Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Frederick Brodeur, M.D.
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-623

Decision No. CR4703

Date: September 13, 2016

DECISION

I sustain the determination of a Medicare contractor, as affirmed on reconsideration and ratified by the Centers for Medicare & Medicaid Services (CMS), to assign an effective date for reactivation of Medicare billing privileges to Petitioner, Frederick Brodeur, M.D., of October 20, 2015.[1]

I. Background

Petitioner, a physician, filed a hearing request in order to challenge the effective date of reactivation of his Medicare billing privileges. In his hearing request Petitioner included exhibits identified as the affidavit of Elizabeth Kamm plus Exhibits A-H. CMS filed a motion for summary judgment or for, in the alternative, a decision based on the written record. With its motion CMS filed exhibits that are identified as CMS Ex. 1-CMS Ex. 15. Petitioner filed a brief opposing CMS's motion but no additional exhibits. CMS then

[1] As CMS observes, technically, Petitioner's effective reactivation date should be November 19, 2015. However, CMS has not contested the contractor's determination to assign an effective reactivation date of October 20, 2015 to Petitioner.

moved to file a reply brief. I grant CMS's motion. I receive all of the parties' exhibits into the record.

It is unnecessary that I decide whether grounds exist to grant CMS's motion for summary judgment inasmuch as CMS has not requested cross-examination of the one witness (Elizabeth Kamm) whose affidavit is of record. CMS has not offered the testimony of witnesses. I decide the case based on the parties' written exchanges including their exhibits.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether the contractor appropriately assigned an effective date of October 20, 2015 to Petitioner for reactivation of his Medicare billing privileges.

B. Findings of Fact and Conclusions of Law

In order to maintain Medicare billing privileges, a Medicare supplier such as Petitioner must "revalidate" its enrollment information at least once every five years by resubmitting and recertifying the accuracy of its enrollment application. 42 C.F.R. § 424.515. The supplier must file the appropriate enrollment application within 60 calendar days of CMS's notification of the need to re-file. 42 C.F.R. § 424.515(a)(2).

CMS may deactivate a supplier's Medicare billing privileges if the supplier fails to file the required application for enrollment within 90 days of CMS's notice to re-file. 42 C.F.R. § 424.540(a)(3). CMS will not pay the supplier for items or services allegedly provided on dates when billing privileges are deactivated. 42 C.F.R. § 424.555(b).

A decision by CMS or one of its contractors to deactivate a supplier's billing privileges is non-reviewable because it is not an initial determination that confers hearing rights. *See* 42 C.F.R. § 498.3. The recourse for a supplier whose billing privileges have been deactivated for any reason other than nonsubmission of a claim is to file a new Medicare enrollment application. 42 C.F.R. § 424.540(b)(1).

The regulation governing the effective date of participation in Medicare states in relevant part that the effective participation date of a physician supplier shall be the filing date of a Medicare enrollment application that is subsequently approved by a Medicare contractor. 42 C.F.R. § 424.520(d). Thus, the regulatory criterion for establishing an effective date of reactivation of billing privileges for a physician supplier is the date when that physician submits a reactivation application that is subsequently approved by a Medicare contractor. However, as a matter of policy, CMS has decided that it will grant a deactivated physician supplier an effective reactivation date of the date that his or her

billing privileges were deactivated *if* the physician supplier submits a reactivation application within 120 days of the date of deactivation of billing privileges. Medicare Program Integrity Manual (MPIM) § 15.29.4.3 (rev. 578, effective May 15, 2015). For applications submitted after 120 days, the regulatory criterion stated by 42 C.F.R. § 424.520(d) applies. *Id.*

This policy is an act of largesse by CMS. There is nothing in the regulations that requires CMS to assign a physician supplier whose billing privileges have been deactivated an effective reactivation date as of the date of deactivation. CMS can, if it chooses, rely on the regulatory language of 42 C.F.R. § 424.520(d) to establish an effective reactivation date.

I find the determinative facts of this case to be as follows. On January 13, 2015, a Medicare contractor sent a letter to Petitioner advising him that it would be necessary to revalidate his Medicare enrollment information. CMS Ex. 1; CMS Ex. 2. Petitioner did not respond to this request. On March 30, 2015, the contractor contacted Petitioner's group practice by telephone, notifying it that it had not received a revalidation application from Petitioner. CMS Ex. 6.

Despite these notifications Petitioner did not file a revalidation application. On May 21, 2015, the contractor deactivated Petitioner's billing privileges. CMS Ex. 7.

The contractor received an application filed on Petitioner's behalf for reactivation of his billing privileges on November 19, 2015, more than 120 days from the date that it had deactivated his billing privileges.[2] CMS Ex. 8. The contractor processed this application and assigned Petitioner an effective date for reactivation of his billing privileges of October 20, 2015. CMS Ex. 10.

These facts fully support the contractor's determination. They establish that Petitioner failed to file an enrollment application despite being requested to do so by the contractor. The contractor acted consistent with regulatory requirements and deactivated Petitioner's billing privileges after 90 days had elapsed from its request for revalidation information without receiving an application from Petitioner. Petitioner finally requested reactivation but more than 120 days after the date of deactivation of his billing privileges. Consequently, the contractor reactivated Petitioner's billing privileges consistent with the regulatory criterion.

Petitioner makes both fact and legal arguments to assert that the contractor and CMS erred. I find that these arguments, individually and collectively, are without merit.

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[2] On that same date the contractor also received from Petitioner an application for reassignment of his Medicare benefits. CMS Ex. 9.

First, Petitioner – relying on the affidavit of Elizabeth Kamm – asserts that an individual revalidation application was filed on his behalf on January 29, 2015; that Ms. Kamm was subsequently assured by the contractor that Petitioner's application was in order; and that it would be processed. Elizabeth Kamm affidavit at 1-3, ¶¶ 6-21. However, Petitioner submitted nothing to corroborate this assertion and I find it not to be credible. Petitioner has not offered a copy of the individual enrollment application that he contends was filed on his behalf on January 29, 2015. He contends that the application was filed electronically on that date but he has not offered any supporting data. The contractor has no record of receiving an individual revalidation application from Petitioner prior to receiving an application from Petitioner signed November 19, 2015 and received on November 19. What the contractor *does have* in its records is an application dated January 20, 2015 for revalidation of Petitioner's *group practice.* CMS Ex. 13. That application is not the same thing as an application for individual revalidation and does not substitute for it.[3]

I also do not find to be credible Ms. Kamm's assertion that she was assured by a contractor's representative that the contractor had on file Petitioner's individual revalidation application. Petitioner offered nothing to corroborate these claims, neither written confirmation nor even notes of the alleged conversations.

Petitioner also asserts that he was denied access to certain contractor "call logs" and the testimony of the contractor's employees which, he contends, might show that his assertions about conversations between Ms. Kamm and the contractor's representative are accurate. Discovery is not available to parties in cases involving CMS. 42 C.F.R. Part 498. However, these same regulations allow for administrative law judges to issue subpoenas. 42 C.F.R. § 498.58. Petitioner could have requested that I subpoena call logs or related documents or contractor's employees as witnesses, and I would have evaluated that request. Petitioner did not do so.

Furthermore, I do not accept Petitioner's contention that: "without said call logs or the testimony of any [contractor's] employees that Ms. Kamm spoke with at the time, it is impossible for [Petitioner] to submit additional evidence to demonstrate that his initial Individual Revalidation application was received . . . ." Petitioner's brief at 2. Submission of a copy of the application, if one exists, does not depend on call logs or the testimony of a contractor's employee.

Petitioner also contends that the contractor sent its notice of deactivation of Petitioner's billing privileges to an address "that has not been associated with [Petitioner] since

[3] The only application that the contractor received in January 2015 related to Petitioner was an application to reassign his benefits to the group practice. CMS Ex. 3.

2013." Petitioner's brief at 3; CMS Ex. 7 at 1. Petitioner argues that the notice was sent to Petitioner's former correspondence address in Kentucky rather than Petitioner's current address in Wisconsin.

Whether or not that is so, the address to which the contractor sent the notice was the address that *Petitioner* had provided to the contractor as his correspondence address in his 2013 CMS-855I Medicare Enrollment application. CMS Ex. 15 at 3. The contractor relied on the information that Petitioner had supplied to it and which was on file as of May 21, 2015, the date of the notice of deactivation. It was Petitioner's duty to advise the contractor of any change in his address by filing the appropriate form with the contractor.

Petitioner argues that the application that was filed on his behalf in January 2015 for reassignment of benefits showed his current address. From that, Petitioner asserts that the contractor and CMS were aware of his change of address and should have sent him notices based on that. Effectively, Petitioner is asserting that the contractor and CMS are under an obligation to infer a change of address from any document that contains a different address than the mailing address that Petitioner previously submitted.

I find that argument to be without merit. The regulations explicitly require suppliers and providers to provide notice to CMS and its contractors of their addresses and any change. They do not require CMS or one of its contractors to be mind readers and draw inferences from documents that suggest, but that do not directly state, a change of address. The burden was on Petitioner to correct his address with the appropriate notification.

In the end, Petitioner's arguments reduce at least partially to equitable claims. He asserts that he was misled by the contractor's employees into believing that he need not file anything with the contractor to revalidate his Medicare enrollment even after being told by the contractor on March 30, 2015, that it had not received a revalidation application from him (Ms. Kamm concedes in her affidavit that Petitioner's practice received a telephone message from the contractor on that date informing it that an individual revalidation application had not been received). *See* Elizabeth Kamm Affidavit at 2, ¶¶ 13-14. In effect, Petitioner contends that CMS should be estopped from deactivating his billing privileges because he would timely have filed a reactivation application had he known that the contractor hadn't received one from him.

As a general rule estoppel will not lie against CMS. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990). I am not authorized to grant Petitioner an earlier effective

reactivation date than that which is authorized by regulation. *US Ultrasound*, DAB No. 2302, at 8 (2010). Furthermore, even if I had such authority, Petitioner has not established a basis for application of the estoppel doctrine. Petitioner has not shown that anything that was allegedly said by the contractor constituted affirmative misconduct as opposed to, potentially, mere error.

Petitioner also argues that the contractor's determination rests on a conflict between CMS policy and a controlling regulation and it demands that I remand this case for reevaluation by the contractor. He relies on 42 C.F.R. § 424.540(c), which, he contends, effectively nullifies any policy determination by CMS or a contractor that allows for non-payment of claims for services delivered during a period of deactivation.

Petitioner misreads this regulation. The regulation states:

> Deactivation of Medicare billing privileges is considered an action to protect the provider or supplier from misuse of its billing number and to protect the Medicare Trust Funds from unnecessary overpayments. The deactivation of Medicare billing privileges does not have any effect on a provider or supplier's participation agreement or conditions of participation.

This language does not mean that a provider or supplier whose billing privileges are deactivated will nonetheless be able to claim reimbursement from Medicare for items or services provided during the deactivation period. Rather, it means exactly what it plainly says: deactivation of billing privileges is not tantamount to revocation of participation. A deactivated provider or supplier may reactivate his or her billing privileges by supplying CMS or its contractor via a new enrollment application with the information needed to update his or her enrollment information. 42 C.F.R. § 424.540(b)(1). By contrast a provider or supplier whose participation is revoked must reapply for participation and must satisfy anew all of the criteria for participation.

Furthermore, Petitioner's argument avoids the explicit language of 42 C.F.R. § 424.555(b). That regulation states that:

> No payment may be made for otherwise Medicare covered items or services furnished to a Medicare beneficiary by a provider or supplier if the billing privileges of the provider or supplier are deactivated . . . .

It is this language that controls this case and it explicitly directs nonpayment to Petitioner for Medicare items or services during the period when his Medicare billing privileges were deactivated. Nothing in 42 C.F.R. § 424.540(c) conflicts with either this language or CMS policy.

_____/s/_____
Steven T. Kessel
Administrative Law Judge