Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jennifer Tarr, M.D.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-895

Decision No. CR2299

Date: December 23, 2010

DECISION

Dr. Jennifer Tarr (Petitioner) appealed the determination of Palmetto, GBA (Palmetto), a Medicare contractor, that she was not eligible for enrollment in the Medicare program as a supplier[1] earlier than March 10, 2010, and could not submit claims for payment earlier than February 8, 2010. I grant the Centers for Medicare and Medicaid Services' (CMS's) motion for summary judgment, finding that Petitioner did not submit an application that was able to be processed to approval until March 10, 2010.

I. Background

On December 10, 2009, Petitioner submitted, through her office manager, an enrollment application to Palmetto for Medicare billing privileges, along with three other physicians in her new practice group, MedCorp of Stark County (MedCorp). However, Petitioner did not sign her application, while the other three MedCorp physicians signed their applications. By letter dated January 13, 2010, Palmetto approved the Medicare

[1] Medicare defines "supplier" to mean "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services" under the Medicare statute. Social Security Act (Act) § 1861(d), 42 U.S.C. § 1395x(d).

enrollment applications for the other three MedCorp physicians who signed their applications. CMS Ex. 6. Palmetto returned Petitioner's incomplete application, with a letter dated January 7, 2010, explaining that Petitioner's application's signature page, section 15, was missing. CMS Ex. 7. The January 7, 2010 letter stated that "[i]f you wish to have this application(s) processed, please obtain the correct signatures and/or dates, along with any additional information as noted above and re-submit the application to us." *Id.* In response, Petitioner submitted an entirely blank Medicare enrollment application that contained only Petitioner's name and signature (CMS Ex. 9), which Palmetto received on January 28, 2010. By letter dated February 11, 2010, Palmetto returned the blank application and directed Petitioner to complete the application materials "in their entirety." CMS Ex. 10. On March 10, 2010, Palmetto received Petitioner's application materials with all required signatures and information. Palmetto approved and processed these applications. Palmetto informed Petitioner of its approval by letter dated March 25, 2010. CMS Ex. 11. Palmetto granted Petitioner an effective date of February 8, 2010,[2] thirty days before March 10, 2010, the date of receipt of her application that was processed to approval.

Petitioner requested reconsideration review in a March 31, 2010 letter and asked Palmetto to grant Petitioner an effective date of August 1, 2009, the same date as the MedCorp doctors who simultaneously submitted signed applications along with her unsigned application. After an unfavorable reconsideration decision issued on April 20, 2010, Petitioner filed an untimely hearing request on August 5, 2010, pursuant to 42 C.F.R. § 498.40. This case was initially assigned to Board Member Leslie A. Sussan pursuant to 42 C.F.R. § 498.44, which permits a Board Member of the Departmental Appeals Board (Board) to hear appeals under part 498.

On August 16, 2010, Board Member Sussan issued an Order To Show Cause as to the untimely request for hearing. In response, Petitioner sent an August 23, 2010 letter, and Board Member Sussan ultimately declined to dismiss this case because there was no mention of appeal rights in her reconsideration decision dated April 20, 2010. However, as the Board later recognized in *Victor Alvarez, M.D.*, DAB No. 2325 (2010), 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. Accordingly, Board Member Sussan found good cause to extend the time for filing and accepted Petitioner's hearing request on August 27, 2010. On October 25, 2010, this case was transferred to me for hearing and decision.

CMS filed a "Motion for Summary Affirmance" accompanied by 13 exhibits. Through an electronic submission dated October 28, 2010, Petitioner stated that she "had nothing more to submit" and requested a "decision on the record." Neither party objected to any

[2] I disagree with February 8, 2010 being the "effective date," as I explain later in my analysis.

exhibit or identified any exhibit as "new evidence" subject to the restrictions of 42 C.F.R. § 498.56(e). I admit all proffered exhibits into evidence.

II. Issue

The issue in this case is whether CMS is entitled to summary judgment based on undisputed facts, showing the effective date that Palmetto assigned Petitioner is authorized as a matter of law.

III. Analysis

My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

a. This case is appropriate for summary judgment.

CMS's motion makes clear that the summary affirmance, which it seeks, is in the nature of summary judgment. The Board stated the 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. . . . 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. . . . 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. . . . 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.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an Administrative Law Judge (ALJ) in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame*, DAB No. 2291, at 4-5 (2009).

CMS argues that it is entitled to summary judgment, because "no genuine disputes of material fact exist." CMS Br. at 1. Petitioner's filings are limited to her hearing request, the August 23, 2010 letter in response to the Order to Show Cause, and her October 28, 2010 email stating she has "nothing more to submit." In her August 23, 2010 letter, Petitioner states that her "application was sent the same time as her three colleagues" and

that it was "sent back when they were approved because a signature was missing." Petitioner also states in this letter that "[e]ach time the applications came back for corrections, they were corrected promptly and sent by overnight mail to Palmetto GBA." These statements do not place in dispute any fact material to my resolution of the case. After CMS filed its brief on September 15, 2010, Petitioner did not dispute any of the facts that CMS presented. Most importantly, Petitioner never disputed that CMS did not receive a fully completed and signed application until March 10, 2010.

b. Palmetto properly required Petitioner to submit an enrollment application that was complete and contained her signature in accordance with 42 C.F.R. § 424.510(d)(1) and (3).

Petitioner asserts that she should be granted the same enrollment date as the other MedCorp doctors who simultaneously submitted signed applications with her unsigned application. Hearing Request. It is undisputed that on December 10, 2009, Petitioner submitted an application lacking her signature and then submitted a blank application containing only her signature, which was received on January 28, 2010. The parties agree that it was not until March 10, 2010 that Petitioner submitted a completed application bearing her signature. Hearing Request; CMS Br. at 6. Section 424.510(d) of 42 C.F.R. sets forth the application requirements for supplier enrollment in the Medicare program. The regulation explicitly requires the submission of an enrollment application that is both complete and contains the supplier's signature certification:

> (1) *Submittal of the enrollment application.* A provider or supplier must submit a complete enrollment application and supporting documentation to the designated Medicare fee-for-service contractor.
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> * * *
>
> (3) *Signature(s) required on the enrollment application.* The certification statement found on the enrollment application must be signed by an individual who has the authority to bind the provider or supplier, both legally and financially, to the requirements set forth in this chapter. This person must also have an ownership or control interest in the provider or supplier, as that term is defined in section 1124(a)(3) of the Act, such as, the general partner, chairman of the board, chief financial officer, chief executive officer, president, or hold a position of similar status and authority within the provider or supplier organization. The signature attests that the information submitted is accurate and that the provider or supplier is aware of, and abides by, all applicable statutes, regulations, and program instructions.

The signature certification requirement serves an important legal function to bind the supplier, both legally and financially, and is not a mere formality. CMS instituted these regulatory requirements in its policy at the relevant time, stating that all applications shall be returned "immediately" if there is "no signature on the CMS-855 application." Medicare Program Integrity Manual (MPIM), Ch. 10 § 3.2A. CMS considers such a returned application a non-application. *Id.; see, e.g., Tri-Valley Family Med., Inc.*, DAB CR2179, at 3 n.1 (2010).

The requirement of a signature is also set forth clearly on the application materials Petitioner submitted. *See* CMS Ex. 9, at 22 (stating supplier "MUST sign the certification statement below to be enrolled in the Medicare program"). The form also states that the provider or supplier will be certifying, among other things, that the contents of the application are "true, correct, and complete." *Id.* Also, the application has the applicant certify:

> I have read and understand the Penalties for Falsifying Information, as printed in this application. I understand that any deliberate omission, misrepresentation, or falsification of any information contained in this application or contained in any communication supplying information to Medicare, or any deliberate alteration of any text on this application form, may be punished by criminal, civil, or administrative penalties including, but not limited to, the denial or revocation of Medicare billing privileges, and/or the imposition of fines, civil damages, and/or imprisonment.

Id. In addition, the application materials require Petitioner's signature certifying that, "I understand that any misrepresentation or concealment of any information requested in this application may subject me to liability under civil and criminal laws." CMS Ex. 8, at 3.

Palmetto properly returned Petitioner's December 10, 2009 application, because it was not signed. Although Petitioner's next application, on January 28, 2010, contained a signature, Palmetto acted appropriately also in returning that application, considering the rest of the application was entirely blank, and Petitioner was therefore certifying to the truth and accuracy of absolutely no information. Finally, on March 10, 2010, Palmetto received application materials from Petitioner that were completed and signed. Palmetto began properly processing these materials, as of March 10, 2010, and notified Petitioner of the approval of her billing privileges by letter dated March 25, 2010. CMS Ex. 11.

c. Palmetto's receipt of Petitioner's signed application necessarily determines her effective date and retrospective billing privileges.

The determination of the effective date of Medicare enrollment is governed by 42 C.F.R. § 424.520, which provides, in part, that the effective date for enrollment for physicians,

among others, 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) (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).

In this case, the effective date of Medicare enrollment depended on the date the contractor first received an *approvable* application. This is consistent with the preamble to the final rule and the plain language of the regulation. 73 *Fed Reg.* at 69,769; 42 C.F.R. § 424.520(d). Prior cases have further clarified this requirement that the receipt of a *signed*, fully complete application by a contractor triggers the effective date of Medicare enrollment. *See, e.g., Tri-Valley Family Med., Inc.,* DAB CR2179 (2010), at 10-11. Therefore Petitioner's applications could not be considered approvable until Palmetto received her completed and signed application. It is undisputed that Petitioner did not send a signed, complete, and approvable application to Palmetto before March 10, 2010.

Although Palmetto erroneously referred to February 8, 2010 as Petitioner's "effective date" (CMS Ex. 11), regulations actually require the contractor to assign the date of receipt of the application as the effective date of Petitioner's enrollment, while permitting the contractor to grant retrospective billing privileges for 30 days prior to the effective date. 42 C.F.R. § 424.521(a)(1). Thus, I am treating Palmetto's action as if it intended to set February 8, 2010 as the earliest date for which Petitioner may submit reimbursable claims, with the effective date of Petitioner's enrollment as March 10, 2010.

IV. Conclusion

For the reasons explained above, I conclude based on the undisputed facts that Palmetto did not receive a completed application with Petitioner's signature until March 10, 2010, which properly started the application process and necessarily determined her effective date and retroactive billing period.

/s/
Joseph Grow
Administrative Law Judge