Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Christina Dziedzic Asig, M.D.,
(NPI: 1750346490)
(PTAN: A300077980)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-571

Decision No. CR3188
Date: April 3, 2014

DECISION

Petitioner, Christina Dziedzic Asig, M.D., appealed the determination establishing the effective date of her enrollment as a supplier in the Medicare program, and the Centers for Medicare & Medicaid Services (CMS) moved for summary judgment. For the reasons explained below, I grant summary judgment in favor of CMS and affirm an effective date for Petitioner's enrollment as of September 21, 2012, with retrospective billing privileges beginning August 23, 2012.

Background

This case involves two enrollment applications. While only Petitioner's second application is material to the decision here, it is important to explain the background of both applications because much of Petitioner's argument focuses on the circumstances surrounding her first application.

The facts are not disputed. Petitioner submitted a CMS-855I enrollment application that National Government Services (NGS), the contractor acting on behalf of CMS, received on July 16, 2012. By letter dated August 2, 2012, and faxed to Petitioner on August 13,

2012, NGS notified Petitioner that she needed to submit additional information or else NGS could reject her application. The letter notified Petitioner that she must submit the information within 30 days, no later than August 31, 2012. CMS Ex. 1, at 1-6. Although Petitioner contacted an NGS enrollment specialist, she did not provide the requested documentation by August 31, 2012 because she was still collecting documentation issued under her new married name. Therefore, on September 8, 2012, NGS rejected Petitioner's enrollment application. CMS Ex. 1, at 7-8.

NGS received Petitioner's second enrollment application on September 21, 2012. CMS Ex. 2. NGS approved this application and granted her retrospective billing privileges beginning August 23, 2012.[1] CMS Ex. 3. Petitioner requested reconsideration to seek an earlier effective date based on her previously rejected application. CMS Ex. 3, at 3. On February 25, 2013, NGS issued an unfavorable decision, upholding the effective date and the commencement of Petitioner's retrospective billing privileges. CMS Ex. 3, at 3-7.

Petitioner timely filed a request for hearing before an Administrative Law Judge (ALJ). I issued an acknowledgement and prehearing order on March 26, 2013. CMS filed a motion for summary judgment and prehearing brief (CMS Br.), accompanied by three exhibits (CMS Exs. 1-3). Petitioner filed an opposition to the CMS motion for summary judgment (P. Br.) and submitted six exhibits (P. Exs. 1-6).[2] In the absence of objection, I admit CMS Exs. 1-3 and P. Exs. 1-6 into the record.

Issues

The issues in this case are:

1. Whether summary judgment is appropriate; and

2. Whether the undisputed evidence establishes that CMS and its contractor properly determined the effective date of Petitioner's enrollment and retrospective billing privileges in the Medicare program.

---

[1] The contractor refers to August 23 as the "effective date." CMS Ex. 3, at 1, 6. However, August 23 is the effective retrospective *billing* date, and September 21 is the effective date of Petitioner's enrollment. *See* 42 C.F.R. § 424.521(a).

[2] Two duplicative copies of P. Ex. 4 appear in the electronic file (DAB E-File), and page 11 of P. Ex. 2 incorrectly appears as another P. Ex. 3 on DAB E-File document number 9.

Findings of Fact and Conclusions of Law

1. Summary judgment is appropriate.

Summary judgment is appropriate if "the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must "come forward with specific facts showing that there is a genuine issue for trial . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab.*, DAB No. 2300, at 3. To determine whether there are genuine issues of material fact for hearing, an ALJ must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.*

Here, CMS moved for summary judgment, and the parties do not dispute the facts material to this case. *See* CMS Br. at 2; P. Br. at 1-3. The only issue to be resolved in this case is a matter of law, which as discussed below, must be decided in CMS's favor. Accordingly, summary judgment is appropriate.

2. NGS properly determined Petitioner was enrolled as a supplier in the Medicare program on September 21, 2012, the date that NGS received Petitioner's application that it was able to subsequently process to approval. NGS was authorized to grant Petitioner retrospective billing privileges beginning August 23, 2012.

The Social Security Act (Act) requires that the Secretary of the U.S. Department of Health and Human Services promulgate regulations that establish the requirements to enroll providers and suppliers of services in the Medicare program. *See* Act § 1866(j) (42 U.S.C. § 1395cc(j)); 42 C.F.R. Part 424, Subpart P. A provider or supplier must be enrolled in the Medicare program to be reimbursed for services provided to Medicare beneficiaries. 42 C.F.R. § 424.505. To enroll, a potential provider or supplier must submit an enrollment application and meet all participation requirements. 42 C.F.R. § 424.510.

The effective date of Medicare enrollment and billing privileges is dictated by 42 C.F.R. § 424.520(d). The regulation provides:

> (d) *Physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations.* The effective date for billing privileges for physician, 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.

(Emphasis added).

The "date of filing" is the date that the Medicare contractor receives a signed enrollment application that the Medicare contractor is able to process to approval. 42 C.F.R. § 424.510(d)(1); 73 Fed. Reg. at 69,726, 69,769 (Nov. 19, 2008). Here, NGS received two enrollment applications from Petitioner, but it was only able to process one of the applications to approval. Petitioner concedes that she did not file the requested documentation regarding her first application within the provided time period. Hearing Request; P. Br. at 2. The parties do not dispute that NGS received Petitioner's second application on September 21, 2012, and NGS was able to process that application to approval. CMS Exs. 2-3. Accordingly, the effective date of Petitioner's enrollment must be September 21, 2012, the date that NGS received Petitioner's enrollment application that it subsequently approved.

An enrolled provider or supplier may 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). Retrospective billing for up to 90 days prior to the effective date of enrollment is permitted only in case of a Presidentially-declared disaster. 42 C.F.R. § 424.521(a)(2). Here, 30 days prior to the effective date of September 21, 2012, is August 23, 2012. Accordingly, Petitioner may bill Medicare retrospectively for reimbursement of covered services beginning August 23, 2012.

3. I am not authorized to grant Petitioner's requests for equitable relief.

On July 16, 2012, NGS received Petitioner's first application and then later rejected it. Although Petitioner was working with NGS to provide the requested information, she concedes that she did not submit all requested information within 30 days of the notice letter. P. Br. at 2. NGS was permitted to reject Petitioner's incomplete application because she failed to timely provide the requested information. 42 C.F.R. § 424.525(a). An applicant does not have appeal rights to challenge a rejected application. 42 C.F.R. § 424.525(d). Rather, the applicant must resubmit a new enrollment application. 42 C.F.R. § 424.525(c).

CMS may extend the 30-day period provided for the applicant to comply before rejecting an application if CMS determines that the applicant is actively working with CMS to resolve any outstanding issues. 42 C.F.R. § 424.525(b). But this determination is purely a discretionary matter and also is not subject to appeal.

Petitioner raises a number of reasons why I should grant her billing privileges effective July 1, 2012. Petitioner states that the NGS enrollment specialist assisting her misled her and did not tell her that further delay in receiving the updated documentation could impact her enrollment and effective date for billing. P. Br. at 3-4. Petitioner also concedes, however, that NGS's "August 13, 2012 facsimile stated that 'failure to respond to this request within 30 days of this notice may result in the rejection or denial of your application.'" P. Br. at 2. Federal case law and Departmental Appeals Board precedent establish 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. 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); *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). Here, Petitioner does not allege any affirmative misconduct, and I am unable to grant the relief that Petitioner requests.

Although Petitioner appears to have made a good faith effort to try to complete her July 2012 application within the time provided, and she references a commendable ten-year history of providing services to Medicare beneficiaries, Petitioner's arguments are equitable in nature, and regardless of the accuracy of these statements, I simply do not have the authority to grant the equitable relief she requests. *US Ultrasound*, DAB No. 2302, at 8 (2010). I cannot grant an exemption to Petitioner under the regulation set forth at 42 C.F.R. § 424.520(d), which is binding on me. *See 1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) ("[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground . . . .").

Conclusion

I grant summary judgment in favor of CMS and affirm NGS's determinations. The undisputed evidence establishes that NGS received an application from Petitioner on September 21, 2012, and that was the application it was able to subsequently process to

approval. Petitioner's enrollment in the Medicare program, therefore, is effective September 21, 2012, with retrospective billing privileges starting August 23, 2012.

/s/
Joseph Grow
Administrative Law Judge