Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Karissa M. Misner, D.O,
Karissa Misner, PLLC,
(PTANs: GG783Z, GF705A),

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-103

Decision No. CR2776

Date: May 6, 2013

DECISION

Karissa M. Misner, D.O., appeals on behalf of herself and her practice group, Karissa Misner, PLLC (Petitioners, collectively), the June 5, 2012 effective date determination of her and her practice group's enrollment as suppliers in the Medicare program.[1] The Centers for Medicare and Medicaid Services (CMS) now moves for summary judgment. For the reasons explained below, I grant summary judgment in favor of CMS and affirm an effective date for Petitioners' enrollment as of June 5, 2012, with a retrospective billing period starting May 6, 2012.

I. Background and Procedural History

This case involves two separate sets of enrollment applications. While only one of those application sets (the second application set) is material to the decision here, it is important to explain the background of both application sets because much of Petitioners' argument on appeal focuses on the first application set.

[1] 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.

The facts of this case are undisputed. On November 28, 2011, Palmetto GBA, a Medicare contractor, received enrollment applications from Karissa Hannasch, D.O. (now known as Karissa Misner), and Karissa Misner, PLLC to enroll in the Medicare program. Palmetto GBA ultimately denied the applications after it had given Petitioners an opportunity to provide additional documentation needed to complete the application process. Petitioners requested reconsideration of the enrollment denials. On April 9, 2012, a Palmetto GBA hearing officer upheld the denials. Petitioners did not request a hearing before an administrative law judge (ALJ) to challenge the reconsidered determinations.

On June 5, 2012, Palmetto GBA received a new enrollment application that Dr. Misner electronically submitted that day on behalf of her and her practice group, Karissa Misner, PLLC.[2] On July 26, 2012, Palmetto GBA sent a notice to Dr. Misner, stating that the enrollment application for the practice group was approved and assigning Dr. Misner and Karissa Misner, PLLC two new Provider Transaction Access Numbers (PTANs) associated with the practice group. The notice stated that the group's PTAN was "effective May 6, 2012."[3] Petitioners requested reconsideration, seeking to change the effective date of the PTAN to August 15, 2011, based on the previously filed application

[2] A prospective supplier that has been denied enrollment must wait to file a new enrollment application until the time to appeal has expired, or, if appealed, after notice that the determination has been upheld. 42 C.F.R. § 424.530(b). Here, Petitioners filed the new enrollment application after they received notice that the reconsideration determinations denying the applications had been upheld.

[3] The parties use the term "effective date" to refer to the date on which Petitioner could retrospectively bill for Medicare services. *See*, *e.g.*, CMS Exhibit (Ex.) 5 (Palmetto GBA letter to Petitioners on July 26, 2012, stating the group's PTAN was "effective May 6, 2012"). By regulation, the effective date would ordinarily be the date Palmetto GBA received Petitioners' application that it approved. CMS is authorized, however, to permit Petitioners to "retrospectively bill" for services for up to 30 days prior to that effective date, as they did here. 42 C.F.R. § 424.521(a). For clarity, I prospectively only use "effective date" in this decision to refer to the effective date of enrollment that is established by regulation and not the date on which Petitioners' retrospective billing begins.

dated September 27, 2011.[4] On September 18, 2012, Palmetto GBA issued a reconsidered determination that upheld the effective date established in the initial determination letter.

On November 8, 2012, Dr. Misner filed her request for hearing. Following the issuance of my Acknowledgement and Pre-Hearing Order dated November 14, 2012, CMS moved for summary judgment and filed a supporting brief (CMS Br.) with seven proposed exhibits (CMS Ex. 1-7). Petitioner then submitted a pre-hearing brief (P. Br.) with nine proposed exhibits (P. Exs. 1-9). In the absence of any objections, CMS Exs. 1-7 and P. Exs. 1-9 are admitted into the record.

II. Applicable Law

Suppliers such as Petitioners 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 *et seq*.; *see also* Social Security Act (Act) § 1866(j)(1)(A) (authorizing the Secretary of the Department of Health and Human Services to establish by regulation the process for enrolling providers and suppliers in the Medicare program). CMS may deny or revoke enrollment if a prospective supplier or currently-enrolled supplier does not meet and continue to meet enrollment requirements established by regulation. *See* 42 C.F.R. §§ 424.530, 424.535. The effective date of enrollment 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." *Id.* § 424.520(d).

The effective date of enrollment is an "initial determination" that a supplier may appeal by requesting reconsideration from the contractor within 60 days of receipt of the initial determination notice. *Id.* §§ 498.5(*l*)(1), 498.3(b)(15), 498.22(a). Any party dissatisfied with a reconsidered determination may file a request for hearing within 60 days of receipt of the reconsidered determination notice. *Id.* §§ 498.5(l)(2); 498.40(a)(2).

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[4] The initial determination expressly applied the "effective date" of May 6, 2012 only to the PTAN for Karissa Misner, PLLC, although the same effective date must also apply to the PTAN for Dr. Misner because it was established in the same determination. *See* CMS Ex. 5, at 1. Indeed, Dr. Misner appealed the effective date for both PTANs established in the initial determination. *See* CMS Ex. 6 (requesting reconsideration for both PTANs). The Palmetto GBA hearing officer addressed the effective date issue broadly in her reconsidered determination without actually applying her decision to a specific PTAN. CMS Ex. 7, at 1. The effective date for both PTANs is at issue in this appeal.

III. Issues

This case presents the following issues:

1. whether summary judgment is appropriate; and

2. whether CMS or its contractor correctly established the effective date for Petitioners' enrollment as suppliers in the Medicare program.

Petitioners also raise the issue of whether Dr. Misner's previous application, dated September 27, 2011, is administratively final or may be subject to review in this appeal. However, Petitioners did not request a hearing based on the denial of that application but rather on the effective date established based on the application dated June 5, 2012. Considering that Petitioners did not preserve review of the September 27, 2011 application, I do not have jurisdiction to address it in this appeal.

The limited review in this appeal may seem like a harsh result to Petitioners, who appear in this appeal without representation by an attorney, so further explanation is warranted. Petitioners view the two different application sets as a continuous application; however, the regulations do not. Palmetto GBA took two separate and distinct actions based on two separate applications. The first application was denied, and that denial was upheld on reconsideration. *See* P. Ex. 8. Petitioners may have then appealed that reconsidered determination by filing a request for hearing within 60 days of that determination. 42 C.F.R. §§ 498.5(*l*)(2), 498.22(a); *see also* P. Ex. 8 (advising Petitioners: "If you believe that this determination is not correct, you may request a final ALJ review . . . . You must file your appeal within 60 calendar days after the date of receipt of this decision"). Instead, Petitioners submitted a new, separate enrollment application to Palmetto GBA. Petitioners' second application was not related to the first application because that first application was denied and Petitioners did not appeal that denial further. *See* 42 C.F.R. § 498.25(b) (stating that a reconsidered determination is "binding" unless revised by CMS or through a hearing decision). By choosing to submit a second application, rather than appealing the denial of its first application, Petitioners essentially started the enrollment process again. From the second application -- viewed as wholly distinct from the first application that had been denied -- Palmetto GBA approved Petitioners' enrollment and set the effective date that is now at issue. Petitioners requested reconsideration from the second application, and the effective date was upheld. Petitioners then requested a hearing on the reconsidered determination for the second application. Accordingly, the denial of the first application is not at issue in this appeal and may not even be considered here because Petitioners never requested a hearing on the reconsidered determination upholding that denial.

IV. Discussion

1. *Summary judgment is appropriate.*

Summary judgment is appropriate if "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." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574,587 (1986). "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." *Senior Rehab.*, DAB No. 2300, at 3. To determine whether there are genuine issues of material fact for hearing, an ALJ must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.* When ruling on a motion for summary judgment, an ALJ may not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

Here, CMS has moved for summary judgment. In support of its motion, CMS provided documentary evidence establishing the material facts necessary for a decision. Petitioners have not disputed any evidence that CMS submitted, nor have they provided their own evidence that established a dispute of material fact. Therefore, this case must be resolved on a question of law, and summary judgment is appropriate.

2. *The undisputed facts show Palmetto GBA received Petitioners' enrollment application on June 5, 2012, and it later approved that application.*

Palmetto GBA acknowledged electronic receipt of Petitioners' enrollment application on June 5, 2012. CMS Ex. 4, at 1. While Petitioners challenge the appropriateness of establishing an effective date based on that application, Petitioners do not dispute that they submitted, and Palmetto GBA received, a new enrollment application on that date. P. Br. at 1; *see also* CMS Br. at 2. Accordingly, it is undisputed that Palmetto GBA received a new enrollment application from Petitioners on June 5, 2012. Palmetto GBA approved the June 5, 2012 application on July 26, 2012. CMS Ex. 5.

The Palmetto GBA hearing officer apparently misstated in the redetermination letter that the contractor received Petitioners' application on June 6, 2012, and calculated 30 days prior to that date as May 6, 2012. CMS Ex. 7, at 1. But 30 days prior to June 6, 2012 is actually May 7, 2012. No evidence supports that Palmetto GBA received Petitioners'

enrollment application on June 6, 2012. Indeed, CMS now argues that Palmetto GBA received the application on June 5, 2012. CMS Br. at 2. Moreover, Palmetto GBA's initial and reconsidered determinations concluded that the PTANs were eligible for retrospective billing starting May 6, 2012, which is consistent with the evidence establishing that Palmetto GBA received the application on June 5, 2012. The simple misstatement of the hearing officer in the reconsidered determination, which appears to be a typographical error, does not preclude summary judgment especially when neither party argues that the misstated fact is correct or otherwise material to the outcome of the case.

3. *The effective date of Petitioners' enrollment in Medicare is June 5, 2012, with retrospective billing privileges starting May 6, 2012.*

By regulation, the effective date of a supplier's enrollment, for a supplier already furnishing services at a new location, is the date when a CMS contractor receives an enrollment application that it subsequently approves. 42 C.F.R. § 424.520(d). Here, Palmetto GBA received two enrollment applications from Petitioners, but only one of the applications was later approved. The first application was denied, a decision which was upheld in a reconsidered determination and not appealed further. P. Exs. 4, 8, 9. The second enrollment application, which Palmetto GBA received on June 5, 2012, was later approved. CMS Exs. 4, 5. Therefore, the effective date of Petitioners' enrollment must be June 5, 2012, the date Palmetto GBA received the enrollment application it subsequently approved.

As noted above, the regulations permit retrospective billing for up to 30 days prior to the effective date of enrollment. 42 C.F.R. § 424.521(a). Here, 30 days prior to the effective date of June 5, 2012 is May 6, 2012. Accordingly, Petitioners may bill Medicare retrospectively for reimbursement of covered services starting May 6, 2012.

V. Conclusion

For all of the foregoing reasons, I grant summary judgment in favor of CMS. Petitioners' enrollment in the Medicare program is effective June 5, 2012, with retrospective billing privileges starting May 6, 2012.

_____/s/_____
Joseph Grow
Administrative Law Judge