

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Devinderjit S. Bhangu, MD, PLLC
(PTAN: MI4462001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-679

Decision No. CR5009

Date: January 19, 2018

DECISION

Petitioner's Medicare billing privileges were deactivated on November 23, 2016, as a result of its failure to timely comply with a request that it revalidate its Medicare enrollment. For the reasons discussed below, I conclude that the effective date of Petitioner's reactivated Medicare billing privileges remains January 10, 2017, which is the date that the Medicare administrative contractor received a revalidation application that it processed to approval.

I. Background and Procedural History

On June 14, 2016, Wisconsin Physicians Service Insurance Corporation (WPS), a Medicare administrative contractor, sent Petitioner two letters requesting that both Petitioner, Devinderjit S. Bhangu, MD, PLLC, a medical practice, and Devinderjit S. Bhangu, MD (Dr. Bhangu), an individual physician who owns the practice, revalidate their Medicare enrollment no later than August 31, 2016. *See* Centers for Medicare &

Medicaid Services (CMS) Exhibit (Ex.) 1 at 2;¹ *see also* Petitioner Exhibit (P. Ex.) 4 at 30 (Petitioner's enrollment application identifying Dr. Bhangu as its owner). Each letter cautioned that "the failure to respond to the revalidation request will result in a hold of your payments, possible deactivation, and/or cause a gap in your reimbursement." *See* CMS Ex. 1 at 2.

On September 13, 2016, WPS sent Petitioner a "Payment Hold Letter" that provided notice that WPS was "holding all payments on Medicare claims" because Petitioner had not responded to the revalidation request.² CMS Ex. 2 at 1; *see* CMS Ex. 1 at 2. WPS specifically instructed Petitioner that it must revalidate its enrollment by either using the Provider, Enrollment, Chain, and Ownership System (PECOS) website or by completing and mailing the appropriate Form CMS-855 enrollment application. CMS Ex. 2 at 1.

Petitioner submitted a Form CMS-855I application on October 20, 2016, and WPS, on October 24, 2016, sent Petitioner a development letter because Petitioner did not submit a complete application. P. Ex 4; *see* CMS Ex. 1 at 2. The following day, WPS received additional information from Petitioner via facsimile; however, the information was incomplete.³ *See* CMS Ex. 1 at 2.

On November 28, 2016, WPS notified Petitioner that it had deactivated Petitioner's billing privileges, effective November 23, 2016. CMS Ex. 4 at 1. WPS explained to Petitioner that it had deactivated Petitioner's billing privileges because "you haven't reactivated your enrollment record with us, or you didn't respond to our requests for more information." CMS Ex. 4 at 1. WPS again explained that Petitioner needed to revalidate its enrollment record. CMS Ex. 4 at 1.

¹ On a number of occasions, CMS did not cite to source documents in its presentation of "undisputed facts." For instance, the evidence submitted to support this statement is not the June 16, 2016 correspondence, but rather, a summary of evidence contained in a letter issued on March 14, 2017. CMS Ex. 1. Such a practice by CMS does not fully inform the administrative law judge (ALJ) or the petitioner of the evidentiary basis for its arguments. However, Petitioner, who is represented by counsel, has not disputed the material facts presented by CMS, and I will not further address this issue.

² Dr. Bhangu revalidated his individual enrollment record on September 1, 2016, which WPS approved on September 9, 2016. *See* CMS Ex. 1 at 2.

³ Neither party has submitted a copy of Petitioner's response to the October 24, 2016 request for additional information.

Petitioner submitted another enrollment application on January 10, 2017. *See* CMS Ex. 1 at 2. After receiving additional development, WPS approved the application on February 15, 2017, and assigned a January 10, 2017 effective date of reactivated billing privileges. CMS Ex. 5 at 1; *see* CMS Ex. 1 at 2.

On February 23, 2017, Petitioner submitted a request for reconsideration, dated February 22, 2017, disputing the effective date assigned for its reactivated billing privileges. CMS Ex. 6. Petitioner alleged that on October 25, 2016, it submitted information in response to WPS's October 24, 2016 request for additional information, specifically Sections 1A, 4C, 4E, 4G, 8, and 15 of the enrollment application.⁴ CMS Ex. 6 at 1, 3. However, WPS had determined that the information Petitioner submitted was once again incomplete, and it rejected the application. CMS Ex. 3; *see* CMS Ex. 1 at 2. In its reconsideration request, Petitioner contended that it first became aware of its deactivation on December 12, 2016, because it did not receive the November 28, 2016 letter notifying it of its deactivation,⁵ and that it mailed a revalidation application on January 9, 2017. CMS Ex. 6 at 3.

WPS issued a reconsidered determination on March 14, 2017, in which it determined that, pursuant to 42 C.F.R. §§ 424.520 and 424.521, it had “correctly deactivated . . . [Petitioner’s] billing privileges due to not receiving the requested information to revalidate [Petitioner’s] Medicare enrollment.” CMS Ex. 1 at 1. WPS further determined that, with respect to Petitioner’s reactivated billing privileges, “the effective date was issued correctly, which has caused a gap in your reimbursement from November 23, 2016, to January 9, 2017.” CMS Ex. 1 at 2.

Petitioner submitted a request for hearing via DAB E-File on May 11, 2017. CMS filed a Pre-Hearing Brief and Motion for Summary Judgment (CMS Br.), along with six exhibits (CMS Exs. 1-6). Petitioner filed a Pre-Hearing Brief, Response to Respondent’s Motion for Summary Judgment and a Motion for Summary Judgment (P. Br.), along with five exhibits (P. Exs. 1-5). In the absence of any objections, I admit CMS Exs. 1 to 6 and P. Exs. 1 to 5 into the record.

Petitioner submitted the written direct testimony of two witnesses (P. Exs. 2, 5), and CMS has not requested an opportunity to cross-examine these witnesses. Therefore, a

⁴ Petitioner submitted a copy of its October 20, 2016 enrollment application with its pre-hearing exchange. P. Ex. 4. I observe that there are omissions in Sections 1A, 4C, 4E, 4G, and 8. *See* CMS Ex. 6 at 1, 3 (Petitioner’s statement that WPS directed it to re-submit, *inter alia*, sections 1A, 4C, 4E, 4G, and 8 of its application).

⁵ Even if I accept as true that Petitioner first learned of its deactivation on December 12, 2016, Petitioner waited until January 10, 2017, to submit an enrollment application for purposes of revalidation and reactivation.

hearing for the purpose of cross-examination 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.⁶

II. Issue

Whether CMS had a legitimate basis to assign Petitioner a January 10, 2017 effective date for its reactivated billing privileges.

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 June 14, 2016, WPS requested that Petitioner revalidate its Medicare enrollment no later than August 31, 2016.*
- 2. After Petitioner did not revalidate its Medicare enrollment in accordance with the revalidation request, WPS provided notice that it had stopped payments and again directed Petitioner to revalidate its enrollment by either using PECOS or submitting the appropriate Form CMS-855 application.*
- 3. On October 20, 2016, Petitioner submitted an incomplete revalidation application, and on October 24, 2016, WPS instructed Petitioner to submit additional information.*
- 4. Petitioner did not submit a complete response to WPS's development request, and WPS rejected the revalidation application.*
- 5. On November 28, 2016, WPS deactivated Petitioner's billing privileges, effective November 23, 2016.*
- 6. WPS received Petitioner's enrollment application for purposes of revalidation of enrollment and reactivation of billing privileges on January 10, 2017, and it ultimately processed that application to approval.*

⁶ CMS and Petitioner have 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.

7. *On February 15, 2017, WPS notified Petitioner that it had approved Petitioner's revalidation application, and that it had assigned an effective date of reactivated billing privileges of January 10, 2017.*
8. *An effective date earlier than January 10, 2017, the date WPS received Petitioner's enrollment application, is not warranted for the reactivation of Petitioner's Medicare enrollment and billing privileges.*

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 (2017). 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).

On June 14, 2016, WPS mailed a letter to Petitioner directing it to revalidate its Medicare enrollment record no later than August 31, 2016, and WPS warned that the failure to revalidate could result in deactivation of its Medicare enrollment and billing privileges, with a resulting gap in reimbursement. *See* CMS Ex. 1 at 2. After Petitioner did not revalidate its Medicare enrollment by the August 31, 2016 deadline, WPS informed Petitioner, in a letter dated September 13, 2016, that it would be holding all payments for Petitioner's Medicare claims. CMS Ex. 2 at 1. WPS again directed Petitioner to revalidate its enrollment and instructed that Petitioner needed to revalidate its Medicare enrollment record to resume payments. CMS Ex. 2 at 1. WPS explained that Petitioner could revalidate through PECOS, or it could complete and mail the appropriate Form CMS-855 enrollment application. CMS Ex. 2 at 1-2. Petitioner submitted an enrollment application on October 20, 2016 (P. Ex. 4), and when asked to submit additional information on October 24, 2016, it did not provide all of the requested information. *See* CMS Ex. 1 at 2 ("The development information was incomplete and therefore, the application was rejected . . ."). WPS notified Petitioner of its deactivation by letter dated November 28, 2016 (CMS Ex. 4), and while Petitioner contends it did not receive this letter, it nonetheless concedes it became aware of its deactivation on December 12, 2016. CMS Ex. 6 at 1. Petitioner submitted a revalidation application by mail that was received on January 10, 2017, and the effective date of its reactivated billing privileges is January 10, 2017, the date of receipt of the application. *See* CMS Ex. 1 at 2; *see also* CMS Ex. 6 at 3 (timeline provided by Petitioner in its request for reconsideration).

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). WPS deactivated Petitioner's billing privileges because Petitioner "didn't respond to [its] requests for more information" (CMS Ex. 4 at 1). Petitioner filed the application for purposes of revalidation and reactivation that was processed to approval was January 10, 2017, which is the date that WPS received the application. *See* CMS Exs. 1 at 2; 6 at 3. Based on the January 10, 2017 receipt date of the enrollment application that was processed to approval, WPS correctly assigned a January 10, 2017 effective date for reactivated billing privileges. *See Goffney*, DAB No. 2763 at 6 ("It 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 January 10, 2017 effective date of its reactivated billing privileges, which resulted in a gap in reimbursement from November 23, 2016 through January 9, 2017. P. Br. at 2; *see* CMS Ex. 5 at 2. 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 its billing privileges after WPS rejected Petitioner’s revalidation application due to its failure to submit a complete application and to provide the additional information required in the development request. *See* CMS Ex. 1 at 2; *see also* 42 C.F.R. § 424.525(d) (CMS “may reject . . . an enrollment application” if the supplier “fails to furnish complete information . . . within 30 calendar days from the date of the contractor request for missing information.”). 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].”⁷ *Goffney*, DAB No. 2763 at 3-5. WPS correctly deactivated Petitioner’s billing privileges because it rejected, pursuant to 42 C.F.R. § 424.525(d), Petitioner’s incomplete enrollment information that it provided in response to the revalidation request. As such, Petitioner did not comply with the revalidation request in accordance with the time period prescribed by 42 C.F.R. § 424.540(a)(3). WPS appropriately assigned an effective date of January 10, 2017, for Petitioner’s reactivated billing privileges based on a correct application of 42 C.F.R. § 424.520(d).

Petitioner argues that the regulations controlling the effective date of reactivated billing privileges do not apply to suppliers “seeking to ‘recertify’ information.” P. Br. at 5-6. Petitioner argues both that “42 C.F.R. § 424.502(d)” and “42 C.F.R. § 424.501(d)” do not apply in the instant case.⁸ P. Br. at 6. Petitioner’s argument is not only legally unsupported, but is also based on a misunderstanding of fact. First, Petitioner did not attempt to “recertify” its information when it submitted the October 2016 enrollment application; it provided *new* information at that time, and the only appropriate means to provide new enrollment information is to submit an enrollment application. P. Ex. 4; 42 C.F.R. § 424.510(a)(1) (directing that a supplier “must submit enrollment information on the applicable enrollment application”). If Petitioner was simply “recertifying” its information, it would have “recertif[ied] the accuracy of [its] enrollment information.” 42 C.F.R. § 424.515. However, Petitioner provided *updated* enrollment information, which necessitates the filing of an enrollment application. *See* P. Ex. 4 (Petitioner’s

⁷ 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).

⁸ Neither 42 C.F.R. 424.502(d) nor 42 C.F.R. § 424.501(d) is a valid regulation. Petitioner elsewhere references 42 C.F.R. § 424.520(d), which is a valid regulation.

October 2016 enrollment application that lists a new records storage location, a new managing employee, and a new billing agency). Thus, in revalidating its enrollment, Petitioner was not merely “recertifying” the information that was already of record since April 2011. *See* P. Exs. 1, 4.

Further, with respect to Petitioner’s arguments that it did not need to submit a new enrollment application, I point out that WPS specifically directed Petitioner that it could revalidate its enrollment in one of two ways: It could use the PECOS website, or it could mail the appropriate Form CMS-855 enrollment application to WPS. CMS Exs. 2 at 1; 4 at 1. While Dr. Bhangu, Petitioner’s owner, states that *he* “determined that only a recertification of prior information was required and no supplemental information was needed,” he is mistaken; Dr. Bhangu failed to follow WPS’s clear instructions. P. Ex. 5 at 2.

Petitioner argues that “CMS improperly deactivated [its] billing privileges” and that “the ‘effective date’ provision” should not apply to it.⁹ P. Br. at 6-7. Even though I need not address Petitioner’s arguments regarding its deactivation because, as previously discussed, a deactivation action is not reviewable in this forum, I nonetheless observe that Petitioner’s argument is unsupported by any authority or evidence. Petitioner relies, in part, on “42 C.F.R. 424.502(d).” However, no such provision of law exists. Petitioner also relies on *John Heverin, Ph.D.*, ALJ Ruling No. 2013-06 (2013), which is irrelevant to this case. I first note that I am not bound by the decisions or rulings of other ALJs. *See, e.g., Vamet Consulting & Medical Servs.*, DAB No. 2778 at (2017) (discussing that an ALJ decision is “not binding precedent on another ALJ or on the [DAB]”). Further, and more importantly, the *Heverin* decision is inapplicable to this case. In the *Heverin* case, the supplier’s billing privileges had been deactivated based on 42 C.F.R. § 424.540(a)(1) because the supplier had not submitted any claims for 12 consecutive months; the deactivation of Dr. Heverin’s billing privileges was not based on the failure to respond to a revalidation request. *Heverin*, ALJ Ruling 2013-06 at 4. Because Dr. Heverin’s billing privileges were deactivated based on the non-submission of claims, and *not* a failure to comply with a revalidation request, the ALJ explained that “[t]he reactivation provision applicable to a supplier deactivated for the non-submission of claims does not require that the supplier submit a ‘Medicare enrollment application’ to recertify his or her information” *Id.* at 6 (citing 42 C.F.R. § 424.540(b)(2) (“Providers and suppliers deactivated for nonsubmission of a claim are required to recertify that the enrollment information currently on file with Medicare is correct and furnish any missing information as appropriate.”)). Petitioner’s situation is unlike that of Dr. Heverin; Petitioner’s deactivation was not due to the nonsubmission of a claim, but rather, its deactivation was a result of its failure to timely comply with a revalidation request. Therefore, pursuant to 42 C.F.R. § 424.540(b)(1), in order to reactivate it “must

⁹ 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.

complete and submit a new enrollment application to reactivate its Medicare billing privileges, or when deemed appropriate, at a minimum, recertify that the enrollment information currently on file with Medicare is correct.” As previously discussed, Petitioner updated its enrollment information when it revalidated, and therefore, it was not recertifying its existing information. P. Ex. 4. Further, WPS did not inform Petitioner that certification was “deemed appropriate,” and specifically directed Petitioner to revalidate by using the PECOS website or by mailing the appropriate enrollment application. CMS Exs. 2 at 1; 4 at 1. Therefore, Petitioner’s situation is unlike the situation presented in the *Heverin* case. Petitioner has not demonstrated error in the effective date assigned for the reactivation of its billing privileges, January 10, 2017, which is based on the date of receipt of the revalidation application that was processed to approval. 42 C.F.R. § 424.520(d) (effective date of billing privileges is the date of filing of the enrollment application that was approved by the contractor).

To the extent that Petitioner is requesting equitable relief in the form of an earlier effective date of reactivated billing privileges, I am unable to grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“Neither the ALJ nor the [DAB] is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”); *see* P. Br. at 8 (arguing that “this Tribunal is authorized to grant equitable relief”). 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.”).

Likewise, to the extent that Petitioner feels that deactivation of its enrollment does not further the goals of the Medicare program (P. Br. at 7), it is mistaken. First, Petitioner’s argument that “[i]f the supplier is reactivating his or her billing privileges, then there is no need to verify the veracity of anything provided on the CMS-855 . . .” is based on a misunderstanding of the facts of this case. P. Br. at 8. As previously discussed, Petitioner *did* update its enrollment information when it revalidated its enrollment. P. Ex. 4 (updating records storage location, managing employee, and billing agency). Further, CMS has recognized that revalidation is a tool “to prevent or combat fraudulent activity in our programs,” and that providers and suppliers are “subject to adverse consequences, including . . . the deactivation of their Medicare billing privileges” when they fail to respond to a revalidation request.” 77 Fed. Reg. 29,013 (May 16, 2012).

In the absence of any basis to grant an earlier date for the reactivation of billing privileges, the January 10, 2017 effective date for the reactivation of Petitioner’s billing privileges must stand.

