

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Laurie S. Coyner, M.D.,
(NPI: 1376547828),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-765

Decision No. CR2666

Date: November 19, 2012

DECISION

Wisconsin Physicians Service (WPS), an administrative contractor acting on behalf of the Centers for Medicare and Medicaid Services (CMS), determined that Petitioner was not eligible for enrollment in the Medicare program earlier than January 6, 2012, and that Petitioner could not submit claims for payment of services performed or delivered earlier than December 7, 2011. Petitioner appealed. For the reasons stated below, I affirm WPS's determination concerning Petitioner's enrollment effective date.

I. Case Background and Procedural History

On January 5, 2012, Petitioner mailed to WPS a Medicare enrollment application (Form CMS-855R) seeking to reassign her Medicare billing privileges to Newton Medical Center (NMC). CMS Ex. 1. An official from NMC and Petitioner signed the application on January 3, 2012, and January 4, 2012, respectively. CMS Ex. 1, at 3. WPS received the application on January 6, 2012. CMS Ex. 2, at 1. On February 15, 2012, WPS issued an initial determination in which WPS approved Petitioner's Medicare enrollment application with an "Effective Billing Date" of December 7, 2011. CMS Ex. 3, at 1.

In February 2012, NMC, acting on behalf of Petitioner, timely requested reconsideration of the effective billing date. CMS Ex. 4. Petitioner claimed that she began seeing patients at the NMC on February 1, 2011, and that it was “during the month of February [2011] that we submitted an application to Medicare to obtain a provider number so that we could bill for services rendered to Medicare Beneficiaries.” CMS Ex. 4, at 1. Petitioner asserted that she did not receive a response back from Medicare regarding the status of Petitioner’s application, but believed that Petitioner had up to a year to retroactively bill Medicare for her services. In December 2011, NMC contacted WPS and WPS informed NMC that it had not received an application from Petitioner. Petitioner requested an effective billing date of February 1, 2011. CMS Ex. 4, at 1.

On April 4, 2012, WPS issued a reconsidered determination affirming its initial determination. CMS Ex. 5. WPS stated that it received a valid application from Petitioner on January 6, 2012, which WPS approved with an enrollment effective date based on the January 6, 2012 receipt date. CMS Ex. 5, at 2. WPS further stated that it had “no record of applications being received in February 2011” and that Petitioner’s “effective billing date will remain December 7, 2011.” CMS Ex. 5, at 2.

Petitioner timely filed a request for a hearing with the Departmental Appeals Board, Civil Remedies Division. Following the issuance of my June 4, 2012 Acknowledgment and Pre-hearing Order (Order), CMS filed a motion for summary disposition, a pre-hearing brief and memorandum in support of its motion for summary disposition (CMS Br.), and five proposed exhibits (CMS Exs. 1-5). CMS asserted that an in-person hearing was not necessary in this case (CMS Br. at 4) and did not propose any witnesses. Petitioner, through counsel, filed a response to CMS’s motion, a brief (P. Br.), and four proposed exhibits (P. Exs. 1-4). Three of Petitioner’s four proposed exhibits included the affidavits of NMC employees Staci Hershberger (P. Ex. 1), Paul Lavender (P. Ex. 2), and Chris Kelly (P. Ex. 4). Because neither party has objected to any of the proposed exhibits, I admit all of them into the record.

The Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8, 10, 11; *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). CMS did not offer any witnesses that Petitioner could request to cross-examine. Petitioner offered the affidavits of three witnesses; however, CMS did not request to cross-examine any of these individuals. Consequently, I will not hold an in-person hearing in this matter. See *Kate E. Paylo, D.O.*, DAB CR2232, at 9 (2010). Accordingly, the record is closed and I will decide this matter based on the written record. Order ¶ 12.

II. Discussion

A. Issue

Whether CMS had a legitimate basis for finding that January 6, 2012, was the effective date for Petitioner's Medicare enrollment and that Petitioner could retrospectively bill for services rendered to Medicare beneficiaries on or after December 7, 2011.

B. Findings of Fact, Conclusions of Law, and Analysis¹

The Social Security Act authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers² in the Medicare program. 42 U.S.C. §§ 1302, 1395cc(j). Under the Secretary's regulations, a provider or supplier who seeks billing privileges under Medicare 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).

1. WPS received Petitioner's completed Form CMS-855R (Medicare enrollment application for reassignment of Medicare benefits) on January 6, 2012.

NMC and Petitioner completed and signed a Form CMS-855R enrollment application on January 3, 2012, and January 4, 2012, respectively. CMS Ex. 1, at 3. Petitioner submitted the Form CMS-855R to WPS by United States Postal Service Express Mail on January 5, 2012. CMS Ex. 1, at 8. WPS acknowledged receiving the Form CMS-855R on January 6, 2012 (CMS Ex. 3, at 1), and Petitioner does not dispute that this completed Form CMS-855R was received by WPS on January 6, 2012. *See* P. Br. at 3. Therefore, the evidence of record supports the conclusion that WPS received Petitioner's January 4, 2012 enrollment application on January 6, 2012.

2. WPS properly concluded that Petitioner's reassignment of Medicare benefits was effective on January 6, 2012, with a retrospective billing period commencing on December 7, 2011.

WPS determined that the effective billing date of Petitioner's reassignment of benefits was December 7, 2011. CMS Ex. 3, at 1. WPS indicated that "[t]his effective billing

¹ My findings of fact and conclusions of law are set forth in italics and bold font.

² A "supplier" furnishes services under Medicare, and the term supplier applies to physicians and other nonphysician practitioners and facilities that are not included within the definition of the phrase "provider of services." 42 U.S.C. § 1395x(d).

date is based on 30 days prior to the filing date” for the Form CMS-855R. CMS Ex. 3, at 1; *see also* CMS Ex. 5, at 1-2.

The Secretary’s regulations provide that the effective date of enrollment of physicians 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/supplier enrollment application that the Medicare contractor is able to process to approval. 73 Fed. Reg. 69,725, 69,769 (Nov. 19, 2008). The regulations applicable to this case permit limited retrospective billing for physician services provided to Medicare beneficiaries for up to 30 days before the effective date of enrollment. 42 C.F.R. § 424.521(a). Thus, WPS correctly determined, based on a January 6, 2012 date of filing, that the enrollment effective date is January 6, 2012, and Petitioner could retrospectively bill for services provided to beneficiaries beginning on December 7, 2011.

3. Petitioner has not proven that WPS received a Form CMS-855R from Petitioner earlier than January 6, 2012.

Petitioner does not dispute that 42 C.F.R. § 424.520(d) means that the effective date for a Medicare enrollment application is the date of filing. P. Br. at 2-3. However, Petitioner asserts that she submitted a completed Form CMS-855R in mid to late January 2011. P. Br. at 3. Petitioner argues that the earlier submission date should result in an earlier enrollment effective date.

Petitioner provided the following chronology in support of her case. In anticipation of Petitioner’s employment with NMC, NMC filed the Form CMS-855R with WPS and with multiple commercial carriers at the same time “all in January or February 2011.” P. Br. at 1; P. Ex. 3. Petitioner indicated that while NMC received confirmation of receipt of its applications from the commercial carriers, it did not receive any confirmation from WPS. P. Br. at 1-2. Rather than immediately consulting WPS about whether it received the enrollment application allegedly submitted sometime in January or February 2011, Petitioner waited until “November or December of 2011” to contact WPS to inquire about the status of the application. P. Ex. 4. When it learned that WPS had not received any application from Petitioner, NMC submitted a second application for Petitioner that WPS received on January 6, 2012, and subsequently approved. P. Ex. 4.

Despite Petitioner's allegation that NMC filed a Form CMS-855R in early 2011, WPS indicated in its reconsideration determination that it had no record of receiving any applications from Petitioner in February 2011. CMS Ex. 5, at 2. "CMS does not bear the burden of establishing that a prospective provider or supplier failed to file enrollment applications; rather, the prospective provider or supplier must show affirmatively that he filed his enrollment application." *Jorge M. Ballesteros, CNRA, DAB CR2067*, at 3 (2010). Because Petitioner contends that she should have an earlier effective date based on an alleged previously submitted application, Petitioner has the burden to prove that WPS *received* the previous application. *See Caroline Lott Douglas, PA, DAB CR2406*, at 5-7 (2011) (holding that the date of receipt of an enrollment application determines the "date of filing," and thus the effective date for enrollment). Based on the evidence of record, I find that Petitioner has not met her burden of proof.

Petitioner has presented no proof that NMC mailed the Form CMS-855R in January or February of 2011. Even if I were to assume the application was mailed as alleged, there is no evidence, such as a United States Postal Service return receipt card or documentation from a commercial carrier, that WPS *received* the application. Although Petitioner submitted affidavits from NMC employees concerning the alleged mailing of the application in early 2011 and a copy of the first application that Petitioner purports to have submitted, Petitioner's submissions are so inconsistent and vague concerning the mailing that they are not reliable proof of mailing, let alone receipt by WPS.

In her request for hearing as well as her request for reconsideration to WPS (CMS Ex. 4), Petitioner contends that Petitioner's application was sent to WPS on February 22, 2011. Yet in her brief, Petitioner was much less specific about when she submitted the enrollment application to WPS, stating only that it was sometime in January or early February 2011. P. Br. at 1. The affidavit of Staci Hershberger, an employee of NMC who was responsible for the mailing of Petitioner's applications to the commercial carriers as well as to WPS, differs from Petitioner's assertions, stating "an application was prepared by me and mailed by mid-to-late January 2011 . . . I don't know the exact date I mailed the document but it was mailed shortly after obtaining Mr. Lavender's signature, mid to late January 2011." P. Ex. 1, at 1. Rather than proving mailing of the application, this information only casts further doubt as to whether an application was in fact mailed. Ms. Hershberger's affidavit makes it clear that neither Petitioner nor NMC kept accurate records regarding the filing of the application.

Petitioner's failure to maintain accurate records concerning the alleged filing of an enrollment application in early 2011 is consistent with the lack of care apparent when I reviewed the application. P. Ex. 1, at 3-10. For example, while Petitioner signed her name on the application, she did not date her signature, and the NMC official signing the application provided an incorrect date next to his signature. P. Ex. 1, at 8. Further, Petitioner's failure to contact WPS concerning the application until approximately 11

months had passed creates doubt as to whether Petitioner's original application was actually mailed.

4. The Secretary's regulation at 42 C.F.R. § 424.525(b) does not provide WPS with the discretion to set an earlier effective date for Petitioner and, even if it did, WPS's refusal to exercise that discretion is not reviewable.

In her brief, Petitioner argues that WPS has discretion, under 42 C.F.R. § 424.525(b) to approve a February 1, 2011 effective date . P. Br. at 3-4. Petitioner quotes the following from the regulations as support: "Respondent has the discretion to 'choose to extend the 30 day period if CMS determines that the prospective provider or supplier is actively working with CMS to resolve any outstanding issues.'" P. Br. at 3.

Section 424.525 is inapplicable to this case because it provides procedures for the rejection of a provider or supplier application. WPS did not reject Petitioner's application; rather, WPS asserted it never received an application in January or February of 2011. CMS Ex. 5, at 2. Further, even if section 424.525 provided WPS with the discretion to take action favorable in this matter, a failure to exercise such discretion is not appealable. 42 C.F.R. § 424.525(d); *see also* 42 C.F.R. §§ 498.3, 498.5, 498.40.

III. Conclusion

WPS's determination that Petitioner's effective date of enrollment was January 6, 2012, with a 30-day retrospective billing period commencing on December 7, 2011, is affirmed.

/s/
Scott Anderson
Administrative Law Judge