**Department of Health and Human Services**
**DEPARTMENTAL APPEALS BOARD**
**Appellate Division**

Howard M. Sokoloff, DPM, MS, Inc.
Docket No. A-18-89
Decision No. 2972
October 3, 2019

# FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Howard M. Sokoloff, DPM, MS, Inc., appeals an Administrative Law Judge (ALJ) decision upholding the determination by the Centers for Medicare & Medicaid Services (CMS) that the effective date for reactivation of Petitioner's Medicare billing privileges is May 10, 2017. *Howard M. Sokoloff, DPM, MS, Inc.*, DAB CR5083 (2018) (ALJ Decision).

For the reasons discussed below, we conclude that the ALJ's determination of the effective date of reactivation of Petitioner's Medicare billing privileges is supported by substantial evidence and free from legal error. We further explain that Petitioner's arguments do not provide grounds for the Board to set an earlier date for reactivation of Petitioner's billing privileges or authorize Medicare reimbursement for services furnished during the gap between the deactivation and reactivation of Petitioner's Medicare billing privileges.

## Legal Background

Physicians and physician practices must be enrolled in Medicare and maintain active enrollment status in order to receive payment for Medicare-covered services furnished to Medicare beneficiaries. Social Security Act (Act) § 1866(j)(1)(A)[1]; 42 C.F.R. §§ 424.500, 424.505, 424.510, 424.516.[2] Physicians and physician practices are classified as "suppliers" under Medicare. 42 C.F.R. § 400.202. The Medicare enrollment

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

[2] We cite to, and apply, the enrollment regulations in effect on June 9, 2017, the date CMS's contractor issued the initial determination. *Cf. John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016) (applying regulations in effect on date of initial determination to revoke supplier enrollment).

process includes: (1) identifying a supplier; (2) validating a supplier's eligibility to provide services to Medicare beneficiaries; (3) identifying and confirming a supplier's owner(s) and practice location(s); and (4) granting Medicare billing privileges. *Id.* § 424.502.

To maintain Medicare billing privileges, a supplier must periodically resubmit and recertify the accuracy of its enrollment information. 42 C.F.R. § 424.515. CMS (or a Medicare administrative contractor acting for CMS) may deactivate a supplier's billing privileges if the supplier does not furnish complete and accurate information and all supporting documentation within 90 days of receipt of notice to submit an enrollment application and supporting documentation, or resubmit and certify the accuracy of its enrollment information. *Id.* § 424.540(a)(3). "Deactivation 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." *Id.* § 424.540(c). If deactivated, a supplier may reactivate its billing privileges by meeting certain regulatory and CMS policy benchmarks. To reactivate billing privileges, a supplier generally must complete and submit a new enrollment application. *Id.* § 424.540(b).

## Case Background[3]

### *1. The revalidation process and Petitioner's applications*

On February 8, 2017, Noridian Healthcare Solutions (Noridian), a Medicare administrative contractor, issued a letter to notify Petitioner that it had to revalidate all of the information in Petitioner's Medicare enrollment record by April 30, 2017. CMS Ex. 1. "Failure to respond to this notice," the letter provided, "will result in a hold on your payments, and possible deactivation of your Medicare enrollment." *Id.* at 1. If deactivated, the notice continued, Petitioner would "not be paid for services rendered during the period of deactivation," and this would "cause a gap in" Petitioner's Medicare reimbursement. *Id.*

On February 23, 2017, Petitioner submitted a Medicare revalidation application through the Medicare Provider Enrollment, Chain, and Ownership System (PECOS). CMS Ex. 2. The submission included the name and contact information for Petitioner's enrollment application contact person. *Id.* at 3 § 13. On March 10, 2017, Noridian sent an email to Petitioner's contact person stating that in order to complete the revalidation application, Petitioner must "complete the EFT [electronic funds transfer] section" of the application

[3] The information in this section is drawn from the record before the ALJ and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify or supplement the ALJ's findings.

and "[u]pload a copy of a voided check or bank verification letter" before March 17, 2017. CMS Ex. 2, at 5-7. The email stated that if Petitioner was unable to upload the document, it could fax it. "Failure to respond in a timely manner," the email continued, "will result in your Medicare application being rejected if you do not furnish the complete information requested." *Id.* at 6.

On April 12, 2017, Noridian rejected Petitioner's February 23, 2017 revalidation application on the ground that it did not receive the documentation that it requested from Petitioner on March 10, 2017. CMS Ex. 3; Petitioner (P.) Request for ALJ Hearing at 5.[4] Noridian deactivated Petitioner's billing privileges effective April 30, 2017. CMS Ex. 7, at 2. Noridian received a new enrollment application from Petitioner on May 10, 2017. *Id.*; CMS Ex. 4, at 1.

By initial determination dated June 9, 2017, Noridian notified Petitioner that it had approved Petitioner's enrollment application and reactivated Petitioner's billing privileges. CMS Ex. 5. The notice further advised Petitioner that there was a lapse in Petitioner's Medicare billing privileges that began April 30, 2017, and ended May 10, 2017. *Id.* at 2.

### *2. The reconsideration request and determination*

Petitioner timely requested reconsideration of Noridian's June 9, 2017 determination. CMS Ex. 6. Petitioner said that its office manager was "new to Medicare and the online process with Noridian, and she did not know that a voided check was needed [to] compete the re-validation process." *Id.* at 1. "Upon notice," Petitioner continued, "we immediately provided the voided check [and] were clearly told by a Medicare Representative that the application would be processed without delay and without any penalty." *Id.* (emphasis omitted). Nevertheless, Petitioner continued, it was later told that it would not be paid for claims for the April 30 through May 9, 2017 period. Petitioner asserted that the lapse was unfair and unreasonable. *Id.*

By reconsidered determination dated August 14, 2017, Noridian stated that, as a result of its earlier rejection of Petitioner's initial application for revalidation, Petitioner's enrollment was deactivated, with an effective date of April 30, 2017. CMS Ex. 7, at 2. Noridian also stated that it had received a "new revalidation [application]" on May 10, 2017, which it approved. *Id.* Noridian continued, "CMS requires a lapse of billing from the time of deactivation until the day prior to the receipt date of the application." *Id.* Consequently, Noridian concluded that it was not authorized "to remove the lapse dates." *Id.*

[4] The pages of Petitioner's ALJ hearing request and attachments are not numbered. We cite to the page numbers of the submission based on the order in which the pages appear in the record.

### *3. The ALJ proceedings and ALJ Decision*

Petitioner requested that an ALJ review its case. Petitioner said on appeal that it had been receiving Medicare payments by electronic transfers for six years and that "a voided check [had] been on file with Medicare at all times." P. Request for ALJ Hearing at 1. Petitioner reported that when it received the March 10, 2017 email directing it to provide a voided check for revalidation, it "[a]ttempted to upload [a] voided check, without success." *Id.* at 2 (timeline of calls and emails). Petitioner said it then "[c]ontacted Medicare [and] with their help tried uploading again, without success, [and was] then instructed to fax it to them." *Id.* Petitioner said it faxed the document "several times along with the email as instructed, as they were not receiving it." *Id.*

Petitioner also said that it received two emails from Noridian on April 12, 2017, but read only one of the emails, "where it appears all is good." P. Request for ALJ Hearing at 2. Petitioner said it "had no idea" about the deactivation until it began to receive denials of claims for services that it provided to Medicare-covered patients after the deactivation. *Id.* at 1. Petitioner said that it deserved to be compensated for the services it provided during the lapse period and that "the loss of over $9500" for services provided during the lapse in billing privileges "is extremely detrimental to our practice." *Id.*

CMS filed a pre-hearing brief and motion for summary judgment, asserting that there was no dispute of material fact and that "CMS provided Petitioner with the earliest effective date to which it was entitled, and the lapse in coverage was properly applied." CMS Pre-hearing Brief and Motion for Summary Judgment at 5. CMS also said that the ALJ did not have the authority to review the deactivation of Petitioner's billing privileges or to grant equitable relief to Petitioner. *Id.* at 7. Petitioner opposed CMS's motion.

The ALJ concluded that it was unnecessary to address whether summary disposition was appropriate because neither party had requested an in-person hearing. ALJ Decision at 3 n.2. The ALJ made the following findings of fact and conclusions of law on review of the written record:

> 1. On February 8, 2017, Noridian requested that Petitioner revalidate its Medicare enrollment no later than April 30, 2017.
>
> 2. On February 23, 2017, Noridian received an enrollment application that listed a designated point of contact and email address for that point of contact.
>
> 3. On March 10, 2017, Noridian sent Petitioner, via the email address it provided in February 2017, a development request in which it directed Petitioner to provide additional information and documentation.

4. Petitioner did not submit a response to Noridian's development request, and Noridian rejected Petitioner's revalidation application on April 12, 2017.

5. Noridian deactivated Petitioner's billing privileges effective April 30, 2017.

6. Noridian received Petitioner's enrollment application for purposes of revalidation and reactivation on May 10, 2017, and Noridian processed that application to approval.

7. An effective date earlier than May 10, 2017, is not warranted for the reactivation of Petitioner's Medicare enrollment and billing privileges.

ALJ Decision at 3-4. The ALJ also stated that the Board has held that a deactivation of billing privileges is not reviewable and "[t]he only action in the reconsidered determination which is appealable is . . . the initial determination of the effective date of the enrollment application reinstating [the petitioner]." *Id.* at 6 (quoting *Willie Goffney, Jr., M.D.*, DAB No. 2763, at 3-5 (2017) (quoting 42 C.F.R. § 498.3(b)(15), (17)), *aff'd, Goffney v. Azar*, No. 2:17-cv-08032 (C.D. Cal. Sept. 25, 2019)). In addition, the ALJ stated that she was not authorized to grant Petitioner an earlier effective date of reactivation for Petitioner to obtain Medicare reimbursement for the services it provided to Medicare beneficiaries during the gap in billing privileges. *Id.* at 7.

**Standard of Review**

The Board's standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. The Board's standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (*Guidelines*), accessible at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html.

**Discussion**

***1. We review only the effective date of reactivation of Petitioner's billing privileges.***

The regulations in 42 C.F.R. Part 498 provide for Medicare providers and suppliers to appeal certain categories of CMS "initial determinations" to an ALJ and, if dissatisfied with the ALJ decision, to the Board. 42 C.F.R. §§ 498.3(b), 498.5. The appealable determinations include unfavorable reconsiderations as to the effective date of a Medicare provider agreement or supplier approval, and whether to deny or revoke a provider or supplier's Medicare enrollment in accordance with sections 424.530 or

424.535. *Goffney* at 5 (quoting 42 C.F.R. § 498.3(b)(15), (17)). "The regulations do not grant suppliers the right to appeal deactivations," however. *Urology Group of NJ, LLC*, DAB No. 2860, at 6 (2018) (citing *Goffney* at 5). While CMS and Medicare administrative contractors are authorized to reject a supplier's revalidation application and deactivate the supplier's billing privileges, ALJs and the Board are not authorized to assess whether the deactivation of a supplier's billing privileges was correct. *Urology Group* at 6; *Goffney* at 3-5. Instead, a supplier may file a "rebuttal" to the contractor to challenge the deactivation; the "rebuttal" is "not itself an appeal." *Goffney* at 5; 42 C.F.R. §§ 405.374, 424.540, 424.545(b).

Thus, the only action in the reconsidered determination that is appealable in this case is "the initial determination of the effective date of the enrollment application reinstating Petitioner." *Goffney* at 5. Furthermore, a petitioner's arguments for Medicare reimbursement for services rendered in the lapse between the deactivation and reactivation of billing privileges, the Board has held, "are not cognizable in this forum" and "may be appealed only after submitting a claim and only through the process set out in 42 C.F.R. Part 405." *Urology Group* at 7 (quoting *Goffney* at 6; *Vijendra Dave, M.D.*, DAB No. 2672, at 12 (2016)) (emphasis omitted). Accordingly, the ALJ's and the Board's authority in this matter is limited to review of the May 10, 2017 effective date for the reactivation of Petitioner's Medicare billing privileges established in the reconsidered determination.

### *2. The ALJ's conclusion that the effective date for reactivation of Petitioner's billing privileges is May 10, 2017, is supported by substantial evidence and free from error.*

The Board has consistently held that "the policy of CMS to apply the regulation found at 42 C.F.R. § 424.520(d) to determine the effective date for the reactivation of [physicians'] Medicare billing privileges is proper." *Urology Group* at 7. Section 424.520(d) provides that the effective date for billing privileges for physicians and physician organizations 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."[5] CMS stated in the preamble to the rulemaking that adopted section 424.520, that the term "date of

[5] The Board previously explained that CMS modified the Medicare Provider Integrity Manual (MPIM) effective January 1, 2009, to provide that, "for purposes of 42 CFR §§ 424.520(d) and 424.521(a), a CMS-855 reactivation application is treated as an initial enrollment application." *Arkady B. Stern*, DAB No. 2329, at 4 n.5 (2010) (citing MPIM Rev. 289, issued April 15, 2009). This means that, on reactivation, the provider will have a new effective date that is the later of the date of filing or the date it first began furnishing services at a new practice location (if the latter applies) and, per section 424.521(a), limited ability to bill retrospectively. *Id.*

filing" means "the date that the Medicare contractor receives a signed . . . enrollment application that the Medicare contractor is able to process to approval." 73 Fed. Reg. 69,726, 69,766-69 (Nov. 19, 2008). The Board applies that interpretation in resolving disputes concerning the effective date of a supplier's enrollment. *See, e.g., Alexander C. Gatzimos, MD, JD, LLC*, DAB No. 2730, at 4 (2016).

Based on the governing regulations, the Board's prior holdings, and our review of the record in this case, we conclude that the ALJ's determination of the effective date of reactivation of Petitioner's billing privileges is supported by substantial evidence and free from legal error. The record establishes that Noridian deactivated Petitioner's billing privileges effective April 30, 2017. CMS Ex. 7, at 2. The evidence further shows that on May 10, 2017, Petitioner filed, and Noridian received, a revalidation enrollment application, which Noridian subsequently approved. CMS Exs. 4, 5. Properly applying section 424.520(d) to the facts established by the evidence, the ALJ did not err in determining that May 10, 2017, is the effective date for reactivation of Petitioner's billing privileges.

### *3. Petitioner's arguments do not establish a basis for the Board to modify the effective date for reactivation of Petitioner's billing privileges.*

On appeal to the Board, Petitioner takes exception to the ALJ's statements that Petitioner did not comply with Noridian's March 10, 2017 development request. Request for Review (RR) (citing ALJ Decision at 2, 5 n.3). As it stated in its "previous letters and documentation," Petitioner says, "we did attempt to comply with all requests in a timely manner." *Id*. Specifically, Petitioner says that it "did fax/upload a voided check multiple times on March 10th." *Id.*

Additionally, Petitioner says, it was not appropriately notified of the deactivation of its billing privileges. Petitioner asserts that "on April 12th we received an email stating our application had been finalized." RR. "Reading this e-mail," Petitioner says, it appeared its revalidation status was "in good standing." P. Reply to CMS Response Brief on appeal to the Board (P. Reply). Petitioner says it was thus "unaware of any problems" with its revalidation application or that its billing privileges had been deactivated "until bills began being rejected in May" of 2017. RR. Petitioner also points to the ALJ's statement that "CMS has not offered evidence that Noridian notified Petitioner that it had deactivated its enrollment on April 30, 2017, even though an internal policy binding on the contractor directs that it should have notified Petitioner of its deactivation." RR; ALJ Decision at 7 (citing MPIM § 15.29.3.3). The ALJ "acknowledge[d] Petitioner's complaints that it was adversely impacted by a lack of notice of its deactivation," but said she was "not empowered" to "revise the effective date of deactivation or reactivation of billing privileges" "when a Medicare administrative contractor fails to adhere to subregulatory policy." ALJ Decision at 7. Because Noridian did not follow protocol, Petitioner says, it should be paid for the services rendered during the lapse. P. Reply.

As explained above, neither the ALJ nor the Board has the authority to decide whether Noridian properly deactivated Petitioner's billing privileges pursuant to 42 C.F.R. § 424.540(a)(3). Consequently, the finding underlying the deactivation – that Noridian did not receive the documentation requested from Petitioner on March 10, 2017 – is not subject to our review. Accordingly, whether Petitioner did or did not comply with the development request is immaterial in these proceedings. Petitioner's Medicare billing privileges were deactivated effective April 30, 2017, a fact that is supported by the evidence. Petitioner may not "challenge the effectuation of the deactivation through an appeal that solely concerns the effective date of reactivation."[6] *Urology Group* at 7. Likewise, "whether or not Petitioner was notified of the deactivation of its Medicare billing privileges is outside the Board's authority to review." *Id.*

We note, furthermore, that the evidence does not support Petitioner's claim that it had no reason to know that its revalidation application had been rejected, nor does it show that Noridian failed to follow Medicare protocol for notifying a supplier of the deactivation of its billing privileges. As Petitioner acknowledged before the ALJ and in its response brief before the Board, on April 12, 2017, Petitioner "received 2 emails [from Noridian] about 10 minutes apart." P. Request for ALJ Hearing, at 2, 5-8. The first email, sent at 8:15 a.m., stated that Noridian was rejecting Petitioner's February 2017 revalidation application because Petitioner had not provided the information requested on March 10, 2017. *Id.* at 5. The second email, sent at 8:26 a.m., was system-generated and stated that Petitioner's "enrollment application" was "finalized" and that the attached "notification letter" "contain[ed]" Petitioner's "Medicare billing information." *Id.* at 7. Petitioner told the ALJ that it did not see the first email or the attachment to the second email, which that email itself shows, was titled: "Stopping Billing Privileges Cycle 2 Revalidation Letter." *Id.* at 2, 8.[7] Indeed, Petitioner acknowledged in its response to CMS's motion for summary judgment, at 1, "What was actually attached was Stopping of Billing Privileges." Thus, had Petitioner timely opened and read all of the April 12, 2017 email transmissions from Noridian, it could not reasonably have concluded that there were no problems with the revalidation of its Medicare billing privileges.

[6] We note that even if we had the authority to adjudicate whether Petitioner complied with the March 10, 2017 development request – which we do not – there is no evidence in the record of the alleged attempts by Petitioner to upload into PECOS or fax the requested documentation (EFT information and the voided check or bank verification letter) before May 10, 2017.

[7] The title of the attachment indicates that Noridian used the sample letter provided in the MPIM for notifying a provider or supplier of deactivation. *See* MPIM § 15.29.3.3 (notify the provider/supplier of deactivation using the sample letter in section 15.24.5 (Stopping Billing Privileges Sample Letter)).

Petitioner also says that the February 8, 2017 Noridian letter, which directed Petitioner to revalidate its Medicare enrollment record by April 30, 2017, and cautioned Petitioner of a potential lapse in its billing privileges if it did not timely revalidate its billing privileges, "was never received, as it was sent to a previous address from November of 2011." RR. We note that the February 8, 2017 letter, CMS Ex. 1, bears a minor misspelling of the address for Petitioner that appears in the other documents in the record. The February 8, 2017 letter shows Petitioner's street address as "1320 El Captain Drive," while the other documents read "1320 El Capitan Drive." *E.g.* CMS Exs. 3, 5. We also note that Petitioner did not allege during the ALJ proceedings that it had not received the letter, and it is unclear why Petitioner would have submitted a revalidation application on February 23, 2017, if it had not received the February 8, 2017 letter directing it to submit a revalidation application. Regardless, whether Petitioner received the February 8, 2017 letter is not material to the outcome of the effective date of revalidation because, as we have explained, the findings underlying the rejection of Petitioner's February 23, 2017 revalidation application and deactivation of Petitioner's billing privileges are not subject to review by an ALJ or the Board in these proceedings.

Lastly, insofar as Petitioner argues that the reactivation date should be set retroactively to the date that CMS deactivated Petitioner's billing privileges because the gap in Medicare reimbursement for services furnished to Medicare-covered patients during the deactivation period is unfair, the Board has no authority to provide any equitable relief. *Amber Mullins, N.P.*, DAB No. 2729, at 6 (2016) (citations omitted).

**Conclusion**

For the reasons discussed above, we uphold the determination that May 10, 2017, is the effective date of reactivation of Petitioner's Medicare billing privileges.

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member