Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Linda Staiger, M.D., P.C.,

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-258

Decision No. CR2551

Date: June 29, 2012

DECISION

Linda Staiger, M.D., P.C., (Petitioner) appeals the determination of Palmetto GBA (Palmetto), a Medicare contractor, that she was not eligible for enrollment in the Medicare program as a supplier[1] earlier than September 19, 2011, and could not submit retrospective claims for payment earlier than August 20, 2011. I grant the Centers for Medicare and Medicaid Services' (CMS's) motion for summary judgment finding that Petitioner's effective date of enrollment was September 19, 2011, with a retrospective billing period starting on August 20, 2011.

I. Background

Petitioner is a medical practice located in Fork Union, Virginia, which is owned by Linda Staiger, M.D., an orthopedic surgeon. CMS Exhibit (Ex.) 4; Petitioner's Hearing

[1] The Medicare statute defines the term "supplier" to mean "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services" under the Medicare statute. Social Security Act § 1861(d), 42 U.S.C. § 1395x(d). *See also* 42 C.F.R. § 400.202.

Request. On April 21, 2011, Petitioner submitted a Medicare enrollment application to the internet-based Provider Enrollment, Chain and Ownership system (PECOS), as a previously enrolled supplier reactivating Medicare enrollment or billing privileges, which she requested be reassigned to her new business entity. CMS Ex. 4 at 4, 33; CMS Ex. 9. On June 23, 2011, Palmetto returned Petitioner's application and informed her that she needed to re-submit her application because there was no signed certification statement. CMS Ex. 7. In lieu of re-submitting on PECOS, Petitioner submitted a paper enrollment application (CMS Form 855I) which Palmetto received on September 19, 2011. CMS Exs. 2, 4. On October 6, 2011, Palmetto informed Petitioner that her Medicare enrollment application was approved. Palmetto determined the effective date to be September 19, 2011, with a retrospective billing date of August 20, 2011.[2] CMS Ex. 1. Petitioner requested Palmetto reconsider the effective date to be June 1, 2011, as Petitioner had begun seeing patients in mid-June 2011 in anticipation of Medicare participation. CMS Ex. 3. On December 2, 2011, Palmetto issued an unfavorable decision, finding that Petitioner's initial application was received in Palmetto's mailroom on September 19, 2011, the filing date controlling the effective date.[3] Petitioner's Exhibit (P. Ex.) 3; CMS Ex. 8.

On January 2, 2012, Petitioner filed a hearing request with the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB). An Acknowledgment and Pre-hearing Order was sent to the parties on January 10, 2012. On January 30, 2012, Petitioner filed a letter asking that the case be decided based on her hearing request in lieu of testimonial evidence. Petitioner stated that she had no other evidence to present. Petitioner included with this letter a document entitled "PECOS Application Status." On February 9, 2012, CMS filed a Motion for Summary Judgment and Brief (CMS Br.), accompanied by nine proposed exhibits (CMS Exs. 1-9). On April 10, 2012, Petitioner filed a letter reiterating that she would not be submitting any other evidence or argument to dispute CMS's position. I mark the document titled "PECOS Application Status" as P. Ex. 1. The documents included with Petitioner's hearing request are a May 3, 2011 letter

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[2] CMS's October 6, 2011 letter erroneously referred to the effective date of Petitioner's enrollment as August 20, 2011. CMS Ex. 1. Palmetto received Petitioner's enrollment application on September 19, 2011. CMS Exs. 2, 4. The applicable regulations, as discussed below, require the receipt date of the application to control as the effective date of enrollment while permitting a supplier to retrospectively bill for 30 days prior to the effective date. 42 C.F.R. § 424.521(a)(1). Thus, I treat August 20, 2011 as the earliest date on which Petitioner could begin submitting claims because under law the effective date of Petitioner's enrollment must be September 19, 2011.

[3] While properly noting that Palmetto received Petitioner's enrollment application on September 19, 2011, and reciting that the law requires that the effective date is the date of filing, the reconsideration decision also incorrectly cites August 20, 2011, the retrospective billing date, as the effective date.

from Palmetto to Petitioner, which I mark as P. Ex. 2; a copy of the December 2, 2011 reconsideration decision, which I mark as P. Ex. 3; and a list of Petitioner's patients seen from June 21 through November 1, 2011, which I mark as P. Ex. 4. Absent any objection, I admit all proposed exhibits into evidence.

II. General Authority

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. Act §§ 1102, 1866(j); 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). A provider or supplier must submit a complete enrollment application and supporting documentation to the designated Medicare fee-for-service contractor," and the application must include "complete . . . responses to all information requested within each section as applicable to the provider or supplier type." 42 C.F.R. § 424.510(d)(1)-(2). The effective date of enrollment for physicians is set as follows:

> The effective date for billing privileges for physicians . . . and physician . . . 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 . . . first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d). The filing date is when the Medicare contractor receives a signed application that is able to be processed to approval. *See* 73 Fed. Reg. 69,726, 69,769. In addition, CMS permits limited retrospective billing as follows:

> Physicians . . . and physician . . . organizations may retrospectively bill for services when a physician or . . . a physician . . . 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 prior to the effective date [in certain emergencies not applicable here].

42 C.F.R. § 424.521(a).

A physician can apply for enrollment in Medicare or make a change in enrollment information using either PECOS or a paper enrollment application process (e.g., CMS Form 855I). A physician must complete an enrollment application if, among other

things, the physician needs to make changes to enrollment information (i.e., adding or changing a practice location) or the physician has formed a professional corporation, professional association, or limited liability company of which the physician is the sole owner. *See* 42 C.F.R. § 424.540(a)(2) & (b)(1); CMS Ex. 4, at 2.

III. Issue

The issue in this case is whether CMS had a legitimate basis for determining September 19, 2011, as the effective date for Petitioner's Medicare enrollment and billing privileges.

IV. Analysis

My findings of fact and conclusions of law are set forth in italics and bold in the decision captions of this decision.

a. This case is appropriate for summary judgment.

CMS argues that it is entitled to summary judgment. Board Members of the Appellate Division of the DAB (the Board) explained the standard for summary judgment:

> Summary judgment is appropriate when 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. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . 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. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). An Administrative Law Judge's (ALJ's) role in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009). The Board has further stated, "[i]n addition, it is appropriate for the tribunal to consider whether a rational trier of fact could regard the parties' presentation as sufficient to meet their evidentiary burdens under the relevant substantive law." *Dumas Nursing and Rehab., L.P.*, DAB No. 2347, at 5 (2010).

CMS argues that it is entitled to summary judgment because "there is no genuine dispute as to any material fact in this matter [and] . . . CMS is entitled to summary judgment as a matter of law." CMS Br. at 1. Petitioner's filings are limited to her hearing request and her letters of January 30 and April 10, 2012. Petitioner never responded specifically to CMS's motion for summary judgment, only stating in both her January 30 and April 10 letters that she was relying on the hearing request and the documents of record as her only evidence and argument. Petitioner's evidence and argument do not place in dispute any fact material to the resolution of the case. Therefore, summary judgment is appropriate.

b. Palmetto's receipt of Petitioner's complete enrollment application on September 19, 2011, necessarily determines the effective date and retrospective billing privileges.

On April 21, 2011, Petitioner submitted an enrollment application through PECOS. P. Ex. 1; CMS Ex. 9. On May 3, 2011, Palmetto notified Petitioner that the application was incomplete because the required electronic certification statement had not been received. It also requested that Petitioner resubmit an electronic funds transfer agreement and a pre-voided check. P. Ex. 2; CMS Ex. 5. On May 20, 2011, Palmetto notified Petitioner that the application could not be processed without a WEB certification statement. CMS Ex. 6. On June 23, 2011, Palmetto returned Petitioner's application due to a problem with the signature on the certification statement, and informed Petitioner that she needed to resubmit her application on-line. CMS Ex. 7. On October 6, 2011, Palmetto approved the paper Medicare enrollment application CMS Form 855I, which Palmetto received from Petitioner on September 19, 2011. CMS Exs. 1, 4. Petitioner timely requested reconsideration of her effective date, which request was denied by Palmetto on December 2, 2011. P. Ex. 3; CMS Ex. 8.

In Petitioner's hearing request, Petitioner asserts that the PECOS system did not "allow [Petitioner] to delete or change the original application that was rejected." Petitioner "felt forced," after multiple calls to PECOS and Medicare to resolve her issues with the on-line application, to file a paper application in September 2011. While Palmetto approved the paper application, Palmetto gave Petitioner an effective date of September 19, 2011, and a retrospective billing date of August 20, 2011, both after the mid-June 2011 time period when Petitioner "in good faith" began seeing Medicare patients. Petitioner asks that I change the effective date (or at least the retrospective billing date) to June 1, 2011, so that she can be paid for services she rendered from June 1, 2011 through August 20, 2011. If the effective date cannot be changed, Petitioner asks that as a "special consideration" she be paid for the claims reflected in P. Ex. 4 between June 1 and August 20, 2011.

The effective date of billing privileges for physicians, among others, 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 . . . 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 Palmetto "receives" a signed provider enrollment application that Palmetto is able to process to approval. *See* 73 Fed Reg. 69,726, 69,769 (Nov. 19, 2008). While the PECOS system may be used in lieu of the paper Medicare enrollment application to submit an enrollment application, Palmetto did not receive a signed application from Petitioner via the PECOS system that could be processed to approval. It was not until Palmetto received Petitioner's signed September 19, 2011 paper application that it had a complete application that could be processed to approval. Thus, by law, the earliest effective date Palmetto could give Petitioner is September 19, 2011.

Petitioner requests, as a "special consideration," that Medicare pay her for the claims reflected in P. Ex. 4, which are based on her treatment of patients between June 1 and August 20, 2011. CMS does not dispute, and for summary judgment purposes I will infer, that Petitioner treated these patients in good faith and in the expectation of Medicare reimbursement. I am without authority, however, to order either Palmetto or CMS to provide an exemption to Petitioner under the circumstances, even though I may sympathize with her predicament. Petitioner's equitable argument gives me no ground to grant her an earlier effective date of enrollment. *See US Ultrasound*, DAB No. 2302, at 8 (2010) ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements."). Moreover, I have no authority to declare statutes or regulations invalid or ultra vires. *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.").

V. Conclusion

Based on the undisputed facts that Palmetto did not receive a signed enrollment application that it could process from Petitioner until September 19, 2011, I conclude that Petitioner's effective date of enrollment was September 19, 2011, with a retrospective billing period starting on August 20, 2011. Therefore, I grant CMS's motion for summary judgment.

/s/
Joseph Grow
Administrative Law Judge