011

DECISION

I deny the motion of the Centers for Medicare and Medicaid Services (CMS) to dismiss the hearing request of Petitioner Nicola Pike, D.P.M. I decide this case based on summary judgment and find that the effective date of Petitioner's enrollment in the Medicare program is August 3, 2009. Thus, pursuant to 42 C.F.R. § 424.521(a), Petitioner may retrospectively bill for services rendered to Medicare beneficiaries as of July 4, 2009.

I. Background

This case arises from the October 21, 2010 reconsideration decision that affirmed the initial determination of the Medicare contractor, Wisconsin Physician Service Insurance Corporation (WPS), regarding Petitioner's enrollment date in the Medicare program as a supplier.[1] Petitioner is a podiatrist practicing in Sioux Center, Iowa, who was active in the Medicare program as an employee of a hospital-based practice from 2002 until 2008.

[1] Medicare defines "supplier" to mean "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services" under the Medicare statute. Social Security Act (Act) § 1861(d), 42 U.S.C. § 1395x(d).

In September of 2008, Petitioner advised WPS of her decision to open her own private practice. A WPS representative informed Petitioner that due to a change in her employment status she needed to submit a new provider enrollment application (also known as Form 855I). Hearing Request (HR) at 2; Petitioner's Brief (P. Br.) at 3.

Following the approval of one of Petitioner's subsequent enrollment applications, WPS determined that Petitioner was eligible for enrollment in the Medicare program as a supplier as of August 21, 2009 and could retrospectively submit claims for payment as of July 22, 2009. Dissatisfied with the determination, Petitioner requested a reconsideration decision seeking an earlier enrollment date. WPS responded with an unfavorable decision in January 2010 prompting Petitioner to seek review of the unfavorable determination before a hearing official. The appeal was received at the Civil Remedies Division, docketed as C-10-537, assigned to Administrative Law Judge Keith Sickendick, and subsequently reassigned to Board Member Leslie Sussan.[2]

Board Member Sussan held a hearing in August 2010 where Petitioner presented new evidence which consisted of an enrollment application with a signature date of June 22, 2009 and a date of receipt stamp of August 3, 2009. According to Petitioner, the application established that WPS received Petitioner's application on a date earlier than the August 21, 2009 date used to determine Petitioner's enrollment eligibility. Board Member Sussan issued an order remanding the decision to CMS for further review and to provide Petitioner with a new effective enrollment date determination based on the new evidence. P. Br. at 5-7; P. Exhibit (P. Ex.) 6.

CMS thereafter issued an unfavorable effective date determination, finding that WPS properly established Petitioner's Medicare enrollment effective date of August 21, 2009 with a corresponding retrospective billing date of July 22, 2009.[3] P. Ex. 7. Petitioner now challenges that effective date redetermination. Petitioner's October 28, 2010 hearing request was received at the Civil Remedies Division and assigned to me on November 15, 2010 for hearing and decision. My pre-hearing order allowed the parties to file their exchanges and arguments.

CMS has moved to dismiss, arguing that Medicare regulations do not allow a supplier whose Medicare enrollment has been granted to appeal the effective date of their billing privileges. In the alternative, CMS seeks summary judgment asserting that there are no material issues in dispute regarding its effective date determination. Petitioner filed a response opposing CMS's motions, accompanied by a cross-motion for summary

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[2] Pursuant to 42 C.F.R. § 498.44, a member of the Departmental Appeals Board may be designated a hearing official under 42 C.F.R. Part 498.

[3] For clarity, I use "effective date" to refer to the effective date of enrollment in Medicare and not the date on which retrospective billing begins.

judgment. With its motions, CMS submits six exhibits (CMS Exs. 1-6). With its response and motion, Petitioner submits seven exhibits (P. Exs. 1-7).

II. Issues

The issues in this case are:

1. Whether Petitioner may challenge the effective date of her approved Medicare enrollment and billing privileges; and if so,

2. Whether WPS and CMS correctly determined that effective date.

III. Analysis

My findings of fact and conclusions of law are set forth in italics and bold in the discussion caption of the decision.

1. Petitioner may challenge the effective date of her Medicare enrollment and billing privileges.

CMS claims that the regulations that govern a supplier's enrollment in Medicare, at 42 C.F.R. Part 424, do not allow for a hearing to challenge its effective date of enrollment. According to CMS, these regulations allow only a challenge to a denial of enrollment or a revocation of enrollment and not to a determination as to the effective date of enrollment. Therefore, CMS argues that I do not have jurisdiction to hear and decide Petitioner's appeal. CMS Br. at 11-16.

I find the effective date of a Medicare supplier approval is in fact an initial determination reviewable in this forum. Medicare regulations define an appealable "initial determination," to include "[t]he effective date of a Medicare provider agreement or supplier approval." 42 C.F.R. §§ 498.3(b)(15), 498.5(d). The regulatory language is unambiguous. The Board has similarly interpreted this regulation to allow a supplier the right to challenge the effective date of its enrollment. *Victor Alvarez, M.D.*, DAB 2325, at 15 (2010) (although there are no appeal rights for a rejected enrollment application, a provider or supplier may appeal an assigned effective date after CMS has made an effective date determination).

Accordingly, I find that I have the authority to review the effective date of Petitioner's enrollment application and decline to dismiss this case.

2. Summary judgment is appropriate in this case.

Both parties have moved for summary judgment. 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, Inc.*, DAB No. 2291, at 4-5 (2009).

The parties do dispute whether the enrollment application WPS received from Petitioner on August 3, 2009, and then returned to Petitioner, contained an original signature or a stamped or copied signature. According to CMS, the application contained a stamped or copied signature, and therefore WPS returned an invalid application to Petitioner. Petitioner argues that the application contained an original signature and therefore should not have been returned. But even if I infer that the application contained a stamped or copied signature, and this disputed fact is then resolved in CMS's favor, Petitioner still prevails as a matter of law as discussed in the next section of this decision. Therefore, although the parties argue this factual dispute, I do not find it material to the outcome in this case, and I find summary judgment is appropriate.

3. WPS should have based Petitioner's effective date of Medicare enrollment and billing privileges on the receipt date of her August 3, 2009 application.

The enrollment requirements for suppliers are outlined at 42 U.S.C. § 1395cc(j)(1)(A) and 42 C.F.R. Part 424. The determination of the effective date of Medicare enrollment is governed by 42 C.F.R. § 424.520, which provides, in part, that the effective date of enrollment for suppliers such as Petitioner 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 . . . first began furnishing services at a new practice location." 42 C.F.R. § 424.520(d) (emphasis added).[4] Therefore, the effective date of Medicare enrollment depends on the date the contractor first *received* an *approvable* application. This is consistent with the preamble to the final rule and the plain language of the regulation. 73 Fed. Reg. 69,769 (Nov. 19, 2008); 42 C.F.R. § 424.520(d) (emphasis added).

Petitioner claims to have submitted enrollment applications in December 2008, May 2009, and on June 22, 2009. P. Br. at 4-5. As for the December 2008 application, Petitioner claims that she downloaded the application form directly from the CMS website and submitted the complete application to WPS. Petitioner states that WPS returned the application because it was not the correct form. Petitioner has come forward with no evidence showing WPS received the December 2008 application and returned it to her. Petitioner states that she is unable to find a copy of the December 2008 application she submitted. HR at 2; P. Br. at 5. I cannot provide Petitioner with any relief related to the December 2008 application. Petitioner has provided no evidence of specific facts establishing the December 2008 receipt by WPS, and therefore I cannot consider that application in determining an earlier effective date of enrollment. Petitioner also claims to have submitted an application in May 2009. However, Petitioner has not provided any proof of receipt by WPS for its submission, and therefore I may not consider that application in determining an earlier enrollment date for Petitioner.

Petitioner, however, has presented evidence that she submitted a signed Medicare enrollment application that WPS received on August 3, 2009. P. Ex. 5; P. Ex. 4, at 2. This enrollment application, which Petitioner first proffered at the August 2010 hearing, is identified as P. Ex. 5 and shows three signature dates of June 22, 2009 along with Petitioner's signature. P. Ex. 5, at 1, 5, 23. CMS also presents a copy of this application as CMS Ex. 3, which shows a signature date of June 22, 2009 on two pages along with Petitioner's signature. CMS Ex. 3, at 2, 22.

CMS does not dispute that Petitioner submitted the June 22, 2009 enrollment application and that WPS received it on August 3, 2011. P. Ex. 5; CMS Ex. 3; CMS Ex. 4, at 1; CMS Ex. 6. CMS submits the declaration of Kelly Hartung, a Contract Coordination Manager at WPS, who explains WPS's procedures for processing enrollment applications. Ms. Hartung acknowledges that WPS received an application from Petitioner on August 3, 2009, but it was returned to Petitioner because of a "copied signature." CMS Ex. 6; CMS Ex. 4.

[4] A supplier may then also retrospectively bill for up to 30 days prior to the date of filing of the approved Medicare enrollment application. 42 C.F.R. § 424.521(a)(1).

Petitioner's office manager, Susan Sancenito, confirms the return of the June 22, 2009 non-processed application, and she states that she then submitted to WPS another application with the same information. P. Ex. 4, at 2. Ms. Hartung confirms that WPS received a subsequent application on August 21, 2009, which WPS accepted after it received corrections and updates from Petitioner. CMS Ex. 6, at 2. The October 21, 2010 unfavorable redetermination decision from Alisha Banks, Health Insurance Specialist, Division of Provider & Supplier Enrollment at CMS, also acknowledges WPS having received an application from Petitioner on August 3, 2009 and that WPS returned the application because the signature was determined to be stamped or copied. Ms. Banks further notes that the returned application was an "invalid application" and could not be used to determine Petitioner's effective date. P. Ex. 7, at 2.

A Medicare contractor, upon receipt of an application that has missing information or supporting documentation, will request the information or documentation from the supplier and allow the supplier at least 30 days to respond with the missing information in order to cure any deficiencies in the application. 42 C.F.R. § 424.525. The Board addressed this rule in a recent decision, *Tri-Valley Family Medicine, Inc.*, DAB No. 2358 (2010). The petitioner in that case was a physician whose initial and subsequent enrollment applications were returned by the contractor. The Medicare contractor claimed that it returned both applications because Petitioner failed to sign the certification statement section. In addressing petitioner's challenge on appeal, the Board found that the Medicare contractor should not have returned the applications to petitioner, but rather, it should have afforded him the opportunity to cure the application deficiency. The Board stated:

> Nothing in the regulations or their preamble specifically addressed what process would be followed if an application was not signed in all places where a signature was required. But the only two process options the regulation established were that the contractor could either treat the missing signature like any other missing information and request it within the regulatory deadline or treat the failure as noncompliance and deny the application, *after* giving the provider or supplier an opportunity to submit a corrective action plan, and then affording a right to appeal. Under either option, the regulations clearly provided applicants with an opportunity to cure any deficiencies in an application before any adverse action could be taken.

Id. at 6, *citing* 71 Fed. Reg. at 20,754, 20,759 (April 21, 2006); 68 Fed. Reg. at 22,070 (April 25, 2003) (emphasis added).

The Board maintained that a Medicare contractor is required to give an applicant the opportunity to cure any deficiencies or to provide any documentation that may be missing before the enrollment application can be rejected. The Board stated that the preamble to

the final rule specifically states that "[r]ejection would not occur if the provider or supplier is actively communicating with us to resolve any issues regardless of any timeframes." *Id.* at 4, *see* 71 Fed. Reg. at 20,759.

Applying the Board's analysis to the case before me, I find WPS should have either treated the question as to whether Petitioner's signature was stamped or copied like any missing information and requested verification from Petitioner within the regulatory deadline; or WPS should have treated the failure as noncompliance and denied the application, but only after allowing Petitioner an opportunity to submit a corrective action plan. Under either option, the regulations provided Petitioner with an opportunity to cure any signature deficiencies in her June 22, 2009 application within 30 calendar days, before WPS could reject the application. 42 C.F.R. § 424.525.

CMS maintains that when WPS closed the application and returned it to Petitioner, WPS deemed it "an invalid application," and therefore it was not used in determining Petitioner's effective date. P. Ex. 7, at 2. Then on August 21, 2009, after WPS received an additional application from Petitioner with the required signature, WPS asked Petitioner for more information which Petitioner promptly supplied. CMS Exs. 1, 28, 40, 43, 46-49, 90-101. WPS approved and subsequently processed that application with an enrollment effective date of August 21, 2009 and a retrospective billing date of July 22, 2009.

However, CMS has provided no reason for the application WPS received on August 3, 2009 to have been returned to Petitioner but for the determination of a copied or stamped signature. There is no dispute that Petitioner was actively working with WPS to resolve any outstanding issues with her application. I find that WPS received an application from Petitioner on August 3, 2009 that could have been subsequently approved had WPS afforded Petitioner the 30-day opportunity to cure any deficiencies with the application.

Accordingly, I conclude that Petitioner is entitled to an effective enrollment date of August 3, 2009, which is the date WPS received an enrollment application from Petitioner that could have been processed to approval had it not been returned for a signature deficiency. I further conclude that Petitioner is entitled to receive payment for covered Medicare services retrospectively to July 4, 2009, which is 30 days prior to its August 3, 2009 effective date of enrollment. 42 C.F.R. § 424.521(a)(1).

IV. Conclusion

For the reasons explained above, I conclude based on the undisputed facts and as a matter of law that WPS did receive an application from Petitioner on August 3, 2009 which properly started the Medicare enrollment application process. I further conclude that the application should have been processed to approval by the Medicare contractor WPS.

Thus, I order CMS to provide Petitioner with a new effective date of enrollment in the Medicare program of August 3, 2009 and a retrospective billing date of July 4, 2009.

/s/
Joseph Grow
Administrative Law Judge