

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rae L. Lantsberger, DPM,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-602

Decision No. CR2925

Date: September 18, 2013

DECISION

Since 1991, Petitioner Rae L. Lantsberger, DPM (Petitioner) had been enrolled as a supplier of podiatry services in the Medicare program, but On December 30, 2011, Noridian, an administrative contractor for the Centers for Medicare & Medicaid Services (CMS) deactivated her Medicare billing privileges for reasons other than nonsubmission of a claim. On November 22, 2012, Petitioner submitted a Medicare enrollment application to Noridian. Noridian processed Petitioner's November 2012 enrollment application and established an effective date for her Medicare billing privileges. Dissatisfied with the effective date granted, Petitioner appealed, arguing that Noridian erroneously deactivated Petitioner's billing privileges by failing to provide any notice of the deactivation, and based on that error, Petitioner should be entitled to an effective date retroactive to Petitioner's initial enrollment date of January 2, 1991.

CMS moved for summary judgment and Petitioner opposed CMS's effort. For the reasons explained below, I grant CMS's motion for summary judgment: the deactivation of Petitioner's billing privileges is not a determination subject to review in this

proceeding or this forum and the undisputed facts show that Noridian properly established the effective date for Petitioner's Medicare billing privileges based on its receipt of Petitioner's November 22, 2012 enrollment application.

I. Background and Procedural History

Some parts of the procedural history are contested. However, it is uncontested that on December 30, 2011, Noridian deactivated Petitioner's Medicare billing privileges because of her failure to revalidate her enrollment in the Medicare program in a timely fashion. CMS Exhibit (Ex.) 2, at 1; Petitioner (P.) Br. at 3.

On November 22, 2012, Petitioner submitted a new enrollment application. CMS Ex. 5. Noridian processed the application to completion, and, on December 18, 2012, notified Petitioner that she was enrolled in Medicare with an "effective date" of October 23, 2012.¹ CMS Ex. 1. Petitioner requested reconsideration of the effective date. CMS Ex. 3. On February 13, 2013, Noridian affirmed its prior determination that the effective date of Petitioner's enrollment and billing privileges was based on its receipt of the November 2012 enrollment application.² CMS Ex. 1.

On March 22, 2013, Petitioner timely filed a request for hearing (RFH) to challenge the effective date of her Medicare billing privileges. On April 25, 2013, CMS filed a motion for summary judgment and a prehearing brief in support (CMS Br.), and seven proposed exhibits (CMS Exs. 1-7). On May 16, 2013, Petitioner filed a response to the CMS

¹ Noridian inaccurately used the term "effective date" to refer to the date when Petitioner may retrospectively bill for Medicare services. By regulation, the "effective date" would ordinarily be the date Noridian received Petitioner's application that it eventually approved. See 42 C.F.R. § 424.520(d). CMS may, however, permit Petitioner to "retrospectively bill" for services for up to 30 days prior to that effective date. 42 C.F.R. § 424.521(a), which appears to be the case here. For clarity, I use the term "effective date" in later sections to refer to the effective date of enrollment (November 22, 2012) that is established by regulation, not the date when Petitioner's retrospective billing begins (October 23, 2012).

² The effective date at issue is the date Noridian reactivated Petitioner's billing privileges based on the November 2012 application pursuant to 42 C.F.R. § 424.540(b)(1). The effective date of reactivation of Petitioner's billing privileges is an "initial determination" under 42 C.F.R. § 498.3(b)(15). See, e.g., *John Heverin, Ph.D.*, ALJ Ruling 2013-6, at 3 (Mar. 19, 2013) ("While the determination to reactivate a supplier's billing privileges is not an 'initial determination,' and therefore not subject to review before an ALJ, establishing an effective date for supplier approval, and thus the supplier's billing privileges, is an 'initial determination' by regulation.").

motion and supporting brief (P. Br.) along with her affidavit (P. Affidavit) and six proposed exhibits she marked P. Exs. A-F, in apparent disregard of CRDP § 9. In the absence of objections, I admit CMS Exs. 1-7, P. Affidavit, and P. Exs. A-F into the record.

II. Discussion

A. Issue Presented

This case presents the following issue:

Whether Noridian, acting on behalf of CMS, properly established the effective date for the reactivation of Petitioner’s Medicare billing privileges.

B. Background Law

A supplier³ such as Petitioner must enroll in the Medicare program to “receive payment for covered Medicare items or services from either Medicare (in the case of an assigned claim) or a Medicare beneficiary (in the case of an unassigned claim)” 42 C.F.R. § 424.505. The regulations at 42 C.F.R. Part 424, subpart P, establish the requirements for a supplier to enroll in the Medicare program. *Id.* §§ 424.510 – 424.516; *see* Social Security Act § 1866(j)(1)(A) (authorizing the Secretary of the U.S. Department of Health and Human Services to establish by regulation the process for enrolling providers and suppliers in the Medicare program). Prospective suppliers must, among other things, submit an enrollment application in order to begin the enrollment process. 42 C.F.R. § 424.510(a).

Once enrolled in Medicare and granted billing privileges, a physician enters a 5-year revalidation cycle. To revalidate, a physician must resubmit and recertify the accuracy of the enrollment information within 60 calendar days. 42 C.F.R. § 424.515(a)(2). CMS may deactivate a physician’s Medicare enrollment if a physician does not respond to CMS’s request for enrollment information within 90 days of notification. 42 C.F.R. § 424.540 (a)(3).

Deactivated suppliers must also submit a new enrollment application to reactivate their billing privileges if the basis for deactivation was “for any reason other than the nonsubmission of a claim.” 42 C.F.R. § 424.540(a)(3), (b)(1). The effective date of enrollment for physicians, nonphysician practitioners, and physician and nonphysician

³ A “supplier” is “a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare.” 42 C.F.R. § 400.202.

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.” *Id.* § 424.520(d).

C. Analysis

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

1. Summary judgment is appropriate.

CMS argues that it is entitled to summary judgment in its favor. The Departmental Appeals Board (Board) has 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. . . . 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).

The Board has further explained that the role of an Administrative Law Judge (ALJ) 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). I find that Petitioner has not disputed any fact material to my resolution of the case. Accordingly, I conclude that summary judgment is appropriate in this case. Here, the material facts are not disputed, and I draw all reasonable inferences in favor of Petitioner.

2. *Petitioner is not entitled to review of the December 30, 2011 deactivation of Petitioner's billing privileges.*

Petitioner requests reversal of the contractor's decision and seeks an effective date retroactive to the date of her initial enrollment in 1991. P. Br. at 1. Petitioner asserts that she is not appealing the deactivation decision, rather the denial of claims between December 30, 2011 and October 22, 2012. P. Br. at 4-5. Petitioner asserts that CMS deactivated her Medicare billing privileges without any notice to her. Accordingly, Petitioner reasons that because CMS or its contractor deactivated her without notice, Medicare improperly denied her claims during her period of deactivation.

I do not have jurisdiction to review denial of payment for claims of service. Petitioner's challenge to the denial of claims is beyond the scope of my review authority. I do not find, and Petitioner does not identify, any authority for me to review denials of claims for payment. Medicare beneficiaries, and in some cases providers and suppliers, may appeal denials of individual claims for Medicare coverage or benefits through the Medicare carrier or fiscal intermediary and then through the Office of Medicare Hearings and Appeals and the Medicare Appeals Council. *See* 42 C.F.R. Part 405, Subparts G, H, I; 74 Fed. Reg. 65,295 (Dec. 9, 2009). Denials of claims are not among the initial determinations in Part 498 that I may review in this forum.

Furthermore, the relief Petitioner seeks would necessarily entail reversal of CMS's effective date determination, since Petitioner cannot receive payment for services provided during a period for which she was not enrolled in Medicare and not eligible for any retroactive billing privileges. By regulation, only an "initial determination" by CMS or its contractor triggers the appeal rights to an ALJ for an affected provider or supplier. 42 C.F.R. § 498.5(l)(1). The decision of CMS or its contractor to deactivate the billing privileges of a provider or supplier is not an "initial determination" subject to review by an ALJ. *See* 42 C.F.R. § 498.3(b). Therefore, because the deactivation of Petitioner's billing privileges is not an "initial determination" subject to review, I do not have jurisdiction to consider whether Noridian properly deactivated Petitioner's billing privileges on December 30, 2011.⁴

Petitioner argues that she never received a notice to revalidate, or a warning that she should do so, and that CMS failed to provide evidence that it issued the notice. CMS deactivated Petitioner's billing privileges under 424.540(a)(3), which permits deactivation if a provider or supplier "does not furnish complete and accurate information and all supporting documentation within 90 calendar days of receipt of notification from CMS to submit an enrollment application and supporting documentation, or resubmit and certify to the accuracy of its enrollment information." Even if I were to I accept for

⁴ The regulations permit a deactivated provider or supplier to file a "rebuttal" pursuant to 42 C.F.R. § 405.374. 42 C.F.R. § 424.545(b).

purposes of summary judgment that Petitioner's billing privileges were improperly deactivated — and I accept nothing of the sort here — the regulations do not provide for administrative review of such actions.

Petitioner's appeal rights in this forum are limited to the "initial determinations" specified at 42 C.F.R. § 498.3. Of those initial determinations, the only one relevant here is CMS's determination of "[t]he effective date of a Medicare provider agreement or supplier approval," that is, CMS's decision granting Petitioner's application for enrollment and setting the effective date for billing Medicare. 42 C.F.R. § 498.3(b)(15).

Such arguments raise, essentially, a claim of estoppel against the federal government, which, if available at all, is presumptively unavailable absent "affirmative misconduct," such as fraud. *See, e.g., Pacific Islander Council of Leaders*, DAB No. 2091 (2007); *Office of Personnel Management v. Richmond*, 496 U.S. 414, 421 (1990). Petitioner's frustration over the events she describes is clear. However, this does not permit me to ignore the unmistakable requirements of the regulations governing her enrollment in Medicare, by which I am bound.

3. *Noridian properly established the effective date of Petitioner's Medicare billing privileges as November 22, 2012, with retrospective billing starting October 23, 2012.*

On December 30, 2011, Noridian deactivated Petitioner's billing privileges because she failed to timely revalidate her enrollment. 42 C.F.R. § 424.540(a)(3). Upon being deactivated "for any reason other than the nonsubmission of a claim," the regulation required Petitioner to submit "a new enrollment application to reactivate [her] Medicare billing privileges, or when deemed appropriate, at a minimum, recertify that the information currently on file with Medicare is correct." 42 C.F.R. § 424.540(b)(1). Petitioner submitted an enrollment application on November 22, 2012.

The regulation addressing the effective date of providers' and suppliers' Medicare billing privileges 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).

Petitioner asserts that her effective date should be determined by "the date an enrolled physician or nonphysician practitioner first began furnishing services at a new practice

location.” In Petitioner’s view, she “has never moved her location since she began practicing in the early 1990s” and she should be assigned a corresponding effective date. P. Br. at 5.

However, the regulation expressly provides that it “is the later date” that controls. 42 C.F.R. § 424.520(d). In this case, although Petitioner began practicing at the location in the early 1990’s, it was not until November 22, 2012, that Noridian received Petitioner’s enrollment application that was subsequently processed to approval. CMS Ex. 1. Noridian based the effective date on “the receipt date of the application,” which is November 22, 2012. CMS Exs. 1, 5. The reconsidered determination found that the initial determination properly established the effective date of Petitioner’s billing privileges. CMS Ex. 6.

Under the regulations, CMS may permit retrospective billing for services provided up to 30 days prior to the effective date of enrollment and up to 90 days in circumstances not applicable here. 42 C.F.R. § 424.521(a). Here, the earliest effective date for retrospective billing privileges that could be granted was 30 days prior to November 22, 2012. Thirty days prior to November 22, 2012, is October 23, 2012. Therefore, Noridian made a valid discretionary decision to permit Petitioner to bill for Medicare services back to October 23, 2012.

III. Conclusion

For the foregoing reasons, I conclude that Noridian properly determined that the effective date of Petitioner’s Medicare billing privileges was based on its receipt of Petitioner’s November 22, 2012 enrollment application. Petitioner’s effective date, therefore, is November 22, 2012, with retrospective billing privileges starting on October 23, 2012.

/s/
Richard J. Smith
Administrative Law Judge