Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Tri-Valley Family Medicine, Inc.,
(NPI: 1245483759)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-422

Decision No. CR2179

Date: July 9, 2010

DECISION

Tri-Valley Family Medicine, Inc. (Tri-Valley, Petitioner) appeals the determination of Palmetto, GBA (Palmetto), a Medicare contractor, that it could not be enrolled in the Medicare program as a supplier earlier than June 8, 2009. The Centers for Medicare & Medicaid Services (CMS) filed motions for dismissal and summary disposition which I deny for the reasons explained below. I proceed to deny CMS's motions and decide the case on the written record in favor of CMS.

I. Background

Dr. Lorena H. Tan asserts that, in October 2008, she submitted, through billing specialists from her prior medical group, an individual application to enroll as part of Petitioner's group practice, of which she is the president and medical director, in the Medicare program. Petitioner (P.) Ex. 7, at 1. On October 20, 2008, Palmetto returned the application because it was unsigned. P. Ex. 4. Petitioner submitted a second application in November 2008, which Dr. Tan asserts that she signed and photocopied and that she ensured that the signed signature page was included in the envelope for mailing. P. Ex. 7, at 1. That application was also returned with a letter stating that there was no signature on the required certification (which constituted section 15 of the CMS-855 application form). P. Ex. 6. Petitioner further contends that applications were submitted several more

times before an application was approved by Palmetto on September 16, 2009 with an effective date of July 8, 2008 when that application had been received at Palmetto (later modified to a retroactive date of June 8, 2009). P. Br. at 2; CMS Ex. 6.

Petitioner sought reconsideration requesting that the effective date be changed to November 1, 2008. CMS Ex. 9. Palmetto denied reconsideration on the grounds that effective date determinations are not appealable, a position which I reject below. CMS Ex. 10.

This appeal followed. CMS submitted 11 exhibits; Petitioner initially submitted eight exhibits and supplemented with three additional exhibits. Neither party objected to any exhibit or identify 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. Issues

1. Does Petitioner have a right to a hearing on the determination of the effective date of its enrollment in Medicare?

2. Is CMS entitled to summary judgment that the assigned effective date is correct as a matter of law based on undisputed facts?

3. Does the record support an earlier effective date?

III. Analysis

1. I deny CMS's motion to dismiss.

a. Standard of review

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

b. Discussion

CMS seeks dismissal on the grounds that Petitioner's July 8, 2009 enrollment application was accepted and approved and only denials or revocations are appealable. CMS Br. at 5. CMS acknowledges that this position has met with mixed results before different administrative law judges (ALJs), but contends that the appeal rights from unfavorable effective date determinations established by 42 C.F.R. § 498.3(b)(15) should be construed as limited to providers or suppliers subject to survey and certification requirements. *Id.* at 6 nn. 3 and 4.

Petitioner argues that the granting of an effective date based only on the July 2009 application means that it "can be concluded" that the October 2008 and November 2008 applications were effectively denied. P. Br. at 4-5. Petitioner asserts that it did not appeal the denials at the time because, until learning of the effective date determination, Petitioner never received a notice of denial and presumed that the original filing date (based on the first date of services provided by Petitioner with the new practice group on November 1, 2008) would still apply. *Id*.

CMS argues Petitioner is mistaken in asserting that the date of receipt of its first application submitted in October 2008 should be the effective date. CMS Reply Br. at 7. According to CMS, Petitioner erroneously conceives the enrollment process as a single ongoing process begun in October 2008 and completed in July 2009. *Id*. Instead, CMS explains, enrollment applications lacking signatures are "immediately returned to the applicant" and are considered "non-applications." *Id.* at 8, *citing Vincent Pirri, M.D.*, DAB CR2065 (2010). "Logically," says CMS, "no appeal rights can attach to non-applications." *Id*. Since the October and November 2008 applications were returned as unsigned, CMS argues that they did not constitute denials and were not appealable under the definitions in the Medicare Program Integrity Manual (MPIM).[1] *Id*. Therefore, CMS concludes that "Petitioner does not have the right to challenge its effective date based on its October or November 2008 applications." *Id.*

Both parties misconstrue the regulations. CMS is correct that the enrollment process is not treated in the regulations as beginning with the first contact with CMS or its contractor and running continuously until an applicant finally perfects an application regardless of intervening actions by the contractor – such as returning, rejecting or denying an application. Furthermore, I do not accept Petitioner's theory that the assignment of an effective date based on a later date of

[1] CMS's manual distinguishes among denial, rejection and return of applications. Denial is defined as a determination that an applicant is "ineligible to receive Medicare billing privileges." MPIM, Ch. 10, § 1.1. Rejection "means that the provider or supplier's enrollment application was not processed due to incomplete information or that additional information or corrected information was not received from the provider or supplier in a timely manner." *Id*. However, applications by individual physicians or physician practices are not subject to rejection but rather must be denied when incomplete. *Id*. at § 3.1.2. All applications, however, are returned "immediately" if there is "no signature on the CMS-855 application." *Id*. at § 3.2A. Rejected and returned applications are not subject to appeal; denials are appealable. *Id*. at §§ 3.1.1, 6.2, 19A. CMS explains the "difference between a 'rejected' application and a 'returned' application; the former is based on the provider's failure to respond to the contractor's request for missing or clarifying information. A 'returned application is considered a non-application." *Id*. at § 3.2A.

filing converts the return of unsigned applications into denials of those applications that become retrospectively appealable.[2]

I do not, however, agree with CMS's view that only a supplier subject to survey and certification (or accreditation) may challenge an unfavorable effective date determination. As I have explained in prior decisions, the reasoning of which I adopt by reference here, the plain language of section 498.3(b)(15) unambiguously provides appeal rights for suppliers whose applications are approved only as of a date later than that to which they argue they were entitled, since their applications were in effect denied during the period before the approval became effective. *See, e.g., Roland J. Pua, M.D.*, DAB CR2163 (2010)*; Michael Majette, D.C.*, DAB CR 2142 (2010); *Eugene Rubach, M.D.*, DAB CR2125 (2010); *Mobile Vision, Inc.*, DAB CR2124 (2010). As I noted in those cases, section 424.545(a) provides appeal rights for denials of supplier enrollment applications by reference to part 498 with no indication of any intent to exclude section 498.3(b)(15).

I am bound by these regulations and therefore cannot dismiss this appeal on the basis proposed by CMS.

2. I deny CMS's motion for summary disposition.

a. Applicable standard

CMS's motion makes clear that the summary disposition which it seeks is in the nature of summary judgment. The Departmental Appeals 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.

[2] As discussed below, however, a factual question remains about whether the November 2008 application was actually unsigned or was in fact a signed and complete duplicate of the application that was processed to approval at a later date.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an 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 Village at Notre Dame*, DAB No. 2291, at 4-5 (2009).

b. Applicable regulations

The determination of the effective date of Medicare billing privileges is governed by 42 C.F.R. §§ 424.520 and 424.521. Section 424.520(d) provides that the effective date for billing privileges for physician, 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." (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). Certain suppliers, including physicians, may be permitted to bill retrospectively for certain services provided before approval, if they have met all program requirements. Current regulations limit retrospective billing to 30 days prior to the effective date, "if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries," or 90 days in certain disaster situations. 42 C.F.R. § 424.521(a).

c. Discussion

CMS argues that it is entitled to summary judgment because the "undisputed evidence establishes that CMS did not receive an application from Petitioner that it could process and approve until July 8, 2009." CMS Br. at 6. CMS contends therefore that, as a matter of law, it could not grant an effective date earlier than June 8, 2009. *Id.* at 6-7.[3]

Despite these assertions, CMS acknowledges that Petitioner does dispute whether the contractor received an earlier application which it could have processed to approval. *Id* at 7. Specifically, Petitioner states that it first submitted an

[3] Both CMS and the contractor erroneously refer to June 8, 2009 as Petitioner's effective date. In fact, the regulations plainly compel 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 retroactive billing privileges for 30 days prior to the effective date. Thus, I treat the contractor's action as intended to set June 8, 2009 as the earliest date for which Petitioner may submit claims, with the effective date of Petitioner's enrollment as July 8, 2009.

application in October 2008 but that Palmetto sent a letter dated October 20, 2008 stating that it could not process the application because there was no signature on it. P. Br. at 3; P. Ex. 5. Petitioner argues that it then submitted a second application in November 2008. P. Br. at 3. Petitioner asserts that Dr. Tan signed the certification statement page (Section 15 of the CMS 855I), dated it November 1, 2008, and made a photocopy of the completed application to preserve it for her records. P. Br. at 5-6; P. Ex. 7, at 1.[4] Petitioner submits what it alleges is the contemporaneous photocopy of the signed application submitted in November 2008. P. Ex. 1. Petitioner alleges that, despite these precautions, on November 26, 2008, the contractor again returned the application writing that it did not include a signature. P. Br. at 3; P. Ex. 6. According to Petitioner, the November 2008 application that was returned to her by the contractor actually had the signature highlighted with a yellow marker, which she found "unbelievable." P. Br. at 6; P. Ex. 2.

Petitioner proffers declarations from Medical Director Lorena H. Tan and Office Manager Troy A. Kjos who affirm personal knowledge that the November application contained a signed certification. P. Exs. 7, at 1, and 8, at 1-2. Petitioner also presents a supplemental declaration from its Business Manager, Cheong Chuah, who asserts that at the end of 2008 Dr. Tan showed her a November 26, 2008 letter from Palmetto stating that "the enrollment application had no signature but the signature was right there on the page with a yellow highlight over the signature." P. Ex. 9. The declaration continues that when "Dr. Tan showed the letter to me, she shook her head in disbelief and was noticeably

[4] Dr. Tan also reports having checked the completeness of, having signed, and having arranged for the mailing of additional applications in December 2008 and February 2009. P. Ex. 7. I do not explore the facts surrounding these applications further because Petitioner does not offer evidence that either application was actually received by Palmetto. Petitioner asserts in its brief that an unnamed representative of Petitioner spoke to someone at Palmetto "on or around December 20, 2008" who stated that the December application had been received, but then someone else at Palmetto "on or around January 5, 2009," and then repeatedly between January 10 and 31, stated that Palmetto had no record of such an application. P. Br. at 3-4. These vague statements with no identification of the parties to the conversations are not supported by any sworn declaration or any documentation of mailing. Despite the assertion that "[p]hone records can be subpoenaed," Petitioner sought no subpoena. *Id*. at 3. Petitioner acknowledged not keeping any copy of the December 2008 application. As to the February 2009 application, Petitioner asserts that a copy was kept showing the signed certification but does not submit any such copy as evidence. *Id*. at 4. Petitioner offers no documentation of mailing and makes no claim of any communication with Palmetto regarding the February 2009 application.

distraught." *Id.* Linda Gross, identified as front office staff, made a similar declaration. P. Ex. 11.

CMS disputes Petitioner's evidence. CMS Br. at 7. CMS submits what it alleges is the application received by the contractor on November 20, 2008. CMS Ex. 2. CMS asserts that the section 15 certification is absent from the application (rather than present but unsigned), and that the application therefore could not have been processed to approval because the certification statement is crucial to ensure the supplier's commitment to abide by applicable Medicare law. CMS Br. at 7. CMS further suggests that the signed, highlighted section 15 included in Petitioner's Exhibit 2 was not actually received and returned by the contractor because it is not date-stamped in the same manner as the rest of the pages of that application. *Id.* at 8.

It is evident that the parties do dispute the facts relating to whether the November 2008 application received by the contractor was signed and complete and could have been processed to approval (or, put another way, was the same application that ultimately was processed to approval). Petitioner asserts that the contractor returned to her (and hence, had received) the November application including a signed certification statement and that the application was in every other way complete and approvable. CMS does not assert that the application was defective in any way other than the disputed omission of the signed certification statement. CMS does not deny that the November 2008 application was in every other respect identical to the July 2009 application.

CMS does not deny that this fact is material. In fact, CMS states that it simply "could not grant Petitioner an effective date based on the application" received on November 20, 2008 because "the evidence establishes" that it "was incomplete." CMS Br. at 8. It follows that, if the contrary evidence that the application was received complete with the signed certification in section 15 were accepted, then the earlier effective date would be appropriate.

In resolving a summary judgment motion, I do not weigh the relative persuasiveness or strength of the evidence presented by the parties on a disputed issue of material fact. I am, instead, instructed to view all evidence in the light most favorable to the non-movant and to draw all reasonable inferences in the non-movant's favor. Applying that standard, I find that a reasonable finder-of-fact could conclude that a complete and approvable application was submitted in November 2008 that could support an earlier effective date. (I do not make such a finding here; I only acknowledge that the record does not make such a finding beyond reason.) Consequently, I cannot find that CMS is entitled to summary judgment as a matter of law.

I therefore deny CMS's motion for summary disposition.

3. I conclude that, on the record before me, the regulations support an effective date of July 8, 2008.

a. I can resolve the merits without further proceedings.

Having resolved the outstanding dispositive motions, I turn to the question of whether further proceedings are needed to decide the case on the merits. The Pre-Hearing Order (PHO) required all parties to "exchange as a proposed exhibit the complete written direct testimony of any proposed witness" which would then generally serve as their "statement in lieu of in-person testimony." PHO at 3. An in-person hearing would be held to cross-examine witnesses only if admissible written direct testimony was submitted and cross-examination was requested. *Id*.

Neither party raised any objection to this process or requested any exception. On April 26, 2010, CMS submitted its motions to dismiss and for summary judgment, accompanied by its 11 exhibits and a witness list identifying a single witness (Connor Beck, a CMS analyst overseeing Palmetto). CMS did not submit any declaration or written direct testimony for Beck among its exhibits. Petitioner initially submitted its proposed exhibits on May 27, 2010 including the declarations from Tan and Kjos. Petitioner also included a witness list identifying 3 additional witnesses (Chuah, Gross, and Kerry Wheat/Darling, identified as Petitioner's current billing specialist), but failed to produce written direct testimony for the latter 3 proposed witnesses.

Through a staff attorney, I informed the parties on June 7, 2010 that neither of their submissions was in compliance with the Pre-Hearing Order. I permitted the parties a further opportunity to supplement their submissions with the written direct testimony for any proposed witness and ordered them to identify any witness of the opposing party whose cross-examination they sought. Petitioner submitted written declarations for the three remaining named witnesses. P. Exs. 9-11.

By e-mail correspondence dated June 10, 2010, CMS withdrew its witness list (while reserving the possibility of calling Mr. Beck as a rebuttal witness in the event of an in-person hearing). CMS also requested an opportunity to file a reply brief, which was granted. CMS's reply brief was dated June 21, 2010. CMS did not challenge the admissibility of the declarations provided by Petitioner or seek to cross-examine any of Petitioner's witnesses.

Since neither party seeks cross-examination, I find no need or purpose to convening an in-person hearing. I therefore proceed to consider the merits of the case based on the written record before me.

b. I cannot assign an effective date that is not in accord with legal requirements based on equitable arguments.

Petitioner argues that "it is likely that [CMS] made errors in processing Petitioner's applications," citing the history of its multiple applications and various confusing communications with Palmetto staff. P. Br. at 5-9. For that reason in itself, Petitioner asserts, it should be granted the earlier effective date that it requested. *Id.* at 9.

CMS contends that "delays in granting effective dates that were allegedly caused by CMS's contractors' actions cannot serve as a basis for granting . . . an effective date earlier than the effective date that a provider or supplier is entitled to based on the enrollment regulations." CMS Reply Br. at 3. To rely on such factors would, according to CMS, amount to equitable relief beyond my authority. *Id.*

Petitioner also suggests that it has a "cause of action for restitution" of unjust enrichment. P. Br. at 10. Petitioner asserts that, after Dr. Tan started Tri-Valley, she continued to treat Medicare patients whom she had previously seen while practicing with 2 other medical groups in order to ensure the continuity of patient care. *Id.* Petitioner argues that, had she not treated these patients from November 1, 2008 (when Tri-Valley started) to June 8, 2009 (when its enrollment became effective), CMS would have had to pay as much or more for their treatment elsewhere. *Id.* at 10-11. Hence, according to Petitioner, CMS should not be unjustly enriched by obtaining the medical services without paying for their value when Petitioner bore no fault for the delay in enrolling Petitioner. CMS does not directly respond to this argument, but it is at core another plea for equitable relief.

I agree with CMS that I have no general mandate to grant equitable relief, but am, instead, bound by applicable law and regulations. Further, to the extent that Petitioner seeks to use delays or miscommunication by the contractor to obtain an effective date earlier than that provided by law, such arguments seek equitable estoppel against the federal government, which, if available at all, is presumably unavailable absent "affirmative misconduct," such as fraud. *See, e.g., Pacific Islander Council of Leaders*, DAB No. 2091 (2007); *Office of Personnel Management v. Richmond*, 496 U.S. 414, 421 (1990). No such allegations are made here.

The proper question before me is not whether contractor error or delay justify an effective date earlier than supported by the application of the governing law to the facts as proven. Rather, the question which I must resolve is what effective date is appropriate under the governing law applied to the facts as I find them.

> c. The effective date depends on the first date on which a complete application is submitted that can be processed to approval.

I first consider as a matter of law what Petitioner must show in order to demonstrate that she is entitled to an earlier effective date under the regulations. Section 424.520(d), as quoted above, refers to the date of filing of an application "that was subsequently approved by a Medicare contractor" as the touchstone for determining the appropriate effective date. This language might be interpreted to mean that the effective date must be the date on which the contractor received the actual application which it approved. CMS does not adopt this interpretation before me. As I mentioned above, CMS did not argue that it was irrelevant whether the same application (including the necessary signature section) was submitted on a previous date.

The regulatory language is also susceptible of an interpretation that the effective date would be the date on which a complete application is first received which is subsequently processed to approval (even if duplicate copies of the application have to be submitted in the interim). The latter construction is consistent with the position CMS took here and with the explanation in the preamble to the final rule:

> Comment: One commenter urged CMS to adopt a standard establishing that the filing date for an enrollment application is when a signed application is first received by a contractor and not when the application is deemed complete and ready for approval by that contractor. Otherwise, delays associated with contractor processing could become a larger concern.
> Response: We agree with this commenter and have adopted the "date of filing" as 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. at 69,769 (emphasis added). The emphasis thus appears to be on when the contractor first received an approvable application.[5] This explanation is consistent with the interpretation that the receipt of a signed, fully complete application by a contractor triggers the effective date, which would not be defeated

[5] CMS also makes clear in the preamble that, where an application is received that is not yet complete, the contractor generally permits an applicant to provide missing information or cure other technicalities and deficiencies within 30 days before an application is denied, and that, if the application is made complete in the process, then the effective date remains the date on which it was submitted since the contractor has been able to process it to approval ultimately. 73 Fed. Reg. at 69,769.

by subsequent filing of additional copies of the application.[6] Thus, contractor errors in subsequently misplacing an application or delaying its processing would not affect the effective date, while supplier failures to submit applications capable of being approved would not benefit them by locking in an effective date even though they were not eligible for approval at the time of that initial filing.

I therefore conclude that I must resolve the disputed question of fact as to whether a complete signed application was received by Palmetto in November 2008 that was approvable since it was identical to the one which was resubmitted and processed to ultimate approval in July 2009.

> d. I find that Petitioner has not shown that Palmetto received a signed complete approvable application prior to July 2009.

The factual question at the heart of this appeal thus is whether the Medicare enrollment application from Petitioner which Palmetto received on November 20, 2008 contained a signed certification statement. At this point, in contrast to my role in deciding CMS's motion for summary disposition, I am obliged to evaluate the persuasiveness and credibility of and assign appropriate weight to the competing evidence proffered by the parties on this question. I must determine whether Petitioner has established by the preponderance of the evidence that it is entitled to an earlier effective date than that assigned to it by CMS.

I have already discussed the evidence above in concluding that a material dispute of fact existed. To recap, Petitioner presents the sworn declaration of Dr. Tan that she signed the certification statement page for this application on November 1, 2008. P. Ex. 7, at 1; P. Ex. 1. This testimony is backed up by that of the office manager who says he saw her sign it. P. Ex. 8, at 1. Petitioner also submits a copy of the application which includes the signed page. P. Ex. 1, at 27.

Petitioner also provides evidence that Dr. Tan was "distraught" when the application was returned with a letter from Palmetto dated November 26, 2008 stating that it was unsigned. P. Ex. 7, at 1; P. Ex. 6. Two office staff members affirm that Dr. Tan showed them the letter and a page with the signature

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[6] I note that this situation differs from the many cases in which suppliers allege that they have submitted applications multiple times which were either lost or erroneously rejected but do not proffer proof that a contractor actually received an earlier complete application that was approvable as received. *See, e.g., Arkady Stern*, DAB CR2078 (2010). Here, CMS does not dispute the receipt of the application on November 20, 2009 and Petitioner proffers both physical and testimonial evidence as to the inclusion in that application of the signature section. I do not imply here that that evidence is necessarily persuasive (an issue I resolve later in this decision) but only that the Petitioner here placed at issue what was not adequately placed at issue in the earlier cases cited.

highlighted in yellow and describe her as shaking her head "in disbelief" (P. Ex. 9, at 1) and "very frustrated with Medicare" (P. Ex. 11, at 1). Petitioner submitted the certification statement page with yellow highlighter in the signature box and Dr. Tan's signature. P. Ex. 2.

I have found this sufficient to put at issue the question of whether the application received by Palmetto on November 20, 2008 included a signed certification page. I further credit the claims by Dr. Tan, corroborated by her office manager who asserts he personally witnessed it, that she signed a certification page dated November 1, 2008 which was included when a copy of the application was made for the office to retain. Dr. Tan also asserts, however, that she personally "again made sure that the signed signature page was included in the envelope" before she sent the application. P. Ex. 7, at 1. Mr. Kjos does not claim personal knowledge to corroborate this claim as he did with the signing of the application, nor does any other witness for Petitioner. P. Ex. 8, at 1.

I must therefore consider whether the signed certification page was included in the application when Palmetto received it. On this point, CMS provides a copy of what it contends is the application as it was received on November 20, 2008. On each page of this application, a code is marked on the upper left corner which CMS asserts was affixed by Palmetto.[7] CMS Ex. 2. CMS explains the significance of the code in its brief by reference to the marking on the first page which reads D 08326111200011 08325 p001. CMS Br. at 2 n.1; CMS Ex. 2, at 1. The first number string represents a number assigned to Dr. Tan which also appears in Palmetto's correspondence with her. *See, e.g.,* CMS Ex. 3. The second string represents the date of receipt expressed using the Julian calendar which CMS provides in an exhibit. CMS Br. at 2 n.1; CMS Ex. 11, at 2. Thus, 08 represents 2008 and 325 represents the 325th day, i.e. November 20th. CMS points out that the signed certification page which Petitioner claims to have received back with its returned November 2008 application has no code marking on it. CMS Br. at 8. Therefore, CMS contends that it must not have been part of the application returned by Palmetto. *Id.*

I find this argument compelling. A careful review of the application at CMS Exhibit 2 shows that the numerical markings are consecutive from page 1 through page 50. The application does not contain two pre-printed pages of the form (at pages 25 and 26) which correspond to the missing certification statement section. The markings affixed by Palmetto on receipt do not have a two-page break in numbering which strongly suggests to me that the pages of the form were not included in the package at the time Palmetto received it.

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[7] CMS requires all its contractors to date-stamp incoming correspondence to show the date of receipt. MPIM, ch. 10, § 2.3.

Petitioner contends that the fact that the signature page in its copy of the November 2008 application made before mailing does not have yellow highlighting whereas the page which Petitioner says was included in the returned application should demonstrate that "the copy was made before the highlighted mark was applied." P. Br. at 6; *compare* P. Ex. 1, at 27 *with* P. Ex. 3. I agree that this evidence can support an inference that yellow highlighting was not on the application at the time Petitioner photocopied it. I do not find that the evidence proves that the certification pages were included in the envelope when it was mailed.[8]

CMS's position is not that Palmetto received an unsigned certification but rather that section 15 (the two-page section containing the certification which must be signed) was omitted altogether. The yellow highlighting could have been applied to a copy of the signature page after Palmetto returned the application. While Petitioner submitted declarations witnessing to Dr. Tan's frustration and distress when Medicare again returned her application as lacking the signed certification, it submitted no evidence as to who opened the package returning the application or as to anyone else witnessing that the signed highlighted page was contained in the package as it came from Palmetto. P. Exs. 9 and 11. Instead, both witnesses speak of Dr. Tan showing them the highlighted signature.

Petitioner suggests that Palmetto's date-stamping was "unreliable and flawed" because CMS did not produce Petitioner's October 2008 application which Palmetto admitted receiving but claimed was also not signed. P. Br. at 7. Petitioner argues that CMS did not prove that the October 2008 application was unsigned. *Id*. CMS responds that the October 2008 application was irrelevant because Petitioner did not dispute that it was not signed. CMS Reply. Br. at 5. This is not quite accurate, since Petitioner did submit a declaration that the October 2008 application was signed but did not offer a copy of that application. P. Br. at 3; P. Ex. 7, at 1. Petitioner did not request a copy of the October 2008 from Palmetto or CMS and does not explain why CMS was obligated to submit a copy for the record. In any case, I fail to see how the absence of another application in the record proves the unreliability of Palmetto's date-stamping practices. What I find a more telling omission is the failure of Petitioner to produce the full application returned to it by Palmetto rather than the single

[8] Petitioner also points out that all the pages of the copy which it retained of the November 2008 application have a "consistent streak (line) across the pages because Petitioner's photocopy machine at that time needed to be cleaned." P. Br. at 6; P. Ex. 1. The signed certification page with the signature highlighted in yellow does not contain the same streak. P. Ex. 2. I am not persuaded that this difference proves that the copy with the yellow highlighting comes from the original application returned by Palmetto. There are many ways in which the streak could be easily removed or be faded out of sight in making and highlighting another copy of the page at issue from the copy retained by Petitioner.

disputed page on which it relies. I find it more credible that the complete, consecutively date-stamped copy in CMS's exhibits accurately reflects what was received by the contractor than that the single page with yellow highlighter markings but no date-stamp was part of the application as received.

Petitioner further points to presence of a date-stamp reading D 08326111200011 08325 p000 on CMS Exhibit 1, which is the letter from Palmetto to Petitioner dated October 20, 2008 returning the October 2008 application as unsigned. P. Br. at 7-8. Petitioner acknowledges that Palmetto "did date stamp the second enrollment application as November 20, 2008," but then questions why a letter issued on October 20, 2008 would have the same Julian date stamped on it. *Id*. Petitioner submits its own copy of the October 20, 2008 letter with the same date stamp on it and contends that this reasoning should undercut the date-stamping process. P. Ex. 5; P. Br. at 8.

CMS responds that the October 20, 2008 letter was included by Petitioner when it resubmitted its application in November 2008 and therefore received a date-stamp showing its receipt along with the rest of the package. CMS Reply Br. at 5. As CMS points out, the letter was number as page 000 and the application proper begins on page 001. *Id.*; CMS Exs. 1 and 2, at 1. I find this explanation plausible.

I further note that Petitioner's possession of the date-stamped copy of the October 20, 2008 Palmetto letter further persuades me that Petitioner did receive a date-stamped copy of the returned November 2008 application but has not produced that copy to me. I infer that that copy does not contain a signed certification section and that the signed highlighted certification section which Petitioner produced was not part of the application received by Palmetto on November 20, 2008.

Given the evidence before me, to accept Petitioner's position would require me to believe that Palmetto received a complete application on November 20, 2008 including a signed certification section. Palmetto then removed the two-page section from the middle of the application before date-stamping the remaining pages in numerical order.[9] Palmetto then highlighted the signature on the certification in yellow, bundled it back with the remaining date-stamped pages, and returned the whole to Petitioner with a letter stating that the application was not signed. I have no doubt that contractors make errors in receiving, tracking and processing Medicare enrollment applications. The scenario that would have to have occurred to support Petitioner's version of events, given the documentation

[9] Such a procedure would be inconsistent with CMS's requirements for contractors handling incoming applications which call for date-stamping the pages of all correspondence in the mailroom on the day received before forwarding it to enrollment staff who would conduct a prescreening review of the contents. MPIM, ch. 10, §§ 1.3, 2.9.3, 3.

in the record, however, requires Palmetto staff to have intervened actively to tamper with the application before applying a date-stamp to the package, to place yellow highlighting on the signature and then to return the application specifically denying the existence of the pages on which it placed the highlighting. Petitioner itself refers to this as "unbelievable," and I agree. P. Br. at 6.

It is difficult to discern any possible motivation for Palmetto staff to undertake such conduct. By contrast, it is not difficult to comprehend how Dr. Tan might be motivated to remember events in a light more favorable than accurate, given that Petitioner presents evidence that claims for payment in the amount of $78,423.84 to Dr. Tan depend on the question of when Palmetto received a signed complete application. *See* P. Ex. 10, at 2.

Based on these considerations, I find it more likely than not that Petitioner's application as received by Palmetto in November 2008 did not contain a signed certification section. I conclude that Petitioner has not shown that a signed complete approvable application was received by the contractor prior to July 8, 2009. I therefore conclude that Petitioner is not entitled to an effective date earlier than July 8, 2009 or to bill for services prior to June 8, 2009 since CMS granted a 30-day retroactive billing period.

IV. Conclusion

For the reasons explained above, I conclude that CMS correctly determined the effective date of approval of Petitioner's enrollment in Medicare.

/s/
Leslie A. Sussan
Board Member