

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

Dennis R. Hardin, DDS, Inc.  
(PTANs: CA183857, CB248628),  
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-748

Decision No. CR4776

Date: January 24, 2017

**DECISION**

The effective date of the Medicare enrollment and billing privileges of Petitioner, Dennis R. Hardin, DDS, Inc., is December 21, 2015, with retrospective billing privileges beginning November 21, 2015.

**I. Background and Procedural History**

Petitioner is a mobile dental group that operates in two geographic areas of California. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 7 at 1. Petitioner submitted separate Medicare enrollment applications to enroll its two practice locations, and Noridian Healthcare Solutions, LLC (Noridian), a Medicare administrative contractor, received those applications on September 4, 2015. CMS Ex. 1 at 2; 2 at 1; 7 at 1. Noridian sent an email to Petitioner on September 22, 2015, in which it provided a page-long list of requested information, in the form of requested revisions and/or additional documentation that would be needed for it to process the enrollment applications. CMS Ex. 2 at 1-2. Noridian informed Petitioner that it must furnish the requested information no later than October 7, 2015, and that its Medicare applications

would be rejected if it did not “furnish the complete information requested.” CMS Ex. 2 at 1-2. Noridian and Petitioner then communicated back and forth regarding the incomplete enrollment applications over the next month.<sup>1</sup> CMS Ex. 2; Petitioner Exhibit (P. Ex.) 4. After it did not receive all of the requested information by October 7, 2015, Noridian again directed Petitioner to submit revisions and/or supporting documentation by October 20, 2015. CMS Ex. 2 at 12-15. On October 22, 2015, a Noridian employee informed Petitioner that she had received, via facsimile, information pertaining to Sections 15 and 16 of the applications, but that she had not yet received the requested information pertaining to Section 6 of the applications. CMS Ex. 2 at 7. In response, Petitioner informed Noridian that it would provide the requested information on Monday, October 26, 2016. CMS Ex. 2 at 7. However, on October 28, 2015, the same Noridian employee informed Petitioner, by email, that its applications remained incomplete, stating, “I still have not received [Section 6] for you and [R.M.] . . . It is important that I hear from you today. If the applications are rejected you will need to resubmit them again.” CMS Ex. 2 at 16.

On November 2, 2015, after Noridian had not yet received a complete application that it could process to approval, Noridian rejected Petitioner’s applications. CMS Ex. 3 at 1. Noridian explained that the enrollment applications were incomplete, despite its multiple requests for additional information. CMS Ex. 3 at 1. Noridian instructed Petitioner that “[i]f you would like to resubmit an application, you must complete a new Medicare enrollment application(s).” CMS Ex. 3 at 1.

Shortly after receiving notice that its applications had been rejected on November 2, 2015, Petitioner submitted a letter to Noridian on November 4, 2015, in which it explained:

I have submitted Section 6 information multiple times and apparently didn’t check the correct boxes for the correct officials, and therefore due to time limitations, both group applications (Northern and Southern California) for Dennis R. Hardin, DDS, Inc. were rejected a couple of days ago *before I could submit the corrections.*

P. Ex. 5 (emphasis added). Petitioner further explained that it had provided the requested information pertaining to Section 6 with its November 4, 2015 letter. P. Ex. 5.

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<sup>1</sup> With the exception of the request for reconsideration, the evidence indicates that a “credentialing agent” from Lumina Healthcare, S. Kerr, who is not an employee of Petitioner, represented Petitioner in its discussions and correspondence with Noridian. CMS Exs. 2, 4, 5, 7; P. Exs. 3, 4, 5.

Specifically seeking “leniency” from Noridian, Petitioner explained that “[t]he dental group only submits claims for one procedure to Medicare and this is the first time I have been responsible for enrolling the group.” P. Ex. 5.

Petitioner did not submit new enrollment applications until December 21, 2015. CMS Ex. 4. After Petitioner submitted additional information pursuant to a December 31, 2015 request for additional information (CMS Ex. 5), Noridian granted Petitioner’s applications on January 27, 2016 and assigned two Provider Transaction Access Numbers (PTANs). CMS Ex. 6. Noridian favorably assigned a November 21, 2015 effective date of billing privileges based on its apparent interpretation that 42 C.F.R. § 424.521(a) allowed for an earlier effective date of billing privileges based on the 30-day retrospective billing provision contained in that regulation. *See* CMS Ex. 6 at 1, 4; *see* CMS Br. at 2-3; 42 C.F.R. § 424.521(a).

In a March 15, 2016 letter, Petitioner requested reconsideration of the November 2, 2015 determination and requested that the effective date of its enrollment be changed to August 21, 2015, which is a date that precedes its initial filing of its enrollment applications. CMS Ex. 7; *see* CMS Ex. 1 at 2. Noridian issued a reconsidered determination on May 19, 2016, at which time it determined that “[t]he 855B application received September 4, 2015 was correctly rejected” and an effective date of November 21, 2015, which took into account a 30-day retrospective billing period, was warranted. CMS Ex. 1.

Petitioner submitted a request for a hearing by an administrative law judge (ALJ) that was dated July 13, 2016, and received on July 18, 2016. I issued an Acknowledgment and Pre-Hearing Order (Order) on August 1, 2016, in which I directed the parties to file their respective pre-hearing exchanges, to include briefs and supporting exhibits, by specified deadlines. I also gave the notice in Section 4 of my Order that a party may file a motion for summary judgment with its pre-hearing exchange.

CMS filed a motion for summary judgment and a pre-hearing brief, along with CMS Exs. 1 through 7, on September 2, 2016. Petitioner, who is represented by counsel, filed a brief in opposition of CMS’s motion for summary judgment, along with five exhibits.<sup>2</sup>

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<sup>2</sup> Petitioner filed five exhibits, P. Exs. A, B, C, D, and E, and did not identify each of its exhibits with a whole number. Order, § 5(b). In lieu of rejecting Petitioner’s exhibits, I have re-designated Petitioner’s exhibits as P. Exs. 1-5.

In the absence of any objections, I admit CMS Exs. 1 to 7 and P. Exs. 1 to 5. Neither party has requested an in-person hearing for the purpose of obtaining testimony or cross-examination. The matter is ready for a decision on the merits.<sup>3</sup>

## II. Jurisdiction

I have jurisdiction to decide this case. *See* 42 C.F.R. §§ 498.3(b)(15), 498.5(l)(2).

## III. Discussion

### A. Issues

The issue in this case is:

Whether the effective date of Petitioner's Medicare enrollment and billing privileges is December 21, 2015, with a retroactive effective date of billing privileges of November 21, 2015.

### B. Background law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers. Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395u(h)(1)). Petitioner is a "supplier" of services under the Act and the regulations. A "supplier" furnishes services under Medicare, and the term "supplier" applies to physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The effective date of enrollment in Medicare of a physician, nonphysician practitioner, and physician and nonphysician practitioner organizations is governed by 42 C.F.R. § 424.520(d). Pursuant to section 424.520(d), the effective date of enrollment for a

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<sup>3</sup> CMS has argued that summary disposition is appropriate. It is unnecessary in this instance to address the issue of summary disposition, as neither party has requested an in-person hearing.

physician or nonphysician practitioner may only be the later of two dates: the date when the practitioner filed an application for enrollment that was subsequently approved by a Medicare contractor charged with reviewing the application on behalf of CMS; or, the date when the practitioner first began providing services at a new practice location. As applicable here, an enrolled physician or nonphysician practitioner may retrospectively bill Medicare for services provided to Medicare-eligible beneficiaries up to 30 days prior to the effective date of enrollment, if circumstances precluded enrollment before the services were provided. 42 C.F.R. § 424.521(a).

### **C. Findings of Fact, Conclusions of Law, and Analysis<sup>4</sup>**

***1. Pursuant to 42 C.F.R. § 424.520(d), Petitioner's effective date of Medicare enrollment is December 21, 2015, the date of filing of the Medicare enrollment applications that Noridian was able to process to approval.***

***2. Petitioner was authorized, pursuant to 42 C.F.R. § 424.521(a)(1), to bill Medicare for services provided to Medicare-eligible beneficiaries up to 30 days prior to its effective date of enrollment, i.e., beginning on November 21, 2015.***

Petitioner, in its request for hearing, seeks an earlier date of August 21, 2015, for its Medicare enrollment and billing privileges. There is no dispute that Noridian received the enrollment applications that it ultimately processed to approval on December 21, 2015. CMS Ex. 1 at 2; Request for Hearing. Therefore, the earliest possible effective date for Petitioner's Medicare enrollment and billing privileges was December 21, 2015, the date the applications were filed, as the regulation specifically provides that the effective date is the later of the date of filing a Medicare enrollment application that was subsequently approved or the date services were first provided. 42 C.F.R. § 424.520(d). Retrospective billing may be permitted for 30 days prior to the effective date of enrollment and billing privileges pursuant to 42 C.F.R. § 424.521, and Noridian allowed Petitioner to bill for services effective 30 days prior to the submission of the applications, effective November 21, 2015. CMS Ex. 1 at 2. Accordingly, I conclude that, pursuant to 42 C.F.R. § 424.520(d), the effective date of Petitioner's Medicare enrollment and billing privileges is December 21, 2015, with an earliest possible billing date beginning November 21, 2015, in accordance with 42 C.F.R. § 424.521(a)(1).

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<sup>4</sup> Findings of fact and conclusions of law are set forth in bold and italics.

Petitioner gives significant attention to the case of *Spine Physicians Institute, P.A.*, DAB No. CR2669 (2012), which addressed the effective date of a petitioner's enrollment and billing privileges and contained a finding that CMS "did not properly reject" a previous enrollment application. *Spine Physicians Institute*, DAB No. CR2669 at 3. Petitioner argues that the *Spine Physicians Institute* decision discusses "strikingly similar" facts to the ones presented in this case and that it supports that Petitioner should be allowed to appeal the rejection of its September 2015 enrollment applications and be assigned an earlier effective date for its Medicare enrollment and billing privileges. P. Br. at 6.

First, the *Spine Physicians Institute* decision is not binding on the instant case. While ALJ decisions often contain insightful analysis that may be persuasive, I am not required to adhere to ALJ decisions. Furthermore, the *Spine Physicians Institute* decision is not instructive in this particular case. Petitioner argues that pursuant to *Spine Physicians Institute*, "no 30-day period had expired without active communication by [Petitioner] and the applications should not have been rejected," but that is not the factual premise underlying this case. P. Br. at 5-6. Rather, Noridian gave Petitioner several deadlines to submit a completed application, and Noridian ultimately rejected the applications because Petitioner failed to submit the requested information despite each of these deadlines. Specifically, Noridian informed Petitioner that it must submit revisions and/or supporting documents to complete its applications prior to October 7, 20, and 28, 2015, and that in general, it must submit complete information for its applications within 30 days of Noridian's initial request on September 22, 2015. CMS Ex. 2. Noridian went as far as to give Petitioner one final warning, on October 28, 2015, in which it informed Petitioner that it would reject its applications if it did not receive the requested information that same day (yet nonetheless waited several more days, until November 2, 2015, to reject the applications). There is no documentary evidence showing that Petitioner submitted the information requested by Noridian in response to its two requests on October 22 and 28, 2015. Petitioner did not provide the information that it reported it would send on October 26, 2015, nor has it shown that it responded to Noridian's October 28, 2015 request giving Petitioner a final opportunity to complete its applications. The evidence does not support that Noridian had any reason to believe that Petitioner would correct its applications or that Petitioner continued to be in active communication with Noridian after October 22, 2015. Finally, I note that the *Spine Physicians Institute* decision that Petitioner relies on is predominantly based on the Departmental Appeals Board's decision in *Tri-Valley Family Medicine, Inc.*, DAB No. 2358 (2010), which the Departmental Appeals Board later explained, at length, involved "a narrow issue regarding how to apply a revised effective date regulation to an enrollment application that had been submitted before that regulation was in effect." *Karthik Ramaswamy, M.D.*, DAB No. 2563 at 8 (2014), citing *Tri-Valley Family Medicine*, DAB No. 2358 at 3.

While Petitioner spends considerable effort explaining that it "contacted Noridian dozens of times in order to make the requested modifications," the record does not support that such extensive communication occurred. Likewise, even if *Spinal Physicians Institute* is

controlling, which it is not, the evidence does not support that Petitioner remained “in active communication with the contractor” as the ALJ determined had occurred in the *Spinal Physicians Institute* case. *Spinal Physicians Institute*, DAB No. CR2669 at 5. Rather, the evidence demonstrates that Noridian requested that Petitioner submit the necessary information in accordance with deadlines of October 7, 20, and 28, 2015, and there is no documentary evidence showing that Petitioner submitted the necessary information in accordance with those deadlines. While Petitioner’s witness, Ms. Kerr, expressed recent recollection, without reference to any documentary support, that on October 31, 2015, after several unsuccessful attempts dating back to October 28, 2015, she sent via facsimile and email the requested information to Noridian, she contemporaneously admitted, on November 4, 2015, that she had *not* submitted the requested information prior to the rejection of the applications on November 2, 2015.<sup>5</sup> P. Ex. 5. Further, when Petitioner requested reconsideration of the effective date of its enrollment on March 15, 2016, Petitioner made no reference to any purported difficulty in submitting the requested information. CMS Ex. 7 at 1-2. In fact, Petitioner focused its

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<sup>5</sup> Ms. Kerr’s declaration is the sole source cited in support of this contention, and on its face, it does not support Petitioner’s claim that it contacted Noridian “dozens” of times between September 22, 2015, the date Noridian first requested corrections, and November 2, 2015, the date Noridian rejected the applications. Ms. Kerr reports sending, via facsimile, information on October 6 and 19, 2015, and that she made unsuccessful attempts to send information by facsimile in late October of 2015. Ms. Kerr reports that she ultimately sent the requested information via an email message on October 31, 2015. Ms. Kerr did not provide the specific dates, times, and content of her facsimile and email attempts, nor did she provide documentary evidence supporting her statements, such as printouts of any facsimile transmission reports or a copy of the October 31, 2015 email message and “scanned copy of information” that she claims she attached to that email. P. Ex. 4 at 3. Ms. Kerr also alleged that she was informed that the point of contact at Noridian “worked from home, and her fax machine was not always turned on,” but she provides no support for this statement, such as the source of this allegation or facsimile transmission reports showing that facsimile transmissions were unsuccessful. I find it noteworthy that in the November 4, 2015 correspondence that she submitted only two days after receiving notice that Petitioner’s applications had been rejected, Ms. Kerr made no reference to experiencing any difficulty in sending information to Noridian via facsimile. P. Ex. 5. To the contrary, Ms. Kerr conceded that, prior to November 4, 2015, she had not yet sent in all of the requested information and reported that she had included this information with her November 4, 2015 correspondence. Likewise, Ms. Kerr conceded that she “apparently didn’t check the correct boxes for the correct officials” in the enrollment applications, that it was the first time she was responsible for enrolling the practice, and that she requested leniency from the contractor. P. Ex. 4.

arguments on its disagreement regarding whether it or its billing agent is the proper entity that should be enrolled in Medicare. CMS Ex. 7 at 1-2.

Finally, Petitioner explains in its request for hearing that it is only seeking Medicare reimbursement for brush biopsy tests that it performed to detect oral cancer. Petitioner's plea may be viewed as a request for equitable relief. However, I do not have the authority to grant equitable relief in the form of an earlier effective date of enrollment. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”). Petitioner points to no authority by which I may grant it relief from the applicable regulatory requirements, and I have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (“[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.”).

#### **IV. Conclusion**

For the foregoing reasons, I conclude that the effective date of Petitioner's Medicare enrollment and billing privileges is December 21, 2015, with a 30-day period for retrospective billing beginning on November 21, 2015.

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/s/  
Leslie C. Rogall  
Administrative Law Judge