

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Michael Smith, M.D.  
(PTAN: MA4663002; NPI: 1205871035),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-735

Decision No. CR5008

Date: January 18, 2018

**DECISION**

Petitioner's Medicare billing privileges were deactivated on September 12, 2016, as a result of his failure to timely comply with a request that he revalidate his Medicare enrollment. For the reasons discussed below, I conclude that the effective date of Petitioner's reactivated Medicare billing privileges remains November 3, 2016, which is the date that the Medicare administrative contractor received his revalidation application.

**I. Background and Procedural History**

On April 8, 2016, Wisconsin Physicians Service Insurance Corporation (WPS), a Medicare administrative contractor, sent Petitioner correspondence requesting that he revalidate his Medicare enrollment. WPS sent the letter to Petitioner at "Kansas City Physician Partners, 100 Central St., Chillicothe, MO 64601-1554" (herein "Chillicothe address") (Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1 at 1-2), and it sent a duplicate copy of the letter to Petitioner at "Kansas City Physician Partners, Inc[.], P.O. Box 843809, Kansas City, MO 64184-3809" (herein "P.O. Box

address”). CMS Ex. 1 at 2-3. In each letter, WPS instructed Petitioner to revalidate his enrollment no later than June 30, 2016, cautioning:

Failure to respond to this notice will result in a hold on your payments, and possible deactivation of your Medicare enrollment. If you are a non-certified provider or supplier, and your enrollment is deactivated, you will maintain your original PTAN, however [you] will not be paid for services rendered during the period of deactivation. This will cause a gap in your reimbursement.

CMS Ex. 1 at 1, 3.

After Petitioner did not respond to the April 8, 2016 correspondence, WPS sent another letter to the P.O. Box address, dated July 6, 2016, in which it reported that Petitioner had “not revalidated by the requested due date of June 30, 2016.” CMS Ex. 1 at 5. WPS reiterated that Petitioner needed to revalidate his enrollment record every five years and “will not be paid for services rendered during the period of deactivation,” which “will cause a gap in . . . reimbursement.” CMS Ex. 1 at 5.

On September 12, 2016, after it did not receive a response to its previous correspondence, WPS informed Petitioner it had deactivated his Medicare enrollment and billing privileges because he did not comply with the revalidation request. CMS Ex. 1 at 7.

On November 2, 2016, Petitioner submitted, by mail, *inter alia*, a completed Form CMS-855I enrollment application to comply with the revalidation request (CMS Ex. 2 at 40), which WPS received on November 3, 2016.<sup>1</sup> See <https://tools.usps.com/go/TrackConfirmAction!input.action> (tracking # 9470110200830342169743, last visited January 4, 2018). In a letter dated November 21, 2016, WPS informed Petitioner that it had approved his applications and assigned an effective date of reactivated billing privileges of November 3, 2016. CMS Ex. 1 at 9. WPS explained that the effective date “reflects a gap in coverage from 09/12/2016 to 11/02/2016 for failure to respond to the revalidation requested development.” CMS Ex. 1 at 9.

Petitioner requested reconsideration in a letter dated January 17, 2017, at which time he contended that WPS mailed the letter requesting that he revalidate his enrollment to the wrong person and to a clinic “in another city in Missouri” that Petitioner had not been associated with since 2013. CMS Ex. 1 at 12. Additionally, Petitioner stated that he had not seen the letter requesting that he revalidate his enrollment, and he would have timely revalidated his enrollment if he was aware of the request. CMS Ex. 1 at 12.

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<sup>1</sup> Petitioner also submitted a Form CMS-855R to reassign Medicare benefits. CMS Ex. 3; see CMS Ex. 1 at 64.

WPS issued a reconsidered determination on March 9, 2017, in which it explained that it received the revalidation application “on November 3, 2016, which is beyond the due date of June 30, 2016, and therefore our files show the gap in billing from September 12, 2016, to November 2, 2016 . . . .” CMS Ex. 1 at 65. WPS further explained that it “correctly deactivated the provider or supplier’s Medicare billing privileges due to not receiving the requested information to revalidate [his] Medicare enrollment.” CMS Ex. 1 at 64. WPS explained that it sent the revalidation request to “the correspondence address on file based on the latest CMS-855I received and signed by Dr. Smith” and that it also sent the revalidation request to “the billing address of Kansas City Physicians Partners Inc.” CMS Ex. 1 at 65.

Petitioner submitted a request for hearing that was received at the Civil Remedies Division on May 10, 2017. CMS filed a motion for summary judgment, with a supporting memorandum in support of summary judgment (CMS Br.), along with three exhibits.<sup>2</sup> (CMS Exs. 1 to 3). Petitioner filed a response (P. Br.), which included supporting documents.<sup>3</sup> In the absence of any objections, I admit CMS Exhibits 1 to 3 into the record. In light of Petitioner’s inclusion of supporting evidence with his brief, I also admit P. Br.

Neither party has offered the testimony of any witnesses, and therefore, a hearing for purpose of cross-examination of witnesses is not necessary. *See* Acknowledgement 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>4</sup>

## II. Issue

Whether CMS had a legitimate basis for establishing November 3, 2016, as the effective date of Petitioner’s reactivated billing privileges.

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<sup>2</sup> I note that CMS Ex. 1 contains numerous documents. *See* Order, § 5 (requiring each exhibit to be filed as a separate document in DAB E-File). Although I have admitted CMS Ex. 1, I caution that CMS should ensure compliance with all directives.

<sup>3</sup> Petitioner, too, failed to comply with the requirements set forth in section 5 of the Order. Because Petitioner’s brief and supporting documents are not paginated, I have referred to the page numbers that appear in the electronic version of P. Br that is accessible via DAB E-File.

<sup>4</sup> It is unnecessary in this instance to address the issue of summary judgment, as neither party has requested an in-person hearing.

### 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

1. *On April 8, 2016, WPS mailed a letter to Petitioner directing him to revalidate his Medicare enrollment record by June 30, 2016, and that the failure to respond could result in deactivation of his billing privileges, nonpayment for services rendered during a period of deactivation, and a gap in reimbursement.*
2. *On July 6, 2016, WPS mailed another letter to Petitioner notifying him that he had not revalidated his enrollment prior to the June 30, 2016 deadline, and that the failure to respond could result in deactivation of his billing privileges, nonpayment for services rendered during a period of deactivation, and a gap in reimbursement.*
3. *After Petitioner did not revalidate his Medicare enrollment record in response to the revalidation request, WPS notified Petitioner on September 12, 2016, that it had deactivated his Medicare enrollment and billing privileges, effective that same date.*
4. *WPS received Petitioner's signed enrollment application, for the purposes of revalidating and reactivating Medicare enrollment, on November 3, 2016.*
5. *An effective date earlier than November 3, 2016, the date WPS received Petitioner's enrollment applications, is not warranted for the reactivation of Petitioner's Medicare enrollment and billing privileges.*

As a physician, Petitioner is a "supplier" for purposes of the Medicare program. See 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1); 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* 42 U.S.C. § 1395cc(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)(1). “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)(1); *see also* 42 C.F.R. § 424.510(d) (listing enrollment requirements). Thereafter, “[t]o maintain Medicare billing privileges, a . . . supplier . . . must resubmit and recertify the accuracy of its enrollment information every 5 years.” 42 C.F.R. § 424.515.

CMS is authorized to deactivate an enrolled supplier’s Medicare billing privileges if the enrollee does not provide complete and accurate information within 90 days of a request for such information. 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). Further, and quite significantly, the DAB has unambiguously stated that “[i]t is certainly true that [the petitioner] may not receive payment for claims for services during any period when his billing privileges were deactivated.” *Willie Goffney, Jr., M.D.*, DAB No. 2763 at 6. 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 supplier’s billing privileges due to the supplier’s failure to respond to a request for updated enrollment information, such as in this case, the supplier may apply for CMS to reactivate its Medicare billing privileges by completing and submitting the appropriate enrollment application(s) or recertifying its enrollment information, if deemed appropriate. 42 C.F.R. § 424.540(a)(3), (b)(1).

On April 8, 2016, WPS mailed to Petitioner a letter notifying him that he was required to revalidate his Medicare enrollment record by June 30, 2016, and WPS warned him that the failure to revalidate could result in deactivation of his Medicare enrollment and billing privileges, with a resulting gap in reimbursement. CMS Ex. 1 at 1-4. On July 5, 2016, WPS mailed to Petitioner a second letter informing him that it had not received a response to the revalidation request, and again cautioned that his billing privileges could be deactivated and he would not receive reimbursement for services rendered while deactivated. CMS Ex. 1 at 5. On September 12, 2016, WPS sent another letter in which it notified Petitioner that his billing privileges had been deactivated because he failed to revalidate his Medicare enrollment record. CMS Ex. 1 at 7.

More than a half year after WPS first requested that Petitioner update or confirm his enrollment record, Petitioner submitted, *inter alia*, an enrollment application that was received on November 3, 2016. CMS Ex. 1 at 7. WPS approved Petitioner's application on November 21, 2016, and reactivated his billing privileges, effective November 3, 2016. CMS Ex. 1 at 9-11.

The pertinent regulation with respect to the effective date of reactivation is 42 C.F.R. § 424.520(d). *Arkady B. Stern, M.D.*, DAB No. 2329 at 4 (2010). Section 424.520(d) states that “[t]he effective date for billing privileges for physicians . . . 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.” The Departmental Appeals Board (DAB) 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). Petitioner's date of filing was November 3, 2016, the date WPS received Petitioner's enrollment applications that were mailed on November 2, 2016. *See* CMS Ex. 2 at 40. Based on the November 3, 2016 receipt date of the signed enrollment application, WPS correctly assigned a November 3, 2016 effective date for reactivated billing privileges. *See Goffney*, DAB No. 2763 at 6 (“[i]t is certainly true that [the petitioner] may not receive payment for claims for services during any period when his billing privileges were deactivated.”); 42 C.F.R. § 424.520(d).

Petitioner is challenging the assignment of a November 3, 2016 effective date of his reactivated billing privileges, which resulted in a gap in his billing privileges from September 12 through November 2, 2016. P. Br. at 1. Petitioner was required to timely respond to the revalidation request to avoid the prospect of deactivation pursuant to 42 C.F.R. § 424.540(a)(3), and WPS deactivated his billing privileges after he failed to timely submit a revalidation application. CMS Ex. 1 at 7-8. The DAB has explained that a deactivation action 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].”<sup>5</sup> *Goffney*, DAB No. 2763 at 3-5. WPS correctly deactivated Petitioner's billing privileges because he failed to comply with the revalidation request in accordance with the time period prescribed by 42 C.F.R.

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<sup>5</sup> The DAB explained: “Moreover, neither [42 C.F.R. §] 424.545(b) nor any other regulation provides appeal rights from the contractor's deactivation determination or any rebuttal determination.” *Goffney*, DAB No. 2763 at 5; *see also Arkady B. Stern, M.D.*, DAB No. 2417 at 3 n.4 (2011) (Petitioner argues on appeal that deactivation was improper, but the DAB “does not have the authority to review” deactivation under circumstances of this case, (citing 42 C.F.R. §§ 424.545(b) and 498.3(b)); *Andrew J. Elliott, M.D.*, DAB No. 2334 at 4 n.4 (2010) (DAB “does not have authority to review” a deactivation).

§ 424.540(a)(3), and WPS assigned an appropriate effective date for Petitioner's reactivated billing privileges, November 3, 2016, based on a correct application of 42 C.F.R. § 424.520(d).

Petitioner challenges the deactivation of his billing privileges, arguing that he "did not receive notice of the need to revalidate . . . ." P. Br. at 1. As I previously discussed, the deactivation of billing privileges cannot be challenged in this forum. Even though I need not address this argument, I nonetheless observe that Petitioner's argument is not supported by the record. Petitioner has not demonstrated that WPS mailed each letter requesting that he revalidate his enrollment to an address that was not listed in his then-current enrollment record. *See* P. Br. at 13 (Petitioner's copy of his enrollment record, as of November 15, 2016, reflecting that his "enrollment application contact person" could be reached at the Chillicothe address (P. Br. at 13), and CMS Ex. 1 at 1 (revalidation request mailed to the Chillicothe address); CMS Ex. 2 at 20 (November 2016 revalidation application, listing a "special payments" address of the "P.O. Box address,"), and CMS Ex. 1 at 3 (revalidation request mailed to the P.O. Box address).

Petitioner also argues that the "initial request was sent to an address for which credentialing contact of this provider should not have been elected" and that he no longer provided telemedicine services for that hospital. P. Br. at 1. As previously discussed, to maintain Medicare billing privileges Petitioner is required to report certain "reportable events," including any address changes or updates, to a Medicare contractor within certain time frames. 42 C.F.R. § 424.516(d)(1)(iii). The burden is on the supplier to ensure his record is accurate and up to date, and he has not identified any error on the part of WPS in its mailing of the revalidation request.<sup>6</sup>

Finally, Petitioner raises arguments that appear to be based in equity, stating:

Truly this was the perfect storm of happenstance...Dr. Smith was providing a courtesy to their hospital of telemedicine only. In addition, his telemedicine ended in 2014. When I submitted the initial appeal request, CMS then sent back a letter dated in April to our correspondence address. This letter had never been provided to me prior to this. Unfortunately I was out of the office of medical leave from April through to [sic] June of 2016 with a total hip replacement. If it had been mailed (regular mail) as well, I might have received it, but the person managing the bank (and correspondence) at the time, [sic] did not notice the letter.

P. Br. To the extent that Petitioner's argument can be construed as a request for equitable relief in the form of an earlier effective date of reactivated billing privileges, I am unable

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<sup>6</sup> I reiterate that I do not have authority to review the deactivation of Petitioner's billing privileges. *See, e.g., Goffney*, DAB No. 2763 at 5.

to grant equitable relief. *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.”). I cannot grant Petitioner relief on this basis because I do not have the authority to “[f]ind invalid or refuse to follow Federal statutes or regulations or secretarial delegations of authority.” *See, e.g., 1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (“An ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground, even a constitutional one.”).

In the absence of any basis to grant an earlier date for the reactivation of billing privileges, the November 3, 2016 effective date for the reactivation of Petitioner’s billing privileges must stand.

## **V. Conclusion**

For the foregoing reasons, I uphold the November 3, 2016, effective date of Petitioner’s reactivated billing privileges.

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/s/  
Leslie C. Rogall  
Administrative Law Judge