Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

David Varlotta, D.O., LLC,
(NPI No.1073787453),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-164

Decision No. CR2135

Date: May 19, 2010

DECISION

I reject the motion of the Centers for Medicare and Medicaid Services (CMS) to dismiss the hearing request of Petitioner David Varlotta, D.O., LLC, for the reasons explained below. As to the merits of the case, I decide the case on the written record and find that the effective date of Petitioner's enrollment in the Medicare program is May 11, 2009. I conclude that, as a matter of law, Petitioner is not entitled to bill for services provided more than 30 days prior to the effective date of the enrollment, i.e., for services provided earlier than April 11, 2009.

I. Background

Petitioner David Varlotta, D.O., LLC, (DVL) is a single specialty anesthesiology clinic, and Dr. Varlotta is an anesthesiologist in the group.

In November 2008, Petitioner submitted an enrollment application to register as a group practice entity. The application was returned on December 6, 2008, because CMS-855R forms for reassignment of payments to the group were not submitted for any group members. CMS Exs. 1, 2. Petitioner later submitted another application, the contractor's receipt of which was confirmed by letter dated January 22, 2009. CMS Exhibit (CMS

Ex.) 3. The January 2009 application was also returned, because Petitioner used an outdated version of the application form.[1]

Petitioner denies receiving notice of the return of the January 2009 application or getting any of the letters dated January 22, 2009, which are in the record as CMS Exhibits 4-7.[2] Petitioner's Hearing Request (HR). Instead, Petitioner asserts that numerous "follow-up calls were placed to FCSO [First Coast Service Options, Inc., the Medicare contractor,] to inquire about the status" of its application. *Id.* Petitioner states that the contractor told Petitioner to check the IVR,[3] which repeatedly stated the application was "in processing." *Id.* Ultimately, Petitioner did learn that the application was not accepted. *Id.*

It is undisputed that Petitioner next submitted an application that FCSO received on May 11, 2009. CMS Exs. 8, 11-12, 15. That application was processed to approval, and the effective date of Petitioner's enrollment in the Medicare program was based on the filing date, May 11, 2009, which provided Petitioner the benefit of a 30-day period of retroactive billing back to April 11, 2009.[4] CMS Ex. 8.

By letter dated November 20, 2009, Petitioner requested a hearing to challenge the effective date of its enrollment into the Medicare program. HR. With the hearing request, Petitioner submitted: (1) FCSO's reconsideration determination letter, dated October 30, 2009, which rejected the request of Petitioner to change the assigned effective date to February 26, 2008; (2) FCSO's letter dated July 27, 2009, which confirmed receipt of Petitioner's request for reconsideration; (3) FCSO's Reconsideration Request form that Petitioner filled out and submitted; (4) Petitioner's letter to FCSO dated July 15, 2009, which requested reconsideration of the effective date of Petitioner's enrollment in the Medicare program with the oldest pending claim for services rendered by Dr. Varlotta attached; (5) FCSO's letter dated July 6, 2009, which approved Petitioner's enrollment in the Medicare program and also granted a 30-day period for retrospective billing for services provided beginning April 11, 2009, under 42 C.F.R.

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[1] According to CMS letters dated January 22, 2009, "[t]he only acceptable CMS-855 application is the February 2008 version for applications submitted after December 31, 2008." CMS Exs. 4-7.

[2] CMS explained that the contractor actually mailed multiple rejection letters, because Petitioner had filed applications under multiple Medicare identification numbers. CMS Memorandum at 1 n.2.

[3] IVR (Interactive Voice Response) is an information system that applicants can access to learn claim status, eligibility, and reimbursement information.

[4] "Effective date" is defined in CMS's letter to be April 11, 2009. CMS explains that this date incorporates the 30-day retroactive billing period allowed pursuant to 42 C.F.R. § 424.521(a)(1).

§ 424.521(a)(1); (6) FCSO's fax to Petitioner dated November 24, 2008, which acknowledged receipt of Petitioner's CMS-855 Medicare Enrollment Application; (7) FCSO's letter to Petitioner dated December 6, 2008, which returned Petitioner's November 2008 enrollment application, because form CMS-855R was not submitted for any group members; and (8) FCSO's fax to Petitioner dated January 22, 2009, which acknowledged receipt of Petitioner's CMS-855 Medicare Enrollment Application. I mark these documents as Petitioner's Exhibits 1-8 and admit them into evidence for purposes of this decision.

This case was first assigned to Administrative Law Judge (ALJ) Keith W. Sickendick, who issued an Acknowledgment and Prehearing Order (Order) on December 2, 2009. In accordance with that Order, CMS filed a "witness list" with no witnesses listed and an exhibit list, dated April 1, 2010.

This case was transferred to me on March 23, 2010, and I issued an Amended Prehearing Order (Amended Order) on April 16, 2010. In the Amended Order, I noted that upon review of submissions by both parties, it appeared that the case could be resolved based on the written record. Therefore, I modified the prehearing order to require CMS to submit a motion for summary disposition or an argument on the merits based on its proposed exhibits and the record to date, and to allow Petitioner the opportunity to respond to CMS's submission and/or file its own motion for summary disposition. In accordance with that Amended Order, CMS filed a motion to dismiss or, in the alternative, for summary disposition and a supporting memorandum on May 3, 2010. CMS accompanied its motion and memorandum with CMS Exs. 1 – 15, which I admit into evidence.

Petitioner's representative indicated by telephone on May 17, 2010 that she wished me to proceed to decision based on the written record before me without further submissions or proceedings.

Having heard no objection from either party, I proceed to decide this case on the written record that the parties submitted.

II. Issues, Findings of Fact, Conclusions of Law

A. Issues

The issues in this case are:

1. Whether Petitioner may challenge the effective date of its approved Medicare enrollment; and

2. If so, whether Petitioner is entitled to an earlier effective date, specifically February 26, 2008.

B. Findings of fact and conclusions of law

1. I have authority to hear Petitioner's challenge to the determination of the effective date of its approved Medicare enrollment.

CMS argues that Petitioner's appeal should be dismissed, because "[p]ursuant to the Medicare enrollment regulations, a 'prospective provider or supplier that is denied enrollment in the Medicare program, or supplier whose Medicare enrollment has been revoked may appeal CMS' decision in accordance with part 498, subpart A.'" CMS Br. at 2 (citing 42 C.F.R. § 424.545(a)). CMS contends that because Petitioner's application was neither denied nor revoked, but rather approved albeit with an effective date later than anticipated, the regulations do not provide for review. CMS Br. 2 (citing *Rachel Ruotolo, M.D.,* DAB CR2029 (2009)).

CMS's motion to dismiss this case is untimely. Under the December 2, 2009 Order, the parties had 30 days to submit any motion to dismiss this case for lack of jurisdiction. CMS never sought an extension. In my Amended Order dated April 14, 2010, I stated that since the parties had not filed such a motion, I presume that CMS does not dispute jurisdiction. CMS never notified me that it disputed this presumption or sought permission to file a late motion seeking dismissal. Then, CMS filed a motion to dismiss on the basis that Petitioner lacks jurisdiction, acknowledging that its motion was due on January 4, 2010 and giving as its reason for not complying with that deadline "difficulties in obtaining the requisite evidentiary documentation underlying the dispute . . . as the underlying materials which would form the basis for such a motion were not made available to the undersigned until a significantly later date." CMS Motion to Dismiss at 1 n.1.

CMS's explanation is unacceptable. Its motion to dismiss rests entirely on legal arguments, so the alleged difficulty in obtaining documents neither justifies the delay nor explains CMS's failure to request an extension. CMS has shown no good cause for me to accept and consider its untimely motion. I therefore reject the motion.

Even if I were to consider the motion, I would deny it.

The regulations at 42 C.F.R. Part 498 that govern appeals procedures for determinations affecting participation in Medicare (and certain Medicaid determinations) set out a list of initial determinations by CMS that are subject to appeal and specify administrative actions that are not subject to appeal under part 498. One of the initial determinations listed as subject to appeal is "the effective date of a Medicare provider agreement or supplier approval." 42 C.F.R. § 498.3(b)(15). None of the administrative actions identified as not subject to appeal under part 498 refers to the determination of an effective date for a provider or supplier to participate in Medicare.

In adopting section 498.3(b)(15), CMS recognized that approving participation at a date later than that sought amounts to a denial of participation during the intervening time and generally involves the same kind of compliance issues that arise from initial denials. 57 Fed. Reg. 46,362, 46,363 (Oct. 8, 1992); 62 Fed. Reg. 43,931, 43,933 (Aug. 18, 1997). That is exactly the situation Petitioner presents here.[5]

The wording of section 498.3(b)(15) is straightforward in providing that the "effective date of a Medicare provider agreement or supplier approval" is an appealable initial determination. It is well-established, and not questioned by either party here, that both the Departmental Appeals Board and all ALJs are bound by statute and regulations. Where a regulation speaks clearly on its face and applies to the question before me, I am bound to follow it.

I am thus bound to follow the regulations in permitting an appeal by any provider or supplier dissatisfied with a determination as to the effective date of its provider agreement or supplier approval.

I note, however, that a right to challenge the effective date is not a license to seek an effective date other than that prescribed by law. I turn next, therefore, to what the applicable law provides as to the proper effective date in Petitioner's circumstances.

2. ***The effective date of Petitioner's approval to participate in Medicare was properly determined under 42 C.F.R. § 424.520(d).***

The determination of the effective date of Medicare billing privileges is governed by 42 C.F.R. § 424.520, which reads, in pertinent part:

> (d) *Physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations.* The effective date for billing privileges for physician, nonphysician practitioners, and physician and nonphysician practitioner organizations is the later of <u>the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor</u> or the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.

[5] In *Ruotolo*, the sole case on which CMS relies, the Petitioner did not argue that she was entitled to an earlier effective date of enrollment but rather disputed the brevity of the permitted period for retroactive billing by challenging the lawfulness of the relatively newly enacted regulation mandated that result. *Ruotolo,* DAB CR2029, at 3. Because the Petitioner was not arguing that she was entitled to an earlier effective date, the ALJ found that 42 C.F.R. § 498.3(b)(15) was inapplicable to that case. *Id.* In contrast, in the instant case, Petitioner claims to be seeking an earlier effective date and does not claim to be challenging any regulations.

(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).

Approval of an enrollment application establishes eligibility to submit claims for providing Medicare-covered services and supplies. 42 C.F.R. § 424.502. Under section 424.520, contractors must assign the effective date based on the date the approvable application was filed with them. The date of filing of Petitioner's application is not in dispute. Petitioner's application "that was subsequently approved by a Medicare contractor" was filed on May 11, 2009. CMS Exs. 12, 15.

I conclude that, as a matter of law based on these undisputed facts, the effective date for which the Petitioner was approved as eligible to participate in Medicare must be May 11, 2009.

Petitioner argues:

> It should be noted that nothing was ever received by DVL with this denial [of its January 2009 application] and this information was only obtained after inquiring multiple times of the status of the application. DVL would like to emphasize that they took measures to get the appropriate documentation completed in a timely manner and had FCSO responded appropriately the group would have been able to get this issue resolved well before the change in CMS policy effective April 1, 2009 and hence would have been paid for services that were in fact rendered to Medicare beneficiaries.

HR. This argument is purely speculative. The reconsideration decision expressly concluded, after a review of the documentation in FSCO's files, that only the May 11, 2009 application was "processable." CMS Ex. 15, at 3. Petitioner has offered nothing to undercut that conclusion. I cannot presume that Petitioner would have submitted a processable application on any earlier date than it did. Moreover, Petitioner was on notice no later than March 2009 that the January 2009 application had been returned, and it could have filed its application at that time using the proper forms. Instead, Petitioner did not file its enrollment application until May 11, 2009.

CMS regulations permit certain suppliers, including physician and non-physician practitioner organizations, to bill retroactively for certain services provided before approval if they have met all program requirements. Current regulations, which were in effect at the time of Petitioner's approval for participation in Medicare, limit retroactive 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). This billing period is retroactive **from the effective date** of a supplier's approval. It follows that section 498.3(b)(15) does not provide for

challenges to the period for retroactive billing beyond an appeal that the effective date of approval itself was wrongly determined. Thus, I have no authority to extend the retroactive billing period for Petitioner.

In conclusion, the earliest effective date was properly determined to be May 11, 2009. *See* 42 C.F.R. § 424.520(d). Thus, Petitioner's request for an effective date of February 26, 2008 must be denied. *See* 42 C.F.R. 424.521(a).

Conclusion

I conclude that Petitioner's effective date remains May 11, 2009 with a 30-day retroactive billing period to April 11, 2009.

/s/

Leslie A. Sussan
Board Member