

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

New England Urogynecology, P.C.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-518

Decision No. CR2560

Date: June 26, 2012

DECISION

Sujatha Rajan, M.D., who practices as New England Urogynecology, P.C. (NEU), Petitioner, appeals the determination of NHIC, Corp. (NHIC), a Medicare contractor, regarding Petitioner's effective date of Medicare enrollment. I grant the Centers for Medicare & Medicaid Services' (CMS's) motion for summary judgment, finding that Petitioner's effective date of enrollment is September 23, 2011. I find, however, that Petitioner's retrospective date for billing privileges commenced on August 24, 2011, not August 25, 2011, as NHIC and CMS determined.

I. Background

Sujatha Rajan, M.D., a urogynecologist, is the owner of NEU. CMS Exhibit (Ex.) 2, at 3. On September 23, 2011, NHIC received an application from Dr. Rajan to enroll NEU as a supplier in Medicare.¹ On the same day, NHIC received an application from Dr. Rajan to

¹ 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." Social Security Act (Act) § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health

change her Medicare information. CMS Exs. 2, 3. NHIC approved both applications, with an effective date of August 25, 2011.² Petitioner requested reconsideration, asking NHIC to change the effective date to August 3, 2011, the date Dr. Rajan began seeing Medicare patients as NEU. In a reconsideration decision dated March 5, 2012, NHIC declined to do so. CMS Ex. 6, at 1-2. On March 30, 2012, Petitioner filed a hearing request, accompanied by several attachments. CMS filed a motion for summary judgment and brief (CMS Br.), accompanied by six exhibits (CMS Exs. 1-6), on May 2, 2012. CMS Ex. 1 includes copies of all the attachments filed by Petitioner with her hearing request on March 30, 2012. Dr. Rajan responded for Petitioner on May 29, 2012, with a brief and Petitioner's Motion for Summary Judgment in letter form (P. Br.). With Petitioner's brief and Motion, Dr. Rajan filed a document which she asserts constitutes all her "Medicare claims" for August 2011. I have marked this document as P. Ex. 1. In the absence of objection, I admit CMS Exs. 1-6 and P. Ex. 1 into evidence.

II. Applicable Law

The 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).

agencies, hospice programs, and a fund as described in sections 1814(g) and 1835(e) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

² Both NHIC's November 21 and 28, 2011 letters approving Petitioner's enrollment and change of information applications, and the reconsideration decision of March 5, 2012, state that Petitioner's effective date of Medicare participation is August 25, 2011. CMS Exs. 5, 6. It is undisputed, however, that NHIC received the applications from Petitioner that it subsequently approved on September 23, 2011. The applicable regulations, as discussed below, require the receipt date of an enrollment 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). Thirty days prior to September 23, 2011, is August 24, 2011. Thus, as discussed below, I treat August 24, 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 23, 2011.

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 and physician practice organizations is set as follows:

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). In addition, CMS permits limited retrospective billing as follows:

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.]

42 C.F.R. § 424.521(a).

III. Issue

The issue in this case is whether CMS had a legitimate basis for finding that September 23, 2011, is the effective date for Petitioner’s Medicare enrollment and billing privileges, and, thus, whether August 24, 2011, is Petitioner’s retrospective billing date.

IV. Analysis

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

A. This case is appropriate for summary judgment.

Both parties argue that they are entitled to summary judgment. The Departmental Appeals Board (Board) stated 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. . . . If the moving party carries its initial burden, the non-moving party must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” . . . 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 Rehabilitation & Skilled Nursing Center, DAB No. 2300, at 3 (2010) (citations omitted). An Administrative Law Judge’s (ALJ’s) role in deciding a summary judgment motion differs from its role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Village 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 burden under the relevant substantive law.” *Dumas Nursing and Rehabilitaion, L.P.*, DAB No. 2347, at 5 (2010).

Neither party has requested that I convene an in-person hearing to take testimony with regard to any factual issues raised in this case. Thus, I could decide the case based simply on the parties’ briefs and documentary exhibits, and not under the stricter principles governing summary judgment. However, as I discuss below, Petitioner has not furnished evidence of a genuine dispute concerning a material fact. Thus, summary judgment in favor of CMS is appropriate.

B. NHIC’s September 23, 2011 receipt of Petitioner’s enrollment application necessarily determines Petitioner’s effective date and retrospective billing privileges.

It is undisputed that on September 23, 2011, NHIC received an enrollment application for NEU, and Dr. Rajan’s application to change her Medicare information. CMS Exs. 2, 3. By letters dated November 21 and 28, 2011, NEU’s enrollment application and

Dr. Rajan's change of information were approved, and NHIC gave Petitioner an effective date of August 25, 2011. CMS Ex. 5. Petitioner requested reconsideration, asking NHIC to change the effective date to August 3, 2011. In a reconsideration decision dated March 5, 2012, NHIC upheld the August 25, 2011 effective date, noting that the date was 30 days prior to the receipt of the application resulting in Petitioner's approval. CMS Ex. 6.

The determination of the effective date of Medicare enrollment is governed by 42 C.F.R. § 424.520. As noted above, section 424.520(d) provides that the effective date for enrollment for physicians and physician practitioner organizations (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 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 provider enrollment application that the Medicare contractor is able to process to approval. 73 Fed. Reg. 69,726, 69,769 (Nov. 19, 2008). It is well-settled that the date of filing is the date the Medicare contractor receives an approvable application. *Jennifer Tarr, M.D.*, DAB CR2299 (2010); *Michael Majette, D.C.*, DAB CR2142 (2010); *Roland J. Pua, M.D.*, DAB CR2163 (2010); *Rizwan Sadiq, M.D.*, DAB CR2401 (2011).

Although NHIC erroneously referred to August 25, 2011, as Petitioner's effective date in its letters dated November 21 and 28, 2011, and in its March 5, 2012 reconsideration decision (CMS Exs. 5, 6), the regulations require a Medicare contractor to assign the date of receipt of an enrollment application as the effective date while permitting the contractor to grant retrospective billing privileges for 30 days prior to the effective date. 42 C.F.R. § 424.521(a)(1). Thus, as noted above, I treat NHIC's action as if it intended September 23, 2011, as the effective date of Petitioner's enrollment, as that is required by law. Thirty days prior to September 23, 2011, is August 24, 2011. Thus, August 24, 2011, is the earliest date on which Petitioner could be authorized to submit Medicare claims.

Petitioner's concern as expressed here is that it has not been paid for care provided to Medicare beneficiaries from August 3, 2011 (the date Dr. Rajan began her practice as NEU) through August 24, 2011 (the date on which Petitioner is allowed to commence filing Medicare claims).³ Petitioner does not argue that NHIC actually received either the enrollment application for NEU or Dr. Rajan's application concerning a change of information prior to September 23, 2011, and does not dispute the declaration filed by CMS that an NHIC analyst searched NHIC's electronic and physical records and did not

³ Petitioner actually argued that it should be paid for care between August 3 and 25, 2011. However, as noted above, I have found that 30 days prior to September 23, 2011, is August 24, 2011, not August 25, 2011, as determined by NHIC and CMS. Thus, August 24, 2011, is Petitioner's retrospective billing date and she can begin claiming reimbursement as of that date.

find any application from Petitioner submitted in July 2011. CMS Ex. 4. Instead, Petitioner asserts in support of authorizing an earlier billing date, that an enrollment application for NEU, and an application to change Dr. Rajan's Medicare information, was actually submitted during the first week in July 2011, and that the applications were most likely lost in the mail. Petitioner asserts that Dr. Rajan relied on a third party to prepare and submit the applications, an individual who had been doing Dr. Rajan's "credentialing" for a number of years. Petitioner asserts that this individual is experienced in preparing Medicare applications and trustworthy, and that Dr. Rajan believes this individual did send the enrollment and change of information applications to NHIC in early July 2011. To bolster this argument, Petitioner refers to a series of e-mails authored by Dr. Rajan and the individual who was to submit the applications discussing the purported July submissions. A June 9, 2011 e-mail from this individual to Dr. Rajan specifically asserts that "[y]our Medicare Group and Individual applications will be sent out on 7/1/2011 as the earliest I can submit is 30 days before." E-mails of July 12 and September 20, 2011, however, refer only to the status of these purported applications, and they do not show that the applications were actually mailed or otherwise submitted. CMS Ex. 1, at 3-6. Petitioner does not offer a copy of any July 2011 enrollment applications, any proof of mailing, or any other document to corroborate Petitioner's claims. Petitioner does not assert that Dr. Rajan has firsthand knowledge regarding how these applications were submitted in July 2011, nor does it offer an affidavit or request that I hear testimony from the individual it asserts submitted these applications to attest to the fact that the applications were, in fact, mailed or otherwise submitted in July 2011. Dr. Rajan's belief that the applications were mailed in July does not constitute evidence of a dispute concerning a material fact that would preclude summary judgment for CMS, nor does Petitioner's unsupported suggestion that the applications may have been lost in the mail.

Petitioner asserts that Dr. Rajan was diligent and "followed the rules" in getting the applications submitted. When Petitioner realized that the applications did not reach NHIC by September 20, 2011, it asserts Dr. Rajan and the individual preparing and submitting the applications made certain that new applications were submitted immediately, those being the applications received by NHIC on September 23, 2011. Petitioner believes that Dr. Rajan and NEU are now being "penalized for no fault on my part." Petitioner notes Dr. Rajan provided continuity of care to her Medicare patients as of August 3, 2011; that Dr. Rajan is the only urogynecologist in her area; and that her patients would not have had access to urogynecology services had she refused to provide care for them after August 3, 2011. Petitioner asserts that Dr. Rajan's practice is predominantly geriatric, and that most of her patients are Medicare beneficiaries. Petitioner complains that the denial of payment for three weeks of service will produce a significant financial impact on the practice. Petitioner rather disingenuously asserts that

Medicare's refusal to pay transfers the burden of payment to Petitioner's patients. Finally, Petitioner asks that it be paid for services rendered after August 3, 2011, so that Dr. Rajan and the patients do not "pay the price for an error that was not committed by us."

CMS does not dispute, and for summary judgment purposes I will accept *arguendo*, that NEU and Dr. Rajan treated these patients in good faith and in the expectation of Medicare reimbursement. I am without authority, however, to order either NHIC or CMS to provide an exemption to Petitioner under the circumstances. Petitioner's request for payment after August 3, 2011, amounts to a claim of equitable estoppel, but such a claim gives me no authority to grant 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. *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."). It is well-established by federal case law, and in Board precedent, that: (1) estoppel cannot be the basis to require payment of funds from the federal government; (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. *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hospital*, 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).

V. Conclusion

For the reasons explained above, based on the undisputed fact that NHIC did not receive a completed enrollment application from Petitioner until September 23, 2011, I conclude that Petitioner's effective date of enrollment must be September 23, 2011. Petitioner's retrospective billing period, however, starts on August 24, 2011, not on August 25, 2011, as determined by NHIC and CMS.

/s/

Richard J. Smith
Administrative Law Judge