Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Albany Physical Therapy,
(CCN: 09289014100581),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-506

Decision No. CR2184

Date: July 16, 2010

DECISION REMANDING CASE

I deny the Motion to Dismiss of the Centers for Medicare & Medicaid Services (CMS), and I remand the case so that either CMS or its contractor, Palmetto GBA (Palmetto), may develop the record and make a determination based on the facts.

I. Background

By letter dated March 1, 2010, Petitioner, Albany Physical Therapy, appealed the January 4, 2010 reconsideration decision of Palmetto. Hearing Request (HR).

This case was assigned for hearing and decision to Administrative Law Judge (ALJ) Alfonso J. Montano. The case was subsequently transferred to me, pursuant to 42 C.F.R. § 498.44, which permits a Member of the Departmental Appeals Board (Board) to be designated to hear appeals taken under Part 498. ALJ Montano issued an order (ALJ Order) on March 5, 2010, setting out procedures for the appeal.

With its Hearing Request, Petitioner included documents, which it identified as Exhibits A-N.[1] (P. Ex. A-N). These consisted of: a copy of the contractor's January 4, 2010 reconsideration decision; a copy of an executed CMS-855R application, which Petitioner asserts was sent to Palmetto on January 7, 2009; a summary sheet, dated January 7, 2009, indicating various forms that Gordon Woon reviewed and/or signed for Albany Physical Therapy; an executed Office Policy Acknowledgment dated January 7, 2009; an executed Form W-4 dated January 7, 2009; a facsimile verification indicating that a fax was sent with a handwritten note noting that the W-4 form was faxed to a bookkeeper on January 7, 2009; a handwritten note setting forth the mailing address for Palmetto GBA with a note indicating that the author had "NO IDEA what happened to our application that we sent to this address on 1/7/09?" (emphasis in original); a letter from Petitioner to Palmetto dated September 11, 2009; a reconsideration request dated September 30, 2009; a signature page of a CMS-855R application dated September 11, 2009; Petitioner's written account of conversations it contends occurred between Petitioner and Palmetto dated September 11, 2009 and December 7, 2009; an acknowledgement letter from Palmetto dated September 23, 2009; a letter dated September 30, 2009 from Palmetto to Petitioner indicating that the effective date for Mr. Woon's billing privileges for the Medicare program was August 17, 2009; a letter from Petitioner to Palmetto dated September 30, 2009; an affidavit of Sherry Jackson dated February 24, 2010; and a copy of *David A. Baker, M.D. et al.,* DAB CR2035 (2009). CMS did not object to any of these materials. I therefore admit these documents into evidence for this decision.

Based on an enrollment application that Petitioner submitted, Palmetto assigned an effective date of August 17, 2009 for the participation in the Medicare program of Gordon W. Woon, P.T., in an initial approval letter dated September 30, 2009. P. Ex. J. Petitioner then filed a reconsideration request challenging the effective date Palmetto provided and requested an effective date of February 9, 2009. P. Exs. H and L. On January 4, 2010, the Palmetto hearing officer denied Petitioner's reconsideration request, citing 42 C.F.R. §§ 424.520(d) and 424.521(a)(1) as the basis of the decision. P. Ex. A. Petitioner seeks an earlier effective date to bill for Mr. Woon's services rendered beginning February 9, 2009.

On March 11, 2010, CMS moved that I dismiss Petitioner's hearing request. CMS proffered no exhibits with its Motion to Dismiss. Petitioner responded to the CMS motion and filed a Countermotion for Summary Judgment on March 31, 2010. Petitioner proffered one exhibit with its countermotion, marked as P. Ex. 1. CMS has submitted no documents in this case, apart from its brief Motion to Dismiss. CMS did not respond to

[1] In addition, Petitioner suggested in its Hearing Request that it intends to ask the assigned ALJ to issue a subpoena pursuant to 42 C.F.R. § 498.58 for a CMS-855R application it claims to have filed in January of 2009. However, this office never received a subpoena request.

Petitioner's Countermotion for Summary Judgment and, on May 6, 2010, informed this office that CMS had nothing further to file in this matter.

II. Issues

The issues in this case are as follows:

1. Whether I should dismiss Petitioner's hearing request on the ground that it has no right to appeal; and

2. Whether Petitioner is entitled to summary judgment that the CMS contractor incorrectly determined Gordon W. Woon's effective date of enrollment, and Petitioner should receive a new effective enrollment date for Mr. Woon of February 9, 2009.

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

My findings of fact and conclusions of law are set forth in bold and italics as headings below following by my supporting analysis.

A. The effective date of a Medicare provider agreement or supplier approval is an initial determination reviewable in this forum; thus, Petitioner has a right to a hearing.

1. Applicable Standard

Pursuant to 42 C.F.R. § 498.70(b), I may dismiss a hearing request where a party requesting a hearing "does not otherwise have a right to a hearing."

2. Analysis

CMS argues that the Medicare regulations "do not give appeal rights to a Medicare provider or supplier dissatisfied with the effective date of Medicare enrollment" and that I must therefore dismiss the appeal. CMS Motion to Dismiss at 2.

In several prior decisions, I have explained why I do not agree with CMS. *See Michael Majette, D.C.*, DAB CR 2142 (2010); *see also Eugene Rubach, M.D.,* DAB CR2125 (2010); *Mobile Vision, Inc.*, DAB CR2124 (2010). I adopt the reasoning explained in my prior decisions, which I summarize briefly here.

The wording of section 498.3(b)(15) appears straightforward in providing that the "effective date of a Medicare provider agreement or supplier approval" is an appealable initial determination and includes no qualifying or limiting language. None of the

administrative actions identified in section 498.3 as *not* subject to appeal under Part 498 include the determination of an effective date for a provider or supplier to participate in Medicare.

While subpart P of part 424 unquestionably does grant appeal rights from denials and revocations, as CMS notes, it does so by reference to the provisions of subpart A of Part 498, stating that a prospective provider or supplier whose enrollment is denied or revoked "may appeal CMS' decision in accordance with part 498, subpart A of this chapter." 42 C.F.R. § 424.545(a). Subpart A of Part 498 includes section 498.3(b)(15), yet CMS did not exclude section 498.3(b)(15) or otherwise indicate that effective date determinations would not be proper subjects for these Medicare hearings. When CMS published subpart P of Part 424 in 2006 (71 Fed. Reg. 20,753, 20,776 (Apr. 21, 2006)), it was well-aware of the longstanding provision in section 498.3(b)(15), which it had described in 1997 as granting "appeal rights and procedures for entities that are dissatisfied with effective date determinations." 62 Fed. Reg. 43,931-32 (Aug. 18, 1997). Yet, section 424.545(a) incorporated section 498.3 without limitation. Hence, the plain language of section 424.545(a) reinforces the plain language of section 498.3(b)(15).

The history of section 498.3(b)(15) shows CMS's recognition that: (1) approving participation at a date later than that sought amounts to a denial of participation during the intervening time; (2) effective date appeals generally involves the same kind of compliance issues that arise from initial denials; and (3) the right to appeal an effective date determination, while not previously codified, had already been confirmed by court decisions. 62 Fed. Reg. at 43,933-34 (final rule); 57 Fed. Reg. 46,362, 46,363 (Oct. 8, 1992) (proposed rule). While rules for determining effective dates adopted at the same time as section 498.3(b)(15) applied only to providers and suppliers subject to certification or accreditation, the rulemaking addressing section 498.3(b)(15) contains no language parallel to that addressing determining effective dates, limiting its application to only providers and suppliers that are subject to survey and certification or accreditation. 62 Fed. Reg. at 43,934; 57 Fed. Reg. at 46,363.

CMS argues nonetheless that section 498.3(b)(15) is inapplicable here. CMS argues that this provision is meant to apply only to those suppliers or providers subject to survey and certification (or accreditation by a CMS-approved accrediting organization) as a basis for determining their participation in Medicare and whose effective dates are governed by 42 C.F.R. § 489.13, but not to suppliers, such as Petitioner, whose Medicare enrollment is approved under Part 424, subpart P. CMS points out that section 498.3(b)(15) was adopted "long before" the Medicare statute was amended (by section 936(a)(2) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (codified at 42 U.S.C. § 1395cc(j))) to permit suppliers not subject to survey and certification or accreditation to appeal denials of applications for enrollment (CMS Motion to Dismiss at 3) and that the regulations in Part 424 implementing the 2003 amendment permit such suppliers to appeal only denials and revocations of enrollment.

CMS's argument is not persuasive. A later statute does not elucidate the intended meaning of a prior regulation, especially one unambiguous on its face. While regulatory history and other sources of guidance are relevant in interpreting language, which is ambiguous, unclear in its application, or which leaves gaps, courts do not resort to such interpretive tools when the wording is clear on its face. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[T]he 'cardinal canon' of construction is that a statute means what it says and, when unambiguous, 'this first canon is also the last: 'judicial inquiry is complete.'"). CMS has not identified in what respect the wording of section 498.3(b)(15) is ambiguous or unclear, or where the language leaves a gap requiring interpretation to give it meaning. I thus find little room for the interpretation CMS advances.

Based on the foregoing, I deny CMS's Motion to Dismiss.

B. Petitioner is not entitled to summary judgment on the record before me.

1. Applicable Standard

The Board explained the applicable standard for summary judgment as follows:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Kingsville Nursing and Rehabilitation Center*, DAB No. 2234, at 3 (2009), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). While the Federal Rules of Civil Procedure (FRCP) are not binding in this administrative appeal, we are guided by those rules and by judicial decisions on summary judgment in determining whether the ALJ properly granted summary judgment. *See Thelma Walley*, DAB No. 1367 (1992). . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *Kingsville* at 3, citing *Celotex*, 477 U.S. at 323. If the moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. *Id.* at 586, n.11; *Celotex*, 477 U.S. at 322. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010).

2. Analysis

In this appeal, Petitioner argues that it submitted an enrollment application for Gordon W. Woon in January of 2009, and Mr. Woon commenced employment with Petitioner on February 9, 2009. HR at 2-3. Petitioner essentially argues that Palmetto lost the enrollment application submitted in January of 2009 and required Petitioner to submit a second application in September of 2009. HR. Thus, Petitioner contends that, due to CMS's error in instructing Petitioner to resubmit a new enrollment application, Mr. Woon's effective date was incorrectly determined.

Petitioner claims that Mr. Woon was to commence employment with Albany Physical Therapy on February 9, 2009. HR at 1. Petitioner contends that on January 7, 2009 Mr. Woon met with Sherry Jackson, the Business Manager at Albany Physical Therapy. HR. At that meeting, Mr. Woon purportedly filled out various documents including a CMS-855R application. HR at 1; P. Exs. B-F. Petitioner also claims Ms. Jackson contacted Palmetto's office and inquired as to where she should mail Mr. Woon's completed CMS-855R application. HR at 2. Petitioner contends that Ms. Jackson was told to send the application to Palmetto at a post office box in Columbus Ohio and that Ms. Jackson noted the address on a piece of paper which Petitioner also submits. HR at 2; P. Ex. G.

Petitioner further asserts that Mr. Woon commenced employment with Albany Physical Therapy on February 9, 2009. HR at 2. Petitioner contends that it received uninterrupted Medicare payments for Mr. Woon through August of 2009. *Id*. Then, on September 11, 2009, Petitioner received a claim denial by Medicare for Mr. Woon, and Ms. Jackson called Palmetto and spoke to a representative. *Id*. Petitioner contends that the Palmetto representative informed Ms. Jackson that Palmetto could find no record of a CMS-855R application for Mr. Woon. *Id*. Petitioner also claims that the representative "said that the original filing should have gone to a Palmetto post office box in Augusta, Georgia but that should not have been a problem as they would normally forward applications sent to the wrong address to the Georgia address." *Id*. Petitioner claims the Palmetto representative then "told Ms. Jackson to fill out a new signature page with the current date and resend the application for Mr. Woon to the Augusta, Georgia address." *Id*. Ms. Jackson then sent the new application with a cover letter explaining the sequence of events and asked for an effective date of February 9, 2009. HR at 2; P. Exs. H, I.

By letter dated September 23, 2009, Palmetto acknowledged the "resent" application. HR at 2; P. Ex. J. Neither party submitted a copy of this application, or any other evidence, as to the date on which Palmetto received it. On September 30, 2009, Petitioner was informed that the effective date for Mr. Woon's Medicare enrollment application was August 17, 2009. HR at 2; P. Ex. K. Petitioner then filed a reconsideration request, received an unfavorable determination, and this appeal ensued.

The January 4, 2010 reconsideration decision provides no facts upon which the Palmetto hearing officer based the decision. The hearing officer states that "[p]er Title 42 CFR § 405.874 does not afford a physician or non-physician practitioner with the right to appeal the effective date made by a Medicare contractor, a physician can always raise their concerns to the contractor management." P. Ex. A at 1. The hearing officer then states that she has nevertheless "reviewed the specific facts associated with your enrollment application and the effective date established, and unfortunately, we are not able to make a change to the effective date of filing." *Id.* The only further rationale for denying a change to the effective date is given as "30 days from the Receipt Date of the application." *Id.* The decision concludes that "Gordon Woon, PT has not provided evidence to show you have fully complied with the standards for which your effective date was established." *Id*. at 2. These comments do not reveal a factual basis to find when Petitioner's application was received or do not respond to Petitioner's argument that its CMS-855R application was originally sent on January 7, 2009.

Neither the reconsideration decision nor CMS in its Motion to Dismiss provide any argument or explanation in response to Petitioner's account of events. CMS offers no indication of whether it received a CMS-855R application in January of 2009. Although Petitioner provides a letter from Palmetto dated September 23, 2009 acknowledging receipt of Petitioner's application, the letter does not state the actual date of receipt. P. Ex. J. In its motion to dismiss, CMS states that Palmetto approved Petitioner's enrollment application "on or about September 30, 2009." CMS Motion to Dismiss at 1. However, CMS also stated that "Palmetto properly awarded enrollment effective April 12, 2009, thirty days prior to the date petitioner's approvable application was received." CMS Motion to Dismiss at 2. Thus, it is unclear when CMS is claiming that Palmetto actually received Petitioner's enrollment application and CMS does not provide a copy of the application that Palmetto received (as it does in many other cases in which each page of an application shows a stamp with the date and time of receipt).

The date upon which Palmetto received and subsequently approved Petitioner's application is integral to the correct determination of Petitioner's effective date of Medicare billing privileges. Section 424.520 provides in pertinent part:

> (d) *Physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations.* The effective date for billing privileges for physician, nonphysician practitioners, and physician and nonphysician practitioner 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 an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.

(Emphasis added). The "date of filing" is the date that the Medicare contractor **receives** a signed provider enrollment application that the Medicare contractor is able to process to approval. 73 Fed. Reg. 69,725, 69,769 (Nov. 19, 2008) (emphasis added).

It is evident that the date that Palmetto assigned as the "effective date," August 17, 2009, is not consistent with section 424.520(d), since Palmetto describes it as "30 days from the Receipt Date of the application." P. Ex. A at 1. Given the citation to section 424.521(a)(1), I might presume that CMS and Palmetto intended to assign an effective date based on the receipt date sometime on or prior to September 23, 2009, and then to grant a 30-day period of retroactive billing as that regulation permitted. However, given CMS's failure to document any undisputed date of receipt in this case, its failure to explain the calculation purported effective date, and the conflicting dates CMS presents in its briefing, I am unwilling to presume that CMS correctly determined the effective date for either for Petitioner's enrollment in the Medicare program pursuant to section 424.520(d), or the date Petitioner could retroactively bill Medicare pursuant to section 424.521(a)(1).

On the other hand, I am unable to conclude that Petitioner's evidence establishes that it is entitled to judgment in its favor as a matter of law based on the undisputed facts. CMS has not placed any of the facts in Petitioner's account at issue. However, on summary judgment, I must view the factual evidence in the light most favorable to the non-movant, here CMS, and draw all reasonable inferences from the evidence in that light. I cannot therefore assume that Palmetto received a complete and approvable application in January 2009, even accepting Petitioner's assertions about having mailed an application at that time.

Although Petitioner requests an effective date of February 9, 2009, the date Mr. Woon began providing services at Petitioner's practice location, the applicable rule quoted above sets the effective date based on the **later** of the date of receipt of an enrollment application or the date services are first provided at a new location. Thus, February 9, 2009, the date Mr. Woon began furnishing services at Albany Physical Therapy, could only be the basis for Petitioner's effective date if Petitioner could show that an enrollment application that was processed to approval was submitted prior to that date. *See* 42 C.F.R. § 424.520(d).

Thus, in accordance with the above regulations, for me to disturb the effective date determination and grant Petitioner an effective date of February 9, 2009, Petitioner would at a minimum have to prove that Palmetto *received* an enrollment application sometime before February 9, 2009, which was approvable as submitted.

Petitioner has not proffered evidence that would prove Palmetto received a CMS-855R mailed by Petitioner in January 2009. The record does not contain any record of the mailing of Petitioner's CMS-855R application, even though Petitioner could have sent

the document by certified mail or other trackable system. In an affidavit, Ms. Sherry Jackson, Petitioner's billing manager states that "[m]y only regret is that I did not send the original application by certified mail." P. Ex. M at ¶ 6. This statement amounts to recognition that Petitioner could have taken measures within its own control to establish the date of receipt of its enrollment application and simply failed to do so. Furthermore, the absence of any acknowledgment of receipt at that time supports an inference that the application was not received even if it was mailed.

Without proof of an earlier date of filing, I do not have the authority to change the effective date in this matter. Thus, I conclude that Petitioner has not established that it is entitled to summary judgment by law, and Petitioner's request for an effective date of enrollment of February 9, 2009 must be denied.

C. Dismissal without prejudice and remand is appropriate action based on the record before me.

As I have noted, neither the reconsideration decision nor CMS in its motion to dismiss provides any argument or explanation at all in response to Petitioner's account of events or provides a factual basis to support a specific effective date. This silence leaves me without the benefit of CMS's reasoning as to the legal significance of Petitioner's account. Given the cryptic and sparse reconsideration decision, record and pleadings, I do not find the written record adequate to support a final decision on the merits. Also, without the benefit of evidence or explanation as to the contractor's receipt and processing of the application(s) in this case, I will not make findings of fact.

Pursuant to 42 C.F.R. § 498.78(b), I may remand "at any time before notice of hearing decision is mailed." I therefore dismiss without prejudice and remand the matter to CMS so that CMS or its contractor may review all relevant files and materials and issue a new determination addressing the facts. Petitioner may file a new request for hearing before me if the decision on remand is unfavorable.

/s/
Leslie A. Sussan
Board Member