Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sarah M. Woods, M.D.,
(NPI: 1558503557 / PTAN: VVL498a)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-152

Decision No. CR4857

Date: May 23, 2017

DECISION

The effective date of Medicare enrollment and billing privileges of Petitioner Sarah M. Woods, M.D., is April 8, 2016, with retrospective billing privileges beginning March 9, 2016.

I. Background and Procedural History

Palmetto GBA (Palmetto), a Medicare Administrative Contractor (MAC), notified Petitioner's employer, Lynchburg Gynecology PC, by letter dated August 2, 2016, that Petitioner's Medicare application to reassign her Medicare payments to her employer, had been approved with retrospective billing privileges effective March 8, 2016.[1] CMS

---

[1] The parties submitted multiple copies of the August 2, 2016 Palmetto letter approving the reassignment of Medicare payments from Petitioner to her employer. Neither party submitted the initial determination approving Petitioner's enrollment in Medicare. The evidence shows that Petitioner submitted to Palmetto a CMS-855I (marked for initial enrollment) and a CMS-855R (requesting reassignment). Centers for Medicare & Medicaid Services (CMS) Exhibits (Exs.) 1 at 1, 10, 63, 90; 2 at 15, 42. The parties do
(Footnote continued next page.)

Exs. 1 at 36-40; 5 at 2. On August 30, 2016, Petitioner requested reconsideration of the initial determination and that the effective date be changed to September 28, 2015. CMS Ex. 1 at 5, 35. Palmetto notified Petitioner by letter dated September 28, 2016, that the hearing officer determined on reconsideration that Petitioner's enrollment application (CMS-855I) and reassignment application (CMS-855R) were received by Palmetto on April 8, 2016. The hearing officer changed the first day of the retrospective billing period from March 8, 2016 to March 9, 2016. CMS Ex. 1 at 1. Petitioner requested a hearing before an ALJ on November 19, 2016 (RFH). The case was assigned to me on December 9, 2016, and an Acknowledgment and Prehearing Order (Prehearing Order) was issued at my direction.

_____

(Footnote continued.)

not dispute, and I infer, that Palmetto granted both Petitioner's enrollment in Medicare and the reassignment of her Medicare payments. I find no prejudice to Petitioner due to the failure of CMS to offer as evidence the initial determination granting enrollment. Petitioner was clearly on notice of the effective date determination, and her employer requested reconsideration and a hearing on her behalf. I also note that both the reconsidered determination and the initial determination incorrectly refer to March 8, 2016, as the Petitioner's "effective date." In the context of the August 2 letter in evidence, March 8, 2016, would have been the effective date of the reassignment of benefits. CMS Exs. 1 at 36-40; 5 at 2. The reconsidered determination indicates that Palmetto made an initial determination that March 8, 2016, was the effective date of enrollment. The hearing officer on reconsideration corrected the "effective date" to March 9, 2016. CMS Ex. 1 at 1. For reasons discussed hereafter, March 9, 2016, could not be Petitioner's effective date of enrollment. Rather, March 9, 2016, could only be the first day of the 30-day period for retrospective billing by Petitioner. Pursuant to 42 C.F.R. § 424.520(d), the effective date of enrollment is the date a MAC receives an enrollment application that it processes to approval. The evidence in this case shows that Petitioner's CMS-855I and CMS-855R were received by Palmetto on April 8, 2016. As discussed hereafter, April 8, 2016, is the effective date of Petitioner's enrollment. Pursuant to 42 C.F.R. § 424.521(a)(1), retrospective billing privileges are granted for 30 days prior to the effective date of enrollment or, in this case, March 9, 2016. The erroneous reference to the first day of the retrospective billing period as the "effective date" is a frequent and inexplicable error committed by MACs. Counsel for CMS is encouraged to ensure that action is taken to correct MAC form letters so administrative law judges (ALJs) do not have to make this correction for CMS and the MAC.

CMS filed a motion for summary judgment and CMS Exs. 1 through 7 on January 9, 2017. Petitioner did not object to my consideration of the CMS exhibits and they are admitted. Petitioner responded to the CMS motion on February 24, 2017. Petitioner filed no exhibits, but the documents filed with her request for hearing are considered. CMS waived a reply brief on February 27, 2017.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[2] Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Administration of the Part B program is through contractors such as Palmetto. Act § 1842(a) (42 U.S.C. § 1395u(a)).

The Act requires the Secretary of Health and Human Services (the Secretary) to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

Petitioner is a physician practitioner. The effective date of enrollment in Medicare of a physician, nonphysician practitioner, and physician and nonphysician practitioner organizations is governed by 42 C.F.R. § 424.520(d). The effective date of enrollment for a physician or nonphysician practitioner may only be the **later** of two dates: the date when the physician **filed** an application for enrollment that was subsequently approved by

---

[2] Petitioner is a "supplier" under the Act and the regulations. A "supplier" furnishes services under Medicare and the term supplier applies to physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) and 1835(e) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

a Medicare contractor charged with reviewing the application on behalf of CMS; or the date when the physician first began providing services at a new practice location. 42 C.F.R. § 424.520(d). An enrolled physician or nonphysician practitioner may retrospectively bill Medicare for services provided to Medicare-eligible beneficiaries up to 30 days prior to the effective date of enrollment, if circumstances precluded enrollment before the services were provided. Retrospective billing for up to 90 days prior to the effective date of enrollment is permitted only in case of a Presidentially-declared disaster pursuant to 42 U.S.C. §§ 5121-5206. 42 C.F.R. § 424.521. The latter provision has no application in this case.

The Secretary has issued regulations that establish the right to a hearing and judicial review of certain enrollment determinations. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to sections 1866(h)(1) and (j)(8), a provider or supplier whose enrollment application or renewal application is denied is entitled to an administrative hearing and judicial review. Pursuant to 42 C.F.R. § 498.3(b)(15), a provider's effective date is an initial determination that is subject to administrative review by an ALJ. Appeal and review rights are specified by 42 C.F.R. § 498.5.

B. Issues

The issues in this case are:

> Whether or not summary judgment is appropriate; and
>
> Whether Petitioner's effective date for Medicare enrollment and billing privileges is April 8, 2016, with retrospective billing privileges beginning March 9, 2016.

C. Findings of Fact, Conclusions of Law and Analysis

My conclusions of law are set forth in bold followed by my findings of fact and analysis.

1. Summary judgment is appropriate.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations that establish the procedure to be followed in adjudicating Petitioner's case are at 42 C.F.R. pt. 498. The regulations do not establish a summary judgment procedure or recognize such a procedure. However, the Departmental Appeals Board (the Board) has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g., Illinois Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure do not apply in

administrative adjudications such as this, but the Board has accepted that Federal Rule of Civil Procedure 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of this case by my Prehearing Order at paragraph III.G. The parties were given notice by the Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Federal Rule of Civil Procedure 56 will be applied. The parties were advised that a fact alleged and not specifically denied, may be accepted as true for purposes of ruling upon a motion for summary judgment. The parties were also advised that on summary judgment evidence is considered admissible and true unless a specific objection is made. Prehearing Order ¶ III.G.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of 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. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differs from resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided for the allocation of the burden of persuasion or the quantum of evidence in 42 C.F.R. pt. 498. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

Petitioner has not specifically opposed summary judgment. The material facts are not disputed. CMS prevails as a matter of law and summary judgment is appropriate. Petitioner argues that she joined her physician group on or about September 28, 2015, and shortly thereafter, her applications to enroll in Medicare and reassign benefits were sent to an address provided by a Palmetto employee. RFH at 1. I accept Petitioner's representations as true for purposes of summary judgment. However, even accepting the facts asserted as true, it is the date of receipt by Palmetto, not the date of mailing by Petitioner, that is controlling as to the effective date of filing. *Alexander C. Gatzimos, M.D., J.D., LLC* , DAB No. 2730 at 1 (2016). Petitioner does not dispute that Palmetto received applications from her on April 8, 2016. Petitioner offers no evidence, such as a certified mail receipt or evidence of electronic filing, to show that Palmetto received an application from her prior to April 8, 2016. Because there is no dispute as to the April 8, 2016 receipt by Palmetto, the issues in this case that require resolution are issues of law related to the interpretation and application of the regulations that govern enrollment and billing privileges in the Medicare program to that undisputed fact. Accordingly, summary judgment is appropriate.

2. Pursuant to 42 C.F.R. § 424.520(d), Petitioner's effective date of Medicare enrollment is April 8, 2016, the date of receipt by Palmetto of a Medicare enrollment application from Petitioner that Palmetto could process to approval.

3. Pursuant to 42 C.F.R. § 424.521(a)(1), Petitioner is authorized to bill Medicare for services provided to Medicare-eligible beneficiaries up to 30 days prior to her effective date of enrollment, that is, beginning on March 9, 2016.

a. Facts

The material facts are not disputed and any inferences are drawn in Petitioner's favor on summary judgment.

Petitioner, a physician, asserts that her effective date for enrollment in Medicare should be September 28, 2015, rather than April 8, 2016. Petitioner contends that her applications to enroll in Medicare and to reassign her entitlement to Medicare payments to her employer were sent to Palmetto on about September 28, 2015, but to an incorrect address provided by a Palmetto employee. RFH. I accept as true for purposes of summary judgment that the applications, copies of which were filed with the request for hearing, were sent to Palmetto as alleged by Petitioner. However, Petitioner has offered no evidence such as certified or registered mail receipts or receipts from a courier service, a record of electronic filing, or testimony to show that Palmetto received any applications from Petitioner prior to April 8, 2016. Petitioner admits that after about 120 days with no communication from Palmetto, Petitioner's employer called Palmetto and was told that

Petitioner's applications were not received. CMS Ex. 1 at 35; CMS Ex. 6 at 31. Petitioner's employer then shipped the applications to a different address provided by Palmetto. There is no dispute that Palmetto received Petitioner's applications on April 8, 2016. CMS Ex. 1 at 35; CMS Ex. 6 at 31*;* CMS Ex. 7 at ¶¶ 9-10. There is also no dispute that the applications received on April 8, 2016, were subsequently processed to approval by Palmetto. CMS Ex. 5; RFH.

b. Analysis

The regulations controlling the effective date of enrollment of a physician and the application of those regulations are clear. The effective date of enrollment in Medicare of a physician, nonphysician practitioner, and physician and nonphysician practitioner organizations is governed by 42 C.F.R. § 424.520(d). The effective date of enrollment for a physician or nonphysician practitioner may only be the later of two dates: (1) the date when the physician filed an application for enrollment that was subsequently approved by a MAC charged with reviewing the application on behalf of CMS; or (2) the date when the physician first began providing services at a new practice location. 42 C.F.R. § 424.520(d). The date of filing of the enrollment application is the date on which the Medicare contractor receives a signed enrollment application that the contractor is able to process to approval. 42 C.F.R. § 424.510(d)(1); 73 Fed. Reg. 69,725, 69,769 (Nov. 19, 2008); *Gatzimos*, DAB No. 2730 at 1. The burden is on Petitioner, not the government, to demonstrate that the MAC or CMS received the requisite enrollment forms and that Petitioner met all enrollment requirements. 42 C.F.R. § 424.545(c). An enrolled physician or nonphysician practitioner may retrospectively bill Medicare for services provided to Medicare-eligible beneficiaries up to 30 days prior to the effective date of enrollment, if circumstances precluded enrollment before the services were provided. 42 C.F.R. § 424.521(a)(1).

Petitioner requests that her effective date of enrollment be changed to September 28, 2015. RFH. Although I accept as true for summary judgment that Petitioner began providing services on that date, the regulation provides that it is the ***later*** of the date of filing a Medicare enrollment application or the date services were first provided that controls. 42 C.F.R. § 424.520(d). The undisputed evidence shows that Petitioner submitted Medicare enrollment and reassignment applications and that they were received by Palmetto on April 8, 2016, and subsequently approved. Applying the regulations to the undisputed evidence, I conclude that Petitioner's effective date of enrollment is April 8, 2016, which is the date Palmetto received an application that it processed to approval. April 8, 2016 is clearly later than September 28, 2015, the date Petitioner began providing services. The first day of the 30-day period of retrospective billing privileges is March 9, 2016, under 42 C.F.R. § 424.521(a)(1).

Petitioner argues it is unfair for her to be penalized with an effective date of April 8, 2016, and retrospective payments only to March 9, 2016, because the September 28, 2015 applications were not received by Palmetto. Petitioner argues that her applications were sent to an incorrect address provided by a Palmetto employee. Petitioner's argument suggests that the government should be estopped from determining an effective date based on receipt of the applications because non-receipt was due to bad information provided by Palmetto staff, which I accept as true for summary judgment. However, as a matter of law, estoppel against the federal government, if available at all, is presumably unavailable absent "affirmative misconduct," such as fraud. *See, e.g.*, *Pac. Islander Council of Leaders*, DAB No. 2091 at 12 (2007); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990). None of the circumstances Petitioner describes suggests fraud on the part of a Palmetto staff member or that there was even any intent to mislead Petitioner.

I note that Petitioner takes no responsibility for not using the on-line Provider Enrollment, Chain, and Ownership System (PECOS) to enroll, which would have acknowledged receipt of the application by Palmetto. Petitioner also failed to obtain certified or registered mail receipts or other evidence of receipt by Palmetto. The regulations do not require that providers and suppliers send documents by certified or registered mail or by other means that provide proof of delivery. However, it is a reasonable business practice to obtain evidence of receipt of any documents filed with a MAC or CMS to avoid the risk of being unable to prove when applications were received by the MAC, or just as importantly, that applications were not received within a reasonable time.

Finally, I have no authority to grant Petitioner equitable relief in the form of an earlier effective date of enrollment, even if I were inclined to do so. *US Ultrasound*, DAB No. 2302 at 8 (2010). I am bound to follow the Act and regulations and have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009).

III. Conclusion

For the foregoing reasons, the effective date of Petitioner's Medicare enrollment and billing privileges is April 8, 2016, with a 30-day period for retrospective billing beginning on March 9, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge