

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Bird's Song of North Carolina,  
(NPI: 1871838409),  
(PTAN: C148),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-13-1079

Decision No. CR3243

Date: May 30, 2014

**DECISION**

Petitioner, Bird's Song of North Carolina (Bird's Song), is a mental health clinic whose sole owner is Dr. Brenda Harris, a psychiatrist. Bird's Song applied to enroll in the Medicare program, and the Medicare contractor, acting on behalf of the Centers for Medicare & Medicaid Services (CMS), granted its application effective February 19, 2013. CMS Exhibits (Exs.) 5, 7. Petitioner's owner challenged that effective date and sought enrollment beginning September 2, 2012, the date she began providing services at Bird's Song. CMS Ex. 6. In a reconsidered determination, the contractor upheld the February 19, 2013 effective date. CMS Ex. 7. Bird's Song timely appealed, and the case was assigned to me.

My Acknowledgement and Pre-Hearing Order (Pre-Hearing Order) advised the parties that they must submit pre-hearing briefing including written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party affirmatively requested an opportunity to cross-examine a witness. Pre-Hearing Order ¶¶ 8, 9; *see 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 as long as the opposing party has the opportunity to cross-examine those witnesses). Although CMS proposes one witness, Petitioner did not request to cross-examine the witness. Therefore I now close the record and decide the case upon the written record. *See* Pre-Hearing Order, at 5-6 (¶¶ 9-11).

For the reasons set forth below, I reverse the reconsidered determination and find that December 20, 2012, is the appropriate effective date for the supplier's Medicare enrollment (with a retrospective billing date of November 20, 2012).

### **Findings of Fact and Conclusions of Law**

#### ***1. Bird's Song is entitled to a December 20, 2012 effective date pursuant to CMS's policy.***

To receive Medicare payments for services furnished to program beneficiaries, a Medicare supplier must be enrolled in the Medicare program. 42 C.F.R. § 424.505. "Enrollment" is the process used by CMS and its contractors to: 1) identify the prospective supplier; 2) validate the supplier's eligibility to provide items or services to Medicare beneficiaries; 3) identify and confirm the supplier's owners and practice location; and 4) grant the supplier Medicare billing privileges. 42 C.F.R. § 424.502. To enroll in Medicare, a prospective supplier must complete and submit an enrollment application. 42 C.F.R. §§ 424.510(d)(1), 424.515(a). An enrollment application is either a CMS-approved paper application or an electronic process approved by the Office of Management and Budget. 42 C.F.R. § 424.502. If a physician or physician organization meets all program requirements, CMS allows retrospective billing for up to "30 days prior to their effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries." 42 C.F.R. § 424.521(a)(1).

When CMS determines that a physician or physician organization meets the applicable enrollment requirements, it grants Medicare billing privileges, which means that the physician or physician organization may submit claims and receive payments from Medicare for covered services provided to program beneficiaries. The effective date for those billing privileges "is the *later* of the date of filing" a subsequently approved enrollment application 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.* 69,726, 69,769 (Nov. 19, 2008).

Here, Bird's Song applied for Medicare enrollment, submitting Form CMS-855A, an application form for enrollment in the Medicare Part A program, which the Medicare contractor received on December 20, 2012. CMS Exs. 1-2. However, Petitioner should have submitted a Form CMS-855B, an application for enrollment as a supplier in the

Medicare Part B program. On January 31, 2013, the Medicare contractor returned Petitioner's CMS-855A application and instructed Petitioner to submit a form CMS-855B. CMS Ex. 2. On February 19, 2013, the contractor received Petitioner's application on the correct application form. CMS Ex. 3. The contractor subsequently approved this application and granted Petitioner enrollment in the Medicare Part B program with an "effective date" of January 20, 2013, 30 days prior to the receipt of Petitioner's February 19, 2013 CMS-855B application.<sup>1</sup> CMS Exs. 5, 7.

The contractor did not comply with agency policy when it returned Petitioner's application on January 31, 2013. The Medicare Program Integrity Manual (MPIM) requires that, if the "wrong application was submitted (e.g., a Form CMS-855B was submitted for Part A enrollment)," the contractor will develop the application, rather than return it. MPIM CMS Pub. 100-08, ch. 15 § 15.8.2A (rev. 474, eff. October 8, 2013). The manual further instructs the contractor to request the applicant to submit a new or corrected complete application - including all necessary documentation - within 30 calendar days from the date the contractor requested the missing information or documentation. *See Medical Services of Suffolk County PC*, DAB No. CR3149, at 3 (2014) (reversing a contractor's effective date determination where a supplier first filed the wrong application but then timely filed the correct application upon notification). If the applicant fails to follow-up with the correct form, the contractor may reject the application. MPIM, ch. 15 § 15.8.2A (*citing* 42 C.F.R. § 424.525(a)(1), (2)). Thus, when an applicant initially files the wrong application but timely furnishes the correct application, the contractor should not reject the initial application but should develop it instead.

Bird's Song resent the correct form within 30 days of the contractor's request. Accordingly, December 20, 2012, the date the contractor received Petitioner's first enrollment application, is the appropriate effective date for the Petitioner's Medicare enrollment.

***2. I am not authorized to grant Petitioner's request for equitable relief.***

Petitioner argues that a Medicare contractor representative incorrectly instructed its office manager to file the wrong enrollment application. Petitioner also argues that a contractor representative advised its new claims consultant that it would receive an effective date of September 2, 2012, the start date of Petitioner's practice. Hearing Request; P. Br. at 3.

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<sup>1</sup> The contractor refers to January 20, 2013 as the effective date. CMS Ex. 5. However, according to the regulation, February 19, 2013, would actually be the effective date of enrollment, and January 20, 2013, would be the retrospective *billing* date. *See* 42 C.F.R. § 424.521(a).

Petitioner's assertion that it is entitled to an earlier effective date because it received incorrect or misleading information from the contractor's representatives amounts to a claim of equitable estoppel. It is well-established by federal case law, and in Departmental Appeals Board precedent, 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. *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, 63 (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); *US Ultrasound*, DAB No. 2302, at 8 (2010). Here, Petitioner has not alleged affirmative misconduct by the government. It is also well-settled that those who deal with the government are expected to know the law. *See Heckler*, 467 U.S. 51 at 63. Accordingly, I must reject any equitable estoppel argument. Therefore Petitioner's new effective date, as discussed above, is December 20, 2012, and not September 2, 2012 as Petitioner requests.

/s/

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Joseph Grow  
Administrative Law Judge