

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ashleigh Byrne, M.D.,
(PTAN: 002369537),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-69

Decision No. CR3097

Date: January 30, 2014

DECISION

I grant the motion for summary judgment filed by the Centers for Medicare & Medicaid Services (CMS) against Petitioner, Ashleigh Byrne, M.D. The undisputed material facts do not provide any basis for changing Petitioner's effective date of participation in Medicare from February 6, 2013 to September 13, 2012.

I. Background and Undisputed Material Facts.

Petitioner is a physician. CMS determined that she qualified to participate in the Medicare program effective February 6, 2013. Petitioner disagrees with that determination. She contends that she should have qualified to participate effective September 13, 2012. She filed a hearing request to contest CMS's effective date determination and the case was assigned to me for a hearing and a decision.

CMS moved for summary judgment. It supported its motion with six proposed exhibits that are identified as CMS Ex. 1 – CMS Ex. 6. Petitioner opposed the motion and filed an exhibit that is identified as P. Ex. 1. I receive all of these

exhibits into the record of this case. However, as I explain, the material facts of the case are not disputed and I make no credibility findings as a consequence.

The undisputed facts establish that Petitioner filed an initial enrollment application with a Medicare contractor, NHIC, to participate in Medicare on January 8, 2013 and a reassignment application on that same date. CMS Ex. 1. Her purpose was to enroll in the Medicare program as a participating physician and also to reassign her Medicare billing privileges to the physicians' group that employed her.

Petitioner filed her application through an online system known as the "Provider Enrollment, Chain and Ownership System" (PECOS). It is a system that is used universally by Medicare for the enrollment of providers.

CMS declined the electronically signed authorization statement for Petitioner's application on January 8, 2013. On February 6, 2013, NHIC received a paper version of the signed authorization. CMS Ex. 2. NHIC determined to approve Petitioner's application based on the documentation that had been submitted to it electronically and supplemented on paper and, on April 2, 2013, it advised Petitioner that her application for enrollment and assignment of benefits had been approved effective January 8, 2013.¹ CMS Ex. 3.

Petitioner contends that she actually filed an earlier online application via PECOS, dated September 13, 2012, and that this application was lost due to some unspecified error by PECOS or the contractor. However, Petitioner has not offered as evidence any document that supports this contention. She has not supplied a copy of the electronically generated application that she allegedly filed.

¹ NHIC inaccurately characterized January 8, 2013 as Petitioner's "effective date" rather than Petitioner's "retrospective billing date." CMS Ex. 3. In this case, the "effective date" is the date a contractor receives a required enrollment application that it later is able to process to approval. *See* 42 C.F.R. § 424.520(d). However, CMS and its contractors may grant retrospective billing privileges up to 30 days prior to the effective date. *See* 42 C.F.R. § 424.521(a)(1). Here, NHIC determined the date it received Petitioner's enrollment application was February 6, 2013, which is the date it should have properly referenced as the effective date. To be consistent with the relevant regulations, this decision uses "effective date" in later sections to refer to Petitioner's effective date of enrollment, not the date when Petitioner's retrospective billing began.

II. Findings of Fact and Conclusions of Law

The effective date of a physician's participation in Medicare is governed by a federal regulation at 42 C.F.R. § 424.520(d). The regulation provides that the effective date of participation of a physician is the later of the date of filing of a Medicare enrollment application that is subsequently approved by a Medicare contractor or the date when the physician actually began providing services to beneficiaries. NHIC determined that Petitioner had filed an acceptable enrollment application on January 8, 2013 and that is the effective date of participation that it assigned to her.

Petitioner contends she attempted to file an earlier application, on September 13, 2012, and that CMS must approve that application and grant September 13 as the effective date of her participation. However, and as I have stated above, Petitioner has offered no documentary proof that she actually filed an application on September 13. Her case rests on two assertions. First, she contends that I should accept the sworn statement of her employer's provider relations manager, Ms. Chelsea Bailey, as proof that the application was filed on September 13, 2012. P. Ex. 1. In her affidavit, Ms. Bailey contends that she filed Petitioner's application on line via PECOS on September 13, 2012, but that it was somehow lost in the system. Second, Petitioner argues that CMS should be compelled to make a thorough search of its system in order to find the allegedly lost application.

Ms. Bailey contends in her affidavit that she submitted Petitioner's application on September 13, 2012 and that she saw a screen on her computer that stated that the application had been received via PECOS. But, according to Ms. Bailey, she failed to print out that page. Thus, neither she nor Petitioner has any documentary proof whatsoever that an application actually was filed on September 13, as she contends.

I find that failure to make a record of the application to be dispositive. Ms. Bailey's naked assertion that she filed something on September 13, 2012 is not a sufficient basis for me to find a dispute of fact that an application was actually filed on that date. The only acceptable proof that an application was filed is a copy of the application itself.

Petitioner had an affirmative duty to maintain documentary proof that she filed her application on September 13, 2012, if she now wishes to assert that date as the filing date and effective date of participation. The PECOS application form specifically instructs an applicant to print the "submission receipt" page of his or her application for his or her records. *Joseph Ravid, M.D.*, DAB CR2539 at 3 (2012). That would be proof of filing in the event that a contractor or CMS were to claim subsequently that no application was filed. But, if Petitioner attempted to

file an application on September 13, 2012, she failed to obtain the submission receipt. So, she has nothing aside from the speculative assertion of Ms. Bailey that something must have been filed on September 13.

The need to preserve a copy of the application is critical not just to prove that *something* was filed with NHIC but that whatever allegedly was filed was *acceptable*. The act of sending some information to the contractor is not on its face sufficient to preserve an effective date of participation. The contents of the application must be acceptable. So, even if Ms. Bailey could establish by her testimony that she filed something on September 13, that wouldn't advance Petitioner's case without proof that the contents of whatever Ms. Bailey claims to have filed contained the information that the contractor and CMS needed to establish Petitioner's eligibility to participate. And, there is no way to establish that without providing a copy of the application itself. Thus, Ms. Bailey's affidavit not only fails to comport with the requirement that a record copy of the application be maintained by Petitioner, but it fails to supply any facts showing that the alleged September 13 application would have been acceptable to NHIC and CMS.

As to Petitioner's second argument, Petitioner seeks to turn the standard of proof on its head. She argues that CMS must be compelled to make a search of its databases in order to establish whether Petitioner actually filed something on September 13, 2012. I note that CMS contends that it has done precisely that and found nothing. CMS Ex. 6. But, I make no findings as to whether that search was done and done effectively, because CMS was under no duty to make such a search. The burden of generating proof that an application was filed with NHIC on a date earlier than February 6, 2013, falls entirely on Petitioner. CMS is under no duty to winnow its myriad records in order to attempt to find something that Petitioner has no proof of ever having filed.

I find Petitioner's other argument to be without merit. Petitioner argues that the standard in a "reassignment of benefits" case is different from the one that I have described here. But, whatever the merits of that argument – and I find Petitioner's argument to be legally dubious – the issue in this case is not the effective date of reassignment of benefits, but the effective date of Petitioner's participation. And, that is governed by the regulatory standard that I have described in this decision.

/s/
Steven T. Kessel
Administrative Law Judge