

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Alissa Wurtzel, LCSW,  
(NPI No. 1013051440),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-210

Decision No. CR2122

Date: April 27, 2010

**DECISION**

I deny the Centers for Medicare and Medicaid Services (CMS) motion to dismiss this case. As to the merits of the case, I find that the effective date of Petitioner's Medicare enrollment and billing privileges is no earlier than March 10, 2009.

**I. Background**

Petitioner, Alissa Wurtzel, is a licensed clinical social worker (LCSW). By letter dated December 2, 2009, Petitioner filed a hearing request challenging March 10, 2009 as the effective date of her enrollment in the Medicare program. Instead, Petitioner requests an effective date of September 5, 2008, the date she received her LCSW licensure. With her hearing request, Petitioner submitted: the National Government Services' (NGS)<sup>1</sup> decision, dated November 23, 2009, regarding her request for reconsideration of her March 10, 2009 effective date; her September 16, 2009 request for reconsideration of her effective date; a June 5, 2009 letter from NGS notifying Petitioner of her effective date; and a document, titled "Health Care or Environmental Health Professional's License

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<sup>1</sup> NGS is a Medicare contractor with the initial authority to approve or deny enrollment in Medicare.

Status,” on letterhead of the Connecticut Department of Public Health, noting that Petitioner was granted a social worker license on September 5, 2008.

By motion dated February 2, 2010, CMS argued that Petitioner had no right to a hearing and moved to dismiss her hearing request. Alternatively, CMS moved for summary judgment. CMS accompanied its motions and brief (CMS Br.) with CMS Exhibits (CMS Exs.) 1-8. Petitioner did not timely respond and, on March 17, 2010, I issued an order for Petitioner to show cause why I should not dismiss her case for abandonment. Petitioner’s representative, Julie Iseminger,<sup>2</sup> responded to my order by e-mail dated March 22, 2010. In her response, Ms. Iseminger stated that Petitioner did not respond to CMS’s motions, because Ms. Iseminger had “no legal expertise . . . [she] was under the assumption that [they] were just waiting to hear back . . . with [my] final decision based on documents previously submitted.” Based on Petitioner’s response, I notified the parties that I was closing the record of the case and proceeding to decision based on the written record before me. I admit CMS Exs. 1-8 into evidence. I am marking the documents contained in Petitioner’s hearing request as follows: NGS’s November 23, 2009 reconsideration decision I mark as Petitioner’s Exhibit (P. Ex.) 1; Petitioner’s September 16, 2009 request for reconsideration I mark as P. Ex. 2; NGS’s June 5, 2009 letter notifying Petitioner of her effective date I mark as P. Ex. 3; and the document on the Connecticut Department of Health letterhead I mark as P. Ex. 4. I admit P. Exs. 1-4 into evidence.

Given Petitioner’s request that this case be decided “based on documents previously submitted,” I do not decide this case by summary judgment but instead decide the case on the written record submitted by the parties.

## **II. Issues**

The issues in this case are whether:

1. I should dismiss Petitioner’s hearing request; and
2. Petitioner’s effective date for Medicare enrollment and billing privileges is March 10, 2009.

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<sup>2</sup> Ms. Iseminger is the Billing Manager, Patient Accounts, for Petitioner’s employer Community Mental Health Affiliates (CMHA). Ms. Iseminger filed the December 2, 2009 hearing request on Petitioner’s behalf.

### III. Findings of Fact and Conclusions of Law

My findings of fact and conclusions of law are set forth in bold and italics below.

***1. There is no basis for me to dismiss Petitioner's hearing request.***

CMS asserts that Petitioner has no right to a hearing to challenge the effective date of her Medicare enrollment. Specifically, CMS asserts that neither approval of an enrollment application nor the determination of the effective date is an initial determination subject to appeal, and, as such, I have no jurisdiction over the matter. CMS Br. at 12. This argument has been made many times recently before Administrative Law Judges (ALJs) of the Departmental Appeals Board. I will not address the issue further except to say that the regulation at 42 C.F.R. § 498.3(b)(15) states that initial determinations made by CMS that give providers hearing rights include “[t]he effective date of a Medicare provider agreement or supplier approval.”<sup>3</sup>

***2. The effective date of Petitioner's Medicare enrollment and billing privileges is no earlier than March 10, 2009.***

The effective date of Medicare billing privileges for an LCSW is “the later of the date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor or the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice location.” 42 C.F.R. § 424.520(d). LCSWs may bill for services provided 30 days prior to their effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries. 42 C.F.R. § 424.521(a)(1). The date of filing an enrollment application is the date that the Medicare contractor receives a signed provider enrollment application that the Medicare contractor is able to process to approval. *See* 73 Fed. Reg. 69,726, 69,770 (Nov. 19, 2008); CMS Ex. 7 at 6.

In her hearing request, Petitioner asserts that:

- Petitioner's enrollment application was initially submitted on December 12, 2008.
- Petitioner was informed on February 13, 2009 that NGS had not received her enrollment application.
- Petitioner re-submitted her enrollment application on February 16, 2009.

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<sup>3</sup> As noted by ALJ Kessel in *Michael Nillas, M.D.*, DAB No. CR2077 at 2 n.1 (2010), if CMS or the Secretary of Health and Human Services intends to limit the reach of the regulation, the obvious solution is to amend the regulation to make it more narrow.

- NGS informed Petitioner on February 24, 2009 that her enrollment application was being closed, because it was not signed or dated by the authorized or delegated official.
- An NGS employee told Petitioner's representative, Ms. Iseminger, that, before Petitioner's enrollment application could be processed, Ms. Iseminger would need to be added as an authorized official, and the new CMHA CFO would need to be added as an authorized official as well. Ms. Iseminger was told the record would show that the enrollment application was received prior to February 24, 2009 and that the application would be approved retroactive to September 5, 2008.
- On June 5, 2009, Petitioner was notified that her effective date was September 5, 2008. The effective date on the first page of the letter listed the effective date as September 5, 2009, but that was obviously incorrect and September 5, 2008 was listed on the second page of the letter.
- CMHA began billing for Petitioner's services in late June 2009. The claims were denied. Petitioner was told that her provider number was tied to an incorrect provider number for the facility. That was corrected. However, when Petitioner re-submitted claims, all dates of service prior to March 10, 2009 were denied.
- On August 24, 2009, Petitioner was informed that when the error with the facility provider number was corrected, Petitioner's retroactive effective date was changed from September 5, 2008 to March 10, 2009, to conform with the new CMS rule being enforced for applications received after April 1, 2009.

Petitioner argues that both of the dates that she submitted her enrollment applications (December 12, 2008 and February 16, 2009) were prior to April 1, 2009. She maintains that her original September 5, 2008 effective date should be honored as the applications were made prior to the new CMS rule, which limited the amount of time a provider or supplier had to claim reimbursement for items or services provided prior to the provider or supplier's effective date. 42 C.F.R. § 424.521(a)(1). Petitioner asserts she made every effort to follow proper Medicare enrollment procedures and feels that, especially in light of the NGS errors on the final approval letter, she should receive a September 5, 2008 effective date.

In her e-mail, Ms. Iseminger also states that Petitioner never received a letter from NGS notifying her that Petitioner's effective date was March 10, 2009, although that date was referred to in NGS's November 23, 2009 decision letter upholding the March 10, 2009 effective date. CMS Ex. 3; P. Ex. 1. In that November 23, 2009 decision letter, a

provider enrollment specialist found that NGS received Petitioner's enrollment application on December 20, 2008, but that the individual who signed as the delegated official was not yet authorized to sign on behalf of the group. On April 10, 2009, NGS received Petitioner's first approvable enrollment application, and, on June 5, 2009, NGS notified CMHA that Petitioner's enrollment application had been approved and the effective date of billing privileges was March 10, 2009. The provider enrollment specialist appears to be wrong with regard to the June 5, 2009 notification, as that letter actually notified Petitioner that her effective date was both September 5, 2009 and September 5, 2008.

In evaluating the representations made by the parties, a conflict exists in the dates that Petitioner cites with regard to her submissions and with the dates set forth in the November 23, 2009 decision letter. However, the discrepancy can be reconciled, because before Petitioner could submit an approvable enrollment application, her employer, CMHA, had to submit an application to authorize Ms. Iseminger as a delegated official for CMHA. CMHA's application to add Ms. Iseminger was not submitted to NGS until March 16, 2009, and not approved until April 3, 2009. CMS Exs. 6, 8. Only after that application was approved could Ms. Iseminger act on behalf of the group to submit an enrollment application for one of its employees, here Petitioner.

The effective date of the regulations at 42 C.F.R. § 424.520(d) and 424.521(a)(1) is January 1, 2009. 73 Fed. Reg. 69,726 (Nov. 19, 2008). Thus, the terms of the regulations govern this case. The regulation at 42 C.F.R. § 424.520(d) prescribes that an approved application could have an effective billing date of the later of the date of filing of the application or the date the practitioner began furnishing services at a new location. In this case, Petitioner did not dispute that her final enrollment application was submitted on April 10, 2009, after CMHA's application to add Ms. Iseminger as a delegated official was approved. Despite the problems with the June 5, 2009 letter, Petitioner does not dispute that CMS now asserts that Petitioner's effective date is March 10, 2009.<sup>4</sup> That date appears to be predicated on NGS's and CMS's interpretation of the regulation at 42 C.F.R. § 424.521(a)(1), which allows an enrolled provider to claim reimbursement for items or services provided as far back as 30 days from the effective date of enrollment. Had the regulation been strictly applied here, NGS would have provided that Petitioner's effective date for billing privileges was the date of receipt of the approvable application, April 10, 2009, and NGS could have permitted a billing date of 30 days prior to the effective date, March 11, 2009. Thus, Petitioner actually received an effective date which is earlier than that contemplated by regulation.

It is unfortunate that NGS's June 5, 2009 letter contained errors and that Petitioner may have been misinformed regarding whether her final enrollment application's effective date could be retroactive to September 5, 2008. However, what Petitioner would ask me to do is to remedy NGS's errors by requiring CMS to give her a September 5, 2008

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<sup>4</sup> In her e-mail dated March 22, 2010, Ms. Iseminger requested a corrected letter be faxed to her notifying Petitioner that Petitioner's effective date is March 10, 2009. CMS (or NGS) must do so.

effective date, even though Petitioner could not submit an approvable enrollment application until April 10, 2009, after Ms. Iseminger was added as a delegated official. Petitioner's request is an equitable argument, and I have no authority under the regulations to provide the equitable relief Petitioner seeks.

#### **IV. Conclusion**

For the reasons discussed above, I find Petitioner's effective date for Medicare enrollment and billing privileges is no earlier than March 10, 2009.

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/s/  
Alfonso J. Montaña  
Administrative Law Judge