

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Damian A. Diaz-Cotelo, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-525

Decision No. CR2871

Date: July 25, 2013

**DECISION**

First Coast Service Options, Inc. (First Coast), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), determined that Petitioner's effective date of enrollment in the Medicare program was June 14, 2012, with a retrospective billing period starting on May 15, 2012. Petitioner appealed. For the reasons stated below, I modify First Coast's determination. Petitioner's effective date of enrollment in the Medicare program is now June 6, 2012. Further, as explained below, May 15, 2012, will continue to be the starting date of Petitioner's retrospective billing privileges unless CMS or First Coast modifies that date.

**I. Background and Procedural History**

Petitioner is a physician located in Miami, Florida, and one of the owners of JMH Internal Medicine Specialist, LLC (JMH). CMS Exhibits (Exs.) 1, 3, 5. JMH submitted a Medicare enrollment application (Form CMS-855B for Clinics/Group Practices and Certain Other Suppliers) and was enrolled in Medicare effective January 11, 2012. CMS Exs. 3, 5. Petitioner submitted a Medicare supplier enrollment application (Form CMS-855R, Medicare Enrollment Application – Reassignment of Medicare Benefits) with First Coast via the Provider Enrollment, Chain and Ownership System (PECOS) on June 6,

2012. CMS Ex. 1. In a September 10, 2012 initial determination, First Coast approved Petitioner's application to reassign his benefits to JMH and permitted Petitioner to bill retrospectively for his services, but only as of 30 days prior to June 14, 2012, the date First Coast believed that it received Petitioner's Form CMS-855R. CMS Ex. 2.

Petitioner filed a corrective action plan (CAP); however, First Coast denied the CAP. CMS Ex. 3. Petitioner then filed a timely request for reconsideration with First Coast. CMS Ex. 3. However, First Coast upheld the initial determination. CMS Ex. 4. On February 4, 2013, Petitioner timely filed his request for hearing (RFH) and I was assigned to hear and decide this case. Petitioner attached five documents to his RFH.

In response to an Acknowledgment and Pre-hearing Order (Order) that I issued on March 14, 2013, CMS filed a motion for summary judgment and brief (CMS Br.) and five exhibits (CMS Exs. 1-5). Petitioner failed to timely respond to CMS's motion for summary judgment and also failed to timely file the pre-hearing exchange required under my March 14 Order. I issued an Order to Show Cause on May 30, 2013, giving Petitioner the opportunity to explain why I should not dismiss his case for abandonment. Petitioner responded on June 10, 2013, asserting that he rested his case with the submission of his RFH and supporting documents. *See* Petitioner's Order to Show Cause Response (P. OSC Response). Because Petitioner presented his entire case with his RFH, I will adjudicate this case on the merits.

In the absence of an objection, I admit CMS Exs. 1 through 5 into the record. Although Petitioner did not submit any marked exhibits, I admitted Petitioner's RFH and three of his accompanying documents into the record as CMS Exs. 2, 3, 4, and 5. I have reviewed the two remaining documents that Petitioner filed with his RFH and determined that they do not affect the outcome of this case. However, while I will not formally admit those documents as exhibits, I have fully reviewed them and both documents remain in the record as part of Petitioner's RFH.

My March 14, 2013 Order states that the parties must submit written direct testimony for each proposed witness and that an in-person hearing is only necessary if the opposing party requests an opportunity to cross-examine a witness. Order ¶¶ 8-11; *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). Neither party provided a list of proposed witnesses or written direct testimony. Consequently, I will not hold an in-person hearing in this matter. *See Kate E. Paylo, D.O.*, DAB CR2232, at 9 (2010). The record is closed and I decide this matter based on the written record. Order ¶ 11.

## II. Discussion

### A. Issue

Whether CMS had a legitimate basis for establishing June 14, 2012, as the effective date of Petitioner's Medicare enrollment (i.e., reassignment of Medicare benefits) and May 15, 2012, as the beginning of Petitioner's retrospective billing period.

### B. Findings of Fact, Conclusions of Law, and Analysis<sup>1</sup>

The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers.<sup>2</sup> 42 U.S.C. §§ 1302, 1395cc(j). Under the Secretary's regulations, a provider or supplier that seeks billing privileges under Medicare must "submit enrollment information on the applicable enrollment application. Once the provider or supplier successfully completes the enrollment process . . . CMS enrolls the provider or supplier into the Medicare program." 42 C.F.R. § 424.510(a).

***1. First Coast received Petitioner's completed and signed Form CMS-855R via PECOS on June 6, 2012.***

Petitioner electronically signed a Form CMS-855R on June 6, 2012, relating to the reassignment of Medicare billing privileges to JMH. CMS Ex. 1, at 3. CMS concedes this date of receipt even though it is earlier than the date of receipt identified by First Coast or Petitioner. CMS Br. at 3 n.2. Therefore, I find that First Coast received Petitioner's Form CMS-855R on June 6, 2012.

***2. The date of receipt of the Form CMS-855R, processed to completion, is the effective date of Petitioner's enrollment in Medicare.***

On September 10, 2012, First Coast approved Petitioner's Form CMS-855R. CMS Ex. 2. First Coast set May 15, 2012, as Petitioner's "effective date." CMS Ex. 2, at 1. On reconsideration, First Coast upheld May 15, 2012 as the "effective date," noting that this date was 30 days prior to the date First Coast received Petitioner's enrollment application. CMS Ex. 4, at 2, 3.

---

<sup>1</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

<sup>2</sup> Petitioner is considered a "supplier" for purposes of the Act and the regulations. *See* 42 U.S.C. §§ 1395x(d), 1395x(u); *see also* 42 C.F.R. § 498.2. A "supplier" furnishes services under Medicare and the term applies to physicians or other practitioners that are not included within the definition of the phrase "provider of services." 42 U.S.C. § 1395x(d).

The relevant regulation concerning the effective date of Medicare enrollment states:

The effective date for billing privileges for physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations *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) (emphasis added). The “date of filing” is the date that the Medicare contractor “receives” a signed provider enrollment application that the Medicare contractor is able to process to approval. 73 *Fed. Reg.* 69,726, 69,769 (Nov. 19, 2008); *see also Caroline Lott Douglas, PA*, DAB CR2406, at 5-7 (2011); *Rizwan Sadiq, M.D.*, DAB CR2401, at 5 (2011). Because First Coast received a complete, approvable application from Petitioner on June 6, 2012, the effective date for Petitioner’s enrollment is June 6, 2012.

**3. *First Coast’s reference to an “effective billing date” means the date Petitioner’s retrospective billing period begins.***

Under the regulations set forth below, CMS may permit limited retrospective billing if a practitioner meets all program requirements.

Physicians, nonphysician practitioners and physician and nonphysician practitioner organizations may retrospectively bill for services when a physician or nonphysician practitioner or a physician or a nonphysician practitioner organization have met all program requirements, including State licensure requirements, and services were provided at the enrolled practice location for up to—

- (1) 30 days prior to their effective date if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries, or
- (2) 90 days [in certain emergencies not applicable to this case.]

42 C.F.R. § 424.521(a).

In both of its determinations, First Coast erroneously characterized the beginning of the retrospective billing period to be the effective date. CMS Exs. 2, at 1; 4, at 2. This conclusion is based on reading First Coasts’ determinations consistently with the regulation quoted above. *See Jorge M. Ballesteros*, DAB CR2067, at 2 (2010) (“CMS apparently sets enrollment effective dates 30 days prior to the date of application, which

is what the Medicare contractor did here.”). Therefore, I interpret First Coast’s determination to mean that the “effective billing date” is the beginning of the retrospective billing period. *Sadiq*, DAB CR2401, at 5-6.

Accordingly, in the present matter, the earliest effective date for retrospective billing privileges that Petitioner could be granted is 30 days prior to June 6, 2012. Because First Coast originally found Petitioner’s effective date to be June 14, 2012, First Coast determined the retrospective billing to be 30 days prior to June 14, 2012, which is May 15, 2012. However, because CMS has discretion to set retrospective billing privileges for any length of time not exceeding 30 days, I must conclude that May 15, 2012, is still a permissible date for Petitioner’s retrospective billing privileges to begin. As noted above, CMS has the authority to modify this date and CMS has indicated that it is in the process of making an adjustment to the retrospective billing date. CMS Br. at 3 n.2.

#### ***4. Equitable estoppel cannot be applied against CMS.***

Petitioner disputes the effective date of his reassignment (now determined to be June 6, 2012) and his retrospective billing date (May 15, 2012, barring CMS action to change it). CMS Exs. 3, 4, 5; P. OSC Response. Petitioner argues that he is entitled to an earlier effective date due to erroneous advice he received from First Coast personnel. Specifically, he argues that a First Coast employee told him not to file his Form CMS-855R until after JMH’s Form CMS-855B was approved. Petitioner argues that he should have received the same effective date as JMH, which is January 11, 2012. CMS Exs. 3, 4, 5; P. OSC Response.

Because Petitioner did not allege any affirmative misconduct by First Coast personnel, Petitioner’s arguments amount to a claim of equitable estoppel for which I am unable to grant any relief. It is well-established that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. It is well settled that those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984); *U.S. Ultrasound*, DAB No. 2303, at 8 (2010); *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff’d*, 567 F.3d 1202 (10th Cir. 2009). Therefore, Petitioner’s equitable estoppel argument must be rejected.

**III. Conclusion**

For the reasons explained above, I modify First Coast’s determination and find that the effective date of Petitioner’s enrollment in the Medicare program is June 6, 2012. However, until CMS modifies Petitioner’s retrospective billing date, Petitioner’s retrospective billing date remains May 15, 2012.

\_\_\_\_\_  
/s/

Scott Anderson

Administrative Law Judge