

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

AL Peoria LLC dba AlignLife of Peoria  
(PTAN: F100280759)

and

Andrea Forget-Schnowske, DC  
(PTAN: F400281216),

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-615

Decision No. CR4725

Date: October 24, 2016

**DECISION**

This case involves the consolidated requests for hearing of two petitioners-- AL Peoria LLC doing business as AlignLife of Peoria (“Petitioner AlignLife” or “the practice”) and Andrea Forget-Schnowske, DC (“Petitioner Forget-Schnowske”). Petitioners’ Medicare billing privileges were deactivated as a result of the practice’s failure to timely respond to a request that it revalidate its enrollment information. Petitioners’ billing privileges were subsequently reactivated effective January 13, 2016, which is 30 days prior to the receipt of Petitioner AlignLife’s enrollment application to reactivate its billing privileges by National Government Services (NGS), a Medicare administrative contractor. Petitioners have both appealed NGS’s assignment of a January 13, 2016 effective date for the reactivation of their billing privileges. For the reasons discussed below, I conclude that the effective date of Petitioners’ reactivated billing privileges remains January 13, 2016.

## I. Background

Petitioner AlignLife is a chiropractic practice that is owned by Petitioner Forget-Schnowske, a chiropractic doctor. Centers for Medicare & Medicaid Services Exhibit (CMS Ex.) 4 at 2 (letter from Petitioner Forget-Schnowske to NGS stating that she “purchased this business on January 1, 2015”). Petitioner Forget-Schnowske reported in a Form CMS-855B that, prior to purchasing the practice on January 1, 2015, she took over managing control of the practice on December 1, 2014. CMS Ex. 1 at 30. In connection with this appeal, Petitioner currently contends that, despite the aforementioned statements, she did not purchase the practice until May 18, 2015. P. Ex. 3 (letter stating that Petitioner Forget-Schnowske “entered into a sale agreement for the practice AL Peoria LLC on 1/1/2015 and documents were signed showing a sale date of 1/1/2015 at the request of the accountant for the business” but “the actual sale and transfer of ownership of the practice with closing documents did not occur until May 18, 2015.”)

On March 23, 2015, NGS sent Petitioner AlignLife a request for revalidation of its Medicare enrollment. CMS Ex. 2. NGS mailed the correspondence to 4812 N. Sheridan Rd. in Peoria, Illinois. CMS Ex. 2 at 1. NGS’s letter cautioned the practice that its Medicare billing privileges may be deactivated if it did not return a completed revalidation application within 60 days. CMS Ex. 2 at 1. The letter further informed the practice that it was required to report enrollment changes, such as changes in ownership, control, or practice location, within specified time limits. CMS Ex. 2 at 3. Petitioner AlignLife did not return the revalidation application within the prescribed time period.<sup>1</sup>

In a letter dated October 9, 2015, well after its sale was completed, NGS informed Petitioner AlignLife that it had deactivated Petitioner AlignLife’s billing privileges, effective September 19, 2015. CMS Ex. 3 at 1. NGS likewise deactivated Petitioner Forget-Schnowske’s Provider Transaction Access Number (PTAN) because her billing privileges were based on her relationship with Petitioner AlignLife. CMS Ex. 13 at 1; *see* CMS Ex. 4 at 2.

Petitioner AlignLife submitted a revalidation application (Form CMS-855B) that was received on February 12, 2016, at which time it reported that Petitioner Forget-Schnowske assumed managing control on December 1, 2014 and purchased the practice

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<sup>1</sup> Despite the notice provided in the March 23, 2015 letter, Petitioner did not inform NGS of its changes in managing control and ownership until February 12, 2016.

on January 1, 2015.<sup>2</sup> CMS Ex. 1 at 2, 30. Petitioner AlignLife also reported that it had relocated to a new office location at 4700 N. University Street in Peoria, IL, and had seen its first Medicare patient at that location on December 21, 2015. CMS Ex. 1 at 20. In a letter dated March 11, 2016, NGS approved Petitioner AlignLife's revalidation application and assigned a new PTAN with an effective date of January 13, 2016. CMS Ex. 7. In a separate letter issued that same date, March 11, 2016, NGS informed Petitioner Forget-Schnowske that her revalidation application had been approved and assigned a new PTAN. CMS Ex. 12 at 1.

Both petitioners sought reconsideration of the effective dates assigned for their reactivated Medicare billing privileges. CMS Ex. 4. NGS issued a single reconsidered determination that explained that both petitioners would maintain the newly assigned PTANs and that the effective date of billing privileges would continue to be January 13, 2016. CMS Ex. 9 at 1-2.

Both petitioners filed a request for hearing on May 31, 2016 that was received at the Civil Remedies Division on June 7, 2016.<sup>3</sup> CMS filed an amended pre-hearing brief and motion for summary disposition (CMS Br.), along with 13 exhibits (CMS Exs. 1 to 13). Petitioner filed a response (P. Br.) with four exhibits (P. Exs. 1 to 4).<sup>4</sup> In the absence of any objections, I admit CMS Exs. 1 to 13 and P. Exs. 1 to 4 into the record.

Neither party has offered the testimony of any witnesses, and therefore, a hearing for the purpose of cross-examination of witnesses is not necessary. *See* Acknowledgment and Prehearing Order §§ 8, 9, and 10. I consider the record in this case to be closed, and the matter is ready for a decision on the merits.<sup>5</sup>

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<sup>2</sup> Petitioner Forget-Schnowske previously submitted her own enrollment application, Form CMS-855I, on January 13, 2016, presumably to update her practice location and related information. CMS Ex. 10.

<sup>3</sup> Petitioner Forget-Schnowske was added as a named party to this appeal after CMS conceded that she is a proper party in an amended brief filed on August 12, 2016.

<sup>4</sup> While Petitioners' exhibits do not comply with the identification and marking requirements set forth in the Acknowledgment and Pre-Hearing Order, Petitioners' exhibit list identifies each of the four exhibits by number.

<sup>5</sup> CMS has argued that summary disposition is appropriate. It is unnecessary in this instance to address the issue of summary disposition, as neither party has requested an in-person hearing.

## II. Issues

Whether CMS had a legitimate basis for establishing January 13, 2016, as the effective date of the reactivated billing privileges for Petitioner AlignLife and Petitioner Forget-Schnowske.

## III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(15), 498.5(l)(2).

## IV. Findings of Fact, Conclusions of Law, and Analysis<sup>6</sup>

1. *On March 23, 2015, NGS sent a revalidation request to Petitioner AlignLife.*
2. *NGS received Petitioner AlignLife's enrollment application seeking reactivation of its billing privileges on February 12, 2016.*
3. *An effective date earlier than January 13, 2016 is not warranted for the reactivation of billing privileges for Petitioner AlignLife and Petitioner Forget-Schnowske.*

Both petitioners are considered to be “suppliers” for purposes of the Social Security Act (Act) and the regulations. *See* 42 U.S.C. §§ 1395x(d), 1395x(u); *see also* 42 C.F.R. § 498.2. 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.” 42 U.S.C. § 1395x(d). A supplier must enroll in the Medicare program to receive payment for covered Medicare items or services. 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. 42 C.F.R. §§ 424.510 - 424.516; *see also* Act § 1866(j)(1)(A) (authorizing the Secretary of the U.S. Department of Health and Human Services to establish regulations addressing the enrollment of providers and suppliers in the Medicare program). A supplier that seeks billing privileges under Medicare must “submit enrollment information on the applicable enrollment application.” 42 C.F.R. § 424.510(a). “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), (d).

To maintain Medicare billing privileges, a supplier must revalidate its enrollment information at least every five years. 42 C.F.R. § 424.515. CMS (or its contractor) reserves the right to perform off-cycle revalidations in addition to the regular five-year

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<sup>6</sup> My findings of fact and conclusions of law are set forth in italics and bold font.

revalidations and may request that a provider or supplier recertify the accuracy of the enrollment information when warranted to assess and confirm the validity of the enrollment information maintained by CMS. 42 C.F.R. § 424.515. Off-cycle revalidations may be triggered as a result of random checks, information indicating local health care fraud problems, national initiatives, complaints, or other reasons that cause CMS to question the compliance of the provider or supplier with Medicare enrollment requirements. 42 C.F.R. § 424.515(d). When CMS notifies a supplier that it is time to revalidate, the supplier must provide the requested information and documentation within 60 calendar days of CMS's notification. 42 C.F.R. § 424.515(a)(2).

CMS is authorized to deactivate an enrolled supplier's Medicare billing privileges if the enrollee fails to comply with revalidation requirements within 90 days of CMS's notice to revalidate. 42 C.F.R. § 424.540(a)(3). If CMS deactivates a supplier's Medicare billing privileges, "[n]o payment may be made for otherwise Medicare covered items or services furnished to a Medicare beneficiary." 42 C.F.R. § 424.555(b). The regulation authorizing deactivation explains that "[d]eactivation of Medicare billing privileges is considered an action to protect the provider or supplier from misuse of its billing number and to protect the Medicare Trust Funds from unnecessary overpayments." 42 C.F.R. § 424.540(c).

The reactivation of an enrolled provider or supplier's billing privileges is governed by 42 C.F.R. § 424.540(b), and the process for reactivation is contingent on the reason for deactivation. If CMS deactivates a provider or supplier's billing privileges due to an untimely response to a revalidation request, such as in this case, the enrolled provider or supplier may apply for CMS to reactivate its Medicare billing privileges by completing the appropriate enrollment application or recertifying its enrollment information, if deemed appropriate. 42 C.F.R. § 424.540(a)(3), (b)(1). NGS informed Petitioner AlignLife, at the time of its deactivation, that it could revalidate using an internet-based system or it could submit a hard copy Form CMS-855 application. CMS Ex. 3 at 1-2.

NGS deactivated Petitioner AlignLife's billing privileges approximately six months after NGS requested that it revalidate its enrollment information and Petitioner AlignLife did not provide a response.<sup>7</sup> CMS Exs. 3. More than 10 months after NGS initially requested that Petitioner complete the revalidation process (CMS Ex. 2), Petitioner AlignLife submitted an application for revalidation that NGS received on February 12, 2016. CMS Ex. 1. NGS accepted Petitioner AlignLife's application and reactivated both petitioners' billing privileges and assigned new PTANs. CMS Exs. 7, 12. NGS reactivated the billing privileges of Petitioner AlignLife and Petitioner Forget-Schnowske effective January 13, 2016, which is 30 days prior to NGS's receipt of Petitioner AlignLife's signed enrollment application. CMS Exs. 7, 12; *see* CMS Ex. 1.

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<sup>7</sup> The deactivation of Petitioner Forget-Schnowske's billing privileges resulted from the deactivation her practice's billing privileges.

The pertinent regulation with respect to the effective date of reactivation, as cited by NGS in its reconsidered decision, is 42 C.F.R. § 424.520(d). CMS Ex. 9 at 1; *Arkady B. Stern, M.D.*, DAB No. 2329 at 4 (2010). Section 424.520(d) states that “[t]he effective date for billing privileges . . . is the later of – (1) [t]he date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor; or (2) [t]he date that the supplier first began furnishing services at a new practice location.” NGS’s letter referenced a corresponding CMS policy (“Revalidation Received After a Deactivation Occurs”), which at that time had been in effect since May 15, 2015.<sup>8</sup> That policy was consistent with section 424.520(d) and instructed that “[t]he PTAN and effective date shall remain the same if the revalidation application was received prior to 120 days after the date of deactivation” and “[i]f the revalidation is received more than 120 days after deactivation, a new PTAN and effective date shall be issued to the provider or supplier . . . .” Medicare Program Integrity Manual (MPIM), ch. 15 § 15.29.4.3 (rev. 578, issued February 25, 2015, effective May 15, 2015). The Departmental Appeals Board has explained that the “date of filing” is the date “that an application, however sent to a contractor, is actually received.” *Alexander C. Gatzimos, MD, JD, LLC*, DAB No. 2730 at 5 (2016) (emphasis omitted). Accordingly, based on the date of filing of Petitioner AlignLife’s enrollment application, which was more than 120 days after deactivation, NGS reactivated Petitioners’ billing privileges effective January 13, 2016. NGS favorably assigned a January 13, 2016 effective date of billing privileges based on its interpretation that 42 C.F.R. § 424.521(a) allowed for an earlier effective date of billing privileges based on the 30-day retrospective billing provision contained in that regulation. *See* CMS Ex. 9 at 1, citing 42 C.F.R. § 424.521(a).

Petitioners are seeking an effective date of billing privileges dating back to the date of deactivation on September 19, 2015. However, Petitioners do not identify any authority supporting this retroactive effective date for the reactivation of billing privileges.

While Petitioner AlignLife’s failure to respond to the revalidation request for a period of more than 10 months resulted in an approximately 5-month lapse in its billing privileges, only a few years ago such a failure to respond to a revalidation request could have resulted in a revocation of billing privileges and an enrollment bar for a minimum of one year.<sup>9</sup> 42 C.F.R. § 424.535(b), (c) (2010) (stating that “[w]hen a provider’s or supplier’s

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<sup>8</sup> The Secretary recently revised portions of section 15.29.4.3 and related sections of the MPIM, but those revisions do not substantively impact the discussion herein. (Revision 666, issued August 5, 2016, and effective September 6, 2016).

<sup>9</sup> As I previously referenced, the available evidence indicates that Petitioner AlignLife failed to timely report changes in managing control, ownership, and practice location. While not addressed by NGS, I recognize that such delayed notification of changes in Petitioner’s managing control, ownership, and practice location, if supported by the

billing privilege is revoked any provider agreement in effect at the time of revocation is terminated effective with the date of revocation” and “[a]fter a . . . supplier . . . has had their billing privileges revoked, they are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar,” which is a minimum of one year and no more than three years.) The Secretary’s former authority to revoke billing privileges and establish a re-enrollment bar was implemented through a final rule published on June 27, 2008, and the regulatory amendment had a stated purpose “to prevent providers and suppliers from being able to immediately re-enroll in Medicare after their billing privileges were revoked.” 76 Fed. Reg. 65909, 65912 (October 24, 2011), citing 73 Fed. Reg. 36448. When the Secretary later determined, in subsequent rulemaking, that this basis for revocation and a re-enrollment bar should be eliminated through removing the pertinent language in 42 C.F.R. § 424.535(c), the Secretary’s final rule explained:

In our October 24, 2011, proposed rule, we proposed to revise § 424.535(c) to eliminate the re-enrollment bar in instances where providers and suppliers have had their billing privileges revoked under § 424.535(a) solely for failing to respond timely to a CMS revalidation request or other request for information. As we explained in the proposed rule, we believe that this change is appropriate because the re-enrollment bar in such circumstances often results in unnecessarily harsh consequences for the provider or supplier and causes beneficiary access issues in some cases . . . . Moreover, *there is another, less restrictive regulatory remedy available* for addressing a failure to respond timely to a revalidation request. This remedy was identified in proposed § 424.540(a)(3).

77 Fed. Reg. at 29009 (emphasis added). The final rule further stated:

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evidence, could have resulted in the revocation of its billing privileges based on a failure to comply with enrollment requirements. *See* 42 C.F.R. §§ 424.516(d), 424.535(a)(9). In addition to revocation of billing privileges, such a failure to meet enrollment requirements could have resulted in one-year re-enrollment bar, at a minimum, whereas the total duration of Petitioner’s deactivated billing privileges was for approximately 5 months. 42 C.F.R. § 424.535(c). Thus, it is fortuitous for Petitioner that NGS deactivated its billing privileges rather than revoking its Medicare supplier agreement and establishing a re-enrollment bar. While Petitioner Forget-Schnowske attributes the failure to timely revalidate on the practice’s previous owner and billing employee, she was the practice’s owner at the time it both changed ownership and relocated to a new practice location. Petitioner Forget-Schnowske was also the owner of the practice at the time NGS provided notice that its Medicare billing privileges had been deactivated due to its failure to respond to a revalidation request. CMS Ex. 3.

We do not believe that the finalization of our proposed revision to § 424.535(c) will impact our ability to prevent or combat fraudulent activity in our programs. Providers and suppliers that fail to respond once or repeatedly to a revalidation or other informational request *will still be subject to adverse consequences*, including—as explained below—the deactivation of their Medicare billing privileges.

77 Fed. Reg. at 29010 (emphasis added). Finally, in amending section 424.540(a)(3), as referenced above, the final rule stated:

We proposed to add a new § 424.540(a)(3) that would allow us to deactivate, rather than revoke, the Medicare billing privileges of a provider or supplier that fails to furnish complete and accurate information and all supporting documentation within 90 calendar days of receiving notification to submit an enrollment application and supporting documentation, or resubmit and certify to the accuracy of its enrollment information. While the deactivated provider or supplier would still need to submit a complete enrollment application to reactivate its billing privileges, *it would not be subject to other, ancillary consequences that a revocation entails*; for instance, a prior revocation must be reported in section 3 of the Form CMS-855I application, whereas a prior deactivation need not.

77 Fed. Reg. at 29013 (emphasis added). Thus, while the rulemaking explained that the regulatory amendment was intended to mitigate the “unnecessarily harsh consequences” of revocation and a mandatory enrollment bar for a supplier’s failure to respond to a revalidation request, the final rule recognized that there was a “less restrictive regulatory remedy available for addressing a failure to respond timely to a revalidation request” and that a supplier “will still be subject to adverse consequences” that included “the deactivation of their Medicare billing privileges.” The final rule implemented section 424.540(a)(3), which specified that deactivation of billing privileges, rather than revocation, was appropriate, and stated that deactivation “does not have any effect on a provider or supplier’s participation agreement or any conditions of participation.”<sup>10</sup> 42 C.F.R. § 424.540(a)(3), (c).

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<sup>10</sup> A physician or supplier participation agreement can be made through a Form CMS-460. When a physician or supplier enters into such an agreement, it “enters into an agreement with the Medicare program to accept assignment of the Medicare Part B payment for all services for which the participant is eligible to accept assignment under the Medicare law and regulations.” Form CMS-460. A supplier such as Petitioner is not subject to conditions of participation. See 42 C.F.R. Parts 482 and 485.



While section 424.540(a)(3) indicates that the deactivation does not have any effect on the supplier's participation agreement or conditions of participation, deactivation nonetheless may cause "adverse consequences," most significantly, the loss of billing privileges. The effective date of reactivation of billing privileges is governed by 42 C.F.R. § 424.520, "Effective date of Medicare billing privileges," which states, in pertinent part, that the effective date for billing privileges, as applicable to this case, is "[t]he date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor." 42 C.F.R. § 424.520(d)(1). The May 9, 2016 reconsidered determination explicitly relied on 42 C.F.R. § 424.520(d) in determining that the effective date of Petitioner's reactivated billing privileges was correctly determined to be January 13, 2016. CMS Ex. 9 at 2. The reconsidered determination additionally relied on section 15.29.4.3 of the version of the MPIM that was in effect, which contained the aforementioned policy guidance that is consistent with section 424.520(d) and indicates that the effective date of a reactivation based on a revalidation application that was received more than 120 days after deactivation is the date the enrollment application was submitted. *But see Viora Home Health, Inc.*, DAB No. 2690 at 8 (2016) ("the MPIM provision . . . is sub-regulatory guidance, and as the introduction to chapter 15 of MPIM . . . suggests, chapter 15 provisions are primarily intended as guidance or instructions for CMS fee-for-service contractors"). While the regulation does not require CMS to wait as long as 120 days to deactivate billing privileges and assign a new PTAN and effective date, NGS followed the more permissive directive of the MPIM that required assignment of a new PTAN and effective date after more than 120 days following deactivation.<sup>11</sup> NGS correctly applied section 424.520(d), and its reliance on the MPIM was to the benefit of Petitioners. An effective date earlier than January 13, 2016 is not warranted.

Petitioners have argued that they were unaware of the revalidation request and allege that the former owner and an internal billing employee were responsible for the failure to timely revalidate the practice's Medicare enrollment. P. Br. at 1. Prior to the instant appeal, Petitioner Forget-Schnowske asserted, on more than one occasion, that she has owned the practice since January 1, 2015. CMS Ex. 1 at 3; 4 at 2. In fact, Petitioner

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<sup>11</sup> Pursuant to 42 C.F.R. § 424.540(a)(3), CMS may deactivate the Medicare billing privileges when 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 application." Thus, Section 15.29.4.3 of the MPIM in effect at the time of Petitioners' deactivation, while not inconsistent with the regulation, instructed Medicare contractors to allow an additional 30 days, until 120 days, to receive a response to a request for revalidation before deactivating Medicare billing privileges. *See also* MPIM, ch. 15 § 15.29.3.3 (rev. 578, issued February 25, 2015, effective May 15, 2015) (addressing revalidation applications not received within 120 to 125 days of the date the revalidation notice is sent).

Forget-Schnowske reported that she has had “managing control” of the practice since December 1, 2014. CMS Ex. 1 at 30. Only now, in furtherance of her arguments, does Petitioner Forget-Schnowske, for the first time, contend that she was not the owner of the practice prior to May 18, 2015. Furthermore, while the effective date of both petitioners’ billing privileges is the only issue for consideration in the instant case, I observe that the failure to timely revalidate is one of several instances evidencing a pattern of failure to comply with Medicare requirements, to include reporting changes in managing control, ownership, and practice location. Regardless of whether Petitioner Forget-Schnowske owned the practice at the time of the revalidation request, the unrefuted evidence shows that Petitioner Forget-Schnowske had managing control of the practice at that time. Further, Petitioner Forget-Schnowske was unquestionably the owner of Petitioner AlignLife on October 9, 2015, when the notice of deactivation was mailed to the practice. Yet, neither Petitioner AlignLife nor Petitioner Forget-Schnowske submitted a revalidation application soon after receiving notice of the practice’s deactivation. Petitioner’s failure to timely respond to the revalidation request and notice of deactivation is not due to any fault of CMS or NGS, but rather, its own failure to provide a response.

To the extent that the petitioners are requesting equitable relief in the form of an earlier effective date of reactivated billing privileges, I am unable to grant equitable relief. *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”). Therefore, the effective date of January 13, 2016 must stand.

## **V. Conclusion**

I uphold the January 13, 2016 effective date of the reactivation of Medicare billing privileges for Petitioner AlignLife and Petitioner Forget-Schnowske.

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/s/  
Leslie C. Rogall  
Administrative Law Judge