Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Paradigm Health System,
(NPIs: 10436334454, 1780929604)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-20

Decision No. CR4839

Date: May 3, 2017

DECISION

Petitioner, Paradigm Health System (Paradigm or Petitioner), appealed the reconsidered determination reactivating its Medicare enrollment and billing privileges effective April 18, 2016. For the reasons explained below, I find that Novitas Solutions (Novitas), an administrative contractor for the Centers for Medicare & Medicaid Services (CMS), properly determined that Petitioner's enrollment and billing privileges were reactivated effective April 18, 2016. I therefore affirm the effective date set by CMS.

I. Background and Procedural History

Paradigm was enrolled in Medicare as a clinic/group practice. *See, e.g.*, CMS Exhibit (Ex.) 4 at 2. In a letter dated December 9, 2015, Novitas asked Paradigm to submit a change request using Form CMS-855B to delete from its ownership the name of an individual whom Novitas believed to be deceased. CMS Ex. 2 at 1. The December 9 letter stated that Paradigm must submit the change request within 90 days "to avoid deactivation of Medicare billing privileges." *Id*. In a letter dated April 5, 2016, Novitas informed Paradigm that its Medicare enrollment had been deactivated because Paradigm had not submitted the change request within 90 days. CMS Ex. 3. On April 18, 2016,

Paradigm submitted a Form CMS-855B via the internet-based Provider Enrollment, Chain and Ownership System (PECOS). CMS Ex. 4 at 2-12. Paradigm updated its PECOS submission with paper copies of forms which it mailed to Novitas on April 19, 2016 (CMS Ex. 5 at 6-39), and which Novitas received on April 22, 2016. CMS Ex. 5 at 40, 42. By letter dated May 6, 2016, Novitas reactivated Paradigm's enrollment and billing privileges, effective April 22, 2016. CMS Ex. 6 at 1-3.

Paradigm requested reconsideration of Novitas' determination setting the effective date of Paradigm's reactivation as April 22, 2016. CMS Ex. 7 at 15-37. A Novitas hearing specialist issued a reconsidered determination dated August 9, 2016. CMS Ex. 8. The reconsidered determination changed the reactivation date of Paradigm's Medicare enrollment to April 18, 2016, the date Paradigm submitted its Form CMS-855B via PECOS. CMS Ex. 8 at 3. Paradigm filed a timely request for a hearing before an administrative law judge. The case was assigned to me for a hearing and decision.

I issued an Acknowledgment and Pre-Hearing Order (Order) dated October 17, 2016. Pursuant to my Order, CMS filed a motion for summary judgment (CMS Br.) and ten proposed exhibits (CMS Exs. 1-10). Paradigm filed a Pre-Hearing Brief and Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment (P. Br.), as well as sixteen proposed exhibits. (P. Exs. 1-16).

CMS objected to the admission of P. Exs. 2 and 9 (CMS Obj.), contending that the exhibits constitute new evidence that was not presented to Novitas at the reconsideration level of administrative review.[1] In its Response to CMS's Objection (P. Resp.), Paradigm acknowledges that it did not submit P. Exs. 2 and 9 to Novitas until after the reconsidered determination had been issued. P. Resp. at 1-2. Paradigm argues, however, that there is good cause for me to admit the evidence because, among other reasons, Paradigm received inadequate notice that it would have to submit all documentary evidence to the Novitas hearing officer or be precluded from offering it in any subsequent administrative proceeding. P. Resp. at 4. I do not find that Petitioner has demonstrated good cause to admit P. Ex. 2 and P. Ex. 9.

Petitioner argues that the instructions for filing a reconsideration request that Novitas provided stated that all "information" must be submitted to the hearing officer, but that

[1] The regulations governing provider and supplier enrollment appeals provide that if a provider or supplier submits documentary evidence to the administrative law judge that was not previously submitted, the administrative law judge will "determine whether the provider or supplier has good cause for submitting the evidence for the first time at the [administrative law judge] level." 42 C.F.R. § 498.56(e)(1). If the administrative law judge finds good cause, the evidence must be admitted and may be considered; however, if the administrative law judge does not find good cause, the evidence must be excluded. 42 C.F.R. § 498.56(e)(2).

the instructions did not mention "documentary evidence." P. Resp. at 3-5. Relying on the administrative law judge's decision in *Advanced Medical Servs., PLLC*, DAB CR3284 (2014), Petitioner argues that Novitas' instructions were inadequate to put it on notice of the requirement to submit all evidence before the hearing officer. P. Resp. at 4. I disagree. First, administrative law judge decisions are not precedential. *See, e.g., Littlefield Hospitality*, DAB No. 2756 at 13 (2016) (and cases cited therein). Second, I am not persuaded that the reasoning in *Advanced Medical Servs.* applies here.[2] Moreover, even if Novitas' instructions were unclear — a conclusion I do not draw — participants in Medicare, such as Paradigm, are held to have notice of Medicare regulations. *See, e.g. Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395 at 8 (2011); *see also Waterfront Terrace, Inc.*, DAB No. 2320 at 7 (2010). This is true without regard to whether the party is represented by counsel. *Cf.* P. Resp. at 5-6. The regulations plainly state that all evidence must be presented before the hearing officer at reconsideration. *See* 42 C.F.R. § 405.803; *see also* 42 C.F.R. § 498.56(e)(2).

Further, even if I were to conclude that Paradigm had shown good cause for me to admit P. Ex. 2 and P. Ex, 9 as new evidence, I would nevertheless exclude the exhibits as irrelevant. Both P. Ex. 2 and P. Ex. 9 relate to an enrollment change request submitted on behalf of Northlake Neurological Institute (Northlake), a supplier that Paradigm admits has "a different NPI and PTAN" than Paradigm. *See* P. Br. at 3, 10. Moreover, the suppliers' names (i.e., "Northlake" and "Paradigm") are not remotely similar. Thus, I do not find credible the suggestion that Paradigm's representative could reasonably have believed that submitting a change request on behalf of Northlake was responsive to Novitas' request for a change to Paradigm's enrollment information. In addition, Paradigm appears to have offered P. Ex. 2 in support of its argument that it complied with Novitas' request for information on April 1, 2016, prior to April 5, 2016, the date on which Novitas deactivated Paradigm's Medicare enrollment and billing privileges. However, the April 1, 2016 date is relevant only to Paradigm's contention that Novitas acted prematurely in deactivating Paradigm's Medicare enrollment and billing privileges. As discussed below, I cannot set aside Paradigm's deactivation. Thus, P. Ex. 2 is irrelevant if offered to show that the deactivation was improper. For all these reasons, I exclude P. Exs. 2 and 9. I admit CMS Exs. 1-10 and P. Exs. 1, 3-8, and 10-16.

Neither CMS nor Paradigm listed any proposed witnesses; nor did either party offer the written direct testimony of any witness. *See* Order ¶ 8. As my Order informed the parties, a hearing is necessary only if a party requests to cross-examine a witness for

[2] It appears that the petitioner in *Advanced Medical Servs.* did not offer *any* documentary evidence with its request for reconsideration. *See* DAB CR3284 at 3-4. The administrative law judge held this omission triggered a duty of the contractor to inquire whether the petitioner had evidence to submit. *Id.* at 5-6. Paradigm does not contend that it was unaware of how to submit evidence to the contractor, and it did so. *See* CMS Ex. 8 at 2.

whom the party opponent offered written direct testimony. Order ¶¶ 9, 10. Because there are no witnesses for whom cross-examination is requested, there is no need for a hearing, the record is closed, and I issue this decision based on the written record. *See* Order ¶ 11.

II. Issue

The issue in this case is whether Novitas, acting on behalf of CMS, properly established April 18, 2016, as the effective date for reactivation of Paradigm's Medicare enrollment and billing privileges.

III. Jurisdiction

I have jurisdiction to hear and decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2); *see also* Social Security Act (Act) § 1866(j)(8) (codified at 42 U.S.C. § 1395cc(j)(8)).

IV. Discussion

A. Applicable Regulations and Guidance

CMS or its contractor may deactivate an enrolled provider's or supplier's billing privileges for the reasons cited in 42 C.F.R. § 424.540(a). The reasons for deactivation include:

> (2) The provider or supplier does not report a change to the information supplied on the enrollment application within 90 calendar days of when the change occurred. Changes that must be reported include, but are not limited to, a change in practice location, a change of any managing employee, and a change in billing services. A change in ownership or control must be reported within 30 calendar days as specified in §§ 424.520(b) [sic][3] and 424.550(b).
>
> (3) The 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.

[3] The regulation at 42 C.F.R. § 424.520(b) describes the effective date of enrollment for Independent Diagnostic Testing Facilities. Presumably, the drafters intended the cross-reference to refer to the reporting requirements described at 42 C.F.R. § 424.516(d).

Once a provider's or supplier's enrollment and billing privileges are deactivated, its privileges may be reactivated under the following circumstances:

> When deactivated for any reason other than nonsubmission of a claim, the provider or supplier must complete and submit a new enrollment application to reactivate its Medicare billing privileges or, when deemed appropriate, at a minimum, recertify that the enrollment information currently on file with Medicare is correct.

42 C.F.R. § 424.540(b)(1).

A provider or supplier whose enrollment and billing privileges have been deactivated does not have a right to a reconsidered determination or a hearing before an administrative law judge regarding the deactivation. *See, e.g., Willie Goffney, Jr., M.D.*, DAB No. 2763 at 3-5 (2017). Instead—

> A provider or supplier whose billing privileges are deactivated may file a rebuttal in accordance with § 405.374 of this chapter.

42 C.F.R. § 424.545(b). However, a provider or supplier does have a right to administrative review of CMS's determination of the effective date of its enrollment and billing privileges. 42 C.F.R. § 498.3(b)(15); *see also Goffney*, DAB No. 2763 at 3-5.

CMS guidance published in the Medicare Program Integrity Manual (MPIM) explains how the effective date of reactivation is determined:

> If the contractor approves a provider or supplier's reactivation application or reactivation certification package (RCP) for a Part B non-certified supplier, the reactivation effective date shall be the date the contractor received the application or RCP that was processed to completion.

MPIM, ch. 15, § 15.27.1.2 (Rev. 561, effective March 18, 2015).

B. Findings of Fact and Conclusions of Law[4]

1. I have no authority to review Novitas' deactivation of Paradigm's Medicare enrollment and billing privileges.

[4] My findings of fact and conclusions of law appear as numbered headings in bold italic type.

Paradigm argues that its Medicare enrollment and billing privileges should not have been deactivated because it was not afforded a full 90 days from the date it alleges it received Novitas' December 9, 2015 letter to respond to Novitas' request that Paradigm update its enrollment information to delete a deceased owner. P. Br. at 6-8. However, even if Novitas deactivated Paradigm before 90 days had elapsed from Paradigm's receipt of Novitas' request, I have no authority to set aside the deactivation of Paradigm's Medicare enrollment and billing privileges.

As described above, the regulations governing provider and supplier enrollment appeals do not include "deactivation" among the listed "initial determinations" for which a provider or supplier may request reconsideration and administrative law judge review. *See* 42 C.F.R. § 498.3(b). This conclusion is reinforced by section 424.545 of the regulations, which provides that providers and suppliers may appeal if their Medicare enrollment is denied or revoked, but are limited to submitting a "rebuttal" if their enrollment is deactivated. *See Goffney*, DAB No. 2763 at 3. Moreover, while 42 C.F.R. § 498.3(b)(15) establishes a supplier's right to administrative review of the effective date of its Medicare enrollment, that grant of authority cannot be expanded to permit review of a contractor's deactivation of a supplier's Medicare enrollment. Thus, regardless of whether the process Novitas followed in deactivating Paradigm's Medicare enrollment was procedurally flawed, I do not have authority to set it aside.[5]

[5] The limitations on my authority notwithstanding, it is not clear to me that Paradigm was prejudiced by Novitas' actions here. That is because, under the regulations, Paradigm was subject to deactivation 30 calendar days after any change in its ownership information, or within 90 calendar days of any other change in its enrollment information, if it failed to report the change. 42 C.F.R. § 424.540(a)(2). The record does not reveal the date on which the individual identified in Novitas' December 9, 2015 letter died. *See* CMS Ex. 2. However, the record suggests (and Paradigm does not dispute) that the individual was already deceased as of December 9, 2015. *Id*. Accordingly, assuming the individual's death resulted in an ownership change, Paradigm was required to report the change to Novitas within 30 days of his death, pursuant to 42 C.F.R. § 424.516(d)(1)(i). And, even if the individual's death did not represent a change of ownership, Paradigm was nevertheless required to report the change in its enrollment information within 90 days of the event, pursuant to 42 C.F.R. § 424.516(d)(2). Novitas deactivated Paradigm's Medicare enrollment 118 days after the date of the letter asking Paradigm to submit a change request. *See* CMS Ex. 3. At that point, it is safe to assume, the individual had been deceased for greater than 118 days. *See* CMS Ex. 2. Paradigm therefore failed to comply with the reporting requirements of 42 C.F.R. § 424.516(d), without regard to when it received Novitas' change request. Thus, there was a legal basis to deactivate Paradigm's Medicare enrollment.

2. Novitas properly reactivated Paradigm's Medicare enrollment and billing privileges effective April 18, 2016, consistent with CMS interpretive guidance.

The regulation governing reactivation of Medicare enrollment and billing privileges does not address the effective date of reactivation. *See* 42 C.F.R. § 424.540(b). However, CMS has issued interpretive guidance on this point via the MPIM. *See* MPIM, ch. 15, § 15.27.1.2. The MPIM provides that the "reactivation effective date shall be the date the contractor received the application . . . that was processed to completion." *Id*. Appellate panels of the Departmental Appeals Board (DAB) have concluded that agency interpretations of ambiguous regulations, as expressed in manual provisions, are entitled to deference in appropriate circumstances. *See, e.g., Baylor Cnty. Hosp. Dist.*, DAB No. 2617 at 4 (2015), *aff'd, Baylor Cnty. Hosp. Dist. v. Price*, 850 F.3d 257 (5th Cir. 2017) (manual guidance entitled to deference "so long as the agency's interpretation is reasonable and the party against whom the agency seeks to apply the interpretation had adequate notice"). Here, CMS's manual provision is reasonable because it is consistent with the regulations governing the effective date of Medicare billing privileges generally. *See* 42 C.F.R. § 424.520(d)(1). Paradigm has not argued that it lacked notice of the manual provision, which is publicly available via the internet. Nor did it argue that it relied on an alternative reasonable interpretation of the effective date of reactivation. *See Sunset Manor*, DAB No. 2155 at 18 (2008). I therefore defer to CMS's guidance on this point.

Novitas received Paradigm's enrollment change request via PECOS on April 18, 2016. CMS Ex. 4 at 2. In the reconsidered determination, the Novitas hearing specialist made the reactivation of Paradigm's Medicare enrollment and billing privileges effective April 18, 2016. CMS Ex. 8 at 3. This effective date is consistent with the MPIM guidance.

Paradigm argues, as a factual matter, that I should find it submitted a change request earlier than April 18, 2016. Paradigm relies on P. Ex. 2 and P. Ex. 9 as supporting this argument.[6] *See* P. Br. at 2, 3, 10. Paradigm contends that its representative mailed a change request for an unrelated entity (Northlake) on April 1, 2016. *Id.* Paradigm admits that Northlake has "a different NPI and PTAN" than Paradigm, but nevertheless suggests that the submission relating to Northlake was responsive to the request regarding Paradigm. *See* P. Br. at 3, 10. Paradigm seeks to place responsibility for its representative's "inadvertent" error on Novitas, by pointing out that the Novitas change request did not identify Paradigm's NPI or PTAN. *See* P. Br. at 10. The entire argument concerning the Northlake submission is a red herring.

[6] As discussed above (*supra* p. 2-3), I have excluded P. Ex. 2 and P. Ex. 9 from the record in this case, both because Paradigm did not show good cause for their late submission and because they concern an unrelated entity and are, therefore, irrelevant.

First, as CMS correctly points out, Novitas' December 9, 2015 correspondence was addressed to Paradigm by name, and nowhere referenced Northlake. *See* CMS Br. at 6; *see also* CMS Ex. 2 at 1. Second, as I have noted elsewhere in this decision, the business names of Paradigm and Northlake are not likely to be confused. Therefore, Paradigm's representative cannot reasonably have believed that submitting a change request on behalf of Northlake was responsive to Novitas' request for a change to Paradigm's enrollment information. Finally, to the extent Paradigm contends that the Northlake submission could be a basis for establishing a reactivation date earlier than April 18, 2016, the mailing date of the submission is irrelevant. The relevant date under the MPIM provision quoted above is the date Novitas *received* the submission. Yet, even if Novitas received the Northlake submission earlier than April 18, 2016, Paradigm does not contend — nor could it — that the submission (on behalf of Northlake) was "processed to completion" as required by the MPIM. For all these reasons, the Northlake submission is not relevant to Paradigm's reactivation. Accordingly, I find that Novitas properly set April 18, 2016, as the effective date of Paradigm's reactivation.

3. There is no basis to require CMS to authorize retrospective billing in this case.

Paradigm argues that, even if the effective date of its reactivation is appropriately set as April 18, 2016, it should be granted retrospective billing privileges as of April 5, 2016, in accordance with 42 C.F.R. § 424.521(a)(1). P. Br. at 9-10. Paradigm asserts that CMS "routinely" grants retrospective billing privileges when a provider or supplier is reactivated. P. Br. at 9. Even if it were accurate that CMS "routinely" grants retrospective billing privileges in reactivation cases, that would not establish my authority to direct CMS to do so.[7] Petitioner points to no legal authority granting it a right to administrative review of CMS's (or its contractor's) refusal to permit retrospective billing in a given case. The regulations do not state affirmatively that CMS's declining to authorize retrospective billing is an "initial determination" subject to administrative review. *See* 42 C.F.R. § 424.540(b). In the few cases where the issue has been presented, appellate panels of the DAB have declined to hold that there is a right to review on the issue of retrospective billing, but have also stopped short of holding that such review is prohibited. *See Shalbhadra Bafna, M.D.*, DAB No. 2449 at 5 (2012); *Robert Young, M.D.*, DAB No. 2359 at 2 (2011).

[7] Paradigm cites the administrative law judge decision in *June A. Esser, CNS*, DAB CR2913 (2013), as supporting its argument that retrospective billing applies in reactivation cases. P. Br. at 9 n.31. The *Esser* decision does not aid Paradigm's case. Although the petitioner in *Esser* had been deactivated, the circumstances of her case required her to submit a new enrollment application to reactivate her Medicare enrollment. *See* DAB CR2913 at 5-6. Accordingly, the regulations governing new applicants for Medicare enrollment — including the provision allowing CMS to grant retrospective billing — were applicable.

Yet, even if I were convinced that the grant or denial of retrospective billing privileges was an issue subject to my review, I would not conclude that such privileges were withheld erroneously in this case. The regulation authorizing retrospective billing provides that a supplier, such as Paradigm, may retrospectively bill for up to 30 days "if circumstances precluded enrollment in advance of providing services to Medicare beneficiaries." 42 C.F.R. § 424.521(a)(1). Paradigm has made no showing that it qualifies for retrospective billing under this criterion. The regulation applies to suppliers who are newly enrolling, either as an individual or entire organization or, at a minimum, for a new practice location. By contrast, Paradigm was not a newly enrolling supplier, but was already enrolled as a supplier prior to providing services to Medicare beneficiaries during the period April 5-18, 2016. Thus, on its face, the regulation permitting retrospective billing is inapplicable to Paradigm's situation.

V. Conclusion

For the reasons explained above, I affirm CMS's decision that Paradigm's Medicare enrollment and billing privileges are reactivated effective April 18, 2016.

___/s/_____
Leslie A. Weyn
Administrative Law Judge