

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Diane Hendricks,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-362

Decision No. CR4676

Date: August 10, 2016

**DECISION**

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, Palmetto GBA (Palmetto), determined that the effective date for Medicare billing privileges for Diane Hendricks (Petitioner) was September 10, 2015, and that Petitioner could retrospectively bill Medicare for services provided on or after August 11, 2015. Petitioner requested a hearing to dispute this determination. Because Palmetto received an enrollment application from Petitioner on September 10, 2015, and Palmetto approved that application, Palmetto properly determined that September 10, 2015, was the effective date of Petitioner's Medicare billing privileges. Further, Palmetto provided Petitioner with the maximum retrospective billing period permitted under the regulations applicable to this case. Therefore, I affirm CMS's determination.

**I. Background and Procedural History**

Petitioner is a clinical social worker who was enrolled in the Medicare program as a supplier since 2001. CMS Exhibit (Ex.) 15 at 1. On August 17, 2012, Palmetto sent Petitioner a notice to revalidate her enrollment information. CMS Ex. 1. In response, Petitioner submitted a revalidation enrollment application on August 25, 2013, which CMS approved on September 5, 2013; however, Palmetto subsequently deactivated

Petitioner's billing privileges on October 9, 2013. CMS Exs. 2-4; Petitioner (P.) Ex. 1. Petitioner later filed three more enrollment applications, but Palmetto only approved the last application, which Petitioner filed on September 10, 2015. CMS Exs. 5, 8, 9, 11-14. When Palmetto approved Petitioner's September 10, 2015 application, Palmetto indicated that Petitioner's effective date for enrollment was August 11, 2015.<sup>1</sup> CMS Ex. 14.

Petitioner requested reconsideration of her effective date for Medicare billing privileges, seeking an effective date of January 2014 to allow her to receive reimbursement for services she had been providing Medicare beneficiaries over the past two years. CMS Ex. 15. In a February 9, 2016 unfavorable reconsidered determination, Palmetto noted that Palmetto received the enrollment application on September 10, 2015, and assigned August 11, 2015, as the start of Petitioner's retrospective billing period. CMS Ex. 16.

Petitioner timely requested a hearing to dispute the reconsidered determination. On March 4, 2016, I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order), which established a pre-hearing submission schedule. In response, CMS filed a motion for summary judgment with a brief in support of the motion (CMS Br.) and 17 exhibits (CMS Exs. 1-17) as its pre-hearing exchange. Petitioner's pre-hearing exchange included a brief (P. Br.) and one exhibit (P. Ex. 1).

## **II. Decision on the Written Record**

I admit all of the proposed exhibits into the record because neither party objected to any of them. Pre-Hearing Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e).

My Order advised the parties to submit written direct testimony for each proposed witness and that I would only hold an in-person hearing if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8-10; CRDP §§ 16(b), 19(b). Neither party offered written direct testimony for any witnesses; therefore, I issue this decision based on the written record. Pre-Hearing Order ¶ 10; CRDP § 19(d).

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<sup>1</sup> Palmetto used the term "effective date" to refer to the date on which Petitioner could bill for Medicare services. See CMS Br. at 3 n.2; CMS Ex. 14 at 1; CMS Ex. 16 at 1. By regulation, an "effective date" is the date a contractor receives an enrollment application that it later approves. 42 C.F.R. § 424.520(d). CMS and its contractors may permit an enrollee to "retrospectively bill" for services for up to 30 days prior to that effective date, as they appeared to do here. See 42 C.F.R. § 424.521(a); CMS Ex. 14 at 1; CMS Ex. 16 at 1. For clarity, I use "effective date" to refer to the regulatory effective date of enrollment, not the date on which retrospective billing begins.

### III. Issue and Jurisdiction

Whether CMS had a legitimate basis to determine that Petitioner's effective date of Medicare billing privileges was September 10, 2015, and a retrospective billing period commenced on August 11, 2015.

### IV. Findings of Fact, Conclusions of Law, and Analysis<sup>2</sup>

The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers. 42 U.S.C. §§ 1302, 1395cc(j). A "supplier" is "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services" under the Medicare provisions of the Act. 42 U.S.C. § 1395x(d); *see also* 42 U.S.C. § 1395x(u). A supplier must enroll in the Medicare program to receive payment for covered Medicare items or services. 42 C.F.R. § 424.505. The terms "*Enroll/Enrollment* means the process that Medicare uses to establish eligibility to submit claims for Medicare covered services and supplies." 42 C.F.R. § 424.502. A provider or supplier seeking billing privileges under the Medicare program must "submit enrollment information on the applicable enrollment application. Once the provider or supplier successfully completes the enrollment process . . . CMS enrolls the provider or supplier into the Medicare program." 42 C.F.R. § 424.510(a). CMS then establishes an effective date for billing privileges under the requirements stated in 42 C.F.R. § 424.520(d) and may permit limited retrospective billing under 42 C.F.R. § 424.521.

To maintain Medicare billing privileges, a provider or supplier must revalidate its enrollment information at least every five years to recertify the accuracy of the enrollment information. CMS reserves the right to perform off-cycle revalidations in addition to the regular five-year revalidations. 42 C.F.R. § 424.515. When CMS notifies a provider or supplier that it is time to revalidate, the provider or supplier must provide the appropriate application, accurate information, and supporting documentation within 60 calendar days of CMS's notification. 42 C.F.R. § 424.515(a)(2).

CMS can deactivate an enrolled provider or supplier's Medicare billing privileges if the enrollee fails to comply with revalidation requirements by providing complete and accurate information and all supporting documentation within 90 days of CMS's notice to revalidate. 42 C.F.R. § 424.540(a)(3). If CMS deactivates a provider or supplier's Medicare billing privileges "[n]o payment may be made for otherwise Medicare covered items or services furnished to a Medicare beneficiary." 42 C.F.R. § 424.555(b).

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<sup>2</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

The reactivation of an enrolled provider or supplier's billing privileges is governed by 42 C.F.R. § 424.540(b), and the process for reactivation is contingent on the reason for deactivation. If CMS deactivates a provider or supplier's billing privileges due to an untimely response to a revalidation request, the enrolled provider or supplier may apply for CMS to reactivate its Medicare billing privileges by completing a new enrollment application or, if deemed appropriate, recertifying its enrollment information that is on file. 42 C.F.R. § 424.540 (b)(1).

*1. Palmetto received an enrollment application (CMS -855I) from Petitioner on September 10, 2015, which Palmetto ultimately approved.*

The record shows that in a letter dated August 17, 2012, Palmetto advised Petitioner that she needed to revalidate her enrollment in the Medicare program and could do so by either submitting an updated CMS-855 enrollment application form, or by reviewing the information that was currently on file and submitting any updates to Palmetto via the Internet-based Provider Enrollment Chain and Ownership System (PECOS). CMS Ex. 1 at 1-2. The letter also advised Petitioner that failing to submit a complete enrollment application with supporting documentation by either method within 60 calendar days of the postmark date of the letter "may result in your Medicare billing privileges being deactivated." CMS Ex. 1 at 1. The letter included Palmetto's contact number and website if Petitioner had any questions regarding the enrollment application, including "the appropriate 855 application." CMS Ex. 1 at 3.

The record also shows that over a three-year period Petitioner submitted four enrollment applications to Palmetto to revalidate her Medicare enrollment information.

- a. Petitioner submitted a CMS-855I Medicare enrollment application to Palmetto on August 25, 2013, over one year after the August 17, 2012 revalidation request. CMS Ex. 2. In a September 5, 2013 email, sent at 9:33 a.m., Palmetto acknowledged receipt of Petitioner's enrollment application and advised Petitioner that she needed to submit a CMS-588 form to authorize Electronic Funds Transfer (EFT) along with documents to verify her identity and bank account. CMS Ex. 3. The notice stated: "we may deny your application(s) if you do not furnish complete information . . . including all supporting documentation within 30 days of the date of this letter." CMS Ex. 3 at 1. However, later on September 5, 2013, at 10:34 a.m., CMS sent Petitioner an email notice that her CMS-855I application had been "APPROVED." P. Ex. 1. On October 9, 2013, Palmetto deactivated Petitioner, for the first time, because Petitioner "failed to respond to a revalidation request mailed 09/05/2013." CMS Ex. 4. The deactivation notice from Palmetto advised Petitioner that to resume her billing privileges she needed to "**IMMEDIATELY**" submit a CMS-855 provider enrollment application or update her information via PECOS. CMS Ex. 4 at 1 (emphasis in original). The notice

provided Petitioner with a number she could call and a website she could access if she had any questions regarding the reactivation process. CMS Ex. 4 at 3.

- b. On February 12, 2014, approximately four months later, Petitioner submitted a CMS-855B enrollment application to reactivate her billing privileges. CMS Ex. 5 at 1, 29, 33. A CMS-855B is used to enroll institutional suppliers and not individuals. *See* CMS Ex. 5 at 5. In a March 12, 2014 email, sent to an incorrect email address, Palmetto attempted to notify Petitioner that it had received Petitioner's submission, and advised Petitioner that Palmetto could deny her application if she did not submit a completed CMS-855I application (i.e., an application for an individual practitioner) by mail or fax within 30 days. CMS Ex. 7 at 2. The email provided Petitioner with an internet link where she could find the CMS-855I form, and the address and fax number where she should either mail or fax the application. CMS Ex. 7 at 2.

On March 26, 2014, Palmetto sent an email notice substantially the same as the March 12, 2014 email notice to Petitioner's correct email address. CMS Ex. 6. On April 24, 2014, a Palmetto representative forwarded the incorrectly addressed March 12 email notice to Petitioner at 11:48 a.m. CMS Ex. 7. That same day at 12:52 p.m., the Palmetto representative sent Petitioner an email acknowledging they had talked, and advising Petitioner that she should submit the requested application addressed to the representative's attention. CMS Ex. 8 at 1. The Palmetto representative attached an April 24, 2014 letter to the email that: acknowledged receipt of Petitioner's February 2014 application; noted a Palmetto representative had attempted to contact Petitioner on March 12, 2014; stated the CMS 855B application had been rejected; and requested Petitioner submit a CMS-855I application by mail to the representative's attention. CMS Ex. 8 at 2-3.

- c. Petitioner then submitted a third enrollment application through PECOS on June 12, 2014. CMS Ex. 9. On August 18, 2014, Palmetto sent Petitioner an email notice that her application was incomplete and identified the sections of the application that required completion. CMS Ex. 10. There is no evidence in the record that Petitioner responded. On April 15, 2015, Palmetto notified Petitioner that it was deactivating her Medicare billing privileges, for the second time, because Petitioner failed to respond to the request for additional information. CMS Ex. 11. The letter also advised Petitioner of the actions she could "**IMMEDIATELY**" take to resume her billing privileges. CMS Ex. 11 at 1(emphasis in original).
- d. Palmetto received a CMS-855I enrollment application and supporting documentation from Petitioner on September 10, 2015, which she filed through PECOS – approximately five months after the April 2015 notice to file a new

enrollment application – in order to reactivate her billing privileges. CMS Exs. 12, 13. Palmetto approved this application. CMS Ex. 14.

Based on the evidence of record, I find that the only relevant enrollment application that Palmetto received from Petitioner that was subsequently approved was the application received on September 10, 2015.

***2. The effective date for Petitioner's enrollment is September 10, 2015, and Petitioner's retrospective billing period commenced on August 11, 2015.***

The Secretary's regulations provide that the effective date of enrollment of physicians, non-physician practitioners, and physician or non-physician practitioner organizations is the later of the "date of filing" or the date the supplier first began furnishing services at a new practice location. 42 C.F.R. § 424.520(d). The "date of filing" is the date that the Medicare contractor "receives" a signed enrollment application that the Medicare contractor is able to process to approval. 73 Fed. Reg. 69,726, 69,769 (Nov. 19, 2008); *Donald Dolce, M.D.*, DAB No. 2685 at 8 (2016). CMS published guidance to its contractors addressing the effective participation date to assign to a supplier or provider that seeks to reactivate its participation. That date, consistent with the enrollment regulations, is the date when the contractor receives a re-enrollment application that it processes to completion. Medicare Program Integrity Manual (MPIM) § 15.27.1.2.

Although Palmetto incorrectly referred to the beginning of the retrospective billing period as the effective date for Petitioner's enrollment, Palmetto is ultimately correct that it had the authority to set August 11, 2015, as the earliest date Petitioner can bill Medicare for services she provides based on receiving Petitioner's enrollment application on September 10, 2015. 42 C.F.R. § 424.521(a); CMS Ex. 16 at 1. As indicated above, on September 10, 2015, Palmetto received an application and supporting documentation through PECOS from Petitioner to reactivate her Medicare participation. CMS Exs. 12, 13. Palmetto approved this application. CMS Ex. 14. Based on this application, September 10, 2015, was the only effective reactivation date that Palmetto could have granted to Petitioner.

***3. Petitioner's equitable and estoppel arguments cannot be considered.***

Petitioner seeks to reset her activation date back to October 2013, which would allow her to receive reimbursement for services she has provided to Medicare beneficiaries for the past two years. Hearing Request at 2. In support of this request, Petitioner advances several reasons why I should grant her request. First, Petitioner claims that she continued to provide services to Medicare beneficiaries in good faith; the corrections to her 2014 enrollment application were "minuscule and easily remedied;" and the loss of close family members impacted her ability to respond more timely to the Palmetto request. Hearing Request at 1-2. Moreover, Petitioner claims that she was never informed of the

mandatory requirements that she complete an EFT form to allow direct deposits from Medicare to her account and that her payments would be impacted if she did not submit the EFT form. According to Petitioner, the EFT form was optional for her prior applications, and to now deny her payments for services she provided between October 2013 and August 2015, because she failed to submit the EFT form is “unfair” and “unjust” and that CMS has been “unjustly enriched”. P. Br. at 1-2; Hearing Request at 2.

As an initial matter, I have no jurisdiction to review CMS’s decisions to deactivate Petitioner’s billing privileges or reject Petitioner’s enrollment application. *See* 42 C.F.R. §§ 424.525(d), 424.545(b), 498.3(b). Therefore, I cannot determine the efficacy of the October 9, 2013, and April 15, 2015 deactivation notices and the April 24, 2014 rejection of one of Petitioner’s previously filed enrollment applications. CMS Exs. 4, 8, 11.

As for Petitioner’s argument that she was not required to complete an EFT form for her prior revalidations, effective August 26, 2008, the Secretary established a new enrollment and revalidation requirement that providers and suppliers receive Medicare payments via EFT. 42 C.F.R. § 424.510(d)(2)(iv); 73 Fed. Reg. 36, 448 (June 27, 2008).

Further, whether or not CMS has been unjustly enriched by the denial of her claims is not relevant to my decision. If CMS deactivates a supplier’s Medicare billing privileges, CMS cannot pay the supplier for items or services it provides to Medicare beneficiaries. 42 C.F.R. § 424.555(b).

Petitioner appears to have made an initial good faith effort to try to properly complete her revalidation application. Indeed, CMS approved her first revalidation application before Palmetto deactivated Petitioner for allegedly failing to file a revalidation application. Petitioner also references a commendable history of running a small practice and serving Medicare beneficiaries. However, Petitioner’s ultimate arguments as to why she was unable to timely respond to various requests from Palmetto for additional information are equitable in nature. Although I do not question the accuracy of Petitioner’s statements, I have no authority to grant equitable relief. *US Ultrasound*, DAB No. 2302, at 8 (2010); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009).

## **V. Conclusion**

I affirm CMS’s determination that Petitioner’s effective date for Medicare billing privileges is September 10, 2015, with a 30-day retrospective billing period commencing on August 11, 2015.

/s/

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Scott Anderson  
Administrative Law Judge