Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

David R. Sterling, DPM, PC
(PTAN: CB253168),
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-768

Decision No. CR4788

Date: February 8, 2017

DECISION

The effective date of the reactivated Medicare enrollment and billing privileges of Petitioner, David R. Sterling, DPM, PC, is March 16, 2016.

I. Background and Procedural History

Petitioner is a medical practice that was owned by a sole owner, David R. Sterling, DPM, prior to Dr. Sterling's passing on March 12, 2015. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 2 at 2. After Noridian Healthcare Solutions, LLC (Noridian), a Medicare administrative contractor, learned of Dr. Sterling's death, it deactivated Petitioner's Medicare enrollment and billing privileges. *See* Medicare Program Integrity Manual (MPIM), § 15.28(C)(4)(a) (Rev. 609, eff. November 2, 2015) (stating that the contractor should deactivate a professional organization's enrollment if the practitioner who is its sole owner dies). Following Dr. Sterling's death, four doctors continued to see the practice's patients, and they requested reimbursement under Petitioner's National Provider Identifier (NPI). CMS Ex. 2 at 2. During that time, Petitioner had not yet updated its enrollment information to report the passing of its sole owner, and none of the four doctors had "submit[ted] the proper paperwork needed to . . . associate the new providers," namely a Form CMS-855R to reassign benefits. CMS Ex. 2 at 2. Dr. Sterling's surviving spouse, Jacque Sterling, submitted an enrollment application to reactivate Petitioner's Medicare enrollment on March 16, 2016, along with

reassignment of benefits requests for the four doctors who provided services to Petitioner's patients following Dr. Sterling's death. CMS Exs. 4, 5. In a letter dated April 28, 2016, Noridian granted Petitioner's application, at which time it assigned a new Provider Transaction Access Number (PTAN). CMS Ex. 6. Noridian assigned a March 16, 2016 effective date of the reactivated enrollment and billing privileges. CMS Ex. 6 at 1.

In a letter dated May 1, 2016, Petitioner requested reconsideration of the April 28, 2016 determination and requested that the effective date of its reactivated enrollment and billing privileges be changed to March 12, 2015, the date of Dr. Sterling's death. CMS Ex. 1 at 2. Noridian issued a reconsidered determination on June 8, 2016, at which time it determined that "[t]he group David R Sterling DPM PC was deactivated from Medicare on March 12, 2015, the date the sole owner passed away" and that "[t]he group continued to bill under the deceased provider's NPI and did not submit proper paperwork needed to update the enrollment and to associate the new providers they employed." CMS Ex. 2 at 2. The letter further stated that "[t]he requested effective date of March 12, 2015 cannot be honored." CMS Ex. 2 at 2.

Petitioner submitted a request for a hearing by an administrative law judge (ALJ) that was dated July 25, 2016 and filed on July 27, 2016. I issued an Acknowledgment and Pre-Hearing Order (Order) on August 18, 2016, in which I directed the parties to file their respective pre-hearing exchanges, including briefs and supporting exhibits, by specified deadlines. I also gave notice in Section 4 of my Order that a party may file a motion for summary judgment with its pre-hearing exchange.

CMS filed a motion for summary judgment and a pre-hearing brief, along with CMS Exs. 1 through 6, on September 22, 2016. Petitioner, who is represented by counsel, filed a brief in opposition to CMS's motion for summary judgment, along with several exhibits, on October 27, 2016.

In an Order dated November 1, 2016, I informed Petitioner that its filings were not compliant with both my Order and the Civil Remedies Division Procedures (CRDP). I also explained that Petitioner had not submitted a list of proposed exhibits or a list of proposed witnesses, as required by my Order and the CRDP. I directed Petitioner to re-file its supporting evidence, including witness declarations, along with a list of proposed exhibits and proposed witnesses. I also directed Petitioner to re-file its brief so that its citations to the record were consistent with the re-filed exhibits. While Petitioner re-filed its brief and its exhibits, it failed to file an exhibit list or witness list as required by my Order and the CRDP. In another Order, dated January 12, 2017, I again directed Petitioner to comply with my previous Order, instructing Petitioner to file a witness list and exhibit list, along with a motion for leave to file these documents out of time. Petitioner filed a combined exhibit list and witness list in response to the Order, but failed to file a motion for leave, as instructed. I have considered whether I should reject

Petitioner's exhibits as a sanction for its refusal to comply with Orders and governing procedures. *See* CRDP § 23 (stating that an ALJ may sanction a person, including a party or attorney, for failing to comply with an order or procedure). I have determined that the rejection of Petitioner's submissions would have no adverse impact on its appeal, and therefore, such a sanction would serve no effective purpose. I admit CMS Exs. 1 to 6 and P. Exs. 1 to 11, in the absence of any objections.

Neither party has requested an in-person hearing for the purpose of obtaining testimony or cross-examination. The matter is ready for a decision on the merits.[1]

II. Jurisdiction

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

III. Discussion

A. Issues

The issues in this case are:

> Whether the effective date of Petitioner's Medicare reactivated enrollment and privileges is March 16, 2016?
>
> Whether I have jurisdiction over a Medicare overpayment determination?

B. Findings of Fact, Conclusions of Law, and Analysis[2]

1. Pursuant to 42 C.F.R. § 424.520(d), the effective date of Petitioner's reactivated enrollment and billing privileges is March 16, 2016, the date of filing of the application updating its Medicare enrollment information.

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Payment under the program for services rendered to Medicare-eligible

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[1] 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.

[2] Findings of fact and conclusions of law are set forth in bold and italics.

beneficiaries may only be made to eligible providers of services and suppliers. Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395u(h)(1)). Petitioner is a "supplier" of services under the Act and the regulations. A "supplier" furnishes services under Medicare, and the term "supplier" applies to physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The effective date of enrollment in Medicare of a physician, nonphysician practitioner, and physician and nonphysician practitioner organizations is governed by 42 C.F.R. § 424.520(d). Pursuant to section 424.520(d), the effective date of enrollment for a physician or nonphysician practitioner may only be the later of two dates: the date when the practitioner filed an application for enrollment that was subsequently approved by a Medicare contractor charged with reviewing the application on behalf of CMS; or, the date when the practitioner first began providing services at a new practice location.

Petitioner seeks an earlier date of March 12, 2015, as the effective date of its reactivated Medicare enrollment and billing privileges. There is no dispute that Noridian received the enrollment application that it ultimately processed to approval on March 16, 2016. CMS Ex. 4. Therefore, the earliest possible effective date for Petitioner's reactivated enrollment and billing privileges is March 16, 2016, the date the application was filed, as the regulation specifically provides that the effective date is the later of the date of filing a Medicare enrollment application that was subsequently approved or the date services were first provided. 42 C.F.R. § 424.520(d).

Petitioner, in its brief, limits its arguments with respect to the effective date assigned for its reactivated billing privileges only to the issue of whether it should have been permitted a 30-day retrospective billing period, and makes no other arguments challenging the March 16, 2016 effective date of its reactivated enrollment. While an effective date is set in accordance with 42 C.F.R. § 424.520(d), CMS or its contractor may permit retrospective billing for 30 days prior to the effective date if "circumstances precluded enrollment in advance of providing services to Medicare beneficiaries." 42 C.F.R. § 424.521(a)(1). Petitioner has made no assertion in its brief that any circumstance *precluded* enrollment in advance of providing services to Medicare beneficiaries. Therefore, as Petitioner has not asserted that it was precluded from submitting updated enrollment application prior to rendering services after the death of its owner, I see no reason to consider whether CMS or its contractor should have exercised

discretion to grant a 30-day retrospective billing period in accordance with section 424.521(a)(1).[3] Noridian did not err in assigning an effective date of reactivated enrollment and billing privileges of March 16, 2016.

2. I lack jurisdiction to review the overpayment issues raised by Petitioner in its brief.

As discussed earlier, four doctors continued to treat Petitioner's patients and billed through Petitioner's NPI, rather than their own NPIs. *See* P. Ex. 3. Petitioner's enrollment was deactivated effective March 12, 2015, the date of Dr. Sterling's death. CMS Ex. 2 at 2. Petitioner has submitted evidence that it was reimbursed approximately $156,533.37 following Dr. Sterling's death as a result of the four doctors billing to its NPI during this period, and that Noridian is pursuing collection of an overpayment based on its determination that Petitioner was "paid in error." P. Ex. 6 at 1; Ex. 5 at 1.

The process for appealing a deactivation of a supplier's Medicare billing privileges is different than the process for appealing a Medicare overpayment. *See* 42 C.F.R. § 424.565 (stating that overpayments are processed in accordance with 42 C.F.R. part 405). As I explained above, Petitioner's Medicare billing privileges were deactivated following Dr. Sterling's death and were reactivated following its submission of a new enrollment application that included updated enrollment information. CMS Ex. 6. My review of that appeal was governed by 42 C.F.R. part 498, and I may review the types of initial determinations enumerated in 42 C.F.R. 498.3, to include a determination regarding the effective date of Medicare enrollment and billing privileges.

Petitioner is asking that I take jurisdiction over a matter covered by 42 C.F.R. part 405. Petitioner explains that "Noridian failed to provide Petitioner with proper notice of a final Redetermination decision and the procedures to request Reconsideration before a [Qualified Independent Contractor]." P. Br. at 7. Petitioner argues that "the failure of the

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[3] Petitioner, in an overpayment redetermination request, explained that the death of its owner precipitated the issues that are discussed in this decision. P. Ex. 4. Petitioner explained that "being uninformed about the process definitely was the cause of the claims being file incorrectly" and that "the result of ignorance and dealing with the loss has created a very complicated scenario." P. Ex. 4 at 2-3. While I recognize, and empathize with, the loss of Petitioner's sole owner, I observe that Petitioner has not identified a circumstance that precluded it from notifying either CMS or Noridian of its owner's passing prior to continuing to provide services to its patients; Petitioner did not submit updated enrollment information until more than a year later, on March 16, 2016.

contractor to provide a decision on the Redetermination Request within the 60-day deadline entitles Petitioner to an immediate review before the ALJ on the issue of overpayment." P. Br. at 9.

The Office of Medicare Hearings and Appeals (OMHA) is the component of the Department of Health and Human Services that "is responsible for level 3 of the Medicare claims appeal process and certain Medicare entitlement appeals and Part B premium appeals. At level 3 of the appeals process, an appellant may have a hearing before an OMHA ALJ." Medicare Claims Processing Manual (Rev. 3549, June 24, 2016), Chapter 29, § 110 (Glossary). The same manual explains that an ALJ, for purposes of appeals of claims decisions, is an "[a]djudicator employed by [OMHA] that holds hearings and issues decisions related to level 3 of the appeals process." *Id.* The Departmental Appeals Board has previously explained that claims denials and enrollment matters have different appeals processes, stating:

> A supplier may appeal claim denials to a CMS contractor in accordance with procedures set out in 42 C.F.R. Part 405, subpart I. Claim denials may be further appealed, in appropriate circumstances, to the ALJs in the Office of Medicare Hearings and Appeals (OMHA) and then to the Medicare Appeals Council. *See generally* 42 C.F.R. § 405.1000-1140. When a claim is denied, a contractor must give notice and information about the process by which the denial may be appealed. 42 C.F.R. § 405.921 . . . the appeals process for supplier enrollment in Part 498 (which applies to the matter we are deciding) would not apply to the review of the claim denials.

Dr. Elinor Schottstaedt, MD, DAB No. 2337 (2010) at 5, FN 3. Petitioner sent its appeal to the Civil Remedies Division of the Departmental Appeals Board, wherein it was subsequently assigned to a non-OMHA ALJ for a hearing. It does not appear that Petitioner submitted a separate appeal to OMHA. I lack jurisdiction over Petitioner's appeal of an overpayment matter because it is a part 405 matter that is outside of my jurisdiction. Therefore, the Civil Remedies Division will forward a copy of this decision, along with Petitioner's request for hearing, to OMHA.

IV. Conclusion

For the foregoing reasons, I conclude that the effective date of Petitioner's reactivated enrollment and billing privileges is March 16, 2016.

/s/
Leslie C. Rogall
Administrative Law Judge