

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Yury Malachevsky, NP
(NPI: 1326443086)
(PTAN: 467140Y8S),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-772

Decision No. CR4777

Date: January 27, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, determined that Yury Malachevsky, NP (Petitioner) was not eligible for enrollment in the Medicare program earlier than December 10, 2015, and that Petitioner could not submit claims for payment for services performed or delivered earlier than November 10, 2015. Petitioner requested a hearing before an administrative law judge to dispute the effective date of enrollment. Because the CMS administrative contractor received an enrollment application from Petitioner on December 10, 2015, and the CMS administrative contractor approved that application, December 10, 2015, is the correct effective date for Petitioner's Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner is a nurse practitioner employed by Sinai Hospital of Baltimore (Sinai Hospital) to provide hospitalist services. CMS Exhibit (Ex.) 4. On November 20, 2014, the CMS administrative contractor received Petitioner's initial Medicare enrollment application (Form CMS-855I) and a reassignment of benefits application (Form CMS-

855R) seeking to reassign his Medicare payments to Sinai Hospital. CMS Exs. 1, 3. On December 19, 2014, the CMS administrative contractor sent a letter to Petitioner directing that Petitioner submit a copy of his nurse practitioner certification (certification) within 30 days from the postmarked date of the letter; otherwise, his applications might be rejected. CMS Ex. 2. On January 20, 2015, the CMS administrative contractor rejected Petitioner's applications after Petitioner failed to submit a copy of his certification. CMS Ex. 3.

On December 10, 2015, Petitioner submitted a new Medicare enrollment application (Form CMS-855I), and a Medicare reassignment of benefits application (Form CMS-855R) through the Provider Enrollment, Chain and Ownership System ("PECOS"), again seeking to reassign his Medicare payments to Sinai Hospital. CMS Ex. 4. On January 4, 2016, the CMS administrative contractor requested additional information, including copies of Petitioner's Master's degree and nurse practitioner certification, which Petitioner timely supplied. CMS Exs. 5, 6. On January 14, 2016, the CMS administrative contractor approved Petitioner's applications indicating an "effective date" of November 10, 2015. CMS Ex. 7.¹

In its timely filed reconsideration request, Sinai Hospital, on behalf of Petitioner, requested an earlier effective date of December 17, 2014, the date Petitioner began employment at Sinai Hospital. Sinai Hospital stated that although the original applications were rejected due to an untimely response to a developmental request, there was no record of the request for information located in Petitioner's file. CMS Ex. 8.

On June 1, 2016, the CMS administrative contractor's hearing officer issued an unfavorable reconsidered determination. The hearing officer upheld the contractor's earlier determination. The hearing officer explained that the effective date for billing privileges was based on the date the CMS administrative contractor received Petitioner's applications that were processed to completion. The hearing officer further explained that although Petitioner's initial CMS-855I and CMS-855R enrollment applications were received earlier, they cannot be considered in establishing the Medicare effective date because they were not the enrollment applications subsequently approved. CMS Ex. 10.

Petitioner timely requested a hearing to dispute the reconsidered determination. On August 4, 2016, I issued an Acknowledgment and Pre-hearing Order (Order) establishing a submission schedule for pre-hearing exchanges. In response, CMS filed a motion for summary judgment with a brief in support of the motion (CMS Br.) and 11 exhibits. Petitioner submitted his brief (P. Br.) and four exhibits. CMS then submitted a Response brief (CMS Response).

¹ According to CMS, the January 14, 2016 letter sent to Petitioner incorrectly lists November 10, 2015, as the effective date; instead, it is the retrospective billing date and December 10, 2015, is the effective date. CMS Brief (Br.) at 2 n.1.

II. Decision on the Record

I admit all of the proposed exhibits into the record because neither party objected to any of them. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e). I accept CMS's Response brief as a timely rebuttal statement under 42 C.F.R. § 498.17(b)(1).

My Order advised the parties to submit written direct testimony for each witness and that I would only hold an in-person hearing if the opposing party requested to cross-examine a witness. Order ¶¶ 8-10; CRDP §§ 16(b), 19(b). Neither CMS nor Petitioner offered any written direct testimony. Therefore, I issue this decision based on the written record. Pre-Hearing Order ¶ 10; CRDP § 19(d).

III. Issue

Whether CMS had a legitimate basis to determine December 10, 2015, as the effective date for Petitioner's Medicare enrollment and billing privileges and that Petitioner could retrospectively bill for services rendered to Medicare beneficiaries on or after November 10, 2015.

IV. Jurisdiction

I have jurisdiction to hear and decide this case. 42 U.S.C. § 1395cc(j)(8); 42 C.F.R. §§ 498.3(b)(15), (17), 498.5(l)(2).

V. Findings of Fact, Conclusions of Law, and Analysis

My findings of fact and conclusions of law are set forth in italics and bold font.

The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers in the Medicare program. 42 U.S.C. §§ 1302, 1395cc(j). A "supplier" is "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services" under the Medicare provisions of the Act. 42 U.S.C. § 1395x(d). For Medicare program purposes, nurse practitioners provide medical or other health services. 42 U.S.C. § 1395x(s)(2)(H)(i). Consequently, as a nurse practitioner, Petitioner is a supplier.

A supplier must enroll in the Medicare program to receive payment for covered Medicare items or services. 42 C.F.R. § 424.505. The terms "*Enroll/Enrollment* means the process that Medicare uses to establish eligibility to submit claims for Medicare covered services and supplies." 42 C.F.R. § 424.502. A supplier seeking billing privileges under the Medicare program must "submit enrollment information on the applicable enrollment application. Once the . . . supplier successfully completes the enrollment process . . .

CMS enrolls the . . . supplier into the Medicare program.” 42 C.F.R. § 424.510(a). CMS then establishes an effective date for billing privileges. For a non-physician practitioner, such as Petitioner, the effective date for Medicare billing privileges is the date that CMS receives an enrollment application that CMS is able to process to approval (42 C.F.R. § 424.520(d)), and CMS may provide for retroactive billing for up to 30 days. 42 C.F.R. § 424.521(a)(1).

1. The CMS administrative contractor received Petitioner’s applications (Forms CMS-855I and CMS-855R) on December 10, 2015, which the CMS administrative contractor ultimately approved.

The CMS administrative contractor received Petitioner’s CMS-855I and CMS-855R applications on November 20, 2014, to enroll in the Medicare program and reassign his Medicare benefit payments. CMS Exs. 1, 3. After receiving the enrollment applications, the CMS administrative contractor requested, by letter dated December 19, 2014, that Petitioner submit a copy of his nurse practitioner certificate. The letter directed Petitioner to submit a copy of the certificate within 30 days from the postmarked date of the letter; otherwise, the applications would be subject to rejection. CMS Ex. 2. On January 20, 2015, the CMS administrative contractor rejected Petitioner’s applications because Petitioner failed to submit a copy of his certification. CMS Ex. 3.

Petitioner filed new enrollment and reassignment applications (CMS-855I and CMS-855R) that the CMS administrative contractor received on December 10, 2015. CMS Ex. 4. After receiving the applications, the CMS administrative contractor again requested additional documents, including Petitioner’s certification, which Petitioner timely submitted. CMS Exs. 5, 6. The CMS administrative contractor subsequently approved the applications, granting Medicare billing privileges to Petitioner effective November 10, 2015.² CMS Ex. 7.

2. The CMS administrative contractor properly concluded that Petitioner’s enrollment and reassignment of Medicare benefits was effective on December 10, 2015, with a retrospective billing period commencing on November 10, 2015.

The regulations provide the following rules regarding Petitioner’s effective date of billing privileges:

Effective date of billing privileges. Physicians, non-physician practitioners, physician and non-physician practitioner organizations, and ambulance suppliers. The effective date for billing privileges for physicians, non-physician

² Petitioner was granted retrospective billing privileges to commence November 10, 2015, and an effective date of enrollment of December 10, 2015.

practitioners, physician and non-physician practitioner organizations, and ambulance suppliers is the later of – (1) The date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor; or (2) The date that the supplier first began furnishing services at a new practice location.

42 C.F.R. § 424.520(d). Additionally, CMS has the discretion to allow a supplier to bill for services provided 30 days prior to the supplier’s effective date. 42 C.F.R. § 424.521(a)(1).

In the present case, the CMS administrative contractor correctly determined that Petitioner’s effective date for his Medicare billing privileges is December 10, 2015, with a retrospective billing privileges period commencing on November 10, 2015, because December 10, 2015, is the date on which Petitioner filed the enrollment application that the CMS administrative contractor ultimately approved.

3. I have no jurisdiction to review the CMS administrative contractor’s decision to reject Petitioner’s November 2014 application.

Petitioner argues that the CMS administrative contractor improperly rejected his original enrollment application. Petitioner argues that the effective date for Medicare billing privileges should be December 17, 2014, based on the first enrollment application he submitted, and that the enrollment rules in the Medicare statute and regulations do not require a nurse practitioner to submit evidence from the certifying organization as a prerequisite to Medicare enrollment. P. Br. at 3. However, I do not have jurisdiction to review the rejection of an application. I only have jurisdiction to review a matter regarding which the Secretary has made an “initial determination.” *See* 42 C.F.R. § 498.3. CMS’s decision to reject an application is not listed as an initial determination (42 C.F.R. § 498.3(b)), and further review is expressly prohibited. 42 C.F.R. § 424.525(d).

Petitioner also argues that the CMS administrative contractor’s rejection of his first enrollment application was actually a denial of the application, an action over which I have jurisdiction to review. Although I agree that I can consider whether the CMS administrative contractor’s action was actually a denial of enrollment, and thus an initial determination subject to review, I conclude that Petitioner’s assertion in this case is incorrect. The January 20, 2015 rejection letter begins by informing Petitioner that “we are rejecting your applications for the following reasons” CMS Ex. 3. Consistent with the regulation addressing the rejection of a Medicare enrollment application, CMS initially provided Petitioner with 30 days to submit a document that the regulations indicate is necessary for reimbursement to nurse practitioners under 42 C.F.R. § 410.75. 42 C.F.R. § 424.525(a)(1); CMS Ex. 2. Also, Petitioner had to submit new enrollment

and reassignment applications after the rejection. 42 C.F.R. § 424.525(c). In contrast, a denial is a merits-based decision that an applicant does not meet enrollment requirements. *See, e.g.*, 42 C.F.R. § 424.530(a)(1). Nothing in the letter rejecting Petitioner's original application suggested that CMS was denying him enrollment in Medicare and concomitant billing privileges based on the merits of his application. Rather, the rejection letter states that Petitioner failed to submit his nurse practitioner certification. CMS Ex. 3 at 1. Moreover, Petitioner's later enrollment shows that he ultimately met enrollment requirements, but that he simply did not initially submit all requested documents in time. Therefore, CMS did not deny Petitioner's initial enrollment application, and I lack jurisdiction over CMS's decision to reject the earlier application.

VI. Conclusion

I affirm CMS's determination that Petitioner's effective date of enrollment is December 10, 2015, with a 30-day retrospective billing period commencing on November 10, 2015.

_____/s/_____
Scott Anderson
Administrative Law Judge