

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

James Shepard, M.D.
Docket No. A-17-22
Decision No. 2793
May 26, 2017

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

James Shepard, M.D. (Petitioner) has appealed the Administrative Law Judge's (ALJ's) October 13, 2016 decision concerning the effective date of his Medicare billing privileges. Applying the rule in 42 C.F.R. § 424.520(d), the ALJ concluded that Petitioner's effective date was March 28, 2016. *See James Shepard, M.D.*, DAB CR4720 (2016) (ALJ Decision). The ALJ also found that the Medicare program had correctly allowed Petitioner a "retrospective billing period" beginning on February 27, 2016 (or 30 days prior to the effective date determined under section 424.520(d)). *Id.* Finally, the ALJ denied Petitioner's request for an earlier effective date based on a rejected Medicare enrollment application. *Id.*

Petitioner's appeal identifies no factual or legal errors in the ALJ's decision. We therefore affirm it.

Legal Background

A physician or other "supplier"¹ of health care services must be enrolled in Medicare in order to bill and receive payment from the program for covered services. 42 C.F.R. § 424.505. To enroll, a supplier "must submit a complete enrollment application and supporting documentation to the designated Medicare . . . contractor." *Id.* § 424.510(d)(1). A Medicare enrollment application can be either the appropriate version

¹ The term "supplier" is defined in Medicare's regulations to mean "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202 (defining terms as used in the Medicare program).

of the paper-form CMS-855 (physicians must complete the CMS-855I) or an electronic Medicare enrollment process approved by OMB. *Id.* § 424.502. CMS and its contractors use an electronic enrollment system known as “PECOS” (the Provider Enrollment, Chain and Ownership System).²

Title 42 C.F.R. § 424.525 specifies circumstances in which the Centers for Medicare & Medicaid Services (CMS), or a designated Medicare contractor, may “reject” an enrollment application and what a supplier must do to re-start the enrollment process in that event. In this context, the term “reject” or “rejected” refers to an instance in which “the provider or supplier’s enrollment application was not processed due to incomplete information . . . or . . . additional information or corrected information was not received [by the contractor] from the provider or supplier in a timely manner.” 42 C.F.R. § 424.502.

Section 424.525(a) states that CMS may reject an enrollment application if the supplier: (1) “fails to furnish complete information on the . . . enrollment application within 30 calendar days from the date of the contractor request for the missing information”; or (2) “fails to furnish all required supporting documentation within 30 calendar days of submitting the enrollment application.” *Id.* § 424.525(a)(1), (2). “CMS, at its discretion, may choose to extend the 30 day period [for furnishing missing information] if CMS determines that the prospective . . . supplier is actively working with CMS to resolve any outstanding issues.” *Id.* § 424.525(b). In order “[t]o enroll in Medicare and obtain Medicare billing privileges after notification of a rejected enrollment application, the . . . supplier must complete and submit a new enrollment application and submit all supporting documentation for CMS review and approval.” *Id.* § 424.525(c).

When a Medicare enrollment application is approved, CMS (or the Medicare contractor) sets the “effective date for billing privileges” in accordance with 42 C.F.R. § 424.520(d). That provision states that the effective date of a physician’s or physician organization’s Medicare billing privileges is “the later of . . . [t]he date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor” or

² PECOS is a web-based electronic enrollment process established under OMB System of Records Number (SORN) 09-70-0532. 66 Fed. Reg. 51,961-51,966 (Oct. 11, 2001); *see also* 71 Fed. Reg. 60,536-60,540 (Oct. 13, 2006); Privacy Act Issuances, Office of the Federal Register, 09-70-0532, available at [http://www.ofr.gov/\(S\(ykgyoo3jf5wcg1gif4mou3k\)\)/Privacy/2009/hhs.aspx](http://www.ofr.gov/(S(ykgyoo3jf5wcg1gif4mou3k))/Privacy/2009/hhs.aspx) (last visited May 26, 2017). A provider or supplier may use PECOS to apply to enroll in Medicare or make changes to its enrollment information. 42 C.F.R. § 424.502 (definition of “enrollment application”).

“[t]he date that the supplier first began furnishing services at a new practice location.”³ (Only the “date of filing” is relevant here; there is no “later” date concerning services provided at a “new practice location.”) A different provision – 42 C.F.R. § 424.521(a)(1) – permits a physician whose enrollment application has been approved to bill Medicare for services provided up to 30 days prior to the effective date called for under section 424.520(d); we refer to those 30 days as the “retrospective billing period.”

The determination of a supplier’s effective date under section 424.520(d) is an “initial determination” subject to administrative review under 42 C.F.R. Part 498. *See* 42 C.F.R. §§ 498.3(a)(1), (b)(15); *Victor Alvarez, M.D.*, DAB No. 2325, at 3 (2010). A supplier has no right to administrative review of a contractor’s decision to reject an enrollment application under section 424.525(a). 42 C.F.R. § 424.525(d); *Experts Are Us*, DAB No. 2322, at 9 n.8 (2010).

Case Background⁴

In December 2015, Petitioner mailed a Medicare enrollment application – form CMS-855I – to First Coast Service Options (First Coast), a Medicare enrollment contractor. CMS Ex. 2, at 1, 15. Petitioner also mailed a separate application (form CMS-855R) to reassign Medicare benefits to his “professional association.” *Id.* at 12, 15. First Coast received both applications on December 16, 2015. *Id.* at 16.

Section 2B of the 855I asked Petitioner to supply his “correspondence address,” which, the application said, would be used by Medicare’s “fee-for-service contractor” to contact him directly “[o]nce enrolled.” CMS Ex. 2, at 4. Section 2B also asked Petitioner for his telephone number, fax number (if applicable), and email address (if applicable). *Id.* Petitioner responded to these queries by providing the mailing address for an entity he identified (on the 855R) as his “primary practice location.” *Id.* at 4, 13. Petitioner did not provide his telephone number, fax number, or email address on the December 2015 enrollment application. *Id.*

³ In the preamble to the rulemaking that adopted section 424.520, CMS explained that the term “date of filing” means “the date that the Medicare contractor receives a signed . . . enrollment application that the Medicare contractor is able to process to approval.” 73 Fed. Reg. 69,726, 69,766-69,767 (Nov. 19, 2008). The Board has applied that interpretation in resolving disputes concerning the effective date of a supplier’s enrollment. *See Alexander C. Gatzimos, MD, JD, LLC*, DAB No. 2730, at 4 (2016).

⁴ Our case summary is based upon facts found by the ALJ and upon undisputed information contained in the parties’ documentary evidence. Our summary should not be regarded as supplementing or modifying the ALJ’s findings of fact. *Breton Lee Morgan, M.D.*, DAB No. 2264, at 3 n.3 (2009), *aff’d*, *Morgan v. Sebelius*, 2010 WL 3702608 (D. W.Va. Sept. 15, 2010), *aff’d*, 694 F.3d 535 (4th Cir. 2012).

Section 13 of the 855I asked Petitioner for the name of a “contact person” – that is, a “person you [the applicant] would like for us [First Coast] to contact *regarding [the] application.*” *Id.* at 10 (italics added). In response, Petitioner identified a credentialing specialist at Gulf Coast Regional Medical Center as his contact person. *Id.* at 10, 14. Petitioner also provided the contact person’s telephone and fax numbers, email address, and postal mailing address. *Id.*

In a February 9, 2016 letter addressed to Petitioner’s contact person, First Coast acknowledged its receipt of Petitioner’s December 2015 enrollment application but stated that the application had “missing, incomplete, or inaccurate information” in sections 2B, 2C, and 15. CMS Ex. 3, at 1. With respect to section 2B, First Coast stated:

We have attempted to contact the applicant directly at the telephone number listed in this section [actually, no telephone number was provided in section 2B]; however, we have been unsuccessful. *Please provide a valid address and telephone number where the applicant can be contacted directly.*

Id. (italics added). First Coast also asked Petitioner to provide, in section 2C, the date he had completed his residency in “MM/DD/YY” format. *Id.* (This was an apparent request to correct a typographical error – Petitioner had typed a completion date of “06/01/207” on the application. *See* CMS Ex. 2, at 5). Finally, First Coast asked Petitioner to submit the “Certification Terms Agreement” in section 15 “along with a newly signed and dated Section 15 Certification Statement.”⁵ CMS Ex. 3, at 2.

First Coast’s February 9, 2016 letter advised Petitioner that he had “30 calendar days from the date of this letter” – or until March 10, 2016 – to provide the missing or corrected information “in its entirety” in order to complete the application process. *Id.* at 1, 2, 4. The letter also warned Petitioner that “[c]onsistent with” 42 C.F.R. § 424.525, First Coast “may reject your application if you do not furnish *complete information.*” *Id.* at 1 (italics added).⁶

On March 3, 2016, Petitioner sent First Coast some of the information sought by First Coast. *See* CMS Ex. 3, at 10-13, 14. In particular, he resubmitted section 2C without the typographical error. *Id.* at 10 (showing “06/01/2017” as the expected completion date of his residency). However, Petitioner did not provide additional contact information in

⁵ In a separate letter, also dated February 9, 2016, First Coast notified the contact person that Petitioner had 30 days to provide additional information necessary to complete his reassignment (855R) application. CMS Ex. 3, at 5-7.

⁶ Petitioner does not dispute that his December 2015 applications, as initially submitted, did not include the information sought by First Coast in its February 9, 2016 letters.

section 2B. And although he sent a newly signed certification statement in section 15 (*id.* at 12), there is no evidence that Petitioner complied with First Coast's instruction to provide the Certification Terms Agreement in tandem with the signed certification statement.

By letter dated March 17, 2016, First Coast notified Petitioner that it was closing his enrollment application because First Coast had not received within 30 days the "additional information" that its February 9, 2016 letter had asked him to provide. CMS Ex. 4, at 1. According to the March 17, 2016 letter, Petitioner had not provided his "Correspondence Address (complete address and telephone number)" in section 2B, and also had not complied (or fully complied) with the request concerning the Certification Terms Agreement and certification statement. *Id.* The letter reminded Petitioner that a supplier is "required to submit [a] complete application and all supporting documentation within 30 calendar days from the postmark date of the contractors [sic] request for missing/incomplete information." *Id.* (In addition to rejecting his enrollment application, First Coast notified Petitioner, in a separate letter, that it would not further process the reassignment application "due to the rejection" of his enrollment application. CMS Ex. 4, at 3-4.)

On March 21, 2016, Petitioner's contact person mailed to First Coast a cover letter and additional information supporting the December 2015 Medicare enrollment application. CMS Ex. 3, at 14-17. That additional information included a completed section 2B – containing Petitioner's telephone number, email address, and fax number. *Id.* at 15. The cover letter discusses what the contact person understood to be, or was told were, the reasons for First Coast's February 9, 2016 request for additional information. *Id.* at 14 (stating that, "in speaking with [the First Coast employee], she properly informed me that the reason for the delay [in processing the enrollment application] is that the [employee] called the office and could not locate the provider [presumably, the Petitioner] at which time she decided that she would need clarification of a correspondence address as well as a new certification statement").

On March 28, 2016, Petitioner electronically filed, and First Coast received, new applications for enrollment and reassignment of his Medicare benefits. CMS Ex. 5. On April 27, 2016, First Coast issued a determination approving those applications and notifying Petitioner that his "effective date" was February 27, 2016 and that this date reflected the allowance of a 30-day retrospective billing period under section 424.521(a)(1). CMS Ex. 1, at 4. This means that First Coast determined the "effective date for billing privileges" under section 424.520(d) to be March 28, 2016, the date First Coast received (electronically) his second Medicare enrollment application.

Petitioner filed a request for reconsideration, seeking an earlier effective date based on the filing of his December 2015 enrollment application. CMS Ex. 6. First Coast denied that request, CMS Ex. 1, at 1-2, at which point Petitioner requested an ALJ hearing.

Petitioner and CMS subsequently filed documentary evidence and written argument with the ALJ. Petitioner argued that First Coast had “incorrectly processed” his December 2015 enrollment application by “failing to make adequate contact with the contact person listed” on the application in violation of its internal procedures for requesting additional or corrected information. *See generally* Petitioner’s Sept. 8, 2016 Motion for Summary Judgment and Pre-Hearing Brief. Petitioner also suggested that First Coast should have allowed him an additional 30 days to perfect the December 2015 enrollment application, as permitted by 42 C.F.R. § 424.525(c), because he was “actively working with [First Coast] to resolve any outstanding issues.” *Id.* at 2. For these reasons, Petitioner asked the ALJ to make the effective date November 15, 2015. *Id.* at 3. (We treat Petitioner’s submissions to the ALJ as requesting a December 15, 2015 effective date under section 424.520(d), plus a 30-day retrospective billing period – back to November 15, 2015 – under section 424.521(a)(1).)

Based on the following reasoning, the ALJ sustained First Coast’s determination:

The Secretary's regulations provide that the effective date of enrollment of physicians, non-physician practitioners, and physician or non-physician practitioner organizations is the later of the “date of filing” or the date the supplier first began furnishing services at a new practice location. 42 C.F.R. § 424.520(d). The “date of filing” is the date that the CMS administrative contractor “receives” a signed supplier enrollment application that the Medicare administrative contractor is able to process to approval. 73 Fed. Reg. 69,726, 69,769 (Nov. 19, 2008). Because the CMS administrative contractor [First Coast] received an application from [Petitioner] on March 28, 2016, which the administrative contractor was able to process to approval, the regulations require that the effective date of [his] billing privileges be March 28, 2016. However, the regulations permit CMS to grant retrospective billing for physician or non-physician practitioner services provided up to 30 days before the effective date of enrollment. 42 C.F.R. § 424.521(a)(1). Thus, the CMS administrative contractor correctly determined, based on a March 28, 2016 date of receipt of Petitioner's enrollment application, [that] Petitioner could retrospectively bill for services provided to beneficiaries beginning on February 27, 2016.

ALJ Decision at 4.⁷ The ALJ further held that he was “without jurisdiction to review” Petitioner’s claim that First Coast had “failed to properly process” the December 2015 application because First Coast had “rejected” it and because Petitioner had no right to appeal the rejection. *Id.* at 5.

⁷ Since neither party submitted written direct testimony, the ALJ decided the case’s merits “based on the written record.” ALJ Decision at 3.

Petitioner then filed this appeal, restating his claim that he deserved an earlier effective date because his December 2015 enrollment application had been “processed incorrectly.” Dec. 2, 2016 Request for Review (RR) at 1. Essentially Petitioner alleges that First Coast failed to give him, or his “contact person,” notice of the deficiencies in the December 2015 enrollment application, and that this “error in process is what caused the application to be rejected”⁸ *Id.*; Jan. 11, 2017 Reply at 3-4.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it is erroneous. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s or Supplier’s Enrollment in the Medicare Program*, accessible at <http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/index.html?language=en>.

Discussion

We see no error in the ALJ’s legal analysis. The outcome of this case is dictated by 42 C.F.R. § 424.520(d). That provision states, in relevant part, that a supplier’s “effective date for billing privileges” is the “date of filing” of an enrollment application that was “*subsequently approved* by a Medicare contractor” (italics added). The ALJ found, and there is no dispute, that the only enrollment application filed by Petitioner that was “subsequently approved” by a Medicare contractor was the electronic application that he submitted to First Coast on March 28, 2016. For purposes of the effective-date determination, the “date of filing” of an enrollment application is the date the contractor receives the application. *Alexander C. Gatzimos, MD, JD, LLC*, DAB No. 2730, at 4 (2016). Petitioner’s “subsequently approved” enrollment application was received by First Coast on March 28, 2016. CMS Ex. 5, at 2. Hence, the ALJ correctly held, in accordance with section 424.520(d), that Petitioner’s effective date for billing privileges was March 28, 2016.

Petitioner asks for an effective date based on when he filed his December 2015 enrollment application, but granting that request would violate section 424.520(d), the controlling regulation. Under that regulation, the December 2015 application cannot be the basis for Petitioner’s effective date because it was not “subsequently approved” by First Coast but instead “rejected,” necessitating the filing of a new application upon which his enrollment is based.

⁸ Petitioner’s appeal submissions do not reiterate his contention to the ALJ that First Coast should have exercised its discretion under 42 C.F.R. § 424.525(b) to allow him an additional 30 days to complete the December 2015 application.

Not only is it inconsistent with section 424.520(d), Petitioner's request for an earlier effective date invites us to exceed our review authority. In support of that request, Petitioner contends that, prior to rejecting the December 2015 application, First Coast failed to give him timely or otherwise adequate notice of the application's deficiencies. That contention is an implicit request that we assess the reasonableness or legality of First Coast's decision to reject the December 2015 application. However, section 424.525(d) plainly prohibits ALJ or Board review of that decision, stating that "rejected" enrollment applications "are not afforded appeal rights."

In *Karthik Ramaswamy, M.D.*, DAB No. 2563 (2014), *aff'd*, *Ramaswamy v. Burwell*, 83 F. Supp. 3d 846 (E.D. Mo. 2015), a contractor approved a physician's May 2012 enrollment application and assigned him a May 21, 2012 effective date. DAB No. 2563, at 3. The physician requested an earlier effective date based on a May 2011 enrollment application that the contractor had "denied" (rather than rejected) in June 2011. *Id.* at 4. The physician argued that the 2011 application was the appropriate basis upon which to set the effective date because while that application was pending, he timely provided the contractor with the information needed to approve it. *Id.* In addition, the physician alleged that he did not receive timely notice of the May 2011 application's denial, a circumstance that led to an improper dismissal by the contractor of his request for reconsideration and the termination of any further right to appeal the denial. *Id.* at 4, 6-7. (Unlike a "rejection," a contractor's "denial" of an enrollment application is subject to administrative review under 42 C.F.R. Part 498; however, the contractor's dismissal of a request seeking reconsideration of a denial "does not result in a reconsidered determination and is not subject to further review." *Id.* at 2, 7.)

The Board held that the physician's allegations relating to his 2011 application, even if true, were "not material" given that section 424.520(d)'s "plain language" required the effective date to be based on an application that was "subsequently approved" by the Medicare contractor. DAB No. 2563, at 6. The Board further held that to entertain the physician's claim that the contractor had improperly deprived him of an opportunity to contest the denial of his May 2011 application would have circumvented regulations that specify limits on the Board's authority to review the actions or decisions of CMS contractors – regulations that "do not provide for further review from a contractor dismissal of a reconsideration request as untimely." *Id.* at 7.

Like the physician's attempt in *Ramaswamy* to cast doubt on the validity of the contractor's dismissal of his reconsideration request, Petitioner's disagreement with the handling of his December 2015 enrollment application is an indirect or backdoor challenge to a contractor decision – namely, an application rejection – for which there are no administrative appeal rights. To entertain Petitioner's claim that First Coast improperly rejected his December 2015 application would, as the Board in *Ramaswamy* put it, "ma[ke] a nullity" of section 424.525(d)'s prohibition on appeals relating to rejected enrollment applications. DAB No. 2563, at 7.

Petitioner notes the ALJ's comments, in dicta, regarding potential merit in Petitioner's claim that First Coast did not properly process his December 2015 application. *See* RR at 1. While correctly holding that he had "no jurisdiction to review the administrative contractor's actions related to the December 2015 application," the ALJ commented that "it appears that [First Coast] may not have provided Dr. Shepard notice of the deficiencies in his December 2015 application." ALJ Decision at 5. We make no finding on this issue since, as the ALJ properly concluded, it is not material given the limitation on the ALJ's and Board's review authority. We do note, however, that the record contains some evidence that Petitioner, or his contact person, received timely notice of the December 2015 application's deficiencies. That evidence includes Petitioner's March 3, 2016 submission to First Coast, which appears to address two of the three information requests stated in First Coast's initial (February 9, 2016) request for information.

Finally, Petitioner contends that fairness or equity demands that we grant his request for a December 15, 2015 effective date even though section 424.520(d) requires a March 28, 2016 effective date in his circumstances. Reply Br. at 2. However, the Board is "bound by applicable statutes and regulations [including section 424.520(d)] and has no authority to make exceptions to their applicability" on fairness or other equitable grounds. *Vijendra Dave, M.D.* at 8; *Central Kan. Cancer Inst.*, DAB No. 2749, at 10 (2016) (The Board "is bound by the regulations, and may not choose to overturn the agency's lawful use of its regulatory authority based on principles of equity.").

Conclusion

For the reasons stated above, we affirm the ALJ's conclusion that Petitioner's effective date for billing privileges is March 28, 2016 and that his retrospective billing period began on February 27, 2016.

/s/

Sheila Ann Hegy

/s/

Constance B. Tobias

/s/

Christopher S. Randolph
Presiding Board Member