Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

John Heverin, Ph.D.,
(NPI: 1699781781),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-50

ALJ Ruling No. 2013-06

Date: March 19, 2013

ORDER OF REMAND

Petitioner, John Heverin, Ph.D., appeals the Centers for Medicare and Medicaid Services' (CMS) determination to reactivate Dr. Heverin's Medicare billing privileges effective July 2, 2012. On appeal, Dr. Heverin requests an earlier date of reactivation. For the reasons explained below, I conclude that CMS should not have relied on 42 C.F.R. § 424.520(d) to establish the "effective date" for reactivating Dr. Heverin's billing privileges. Therefore, I remand this case and direct CMS to issue a determination that is consistent with this Order.

I. Case Background and Procedural History

Dr. Heverin is a licensed psychologist practicing in New York, who enrolled as a supplier in the Medicare program effective January 1, 1995.[1] CMS Exhibit (Ex.) 4, at 1. On November 4, 2006, CMS deactivated Dr. Heverin's Medicare billing privileges pursuant to 42 C.F.R. § 424.540(a)(1) because Dr. Heverin did not file a claim for payment with

[1] A "supplier" is "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202.

CMS or one of its contractors in the 12 months preceding deactivation. CMS Ex. 4, at 1, 8. While Dr. Heverin claims that CMS did not notify him that his billing privileges had been deactivated until after he submitted a claim for payment in 2012, he does not dispute that CMS did, in fact, deactivate his billing privileges in 2006.

On April 16, 2012, Dr. Heverin began providing services to a Medicare beneficiary, and subsequently billed Medicare for those services. *See* CMS Ex. 10 (request for hearing). CMS rejected Dr. Heverin's claims for payment based on his deactivated status. CMS Ex. 10. To reactivate his billing privileges, Dr. Heverin submitted a CMS-855I enrollment application form to National Government Services (NGS), a CMS administrative contractor, which NGS received on July 2, 2012. CMS Ex. 5, at 4, 29. In his submission to NGS, Dr. Heverin requested that the reactivation of his billing privileges be effective April 15, 2012, when he submitted his first claim for payment since being deactivated. CMS Ex. 6, at 4. By letter dated August 28, 2012, NGS notified Dr. Heverin that his "Medicare enrollment application is approved," and the "effective date" for Dr. Heverin's enrollment was June 3, 2012.[2] CMS Ex. 7, at 1.

On September 4, 2012, Dr. Heverin requested reconsideration from NGS. Dr. Heverin asked that NGS establish the effective date for the reactivation of his billing privileges as April 16, 2012. CMS Ex. 8, at 1. On September 13, 2012, NGS issued its reconsidered determination, wherein it upheld its previously established effective date for Dr. Heverin of July 2, 2012, with retroactive billing to June 3, 2012. CMS Ex. 9, at 1-2. As its rationale for the determination, NGS stated:

> Per 42 [C.F.R.] § 424.520(d), 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.

[2] In its letter to Dr. Heverin, NGS used the term "effective date" to refer to the date on which Petitioner could bill for Medicare services. *See* CMS Ex. 7, at 1. By regulation, an "effective date" is the date a contractor receives a required enrollment application that it later approves. 42 C.F.R. § 424.540(d). CMS and its contractors may permit an enrollee to "retrospectively bill" for services for up to 30 days prior to that effective date, as they appeared to do here. *See id.* § 424.521(a); CMS Ex. 7, at 1. For clarity, I use "effective date" to refer to the regulatory effective date of enrollment, not the date on which retrospective billing begins.

CMS Ex. 9, at 1. Applying 42 C.F.R. § 424.520(d), NGS determined that it had received Dr. Heverin's CMS-855I enrollment application form on July 2, 2012, meaning that he could bill for claims beginning June 3, 2012. CMS Ex. 9, at 2.[3]

On September 24, 2012, Dr. Heverin timely requested a hearing before an administrative law judge (ALJ), wherein he stated that he believed his billing privileges should be effective April 16, 2012, because he had no knowledge that CMS had deactivated his billing privileges. CMS Ex. 10. This case was assigned to me for a hearing, if necessary, and decision. Following my Acknowledgment and Prehearing Order issued October 24, 2012, CMS filed a motion for summary judgment with 10 proposed exhibits (CMS Exs. 1-10). In response, Dr. Heverin submitted a letter restating his position that he should be able to submit claims back to April 16, 2012. Dr. Heverin did not file any proposed exhibits with his letter. Because Dr. Heverin did not object to any of CMS's exhibits, I admit CMS Exs. 1-10 into the record.

II. Jurisdiction

By regulation, an ALJ may hear and issue a decision in cases where a party has requested a hearing from a "reconsidered determination." 42 C.F.R. § 498.5(l)(2); *see Denise A. Hardy, D.P.M.*, DAB No. 2464, at 5 (2012). A party may request reconsideration only in cases where CMS or its contractor has issued an "initial determination." 42 C.F.R. § 498.5(l)(1). An "initial determination" includes, among other things, the "effective date of a Medicare provider agreement or supplier approval." *Id.* § 498.3(b)(15).

Here, NGS established July 2, 2012, as the effective date for reactivating Dr. Heverin's billing privileges. While the determination to reactivate a supplier's billing privileges is not an "initial determination," and therefore not subject to review before an ALJ, establishing an effective date for supplier approval, and thus the supplier's billing privileges, is an "initial determination" by regulation. *Id.* Dr. Heverin requested reconsideration, and received a reconsidered determination upholding the effective date. CMS Ex. 9. Dr. Heverin now requests a hearing to challenge the effective date that NGS established. Therefore, I have jurisdiction to hear this case and issue a decision because Dr. Heverin has appealed from a reconsidered determination, which was, in turn, based on an "initial determination" recognized by regulation.

[3] NGS stated in its reconsidered determination that "[b]ased on the . . . regulations indicated above, the effective date can be up to 30 days prior to the date of filing the Medicare enrollment applications. Therefore, 30 days prior to the receipt date of 7/2/2012 is 6/3/2012." CMS Ex. 9, at 2. As indicated in n.2, *supra*, NGS incorrectly refers to the "effective date" as the beginning of the 30-day retrospective billing period, rather than the date of enrollment.

III. Issue

The issue before me is whether NGS, acting on behalf of CMS, properly determined the "effective date" for the reactivation of Dr. Heverin's billing privileges.

IV. Analysis

CMS may deactivate a supplier's billing privileges if the supplier "does not submit any Medicare claims for 12 consecutive calendar months." 42 C.F.R. § 424.540(a)(1). CMS may also deactivate a supplier's billing privileges if the supplier does not report certain changes of information within 90 calendar days of the changes occurring, or does not provide complete and accurate information within 90 days of CMS's request for such information. *Id.* § 424.540(a)(2), (3). A supplier deactivated due to the non-submission of a Medicare claim must "recertify that the enrollment information currently on file with Medicare is correct and furnish any missing information as appropriate. The provider or supplier must meet all current Medicare requirements in place at the time of reactivation, and be prepared to submit a valid Medicare claim." *Id.* § 424.540(b)(2). A supplier deactivated for a reason other than the non-submission of claims must "complete and submit an enrollment application to reactivate its Medicare billing privileges or, when deemed appropriate, at a minimum, recertify that the enrollment information currently on file with Medicare is correct." *Id.* § 424.540(b)(1).

As explained below, NGS should not have applied 42 C.F.R. § 424.520(d) to the reactivation of Dr. Heverin's billing privileges by establishing an "effective date" for Dr. Heverin's enrollment with Medicare. On remand, CMS is directed to apply 42 C.F.R. § 424.540(b)(2) to determine whether Dr. Heverin's submissions to NGS are sufficient to recertify that his enrollment information on file with CMS is correct.

A. Dr. Heverin was not required to submit a new enrollment application to recertify that the information on file with Medicare was correct.

In this case, NGS required Dr. Heverin to submit a CMS-855I enrollment application to "reactivate" his billing privileges in accordance with section 15.27.1(A) of the Medicare Program Integrity Manual (MPIM). CMS Ex. 5; *see also* CMS Ex. 6, at 1 (stating that NGS could reject or deny Dr. Heverin's enrollment application, despite his already being enrolled, if he did not provide information required as part of the application). The MPIM is a CMS publication that provides general guidance to CMS contractors but is not legally binding. *See Tri-Valley Family Medicine, Inc.*, DAB No. 2358, at 9 (2010). As part of its guidance to contractors such as NGS, the MPIM states that "suppliers *deactivated for non-submission of a claim* are required to complete and submit a *Medicare enrollment application* to recertify that the enrollment information currently on file with Medicare is correct and must furnish any missing information as appropriate." MPIM § 15.27.1(A) (both emphases added). The MPIM then guides contractors to

establish the "reactivation effective date" for when a reactivated supplier may bill Medicare:

> For . . . clinical psychologists . . . the contractor shall establish the reactivation effective date as the later of: (a) the filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor, or (b) the date the supplier first started furnishing services at a new practice location.[4]
>
> The exception to this is if the supplier has at least one other enrolled practice location (under the same [transaction identification number]) for which it is actively billing Medicare; here, the contractor shall establish and enter the effective date as either: (a) the date the supplier first saw a Medicare patient at the location indicated on the CMS-855, or (b) the same date as the non-billing end-date in MCS, whichever is later. To illustrate, *if the supplier has only one enrolled practice location and that site is deactivated for non-billing, the effective date is the later of*: (a) *the filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor*, or (b) the date the supplier first started furnishing services at a new practice location. On the other hand, suppose the supplier has two enrolled locations – X and Y - under its TIN. Location X is actively billing Medicare, but Y is deactivated for non-billing. The reactivation effective date for Y would be the later of: (a) the date the supplier first saw a Medicare patient at the location indicated on the CMS-855, or (b) the same date as the non-billing end-date in MCS. This is because the supplier has at least one other location – Location X – that is actively billing Medicare.

MPIM § 15.27.1(B) (emphasis added). Therefore, under the reactivation process outlined in the MPIM, any supplier wishing to reactive his or her billing privileges must submit a new CMS-855 enrollment application regardless of the basis for deactivation. However, making the submission of the CMS-855 a requirement for all deactivated suppliers is inconsistent with the regulatory provision addressing the reactivation of billing privileges. Accordingly, because the "effective date" determination for reactivation in this case was based on an unwarranted requirement that Petitioner submit a new CMS-855 under the MPIM provision described above, the determination is necessarily erroneous.

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[4] The MPIM "reactivation effective date" tracks the language of the regulatory provision titled "Effective date of Medicare billing privileges." *Compare* MPIM § 15.27.1(B) *with* 42 C.F.R. § 424.520(d).

The regulatory provisions addressing reactivation of a supplier's billing privileges do not specify the appropriate method for a deactivated supplier to "*recertify* that the enrollment information currently on file with Medicare is correct." 42 C.F.R. § 424.540(b)(1), (2) (emphasis added). The reactivation provision applicable to a supplier deactivated for the non-submission of claims does not require that the supplier submit a "Medicare enrollment application" to recertify his or her information as the MPIM requires. *Id.* § 424.540(b)(2); *but see* MPIM § 15.27.1(A) ("[S]uppliers deactivated for non-submission of a claim are *required* to complete and submit a Medicare enrollment application to recertify that the enrollment information currently on file with Medicare is correct . . ." (emphasis added)). By contrast, the reactivation provision applicable to a supplier deactivated for any reason *other than* the non-submission of claims expressly requires that the supplier submit a Medicare "enrollment application" to reactivate his or her billing privileges. 42 C.F.R. § 424.540(b)(1). That subsection also provides an alternative for reactivation, *i.e.*, "when deemed appropriate, at a minimum, [a supplier may] *recertify* that the enrollment information currently on file with Medicare is correct." *Id.* (emphasis added). Thus, the regulation contemplates two different procedures that may apply to reactivate a supplier's billing privileges, depending upon the basis for the deactivation: either (1) through a Medicare enrollment application; or (2) through the recertification of information on file with Medicare.

The preamble to the final rule promulgating 42 C.F.R. Part 424, subpart P (Medicare enrollment requirements), supports the interpretation that only one of two reactivation methods may apply depending upon the reason for deactivation:

> In [section] 424.540(b), we proposed that a provider or supplier whose billing number had been deactivated for any reason other than nonsubmission of a claim for 6 months and who wants to reactivate its Medicare billing number must complete and submit a new CMS 855. Those providers and suppliers whose billing number[s] are deactivated after nonsubmission of a claim must recertify that the enrollment information currently on file with Medicare is correct before the claim would be paid.

71 Fed. Reg. 20,754, 20,762 (April 21, 2006). Therefore, the regulation and preamble make it clear that to "recertify" does not require suppliers to "complete and submit a new CMS 855," otherwise there would be only one provision for reactivating billing privileges.

In addition, the CMS-855I enrollment application itself does not state that a supplier deactivated for the non-submission of claims must use that enrollment application to recertify that the information on file with Medicare is correct. *See* CMS Ex. 5, at 2. The application states that "[p]hysicians and non-physician practitioners who are enrolled in the Medicare program, but have not submitted the CMS 855I since 2003, are required to submit a Medicare enrollment application (i.e., Internet-based PECOS or the CMS 855I)

as an initial application when reporting a change for the first time." CMS Ex. 5, at 2. However, as the regulations make clear, recertification is not reporting a "change" of information, but merely verifying the accuracy of information already on file. 42 C.F.R. § 424.540(b)(2). Thus, the enrollment application provides no requirement that it be used to recertify information. That requirement arises solely from the MPIM.

The MPIM, however, conflates the regulatory requirements for a deactivated supplier to reactivate his or her billing privileges by requiring a single method for reactivation: the "Medicare enrollment application." MPIM § 15.27.1(A). By conflating these provisions, the MPIM renders the final clause of section 424.540(b)(1) and all of section 424.540(b)(2) meaningless, contrary to the standard interpretive method of giving effect to all regulatory provisions. *See* Norman J. Singer, *Statutes and Statutory Construction* § 46:06 (6th ed. 2000) ("A statute should be construed so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."). Even within subsection (b)(1), there is clear, distinguishing language between a "Medicare enrollment application" and the process to "recertify" information. Therefore, section 15.27.1(A) of the MPIM, which requires the submission of an enrollment application to reactivate a supplier deactivated based on the non-submission of claims, is erroneous as a matter of law, and NGS cannot rely on that provision to require that Dr. Heverin submit a new enrollment application to recertify that the information on file with Medicare is correct. The regulation does not require Dr. Heverin to submit an enrollment application to recertify his information.

Certainly, suppliers such as Dr. Heverin, who have been deactivated based on the non-submission of claims, may recertify their information using an enrollment application. However, as explained below, merely because a supplier deactivated based on the non-submission of claims uses a Medicare enrollment application as a means of conveying the information necessary for recertification does not necessarily trigger other regulations premised upon the approval of a *required* enrollment application, such as the "effective date" provision applied in this case.

B. The "effective date" provision in 42 C.F.R. § 424.520(d) does not apply when a supplier must only "recertify" that his or her information on file with Medicare is correct.

Here, Petitioner attempted to "recertify" his information using a CMS-855I enrollment application, even though he did not have to use an enrollment application by regulation. Typically, the approval of a "Medicare enrollment application" or the existence of a "new practice location" triggers the "effective date of billing privileges" regulation. *See* 42 C.F.R. § 424.520(d). However, the "filing of a Medicare enrollment application" for the purposes of establishing an effective date does not apply here because the regulations do not require the "Medicare enrollment application" to recertify information.

By regulation, a supplier seeking to "recertify" his or her information on file with Medicare may do so through means other than filing a new Medicare enrollment application. *See* 42 C.F.R. § 424.540(b)(2). Recertification by means other than an enrollment application, however, would not be within the scope of the "effective date" regulatory provision in 42 C.F.R. § 424.520(d) because there would be no approval of a "Medicare enrollment application" and no new practice location -- the only triggering events for an effective date determination. 42 C.F.R. § 424.520(d). To apply the "effective date" regulation to suppliers merely seeking to "recertify" information would result in an incongruent result: suppliers recertifying information according to the MPIM would be subject to the effective date regulation while those recertifying by letter or other means (as permissible by regulation), would not be subject to the "effective date" provision. Therefore, the "effective date" provision in 42 C.F.R. § 424.520(d) cannot apply to a supplier seeking to recertify his or her information on file with Medicare.

Finally, the goal of deactivation is not to vet the enrollee at a later date, as the CMS-855 enrollment application does. Deactivation is a "temporary action to protect the provider or supplier from misuse of their billing number and to also protect the Medicare Trust Funds from unnecessary overpayments." 71 Fed. Reg. at 20,762. In essence, nothing "new" has occurred requiring a new enrollment application. Only when there is a change in location, manager, licensure, etc., is there a need for the enrollment application. *See, e.g.*, 42 C.F.R. § 424.540(a)(2), (b)(1) (requiring submission of an enrollment application if a supplier has been deactivated based on the failure to report a *change* of information). If the supplier is reactivating his or her billing privileges without any new information, then there is no need to verify the veracity of anything provided on the CMS-855 (as that should have been done at the time of initial enrollment), or establish a "new" effective date.

V. Remand Order

As explained above, NGS did not comply with the applicable regulatory requirement for reactivating Dr. Heverin's billing privileges. NGS followed the guidance outlined in the MPIM, but that guidance does not comport with the regulations. Therefore, pursuant to 42 C.F.R. § 498.56(d), I remand this case to CMS or its contractor to process the reactivation of Dr. Heverin's billing privileges in accordance with 42 C.F.R. § 424.540(b)(2). Specifically, in a new determination, CMS or its contractor should accept the previously submitted CMS-855I as a means of recertifying that Dr. Heverin's information on file with Medicare is correct. If the information in the CMS-855I is sufficient to recertify the information on file, CMS or its contractor shall, in

accordance with the applicable regulation, reactivate Dr. Heverin's billing privileges and process any timely claims for services that Dr. Heverin provided, including those services provided prior to June 3, 2012.

It is so ordered.

/s/
Scott Anderson
Administrative Law Judge