Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Winchester Medical Center (NPI: 1679711261),
Thomas Bouder (PTAN: 00Y116W02), and
Moses Bachan (NPI: 1972764413),

Petitioners

v.

Centers for Medicare & Medicaid Services.

Docket Nos. C-10-612, 618, and 619

Decision No. CR2222

Date: August 18, 2010

DECISION

I dismiss Petitioners' appeals with prejudice because they were filed untimely without a showing of good cause.

I. Background

By letter dated April 1, 2010, Petitioners sought to appeal the denial by TrailBlazer Health Enterprises, LLC (TrailBlazer), the Medicare contractor, of Petitioners' request for reconsideration of the effective date assigned to each of them of August 11, 2009. Hearing Request (HR). Each Petitioner was assigned a docket number (C-10-612 for Winchester Medical Center; C-10-618 for Dr. Bouder; and C-10-619 for Dr. Bachan), but the three cases have been consolidated for decision. The hearing request was accompanied by the following supporting documentation: TrailBlazer letter dated January 19, 2010 denying the reconsideration request as untimely; November 15, 2009 letter to TrailBlazer requesting reconsideration; December 11, 2009 TrailBlazer letter indicating that the reconsideration request was not signed by the individual provider and the requestor was not either the individual provider or the authorized official (and attached copy of the November 15, 2009 letter showing a receipt stamp of December 9, 2009); October 7, 2009 TrailBlazer letter granting enrollment with effective date of

August 11, 2009 for Winchester Medical Services (along with duplicates of preceding documents and a copy of the letter with handwritten notations); October 13, 2009 TrailBlazer letter granting enrollment with effective date of August 11, 2009 for Dr. Bachan; and TrailBlazer letters dated September 14, 2009 acknowledging receipt of each Petitioner's enrollment applications.

It is not disputed that Petitioners, a physician group and two physicians from that group, first attempted to enroll in Medicare in April 2009 (for the group and Dr. Bachan) or July 2009 (for Dr. Bouder). CMS Brs. in C-10-612, 618, and 619, all at 2 n.1. In each case, Petitioner describes efforts to communicate with TrailBlazer about the status of the application and to provide missing information, but acknowledges that the applications were ultimately returned due to failure to provide missing information timely. HRs in C-10-612, 618, and 619.[1]

It is also undisputed that Petitioners re-submitted the enrollment applications which TrailBlazer received by on September 9, 2009. CMS Brs. in C-10-612, 618, and 619, all at 2; HRs in C-10-612, 618, and 619. These applications were ultimately processed to approval and each Petitioner was assigned the effective date for Medicare enrollment of August 11, 2009. CMS Ex. 2 in C-10-612, at 1; CMS Ex.1 in C-10-618, at 1; and CMS Ex. 1 in 619, at 1.

By letter dated November 15, 2009, Petitioners sought reconsideration of their assigned effective dates. CMS Ex. 3 in C-10-612.[2] By letter dated December 11, 2009, TrailBlazer rejected the request (which it received on December 9, 2009) on the grounds that the request was not signed by the individual provider and the requestor was not either

[1] In its briefs, CMS asserts that these applications were "denied" and that Petitioners could have sought reconsideration of the denials but "failed to do so." CMS Brs. in C-10-612, 618, and 619, all at 2 n.1. These assertions appear to be in error. The regulations provide that a contractor *rejects* an application when the applicant fails to provide missing information timely and that, after rejection, a prospective supplier may resubmit a new application but is not afforded appeal rights. 42 C.F.R. § 424.525. By contrast, an application is *denied* when one of the reasons listed in section 424.530 is found to be present (such as non-compliance, a felony conviction or exclusion, or outstanding overpayments or payment suspensions). When an application is denied, a prospective supplier may appeal the basis for the denial but is not permitted to resubmit an application until the appeal is resolved or the time for appeal expires. 42 C.F.R. § 424.530(b). The fact that the reason given for returning the applications was failure to submit missing information timely indicates that they were rejected, not denied. Petitioners therefore had no opportunity to seek reconsideration or appeal of those rejections.

[2] Since the documents relating to the reconsideration request were the same for all Petitioners, I provide only citations to the exhibits in the lead case file for these references.

the individual provider or the authorized official. CMS Ex. 4 in C-10-612. The request was resubmitted and received by TrailBlazer on January 4, 2010. CMS Ex. 5 in C-10-612. On January 19, 2010, TrailBlazer rejected the reconsideration request as past the time limit of 60 days from the postmark date on the original determination and advised Petitioners that failure to request reconsideration timely constituted "a waiver of all rights to further administrative review." CMS Ex. 6 in C-10-612.

The instant appeals were filed by letter dated April 1, 2010. I was assigned to hear the case as a member of the Departmental Appeals Board (Board) pursuant to 42 C.F.R. § 498.44. In each case, CMS filed a motion to dismiss or, in the alternative, for summary judgment. Petitioners' representative indicated that no response or additional documentation would be submitted.

II. Applicable Law and Regulations

Regulations specify the effective dates for physicians and physician groups as follows:

> The 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 an enrolled physician . . . first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d).

> Physicians . . . and physician . . . .organizations may retrospectively bill for services when a physician or . . . a physician . . . organization have met all program requirements, including State licensure requirements, and services were provided at the enrolled practice location for up to—
> (1) 30 days prior to their effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries, or
> (2) 90 days [in certain emergencies.]

42 C.F.R. § 424.521(a).

A prospective supplier "that is denied enrollment in the Medicare program . . . may appeal CMS' decision" in accordance with 42 C.F.R. Part 498. 42 C.F.R. § 424.545(a). An appeal must be requested "in writing within 60 days from receipt of the notice of the initial, reconsidered or revised determination unless that period is extended" by the judge for "good cause shown" and receipt is presumed to be 5 days after the date on the notice absent a contrary showing. 42 C.F.R. § 498.40(a)(2).

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

III. Issue

The issues before me are whether Petitioners have a right to appeal their effective date determinations and, if so, whether CMS is entitled to summary judgment upholding those determinations.

IV. Findings of Fact and Conclusions of Law

My findings and conclusions are in the italicized heading supported by the subsequent discussion below.

A. I reject CMS's argument that Petitioner has no right to appeal the effective date determination.

CMS sought dismissal on two bases: (1) that the regulations do not permit appeals of effective date determinations by suppliers whose enrollment is approved and (2) that Petitioners failed to file a timely hearing request. CMS Brs. in C-10-612, 618, and 619, all at 2, 4-6. I reject the first basis for the reasons explained here.

The Board recently addressed CMS's argument about effective date appeals in *Victor Alvarez, M.D.*, DAB No. 2325 (2010). In *Alvarez*, the Board concluded that "a determination of a supplier's effective date of enrollment in Medicare is an initial determination subject to appeal rights under 42 C.F.R. Part 498." *Alvarez*, DAB No. 2325, at 1. The Board explained that this determination is consistent with the historical interpretation of hearing rights under section 1866(h)(1)(A) and as discussed in the rulemaking process. Further, "while section 498.3(b)(15) originally applied primarily to suppliers subject to survey and certification, the term 'supplier' as used in 42 C.F.R. Part 498 was amended to cover all Medicare suppliers, including physicians." *Id.* at 3.

In several prior decisions, I also came to the same conclusion. *See, e.g., Michael Majette, D.C.*, DAB CR2142 (2010); *Eugene Rubach, M.D.*, DAB CR2125 (2010); *Mobile Vision, Inc.*, DAB CR2124 (2010). I likewise concluded that 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. A legislative rule generally binds the agency that issues it, and the agency is legally bound to follow its own regulations as long as they are in force. *Cal. Dep't of Soc. Servs.*, DAB No. 1959 (2005); *Hermina Traeye Mem'l Nursing Home*, DAB No. 1810 (2002), citing Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.5 (3rd ed. 1994), *aff'd Sea Island Comprehensive Healthcare Corp. v. U.S. Dep't of Health & Human Servs.*, 79 F. App'x 563 (4th Cir. 2003); 2 AM. JUR. 2d *Administrative Law* § 236 (2010), *available at* WL AM. JUR.

ADMINLAW § 236. Absent further rulemaking, I am bound to follow the plain meaning of the regulation and, as the Board mandated, permit an appeal by any provider or supplier dissatisfied with a determination as to the effective date of its provider agreement or supplier approval.

I therefore deny CMS's motion to dismiss on this basis.

B. I conclude that Petitioners failed to perfect their appeals timely or to show good cause for late filing.

Petitioners' attempts to challenge the effective dates for their Medicare enrollment have been tardy on two levels. Petitioners had 60 days from the October 2009 determination letters (dated October 7, 8, and 13) that assigned their effective dates of Medicare enrollment in which to file a request for reconsideration. By a single letter dated November 15, 2009 and signed by a Constance C. Carey, Director of Billing, Petitioners requested reconsideration of the effective dates assigned to all three of their supplier numbers.[3] CMS Ex. 3 in C-10-612. As noted, the request was rejected because it was not filed by either the individual providers or an authorized official on file with the contractor and not signed by the individual providers. CMS Ex. 4 in C-10-612. The December 11, 2009 rejection notice indicates that TrailBlazer did not receive the reconsideration request until December 9, 2009. The same request (still dated November 15, 2009) was apparently resent over the signature of a Terry L. Sinclair, M.D., and received by TrailBlazer on January 4, 2010. CMS Ex. 5 in C-10-612. At that point, more than 60 days had elapsed since the determination notice and the reconsideration request was rejected as untimely. CMS Ex. 6 in C-10-612.

Petitioners do not deny that their initial reconsideration lacked proper signatures or allege that they filed a timely reconsideration request. Petitioners assert, however, that they would have submitted a properly signed reconsideration request if they had been told of the requirement. HR. Petitioners do not indicate that they made any attempt to find out what the requirements were for a valid reconsideration request (such as contacting the contractor, reviewing the manuals or regulations, or visiting the contractor or CMS website). Nor do Petitioners explain why they could not have submitted a valid request within the 60-day time limit had they acted diligently or show that they sought an extension of the time to file for good cause. *See* 42 C.F.R. § 498.22(d). As CMS notes, the failure to request reconsideration timely may be deemed a waiver of further appeal rights. CMS Ex. 6 in C-10-612.

I note, however, that Petitioner would have been explicitly advised of the signature requirement if the determination letter had explained the applicable rights to file a

[3] TrailBlazer assigned each an "effective date" of August 11, 2009. This date is actually 30 days prior to the date on which Petitioners' enrollment applications were received and thus reflects not the actual effective date of their Medicare enrollment but a grant of a 30-day retroactive period of billing privileges as permitted by 42 C.F.R. § 424.521.

corrective action plan or request reconsideration of an adverse effective date determination. *See* CMS Medicare Program Integrity Manual, Ch. 15 passim. The information was likely omitted based on CMS's position that effective date determinations in supplier enrollment cases were not subject to appeal, which I have found to be erroneous in the previous section. Under those circumstances, I would be reluctant to preclude an appeal based solely on the Petitioner's lateness in perfecting their request for reconsideration.

Petitioners continued to be dilatory in seeking further appeal rights, however. Requests for hearings must also be signed by the affected party or authorized official and must be filed within 60 days of the receipt of the initial or reconsidered determination with receipt presumed to be five days after the date on the determination. 42 C.F.R. § 498.40(a)(2). Their hearing request was dated April 1, 2010 and received in this office on April 12, 2010. Even if I were to treat the final letter rejecting the reconsideration request as the determination at issue, it was dated January 19, 2010 so Petitioners are presumed to have received it by January 24, 2010. The last date for filing a hearing request was, therefore, March 25, 2010.

Petitioners offer no explanation for their late hearing request and proffer no basis on which I could find good cause to extend the appeal period. I conclude that their appeals are untimely and subject to dismissal. I grant CMS's motion to dismiss on this basis.

V. Conclusion

For the reasons explained above, I dismiss these appeals.

/s/
Leslie A. Sussan
Board Member