Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Margaret J. Prewitt, CRNA,
(NPI: 1134353600),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-142

Decision No. CR2079

Date: February 26, 2010

DECISION

Petitioner, Margaret J. Prewitt,[1] CRNA (Certified Registered Nurse Anesthetist), is not entitled to a hearing on the issues raised by her request for hearing and the request for hearing is dismissed pursuant to 42 C.F.R. § 498.70(b). A party may request that I vacate a dismissal for good cause but a request to vacate must be submitted within 60 days of receipt of the notice of dismissal. 42 C.F.R. § 498.72.

I. Background

The Medicare contractor, National Government Services (NGS), notified Petitioner by letter dated July 29, 2009, that her application for enrollment in Medicare was approved with a group member effective date of May 30, 2009. Centers for Medicare and

[1] The request for hearing was filed by the practice administrator for Woodland Anesthesiology Associates, P.C. (Woodland), Petitioner's employer to which, I infer, she reassigned her right to bill Medicare for services she provided to Medicare eligible beneficiaries. However, it is the enrollment in Medicare of Margaret J. Prewitt that is in issue and not that of Woodland.

Medicaid Services (CMS) Exhibit (CMS Ex.) 3. Petitioner requested reconsideration by letter dated August 11, 2009, specifically requesting that the effective date for her participation in Medicare be changed to January 20, 2009, the date she started with Woodland. Petitioner argued that her start date preceded the April 1, 2009 implementation date of the CMS policy limiting retrospective effective dates for billing for Medicare claims; that her enrollment application could not be submitted at the time of her start date with Woodland on January 20, 2009 because her state license as an APRN (Advanced Practice Registered Nurse) was not processed until April 2, 2009; but that her CRNA certification was effective January 13, 2009, prior to the date she started with Woodland. CMS Ex. 4. On September 16, 2009, a contractor hearing officer issued a decision denying the reconsideration request for an earlier effective date of Medicare participation. CMS Ex. 5. On November 6, 2009, Petitioner requested a hearing to challenge the reconsideration decision.

The case was assigned to me for hearing and decision on November 20, 2009, and an Acknowledgement and Prehearing Order (Prehearing Order) was issued at my direction. On December 9, 2009, CMS filed a motion to dismiss Petitioner's request for hearing or, in the alternative, a motion for summary judgment (CMS Motion). CMS also filed CMS exhibits 1 through 7. Petitioner did not file a timely response to the CMS motions and on January 25, 2010 was ordered to show cause why this case should not be dismissed for abandonment or as a sanction. On January 28, 2010, Petitioner submitted a letter objecting to the CMS motions.[2] Petitioner submitted no further response to the CMS motions. Petitioner submitted no exhibits or objections to the CMS exhibits, which are admitted.

II. Discussion

A. 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.[3] Act

[2] Petitioner did not address why she failed to timely file her response to the CMS motions. However, I conclude that Petitioner did not abandon her hearing request and it is not dismissed for abandonment or as a sanction.

[3] A "supplier" furnishes services under Medicare and includes 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)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health

§§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Administration of the Part B program is through contractors. Act § 1842(a) (42 U.S.C. § 1395u(a)).

The Act requires the Secretary to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review in the event of denial or non-renewal. Act § 1866(j) (42 U.S.C. § 1395cc(j)). 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. If enrollment is approved, a supplier is issued a National Provider Identifier (NPI) to use for billing Medicare and a PTAN, an identifier for the supplier for inquiries. Medicare Program Integrity Manual (MPIM), CMS Pub. 100-08, Chapter 10, Healthcare Provider/Supplier Enrollment, § 6.1.1.

"A prospective provider or supplier that is denied enrollment in the Medicare program, or a provider or supplier whose Medicare enrollment has been revoked may appeal" the decision in accordance with 42 C.F.R. Part 498. 42 C.F.R. § 424.545(a). Pursuant to 42 C.F.R. § 498.5(a), (d), and (l)(1) & (2), a prospective provider or supplier dissatisfied with an initial decision to deny it enrollment may request reconsideration and, if dissatisfied with the reconsideration decision, is entitled to a hearing before an administrative law judge (ALJ). A provider or supplier dissatisfied with an initial decision to terminate its participation is entitled to a hearing before an ALJ. 42 C.F.R. § 498.5(b) and (e). Initial determinations are listed at 42 C.F.R. § 498.3(b) and include: whether a prospective provider qualifies as a provider; whether a prospective supplier meets the conditions for coverage specified by the regulations; whether services of a supplier continue to meet the conditions for coverage; the effective date of a Medicare provider agreement or supplier approval; and whether to deny or revoke a provider or supplier's Medicare enrollment pursuant to 42 C.F.R. §§ 424.530 and 424.535. 42 C.F.R. § 498.3(1), (5), (6), (15), and (17).

B. Issue

Whether Petitioner has a right to a hearing on the facts of this case.

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agencies, hospice programs, and a fund as described in sections 1814(g) and 1835(e) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent facts and analysis.

> **1. Petitioner has no right to hearing by an ALJ on the issue of whether she may obtain reimbursement from Medicare for services provided to Medicare eligible beneficiaries for more than 30 days prior to her effective date of participation in Medicare.**
>
> **2. Petitioner, as a supplier not subject to survey and certification or accreditation, has no right to hearing by an ALJ on the issue of whether or not her effective date of enrollment was correctly determined by CMS.**
>
> **3. Petitioner has no right to hearing by an ALJ and dismissal pursuant to 42 C.F.R. § 498.70(b) is appropriate.**

Petitioner's applications for enrollment in Medicare and the request for hearing in this case were filed by Petitioner's employer, Woodland. CMS does not dispute the assertions in the request for reconsideration (CMS Ex. 4) and the request for hearing that Petitioner began working for Woodland on January 20, 2009; that her CRNA certification was effective January 13, 2009; and that her APRN license was not granted until April 2, 2009 (CMS Ex. 2, at 4; CMS Ex. 4). The evidence shows that NGS received an enrollment application from Woodland on behalf or Petitioner on June 1, 2009. However, the form used by Woodland had been superseded by a new form. Therefore, NGS informed Woodland that it was closing the enrollment request and that Petitioner must complete and file a new CMS 855I and 855R application form with an original signature and date. CMS Ex. 1. Petitioner submitted a new application on June 26, 2009. CMS Ex. 2. According to the decision on reconsideration, NGS received Petitioner's new application on June 29, 2009. CMS Ex. 5, at 1. On July 29, 2009, NGS notified Petitioner that her application was approved with an effective date of May 30, 2009. CMS Ex. 3. The decision on reconsideration approved the effective date of Petitioner's participation as May 30, 2009. CMS Ex. 5.

Pursuant to 42 C.F.R. § 424.520(d),[4]

[4] This provision was added by final rule at 73 Fed. Reg. 69,725; 69,773 (Nov. 19, 2008) and 73 Fed. Reg. 80,304 (Dec. 31, 2008) effective January 1, 2009, and will be codified at 42 C.F.R. § 424.520(d).

> The effective date for billing privileges for physicians, nonphysician practitioners and physician and nonphysician practitioner organizations is the later of the date of filing of a Medicare enrollment application that is subsequently approved by a Medicare contractor or the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.

The date of filing is the date the Medicare contractor receives a signed application that it can process to approval. *See* 73 Fed. Reg. 69,725, 69,769 (Nov. 19, 2008). In this case, there is no dispute that the date of filing was June 29, 2009. Petitioner does not assert that the second prong of 42 C.F.R. § 424.520(d) is applicable in this case. Because Petitioner does not dispute that she did not file a complete an approvable application with NGS prior to the application received by NGS on June 29, 2009, it is clear that her disagreement is with the operation of the new regulation which limits to 30 days the period for which she may obtain retrospective reimbursement. Petitioner cites no authority for the proposition that her eligibility to claim retrospective reimbursement is an initial determination that is subject to my review and I find no such authority. Petitioner does not specifically challenge the lawfulness of the new regulations at 42 C.F.R. §§ 424.520(d) and 424.521(a)(1). Even if Petitioner challenged the lawfulness of the regulations, I am bound to follow the Secretary's regulations, including 42 C.F.R. §§ 424.520(d) and 521(a)(1), and I have no authority to find the regulations invalid.

I note that in this case NGS granted Petitioner an effective date of May 30, 2009 (CMS Ex. 3) rather than June 29, 2009, which is inconsistent with 42 C.F.R. § 520(d), as the regulation establishes the effective date of enrollment as the date of filing of the application. The effective date determination may have been based upon an incorrect application of 42 C.F.R. § 521(a)(1),[5] which permits enrolled physicians, nonphysician practitioners and physician and nonphysician practitioner organizations to bill "retrospectively" for services provided up to 30 days prior to their effective date if circumstances precluded enrollment in advance of providing services.[6] However, I will not disturb the May 30, 2009 effective date determined by the contractor.

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[5] This provision was also added by final rule at 73 Fed. Reg. 69,725; 69,768-69; 69,773; 69,939 (Nov. 19, 2008) and 73 Fed. Reg. 80,304 (Dec. 31, 2008) effective January 1, 2009, and is to be codified at 42 C.F.R. § 424.521(a)(1).

[6] Prior to the change in the regulations effective January 1, 2009, physicians were permitted to retroactively bill Medicare for services furnished up to 27 months prior to enrollment. CMS Motion at 5, note 2. Whether or not Petitioner can submit claims for services preformed 30 days prior to May 30, 2009 under authority of 42 C.F.R. § 521(a)(1) is also not an issue within my jurisdiction.

CMS correctly argues as grounds for dismissal that Petitioner has no right to a hearing because the determination of the effective date of her enrollment in Medicare is not an initial determination that triggers a right to a hearing. CMS Motion at 1, 11. The CMS position, stated simply, is that Petitioner's enrollment as a supplier was not denied and no right to a hearing is triggered in this case. CMS Motion at 6-9, 11-13. The Act only provides for a right to hearing and judicial review in the case of denial or non-renewal of enrollment. Act § 1866(j) (42 U.S.C. § 1395cc(j)). The Secretary has provided by regulation for a right to hearing and judicial review for both denial and revocation of enrollment. 42 C.F.R. §§ 424.545(a); 498.3(1), (5), (6), (17); 498.5(a), (d), and (l)(1) & (2); 42 C.F.R. § 498.5(b) and (e). CMS acknowledges that the plain language of 42 C.F.R. § 498.3(15) indicates that the determination of the effective date of a Medicare provider agreement or supplier approval, is an initial determination that is subject to hearing and judicial review. However, CMS argues that 42 C.F.R. § 498.3(15) is not a provision applicable in the case of a supplier such as Petitioner. CMS Motion at 14-16. Although the plain language of a regulation would normally control, review of legislative or regulatory history is appropriate when an issue of interpretation is raised as it is in this case. The regulatory history for 42 C.F.R. § 498.3(15) at 62 Fed. Reg. 43,931, 43,933-34 (Aug. 18, 1997) supports the CMS position that the provision only permits a right to hearing related to an effective date determination for providers and suppliers subject to survey and certification or to accreditation by an accrediting organization. Petitioner was not subject to survey and certification or accreditation in order to enroll and qualify as a suppler participating in Medicare. I conclude that 42 C.F.R. § 498.3(15), creates no right for Petitioner to request a hearing to challenge the effective date determination by CMS or its contractor.

Accordingly, I conclude that Petitioner has not shown that she has a right to a hearing and I have found no basis upon which to exercise jurisdiction and grant Petitioner review.

III. Conclusion

I conclude, based on the foregoing, that Petitioner has no right to a hearing and dismissal of her request for hearing is appropriate pursuant to 42 C.F.R. § 498.70(b).

/s/
Keith W. Sickendick
Administrative Law Judge