Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Alexander C. Gatzimos, MD, JD, LLC
d/b/a Michiana Adult Medical Specialists
Docket No. A-16-28
Decision No. 2730
August 19, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) appeals the decision of an administrative law judge (ALJ) that the effective date of Medicare enrollment of Alexander C. Gatzimos, MD, JD, LLC d/b/a Michiana Adult Medical Specialists (Michiana or Petitioner) be set as April 6, 2013, rather than August 14, 2013, as determined by Medicare contractor, Wisconsin Physicians Service Insurance Corporation (WPS). *Alexander C. Gatzimos, MD, JD, LLC d/b/a Michiana Adult Medical Specialists*, DAB CR4421 (2015) (ALJ Decision). The ALJ changed the effective date based on his conclusion that CMS had altered its interpretation of the "date of filing" of an enrollment application from the date the application is received to the date it is mailed. We determine that no such change in interpretation occurred and that the effective date is properly based on the later of the date on which the contractor received an application the contractor is able to process to approval or the date on which the supplier began furnishing services at a practice location. As applicable here, the effective date is based on the date of the contractor's receipt of Michiana's application.

We therefore conclude that the ALJ Decision was based on a legal error and reverse it, reinstituting the original effective date, August 14, 2013, set by WPS.

Case Background

Dr. Gatzimos was a physician enrolled in Medicare when he decided to open a new practice under the Michiana name and filed an enrollment application to accomplish that purpose. By letter dated October 14, 2013, WPS approved the application with an effective date of July 15, 2013. CMS Ex. 9. As the ALJ notes, however, this date "is actually the beginning of the 30-day period for retrospective billing" under 42 C.F.R. § 424.521(a)(l), making August 14, 2013, the actual assigned effective date. ALJ Decision at 2 n.2.

Petitioner requested reconsideration, asking for an effective date of April 1, 2013, based on the date Dr. Gatzimos first began treating Medicare beneficiaries at Michiana. CMS Ex. 1, at 5-6; Petitioner (P.) Ex. 2. WPS denied the request on reconsideration, citing regulations at 42 C.F.R. §§ 424.520 and 424.521. CMS Ex. 1, at 1-3. WPS explained that August 14, 2013, was the date on which WPS received a valid application from Petitioner that was ultimately approved. *Id.* Petitioner requested an ALJ hearing to challenge the effective date determination.

The ALJ denied CMS's motion for summary judgment and proceeded to conduct a hearing on January 15, 2015, and May 11, 2015.

Applicable Legal Authorities

A "supplier" of Medicare services (which includes physicians and physician practices) must be enrolled in the Medicare program in order to receive payment for items and services covered by Medicare. 42 C.F.R. § 424.505. "Enrollment" is the process that the CMS uses to: (1) identify the prospective supplier; (2) validate the supplier's eligibility to provide items or services to Medicare beneficiaries; (3) identify and confirm a supplier's owners and "practice location"; and (4) grant the supplier "Medicare billing privileges." *Id.* § 424.502.

To enroll, suppliers "must submit a complete enrollment application and supporting documentation to the designated Medicare . . . contractor." *Id.* § 424.510(d)(1). An "enrollment application" may be either the CMS-approved paper enrollment application (currently various versions of form CMS-855) or a submission through the electronic Medicare enrollment process known as the Provider Enrollment, Chain and Ownership System (PECOS). *Id.* § 424.502. CMS "may reject" an application if a supplier "fails to furnish complete information" or supplemental materials within 30 days "from the date of the contractor request. . . ." *Id.* § 424.525(a)(1). CMS may, "at its discretion, choose to extend the 30 day period if CMS determines that the prospective . . . supplier is actively working with CMS to resolve any outstanding issues." *Id.* § 424.525(b).

When an enrollment application is approved, the contractor sets the effective date of the approval for billing privileges. The effective date of a physician's or physician organization's enrollment in Medicare is "the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the

date [the supplier] first began furnishing services at a new practice location." 42 C.F.R. § 424.520(d) (Oct. 1, 2012).[1] The preamble for the effective date regulation states that the "date of filing" is the date that a Medicare contractor receives a signed application that the contractor is "able to process to approval." 73 Fed. Reg. 69,726, 69,766-67, 69,769 (Nov. 19, 2008).

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence in the record as a whole and a disputed conclusion of law to determine whether it is erroneous. *See* Departmental Appeals Board, *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program (Guidelines)*. The *Guidelines* are available at http://www.hhs.gov/ dab/divisions/appellate/guidelines/ prosupenrolmen.html.

Analysis

1. The only issue before us is whether Michiana's application was filed when it was placed in the mail or when it was received by the contractor.

Although a number of issues were raised at the ALJ level, on appeal to the Board this case turns on a single question – should the effective date of Michiana's enrollment be determined by when its application was placed in the mail or when it was received by WPS?

The applicable regulation has specified at all relevant times that "[t]he effective date for billing privileges for [physicians and physician 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 [the supplier] first began furnishing services at a new practice location." 42 C.F.R. § 424.520(d) (Oct. 1, 2012) (emphasis added). The regulation itself does not define the "date of filing."

[1] We cite to and quote from the version of section 424.520(d) in effect when Petitioner filed its application for enrollment. The most recent revision to the regulation in December 2014 (discussed below) extended its applicability to ambulance suppliers and slightly altered the clause relating to the provision of services at a new practice location; otherwise, the current version is identical to the prior version in all material respects. *See* 42 C.F.R. § 424.520(d) (Oct. 1, 2015) (stating that the "effective date for billing privileges . . . is the later of . . . [t]he date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor; or . . . [t]he date that the supplier first began furnishing services at a new practice location").

When it was promulgated, however, CMS specifically explained that the "date of filing of the enrollment application is the date that the Medicare FFS [fee-for-service] contractor **receives** a signed Medicare enrollment application that the Medicare FFS contractor is able to process to approval." 73 Fed. Reg. at 69,766-67 (emphasis added). This explanation was offered in the context of explaining why CMS decided against an alternative approach that would have set the effective date based on when the contractor actually approved the application. *Id*. at 69,766. CMS's choice was based on balancing the need to "verify that a supplier has met all of Medicare's enrollment requirements" by having filed an approvable application with the concern that physicians not be impacted by contractor processing delays after an application is received. *Id*. at 69,766-67.

Moreover, CMS's interpretation of "date of filing" in the preamble was consistent with the requirement in the regulation that the application relevant in setting a supplier's effective date must be one "that was subsequently approved by a Medicare contractor." 42 C.F.R. § 424.520(d). Since an application that is processed to approval must presumably have been received, CMS could reasonably understand the date initiating the processing, i.e, the date of receipt, to be the date of filing for purposes of setting an effective date.

As the ALJ recognized, the Board has consistently applied the provision as explained by the drafters and calculated the effective date of an approved application filed by a physician or physician organization using the date of receipt of that application by the contractor. ALJ Decision at 18, *citing Karthik Ramaswamy, MD,* DAB No. 2563, at 3 (2014); *Tri-Valley Family Medicine, Inc.,* DAB No. 2358, at 6 (2010). Indeed, the ALJ acknowledged that he himself has previously applied the effective-date provision in that manner. *Id*., *citing Middlesex Rheumatology,* DAB CR3660, at 8-9 (2015).

The ALJ, however, indicated at the hearing that CMS changed the meaning of "date of filing" in 2014. Tr. (May 11, 2015) at 45. Although neither party had raised this issue before the hearing, the ALJ asked CMS counsel at the hearing whether he was aware that CMS had changed its policy through language in a preamble to a December 1, 2014 Federal Register issuance revising the enrollment regulation at section 424.520(d) to cover ambulance suppliers. *Id*. After CMS counsel indicated that he was not aware of such a change, the ALJ invited both parties to address whether the new policy should be given retroactive effect. *Id*. at 45-51. Both parties discussed the effect of the preamble language in their post-hearing briefs.

The ALJ's conclusion of law stated that the "current CMS interpretive rule or policy since December 5, 2014, is that the 'date of filing' is the date a paper application is mailed by a physician, nonphysician practitioner, a physician or nonphysician practitioner group, or ambulance supplier to the appropriate CMS contractor." ALJ Decision at 6. He then proceeded to apply what he characterized as the "current CMS interpretive rule

or policy" by basing his calculation of the effective date of Michiana's enrollment on the date on which the ALJ found that the application was first mailed rather than on the date of receipt of the application by the contractor. ALJ Decision at 19. On appeal to us, CMS disputes that any change in policy occurred and contends that, even if it had, it should not be given retroactive effect.

Based on our conclusion below that no change in policy occurred, we need not address the ALJ's discussion of retroactivity. Moreover, we need not address disputes between the parties about when Michiana's application was actually mailed because the date of mailing continues to be irrelevant to the effective date determination.

2. The date of filing continues to mean the date that an application, however sent to a contractor, is actually received.

We therefore consider whether CMS did alter the meaning of "date of filing" for purposes of the enrollment effective date regulation in 2014, and, if so, whether the effect of such a change would apply in this case. For the reasons we now explain, a close reading of the discussion in the December 2014 preamble, and its context, persuades us that, while the wording is somewhat ambiguous, CMS did not alter the meaning of the "date of filing" in section 424.520(d) and did not put forward a new interpretation of how to apply the date of filing in setting the effective date for suppliers covered by section 424.520(d).

a. *The preamble language cited by the ALJ is ambiguous at best and does not clearly announce a change in policy.*

The language on which the ALJ relied appears in the preamble to a final rule issued by CMS that revised various provider/supplier enrollment provisions. 79 Fed. Reg. 72,500 (Dec. 5, 2014) (2014 Preamble). One revision finalized by the regulatory change was to add ambulance services, effective February 3, 2015, to the list of suppliers, including physicians and physician organizations, to which the effective date provisions in section 424.520 apply, including the restriction on billing for services provided more than 30 days prior to the effective date of enrollment. *Id*. The language highlighted by the ALJ from the preamble discussion of that revision was as follows: **"The 'date of filing' is considered to be the date on which the supplier submitted its CMS-855 application via mail or Internet based PECOS.**" ALJ Decision at 17, *quoting* 79 Fed. Reg. at 72,522 (bold in ALJ Decision) (also quoting statement, at page 75,521, that "[t]he 'date of filing' is the date on which the provider or supplier submitted its CMS-855 application via mail or Internet-based PECOS").

The ALJ construed these statements to mean that an application is submitted by the supplier on the date that it is placed in the mail. This construction is not, however, the only possible reading of the statements. CMS argues that the statements are emphasizing that the filing occurs when the application is **submitted** to the contractor as opposed to when the contractor **approves** the application and that the reference to mail or PECOS merely means that the choice of a method of filing has no impact on the date. CMS Br. at 12-13. This reading too is plausible.

Neither statement expressly provides that an application is filed at the moment it is placed in the mail. Both statements use the term "submitted." But the question of when an application is submitted is basically the same question as when the application was "filed," so that saying it was filed when it was submitted does not provide much, if any, new information. Dictionary definitions of both terms show a wide range of meanings but the "law dictionary" definitions of each in the online Merriam-Webster dictionary illustrate how much they overlap:

> Legal Definition of *file* (transitive verb) **1a**: to submit (a legal document) to the proper office (as the office of a clerk of court) for keeping on file among the records especially as a procedural step in a legal transaction or proceeding <*filed* a tax return> <a financing statement *filed* with the Secretary of State> <*filing* a notice of appeal>; *also*: RECORD <*filed* a mortgage in the Registry of Deeds> *Editor's note:* In nearly all cases, a document is deemed to be filed when it is actually received by the office to which it is directed. A few cases, however, have held that a document is filed upon the mailing of it. [http://www.merriam-webster.com/dictionary/file, last accessed Aug. 9, 2016 (italics in original)]
>
> Legal Definition of *submit* (transitive verb) **1:** to yield or subject to control or authority <to *submit* himself to the jurisdiction of the tribal court — *Sheppard v. Sheppard,* 655 P.2d 895 (1982)>
> **2a:** to present or propose to another for review, consideration, or decision; *specifically***:** to commit to a trier of fact or law for decision after the close of trial or argument <the trial court could properly *submit* both counts to the jury — Rorie Sherman>
> **b:** to deliver formally [http://www.merriam-webster.com/dictionary/submit, last accessed Aug. 9, 2016 (italics in original)]

In short, to file is to submit and to submit is to deliver formally.

Generally, as the legal definitions indicate, a document may not be delivered without having arrived into the recipient's possession. CMS acknowledges the meaning of "submit" can only be determined by examination of context and that the "dictionary

definition of 'submit' does not settle the question." CMS Br. at 17; CMS Reply Br. at 2. CMS identifies, however, several cases in which courts have understood a document not to be "submitted" until it was "received." CMS Reply Br. at 3, *citing* ***Arulampalam v. Gonzales***, 399 F.3d 1087, 1088-90 (9th Cir. 2005) (Equal Access to Justice Act fees application only "submitted" when received by court); *Purepac Pharmaceutical Co. v. Thompson*, 354 F.3d 877, 889 (D.C. Cir. 2004) (Abbreviated New Drug Application "submitted" to Food and Drug Administration when "received," rather than when "mailed").

On appeal, Michiana nevertheless contends that "submit" by mail can only mean place in the mail, based on Dr. Gatzimos's own experience of common usage:

> In the "old days" we submitted Medicare claims by paper HCFA 1500 forms. When staff was told to "submit these via mail," what did they do? They mailed them. No common sense working person would conflate "submit" with "receive." Why does CMS?

Michiana Response Br. at 13. This anecdoctal account of Dr. Gatzimos's recollections does not establish any single plain language meaning for the verb "submit." To begin with, that a staff person told to submit claims via mail would mail the claims does not necessarily establish that the claims would have been considered "submitted" before they were received by the contractor. Indeed, a supplier mailing a claim in the "old days" would not likely be paid for a claim before it was received because the claim had not been submitted. Michiana offers no authority, beyond its own sense of "common experience and common sense," to support the idea that the plain meaning of "submit" can only be "to mail" or "to send," rather than to deliver to a recipient. As CMS points out, some ordinary dictionary definitions include the latter sense. CMS Reply Br. at 2, citing Merriam-Webster's Collegiate Dictionary, *available at* http://www.merriam-webster.com/dictionary/submit (last viewed Aug. 9, 2016) ("to present or propose to another for review, consideration, or decision" or "to give (a document, proposal, piece of writing, etc.) to someone so that it can be considered or approved").

Where a word is used in multiple ways in daily usage, the general construction technique that courts and the Board often use to help discern the meaning of a term by reference to its plain meaning (*see* Michiana Response Brief at 13-16, and cases cited therein) cannot alone offer dispositive guidance. Moreover, the distinct legal definitions of the verbs "file" and "submit," set out above, are more appropriate to understanding the intended legal effect of a regulatory submission process.

We do recognize that the ALJ might have viewed his interpretation as consistent with the provider/supplier being the subject of the verb "to submit" in the 2014 preamble, which could imply that "submitted" refers to an action performed by the provider/supplier (i.e.,

putting in the mail or uploading the form) rather than to the consequence of that action (i.e., delivery to a Medicare contractor of the application). In the explanatory sentence from the preamble to the original promulgation of the regulation, the Medicare contractor was the "actor" in that "date of filing" was defined in terms of when the contractor "received" an application. However, this shift in grammatical subject does not compel a reading of "submitted" as meaning that the act of submission is complete when the supplier initiates submission by placing the form in the mail.

In short, our review of the wording of the two statements in the 2014 preamble on which the ALJ relied does not suffice to determine definitively whether CMS meant to alter the method of calculating the date of filing for Medicare enrollment applications under the regulation.

b. *The context of the preamble statements does not support the ALJ's reading.*

The ALJ too appeared to recognize that the meaning of the statements in the 2014 preamble was not without ambiguity because he went on to quote and discuss the context of each statement within the preamble. ALJ Decision at 16-18. In so doing, he found support for his construction. Yet, we find that the both the larger context of the regulation's revision in 2014, and the surrounding context of the two statements in the preamble, in fact provide more support for CMS's reading.

As mentioned earlier, when the regulation on determining the effective date of enrollment was first proposed in relation to physicians and physician organizations, CMS considered setting enrollment to become effective only after an application was completed and approved by a contractor. Under that approach, the initial enrollment date would have been the date of approval defined as "the date that a designated Medicare contractor determines that the physician or NPP [non-physician practitioner] organization or individual practitioner meets all Federal and State requirements for their supplier type." 79 Fed. Reg. at 69,766. CMS explained the alternative which it later selected instead as follows:

> The second approach would establish the initial enrollment date for physician and NPP organizations and individual practitioners, including physician and NPPs, as the later of: (1) The date of filing of a Medicare enrollment application that was subsequently approved by a fee-for-service (FFS) contractor; or (2) the date an enrolled supplier first started furnishing services at a new practice location. The date of filing the enrollment application is the date that the Medicare FFS contractor receives a signed Medicare enrollment application that the Medicare FFS contractor is able to process to approval. This option would allow a supplier that is already seeing non-Medicare patients to start billing for Medicare patients beginning on the day they submit an enrollment application that can be

> fully processed. In contrast to the first option, newly enrolling physicians and NPP organizations, and individual practitioners or physician and NPP organizations and individual practitioners that are establishing or changing a practice location would be allowed to bill the Medicare program for services furnished to Medicare beneficiaries on or after the date of filing if a Medicare contractor approves Medicare billing privileges and conveys billing privileges to an NPI [national provider identification number]. It is also important to note that if a Medicare contractor rejects or denies an enrollment application, then the physician or NPP organization or individual practitioner is at risk of not receiving payment for any services furnished after the date of filing.

Id. at 69,766-67. Thus, the definition of "date of filing" was explained by contrasting the contractor's initial receipt of the application to the alternative of the contractor's final approval of the application.[2] Prior to the 2008 regulations, physicians and their organizations had been permitted to bill for services provided for up to 27 months prior to their enrollment in Medicare. *Id*. at 69,766. Because the regulation also restricted such back billing to 30 days prior to the effective date of enrollment, CMS received many comments concerned about the impact on physicians and their employers, and about delays that might ensue in the processing of applications. *See id*. at 69,766-73. CMS determined to use the "date of filing" approach to balance the competing concerns to protect program integrity and ensure practitioners are paid for services to beneficiaries. *Id*. at 69,767. Throughout the discussion of its choice of this approach, CMS repeatedly explained that the touchstone would be the date when the application arrives in the hand of the contractor, whether by mail or by PECOS. *Id*. at 69,766-73.

CMS expressly rejected a request that contractors be required "to notify the provider that the application has been received and it is being processed to ensure the approved billing date is the same between the provider and the Medicare contractor." *Id*. at 69,771. CMS explained that "[d]ue to cost constraints, most Medicare contractors cannot notify an applicant when their paper enrollment application is received," but all Medicare contractors "are required to notify an applicant when the application is missing information or if additional supporting documentation is needed to process the enrollment request." *Id*.

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[2] The preamble to the 2008 regulation also explained that CMS was establishing an online enrollment process to streamline applications and specified that "the date of filing for Internet-based PECOS will be the date the Medicare FFS contractor receives all of the following: (1) A signed certification statement; (2) an electronic version of the enrollment application; and (3) a signature page that the Medicare FFS contractor processes to approval." 73 Fed. Reg. at 69,767.

Clearly, the question of determining when an application has been effectively filed was important in explaining how a regulation that based Medicare billing on the date of filing would be implemented. In the proposed rulemaking, CMS solicited discussion of possible options for assigning effective dates of enrollment, *see* 73 Fed. Reg. at 69,766, and the cited parts of the preamble to the final rule show that CMS addressed in considerable detail numerous comments about how to apply the selected option using "date of filing," defined to mean the date the application is received by (filed with) the contractor.

By contrast, the regulatory change in 2014 did not affect the basis for assigning effective dates to enrollees at all. The only language altered in the relevant regulation itself was the addition of wording making it applicable to ambulance suppliers. The explanation in the preamble summarizing the major provisions of the regulatory amendment showed that the purpose was –

> [l]imiting the ability of ambulance companies to "back bill" for services furnished prior to enrollment. Under § 424.520(d), physicians, non-physician practitioners, and physician and non-physician practitioner organizations currently cannot bill for services furnished prior to the later of the date the supplier filed a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date the supplier first began furnishing services at a new practice location. (Independent diagnostic testing facilities (IDTFs) and suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) have similar restrictions.) We are expanding this to include ambulance suppliers.

79 Fed. Reg. 72,500. The intended result would be to provide "[c]onsistent treatment" to ambulance companies as for other suppliers. *Id*. at 72,521.

To effectuate this purpose, the drafters simply added the words "ambulance suppliers" to section 424.520(d) without changing the language regarding effective date:

> (d) *Physicians, non-physician practitioners, physician and non-physician practitioner organizations, and* ***ambulance suppliers***. The effective date for billing privileges for physicians, non-physician practitioners, physician and non-physician practitioner organizations, and **ambulance suppliers** is the later of —
>
> (1) The date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor; or
>
> (2) The date that the supplier first began furnishing services at a new practice location.

See 79 Fed. Reg. at 72,531 (italics in original; bolding added).

The comments and responses from which the ALJ drew the sentences on which he relied must be viewed in the context of the limited change made by the amendment to the regulations, that is, to simply add ambulance suppliers to the list of suppliers covered by the regulation. As we have said, the effective-date provision in the regulation was not changed at all. Yet, the ALJ extracted the references to date of filing in isolation without giving due consideration to this context. Moreover, the comments to the proposed addition of ambulance suppliers to which the drafters responded were focused on the old concern about how delays or questions arising during processing of an application by a contractor might negatively impact a supplier's effective date. 79 Fed. Reg. at 72,521-22. Nothing in the comments was directed at trying to obtain a change or clarification of CMS's previously stated position on what constituted the date of filing. The drafters provided the following guidance in response the commenters' concern:

> *Comment*: Several commenters requested CMS to clarify that the "date of filing" of a CMS-855 application is the date on which the contractor initially received the application, not the date on which the contractor deemed the application "complete."
>
> *Response*: The "date of filing" is the date on which the provider or supplier submitted its CMS-855 application via mail or Internet-based PECOS.
>
> *Comment*: Several commenters stated that a more definitive distinction must be made as to what is meant by the date of an application that is subsequently approved. One commenter stated that it is not uncommon for contractors to return applications with a request for supporting documentation. Another commenter requested an explicit statement that the date the application is entered into PECOS or a paper CMS-855B is mailed is the effective date of billing privileges, assuming the application is eventually accepted; this would make it clear that a request for additional documentation is part of the original process and does not begin an entirely new cycle.
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> *Response*: We indicated earlier that the effective date of billing privileges under § 424.520(d) will be the later of: (1) The "date of filing" of an enrollment application that is subsequently approved; or (2) the date the supplier began furnishing services at a practice location. The "date of filing" is considered to be the date on which the supplier submitted its CMS-855 application via mail or Internet-based PECOS.

> The term "subsequently approved" includes application submissions for which the contractor requested additional information from the supplier (or otherwise undertook developmental activities with respect to the application) and the application was ultimately approved. It does not include applications that were rejected under § 424.525 or returned pursuant to CMS Publication 100-08, chapter 15, and were later resubmitted. A contractor's request for additional information does not constitute a final disposition regarding the application; that is, the application is still in process. However, a rejection or return indicates that the contractor was unable to process the application to completion, meaning that the application processing cycle has ended and the supplier must submit a new application.

Id. The crux of the quoted comments and responses is on how CMS understands when a submitted application has been "subsequently approved," rather than how to define what the "date of filing" would be for a "subsequently approved" application. Notably, for example, the first comment did not ask whether the "date of filing" meant the date when an application was sent or the date it was received. Instead, the commenter asked whether "date of filing" would be the date of **initial** receipt or the date that the application was considered complete, that is when all required additional information had been received by the contractor. It was in response to **that** question that CMS responded that the "date of filing" was when the applicant "submitted" its CMS-855 application form, that is, when the initial application form was submitted not when all information was complete. Nothing in the response suggests that CMS was rejecting both of the alternatives about which the commenter asked – receipt or completion of the application. Thus, in context, the most reasonable reading is that the responders was simply using "submitted" as a synonym for "filed." In other words, CMS was not indicating any intent to change the date on which the application form was treated as filed but merely reiterating its assurance the effective date would not be delayed until all required additional information was submitted but would be based on the original date that the application form was filed or submitted.

The ALJ put more weight on a response to the next comment stating that the commenter specifically in that instance **asked** that the effective date be based on "the date the application . . . is mailed" or "entered into PECOS." ALJ Decision at 17-18, *quoting* 79 Fed. Reg. at 72,522. We find his reliance on this response misplaced. The overarching question asked by "several commenters" was again about the meaning of subsequent approval, particularly where the approval process required multiple submissions. 79 Fed. Reg. at 72,522. It is true that one commenter asked for "an explicit statement" that the date that the paper application form is mailed be "the effective date of billing privileges." *Id*. at 72,521. Even that commenter, however, went on to explain that the purpose would be to "make it clear that a request for additional documentation is part of the original

process and does not begin an entirely new [application] cycle." *Id*. The commenter's purpose would not be served by a policy change between considering an application filed when mailed instead of filed when received, but rather by an assurance that the initial filing date would remain applicable (even if the contractor required additional information) so long as the application was eventually approved. In any case, even if the comment could reasonably be read as requesting a change to CMS's previously stated position on what constituted the date of filing, CMS did **not** in response provide the requested "explicit statement" that the date the form is placed in the mail would become the date of filing. Instead, CMS reiterated the same language it used in response to the commenters who referred to the date the application was received, i.e., that the "'date of filing' is considered to be the date on which the supplier submitted its CMS-855 application via mail or Internet-based PECOS." *Id*. at 72,522. CMS then went on to spell out in detail when it considers that an application has been "subsequently approved" as opposed to when the clock will be reset (by a further submission after a rejection or return), thus providing the requested reassurance. *Id.*; *see also* CMS Br. at 12 ("CMS was reassuring commenters that the date of filing was not dependent on the contractor having all of the necessary supporting documentation.").

Moreover, in its response CMS referenced the existing language in section 424.520(d), stating that "[w]e indicated earlier that the effective date of billing privileges under § 424.520(d) will be the later of: (1) the 'date of filing' of an enrollment application that is subsequently approved; or (2) the date the supplier began furnishing services at a practice location." *Id*. at 72,523-24. It is implausible, at least without an explicit statement of an intended change, that CMS would make this reference, if it intended to announce in the 2014 preamble a complete reversal in its way of calculating the date of filing. The absence of any such explicit statement is even more telling given the commenter's request for an express statement that an application is filed when it is mailed.

Michiana argues that the reason CMS did not accept the commenter's request to state that "the date the application is entered into PECOS or a paper CMS-855B is mailed is the effective date of billing privileges" is that CMS did not accept the mailing date as the single determinant of the effective date. Michiana Br. at 11. In other words, in Michiana's view, CMS was not rejecting the commenter's use of the date of mailing as meaning date of filing, but rather was reiterating that the effective date could not be earlier than the date a supplier began practicing at a specific location. *Id.* at 11-12. We agree that CMS's response, along with its retention of the same regulatory language, reflects an intent to continue to set the effective date based on the later of the date of filing or date services began. We disagree, however, with Michiana's suggestion that, in rejecting the commenter's requested statement, CMS was somehow actually endorsing its use of the date of filing as the mailing date rather than the receipt date.

We disagree with the ALJ's view that CMS's use of the word "submitted" instead of the word "filed" served to adopt a new policy interpretation. Either word may, depending on the context, refer to the sending of a document to the authority intended to act on it, or to its arrival into that authority's possession. In this case, in the context of this regulation and its history, we do not believe that the small differences in the words used by CMS in 2014 were intended to reverse, or had the effect of reversing, the clear explanation in 2008 that the regulatory language meant to focus on the receipt of the application not its mailing. It is especially unlikely that a change in the interpretation of the term "date of filing" would occur with no reference in the proposed rule or its preamble to such an intention and of any request for comments on such a possible change. *See* 78 Fed. Reg. 25,013, 25,023-24 (Apr. 29, 2013). We simply do not find persuasive the view that CMS changed an explicitly adopted and longstanding practice by less than clear wording used in responding to an entirely different concern with no notice that such a significant change was contemplated.

The ALJ rejected the argument that making a major policy change in this way was implausible, citing as support for his rejection the fact that CMS did not include the definition of "date of filing" in the regulatory text and instead used the 2008 preamble to announce its interpretation of that term as when the application is received by the contractor. ALJ Decision at 19. We disagree with this reasoning. The ALJ overlooked the difference between drafters explicitly explaining the meaning and purpose of a regulatory term in the preamble when issuing a regulation, which CMS did in November 2008, as opposed to CMS supposedly using a response to an unrelated comment in a preamble to a later regulatory revision to alter the meaning of a term <u>not</u> changed by the revision of the regulation. As explained, we find it unlikely that such an unusual announcement in a preamble would be made in that way, at least without discussion or explanation of the nature of and reasons for the new interpretation.

To some extent, the ALJ's contrary conclusion may have been driven by a misunderstanding of CMS's argument after he requested briefing on his theory that CMS had adopted a new policy as to date of filing. The ALJ thought that CMS was arguing that its "drafters only intended for the date of mailing to apply to ambulance suppliers and not change the long-standing rule that applied to the other suppliers listed in 42 C.F.R. § 424.520(d)." ALJ Decision at 18, *citing* CMS Post-hearing Br. in C-14-1059, at 15-18 and CMS Reply Br. in C-14-1059, at 10-11. The ALJ correctly noted that the discussion in the preamble suggests no such distinction and indeed emphasizes the intention to treat all suppliers similarly. *Id.*

But CMS did not, at the cited pages or elsewhere, ever argue that the quoted responses in the preamble changed the definition of "date of filing" as to ambulance companies but retained the original definition for other suppliers, as the ALJ suggests.[3] Instead, CMS insisted that the meaning of "date of filing" had **not** changed for **any** suppliers. The purpose of the 2014 revisions, CMS explained in its briefs, was merely to add ambulance companies to the list of suppliers to which the preexisting practices as to enrollment applications would apply. In other words, CMS agreed that the intention was to treat all listed suppliers similarly, but denied that it had announced any change in that treatment in a regulatory revision meant only to add an additional category of suppliers to the list.

c. *Other arguments proffered by the parties do not affect our conclusion that the "date of filing" remains the date an application is received by the contractor.*

Both parties briefed at some length several other arguments which we do not find helpful to determining whether the 2014 preamble comments changed the established understanding of the "date of filing" of an enrollment application.

CMS contends that we should conclude that the 2014 preamble did not change its policy on "date of filing" based on the fact that CMS did not include "any new language in the Medicare Program Integrity Manual" (MPIM) to instruct its contractors to change their practices. RR at 18-19. The ALJ rejected this argument because he found no explanation in the MPIM explaining how to determine "date of filing" either before or after the 2014 revisions. ALJ Decision at 19. CMS argues that no explanation was needed before, because the 2008 preamble made explicit that the date of receipt by the contractor was considered the "date of filing," but that an instruction would certainly have been needed had CMS intended "an about-face on this established interpretation with no warning[.]" CMS Reply Br. at 6-7. We do not find the absence of additional guidance in the MPIM compelling evidence about the intent of the comments in the 2014 preamble.

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[3] In a section of its post-hearing brief entitled "Filing of an Application Occurs Upon Receipt," CMS explained the 2014 change as follows:

> In the December 5, 2014 Federal Register, CMS announced some revisions to the provider enrollment regulations. One of the revisions expanded the scope of section 424.520(d) to apply it to ambulance suppliers. Commenters on the proposed revision asked for clarification that the "'date of filing' of a CMS-855 application is the date on which the contractor initially received the application, not the date on which the contractor deemed the application 'complete'." The response was: "The 'date of filing' is the date on which the provider or supplier submitted its CMS-855 application via mail or Internet-based PECOS." 79 Fed. Reg. 72500, 72521 (Dec. 5, 2014). The evidence establishes that this was not intended to change the long-standing policy.

CMS Post-hearing Br. in C-14-1059 (dated July 13, 2015) at 15-16. In its post-hearing reply brief, CMS merely stated, in a section entitled "CMS did not change the rule concerning the date of filing," that the "Federal Register language under consideration appears in a section extending section 424.520(d) to apply to ambulance suppliers." CMS Reply Br. in C-14-1059 (dated Aug. 12, 2015) at 10 (citation omitted).

CMS also contends that none of the other ALJs has applied this putative new policy in cases involving the effective date of supplier enrollment after 2014. RR at 2. Michiana responds that the ALJ was simply the first to directly address the question of the effect of the "the 2014 'new' definition vs. the 2008 'old definition.'" Michiana Br. at 3. It serves no purpose for us to determine whether other ALJs have expressed a position on the meaning and effect of the comments in the 2014 preamble. ALJ decisions have no precedential weight and are not binding on the Board. *Zahid Imran, M.D.*, DAB No. 2680, at 12 (2016).

Michiana suggests that we should view CMS's comments in the 2014 preamble as adopting a "mailbox rule" for supplier enrollment. Michiana Br. at 19-20. Michiana asks rhetorically: "If CMS has promulgated a plain-worded rule that adopts the Mailbox Rule to define 'date of filing,' then who are we to contest the agency's rulemaking?" *Id*. at 19. But adopting a "plain-worded rule" defining "date of filing" as the date of mailing is precisely what we find that CMS had not done. Moreover, as CMS points out, the mailbox rule does not address whether the relevant date for legal filing purposes is when a document is placed in the mail or when it is received, but only creates an evidentiary presumption of regularity of delivery by the postal service to support receipt, a presumption that may be rebutted. CMS Reply at 9-12, and cases cited therein.

Having determined that the "mailbox rule" does not address the legal issue before us, we need not address Michiana's argument on appeal that, even if the policy dating filing from the time that a contractor received an application remained in effect, the date that Michiana mailed its application should still determine its effective date under Michiana's understanding of the mailbox rule. Michiana Br. at 29. We also note that Michiana did not make this argument below, and Board procedures preclude raising on appeal issues that could have been but were not raised before the ALJ. *Guidelines.* Michiana has not given any reason why this issue could not have been raised before the ALJ.[4]

Finally, each party proposes various policy reasons why it believes that the interpretation of "date of filing" of an enrollment application should be the one it is championing. Michiana Br. at 20-21; CMS Reply Br. at 12-15. It is not our role to decide what the policy for the effective date of enrollment should be. Our role is to determine what policy CMS adopted and whether it changed that policy in 2014. For the reasons

[4] We note that, even if we were to reach this argument, we would find it unsupported by the cases cited by Michiana, which make no generally applicable rule that mailing always establishes receipt but, rather, consider the role of the mailbox rule, in the context of particular regulatory schemes, in establishing a rebuttable presumption that receipt occurred. *See, e.g., Schikore v. BankAmerica Supplemental Retirement Plan*, 269 F.3d 956, 961-64 (9th Cir. 2001) (Employee Retirement Income Security Act case), cited in Michiana Br. at 29-30. In any case, the issue in the present case is not whether receipt occurred but whether the date of receipt or the date of mailing establishes the date of filing for purposes of Medicare enrollment.

explained earlier, we conclude that CMS adopted the policy of basing the "date of filing" on the date a contractor receives an application from any supplier appearing on the list of suppliers in section 424.520(d), and we further conclude that that policy did not change in 2014 when ambulance companies were added to the list.

Conclusion

For the reasons set out above, we reverse the ALJ Decision and conclude that the effective date of Michiana's enrollment is August 14, 2013, with retroactive billing privileges to July 15, 2013.

/s/
Sheila Ann Hegy

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member