Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Long Island Bariatric, PLLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-494

Decision No. CR2868

Date: July 24, 2013

DECISION

Petitioner, Long Island Bariatric, PLLC, appeals an unfavorable reconsidered determination related to the effective date of its Medicare billing privileges. National Government Services (NGS), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), determined that Petitioner's effective date of enrollment in the Medicare program is March 5, 2012, with a retrospective billing period commencing February 5, 2012. For the reasons stated below, I affirm NGS's determination.

I. Background and Procedural History

In January 2012, Paayal P. Mehta, M.D., an enrolled Medicare supplier, sought to terminate a previously established reassignment of Medicare benefits to Suffolk Surgical Group, PC. CMS Exhibit (Ex.) 6, at 2. In February 2012, NGS terminated the reassignment. Petitioner (P.) Ex. 4. Dr. Mehta took this action because she decided to establish Petitioner, an entity for which she was the sole owner. CMS Ex. 6, at 2.

On February 15, 2012, Petitioner, through its billing manager, Maria Byrnes, filed a Form CMS-855B with NGS. CMS Ex. 1; P. Ex. 3. By letter and e-mail message, each dated

March 1, 2012, NGS informed Petitioner that it rejected Petitioner's Form CMS-855B because Petitioner needed to complete and submit a Form CMS-855I. CMS Exs. 2; 6, at 5. Petitioner submitted a Form CMS-855I, which NGS received on March 5, 2012. CMS Exs. 4; 6, at 6. On March 26, 2012, NGS issued an initial determination approving Petitioner's Form CMS-855I and establishing February 5, 2012, as the "Group member effective date."[1] CMS Ex. 5. However, the initial determination did not provide Petitioner with notice of its appeal rights.

By letter dated September 5, 2012, Petitioner requested reconsideration of the initial determination. CMS Ex. 6. Specifically, Petitioner requested that NGS grant billing privileges from December 23, 2011, because "a representative at Medicare's enrollment department . . . " advised Petitioner to file the Form CMS-855B. CMS Ex. 6, at 2. NGS denied the reconsideration request as untimely and Petitioner requested a hearing (RFH) before an administrative law judge. CMS Exs. 7; 8. The Departmental Appeals Board, Civil Remedies Division, docketed the RFH under number C-13-267. On February 7, 2013, I remanded that case to CMS based on the parties' joint motion for remand. CMS Ex. 9.

On remand, NGS considered Petitioner's previously rejected reconsideration request. CMS Brief (Br.) at 2 n.1. On February 12, 2013, NGS issued a determination upholding the initial determination. CMS Ex. 10. The reconsidered determination explained that NGS received Petitioner's Form CMS-855I on March 5, 2012, thus permitting an "effective date" of February 5, 2012, under the regulations. Petitioner filed a second RFH on February 15, 2013, and this case was docketed and assigned to me to hear and decide.

On March 8, 2013, I issued an Acknowledgment and Pre-hearing Order. On March 18, 2013, I issued an Amended Acknowledgment and Pre-hearing Order (Amended Order) setting dates for the parties to submit their pre-hearing exchanges. CMS timely filed a pre-hearing exchange, which included a motion for summary judgment and brief (CMS Br.), accompanied by 14 exhibits (CMS Exs. 1-14). When Petitioner did not file its pre-hearing exchange, I issued an Order to Show Cause. Petitioner timely filed a response to the Order to Show Cause indicating that an absence of staff at Petitioner's office resulted in its inability to file its pre-hearing exchange. Petitioner requested an extension until

---

[1] NGS erroneously characterized the beginning of the retrospective billing period to be the "effective date." *See Jorge M. Ballesteros*, DAB CR2067, at 2 (2010) ("CMS apparently sets enrollment effective dates 30 days prior to the date of application"). Therefore, I interpret the determination to mean that the "effective date" is the beginning of the retrospective billing period and not the enrollment effective date. *Rizwan Sadiq, M.D.*, DAB CR2401, at 5-6 (2011).

July 1, 2013, to file its pre-hearing exchange. On July 2, 2013, Petitioner filed four exhibits (P. Exs. 1-4). On July 9, 2013, CMS objected to Petitioner's exhibits (CMS Objection) and, on July 18, 2013, Petitioner responded to the objection (P. Response).

II. Evidentiary Rulings

CMS filed 14 exhibits. Petitioner did not object to any of them. Therefore, I admit CMS Exs. 1-14 into the record.

Petitioner filed four exhibits. CMS objected to P. Exs. 1, 3, and 4. CMS stated that Petitioner failed to submit those exhibits with its request for reconsideration and did not provide good cause for failing to submit the exhibits with its request for reconsideration. CMS also argued that the exhibits are not relevant. CMS Objection at 1-2. Petitioner responded that Petitioner submitted P. Exs. 1 and 3 in response to CMS's argument that Petitioner's billing manager was not an authorized official who could submit the February 15, 2012 Form CMS-855B. P. Response; *see* CMS Br. at 11-12. Further, Petitioner submitted P. Ex. 4 in response to CMS's statement that Petitioner first sought termination of an earlier reassignment of Medicare benefits to Suffolk Surgical Group, PC, before Petitioner filed the Form CMS-855B.

The regulations provide that in cases involving a supplier's enrollment, the supplier must submit all of the evidence it wants considered on appeal with its request for reconsideration. 42 C.F.R. § 405.803. Evidence submitted for the first time to an administrative law judge may only be considered if the supplier shows good cause for failing to submit the evidence with the reconsideration request. 42 C.F.R. § 498.56(e). Because Petitioner submitted its exhibits in response to arguments and factual statements in CMS's brief made after Petitioner filed its request for reconsideration, I admit P. Exs. 1-4 into the record.

III. Decision on the Written Record

Neither party submitted written direct testimony for any potential witnesses. Amended Order ¶ 8. Because neither party submitted any written direct testimony, I will not hold an in-person hearing in this matter. The record is closed and I decide this matter based on the written record. Amended Order ¶ 11.

IV. Discussion

A. Issue

Whether CMS had a legitimate basis for finding that March 5, 2012, is the effective date of Petitioner's Medicare enrollment and that Petitioner could retrospectively bill for services rendered to Medicare beneficiaries on or after February 5, 2012.

B. Findings of Fact, Conclusions of Law, and Analysis[2]

The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers.[3] 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. NGS received Petitioner's completed Form CMS-855I Medicare enrollment application on March 5, 2012.

CMS asserts that NGS received Petitioner's Form CMS-855I Medicare enrollment application on March 5, 2012. CMS Exs. 4; 6, at 6; 10, at 1; CMS Br. at 1. Petitioner does not dispute this date of receipt. P. Response at 2; *see also* CMS Ex. 6, at 2. Therefore, I find that NGS received Petitioner's signed and dated Form CMS-855I application on March 5, 2012.

2. NGS properly concluded that Petitioner's enrollment as a supplier in the Medicare program was effective on March 5, 2012, with a retrospective billing period commencing on February 5, 2012.

Based on the date of receipt of Petitioner's Form CMS-855I, NGS established February 5, 2012, as Petitioner's effective Medicare billing date. CMS Ex. 5. NGS explained in its reconsidered determination that Petitioner's Form CMS-855I was received on

---

[2] My findings of fact and conclusions of law are set forth in italics and bold font.

[3] Petitioner is considered a "supplier" for purposes of the Act and the regulations. *See* 42 U.S.C. § 1395x(d), (u); *see also* 42 C.F.R. § 498.2. A "supplier" furnishes services under Medicare and the term applies to physicians or other practitioners that are not included within the definition of the phrase "provider of services." 42 U.S.C. § 1395x(d).

March 5, 2012, and that under the regulations, NGS may set an effective billing date up to 30 days prior to the date of receipt or, in this case, February 5, 2012. CMS Ex. 10.

The relevant regulation concerning the effective date of Medicare enrollment states:

> 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 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.

42 C.F.R. § 424.520(d) (emphasis added). The "date of filing" is the date that the Medicare contractor "receives" a signed enrollment application that the Medicare contractor is able to process to approval. 73 Fed. Reg. 69,726, 69,769 (Nov. 19, 2008); *see also Caroline Lott Douglas, PA*, DAB CR2406, at 5-7 (2011); *Rizwan Sadiq, M.D.*, DAB CR2401, at 5. Because NGS received a complete, approvable application on March 5, 2012, NGS properly used this date as the effective date of enrollment.

Further, under the regulations set forth below, CMS may permit limited retrospective billing if a practitioner meets all program requirements.

> Physicians, nonphysician practitioners and physician and nonphysician practitioner organizations may retrospectively bill for services when a physician or nonphysician practitioner or a physician or a nonphysician practitioner 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 not applicable to this case].

42 C.F.R. § 424.521(a).

In the present matter, the earliest effective date for retrospective billing privileges that could be granted was 30 days prior to March 5, 2012. Thirty days prior to March 5, 2012, is February 5, 2012. Thus, NGS made a legally proper discretionary decision to permit retrospective billing to February 5, 2012.

3. Petitioner's previously filed Form CMS-855B is not relevant to this case and I am not authorized to grant Petitioner's requests for equitable relief.

In the current appeal, Petitioner seeks an earlier date on which it may bill Medicare for services it provided. Petitioner's primary argument is that Petitioner was told by an NGS customer service representative that Petitioner must file a Form CMS-855B to enroll with Medicare; however, even though Petitioner did this, NGS rejected the application and informed Petitioner that it must submit a Form CMS-855I instead. CMS Ex. 6, at 1-2. In response, CMS asserted that Petitioner's billing manager was not a proper official from Petitioner to sign the Form CMS-855B. Therefore, CMS argued that NGS properly rejected that form. CMS Br. 10-15; P. Response at 1.

I do not have the authority to determine whether NGS properly rejected Petitioner's Form CMS-855B. *See* 42 C.F.R. § 424.525(d). For purposes of my review of this case, it is enough that the record shows that NGS rejected Petitioner's Form CMS-855B, and that NGS received Petitioner's Form CMS-855I and processed that application to completion. This is because the effective date for enrollment, and consequently for any retrospective billing privileges, hinges on the date of receipt of an application that is ultimately approved. 42 C.F.R. § 424.520(d).

In this case, the only application that meets this requirement is the Form CMS-855I. Petitioner needed to file this application because Petitioner is solely owned by Dr. Mehta. *See* CMS Ex. 4, at 3. Because the Form CMS-855B was not the correct form for Petitioner to file, NGS rejected it. *See* 42 C.F.R. § 424.510(a) (requiring submission of enrollment information to be on the "applicable enrollment application"). Therefore, the filing date of the Form CMS-855B is not relevant to determining the enrollment date or retrospective billing date for Petitioner.

Finally, Petitioner's argument can be viewed as a request that CMS be equitably estopped due to the alleged misinformation provided to Petitioner concerning the Form CMS-855B. However, because Petitioner did not allege any affirmative misconduct by NGS or CMS personnel, I am unable to grant any relief. It is well-established that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. Those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009); *U.S. Ultrasound*, DAB No. 2303, at 8 (2010). Therefore, I must reject Petitioner's equitable estoppel argument.

V. Conclusion

For the reasons stated above, I affirm CMS's determination that Petitioner's effective date of enrollment is March 5, 2012, with a retrospective billing period commencing February 5, 2012.

/s/
Scott Anderson
Administrative Law Judge