Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Advanced Anesthesiology Associates, LLC,
(PTAN: 564917),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-1164

Decision No. CR4980

Date: December 6, 2017

DECISION

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), sustaining the determination of a Medicare contractor, as affirmed on reconsideration, to reactivate the Medicare enrollment of Petitioner, Advanced Anesthesiology Associates, LLC, effective February 16, 2017.

I. Background

CMS moved for summary judgment. Petitioner opposed the motion but in doing so it averred that it is amenable to having this case decided based on the parties' written pre-hearing exchanges.

Sometimes, ruling on a summary judgment motion as opposed to deciding a case based on the written record is a distinction without a difference, and that may be true here. That said, there are no fact issues whatsoever in this case, and for that reason summary judgment is appropriate. For that reason I find it unnecessary to admit into evidence the

parties' proposed exhibits, although I cite to some exhibits simply to reference the undisputed material facts.[1]

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether a Medicare contractor correctly determined to reactivate Petitioner's Medicare billing privileges effective February 16, 2017.

B. Findings of Fact and Conclusions of Law

The material facts are undisputed. On January 24, 2017, a Medicare contractor told Petitioner that its billing privileges were deactivated. CMS Ex. 6. The reason for the deactivation was that Petitioner had failed to update its Medicare enrollment information within 90 days of being requested to do so by the contractor on October 17, 2016. CMS Ex. 5. The triggering event for the contractor's request was the death of one of Petitioner's co-owners. *Id.*

On February 16, 2017, Petitioner filed an application to reactivate its Medicare billing privileges. CMS Ex. 2 at 1. The contractor accepted this application and reactivated the billing privileges effective February 16. CMS Ex. 7.

Petitioner, dissatisfied with the reactivation date, challenges the contractor's determination. It notes that the contractor made the deactivation effective October 16, 2016. CMS Ex. 6. It offers several arguments to support its assertion that the deactivation should not have been made retroactive or, alternatively, that the contractor should have reactivated Petitioner's billing privileges effective the deactivation date.

All of these arguments are legal in nature. I find that they are either without merit or that I have no authority to adjudicate them.

First, Petitioner acknowledges that the contractor had authority to deactivate Petitioner's Medicare enrollment after it had failed for more than 90 days to respond to the contractor's request for information. Petitioner's Brief (P. Br.) at 6. However, according to Petitioner, the contractor unlawfully implemented the deactivation effective October 16, 2016. Petitioner characterizes this as an impermissible "retroactive" deactivation of its Medicare billing privileges. P. Br. at 4-6.

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[1] Petitioner objected to my receiving CMS Ex. 4 and 5 on the ground that they are irrelevant and prejudicial. P. Br. at 24. They are plainly that, and I would exclude them were I to hold an evidentiary hearing.

Petitioner argues that the contractor acted either without regulatory authority or contrary to the regulations' provisions. P. Br. at 4-6. Either way, this argument is a challenge to the lawfulness of the contractor's decision to deactivate Petitioner's billing privileges.

A contractor's decision to deactivate a supplier's Medicare billing privileges is not an appealable initial determination. *See* 42 C.F.R. § 498.3(b). I may only hear and decide challenges to determinations that the regulations describe as appealable. Consequently, I lack authority to hear and decide this argument.

Petitioner's principal argument is that regulations governing reactivation of billing privileges neither suggest nor require that the effective date of reactivation be the date that a deactivated supplier files an application for reactivation that is accepted by the contractor. P. Br. at 7. According to Petitioner, a better reading of the regulations would be to reactivate effective the date of deactivation. Petitioner argues that CMS's interpretation of the regulations almost inevitably results in reactivated suppliers facing a gap in the period during which Medicare accepts and reimburses them for their claims, a gap which, according to Petitioner, is not contemplated by the regulations. P. Br. at 9-10.

Applicable regulations require every supplier whose Medicare billing privileges are deactivated to file a new Medicare enrollment application in order to have its billing privileges reactivated. 42 C.F.R. § 424.540(b)(1). CMS and its contractors process an application for reactivation of billing privileges under the identical criteria that they use to process new enrollment applications, relying on the requirements of 42 C.F.R. § 424.520(d)(1). This regulation effectively states that the *earliest* effective date of participation of a participating Medicare supplier will be the date when the contractor receives an enrollment application that the contractor accepts. As a consequence of this regulation, the deactivated supplier may not receive an effective participation date (date of reactivation) that is earlier than the date that it submits an application for reactivation that the contractor accepts. 42 C.F.R. § 424.520(d)(1); Medicare Program Integrity Manual (MPIM) §§ 15.27.1.2, 15.29.4.3.

Medicare will not accept a supplier's claims for reimbursement for items or services that it provides on dates that fall between the date of deactivation and the effective date of reactivation. The regulations plainly allow for a reimbursement gap. But, that gap, should it occur, is the consequence of regulatory language as has been interpreted by the Secretary via CMS. The regulations do not allow for CMS or its contractors to waive the requirement that the reactivation date be the date when a deactivated supplier files an acceptable application with the contractor.

These regulations and their impact have been the subject of numerous cases before the Departmental Appeals Board. Administrative law judges and the Board itself have ruled in numerous instances that CMS's application of the regulations constitutes a reasonable reading of regulatory language and, more important, expresses the Secretary's will.

Willie Goffney, Jr., M.D., DAB No. 2763 at 6 (2017). CMS's interpretation of its regulations is settled law within this Department and at this juncture I have no authority to revisit it or to overturn it.

Petitioner argues that at all times it has been a "qualified" supplier, meaning that it has always satisfied Medicare's enrollment requirements. It asserts that the reactivation procedure ignores its underlying status as a qualified supplier and deprives it of a right to obtain reimbursement for its services as any qualified supplier would enjoy. P. Br. at 16-17. Petitioner's point seems to be that its "qualified" status supersedes the regulatory language governing effective dates of participation and that it should therefore be reimbursed by Medicare based on its status rather than on the date when it filed to have its billing privileges reactivated.

This argument fails for two reasons. First, it fails because it disregards the letter of the regulations governing participation. The contractor deactivated Petitioner because it had failed to comply with an explicit regulatory requirement that it respond to the contractor's information request within 90 days. Petitioner concedes that the contractor had the authority to do this. Moreover, and as I discuss above, the regulations do not allow a reactivated supplier to claim reimbursement for items or services that it renders during a period of deactivation. That is the specific regulatory requirement and it governs even suppliers that are otherwise qualified to participate in Medicare.

More important, Petitioner's argument, if carried to its logical conclusion, would render the process of evaluating applications for participation meaningless. Under Petitioner's analysis, *any* supplier, whether participating in the program or not, could argue that it is "qualified" to participate in Medicare and that the program should honor that supplier's claims for services even if that supplier had not filed an application to participate.

Finally, Petitioner argues that CMS's application of the regulations governing reactivation of billing privileges is an unconstitutional taking of its property without affording it due process. P. Br. at 18-24. I am without authority to consider this argument. *Fady Fayed, M.D.*, DAB No. 2266 at 14 (2009).

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Steven T. Kessel
Administrative Law Judge