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## CMS Settles Enrollment Case About Retroactive Billing Over 30 Days

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By Nina Youngstrom

CMS has agreed to pay a physical therapy practice \$55,000 in a December settlement that's at the intersection of claims and enrollment, and again runs into the question of how far CMS can go to enforce payment requirements not rooted in regulations or laws. The physical therapists are being paid because two provider types are permitted to bill Medicare for services provided up to one year before their enrollment application is approved, notwithstanding a March provision in the *Medicare Program Integrity Manual*,<sup>[1]</sup> an attorney says.

“When we see revisions to the Medicare manual that didn't used to affect us and now they do, I am starting to do the research on when, why and how those revisions or *MLN Matters* articles have come about,” says attorney Richelle Marting, with the Forbes Law Group in Overland Park, Kansas. “Is a policy being created without the proper rulemaking process? I have seen so many examples of that in the past year or so.”

When providers and suppliers enroll in Medicare, they are permitted to bill for services performed before the date of their enrollment approval—up to a point, Marting says. In other words, they're able to retroactively bill for their services if their 855 enrollment application is accepted. Providers and suppliers indicate on their enrollment forms when they want their start dates to be. Until 2009, the maximum retroactive effective date was a year for most providers and suppliers because of the one-year timely filing deadline, she says. It almost sounds too good to be true, except that CMS in a 2009 regulation<sup>[2]</sup> said that physicians and nonphysician practitioners (NPPs) could not request an enrollment date earlier than 30 days before their application date.

Here's where the physical therapy practice ran into trouble with CMS. When the three physical therapists submitted enrollment applications (855I) and reassignment applications (855R) so the practice could bill on their behalf, they requested an effective date five months retroactive to their enrollment application date, because they're not limited to 30 days, Marting says. The Medicare administrative contractor (MAC) disagreed, nixing the five months request. The MAC relied on a March 2019 provision in the *Medicare Program Integrity Manual*, which added physical and occupational therapists to the list of suppliers that are limited to billing 30 days before the enrollment date takes effect. CMS announced the change in Medicare Transmittal 865,<sup>[3]</sup> but there's no corresponding regulation anchoring it, she says.

CMS is flat-out wrong about the retroactive billing date for physical therapists without a regulation to back up the Medicare manual, Marting contends. CMS can't slip a significant payment matter into a Medicare manual when it hasn't first been established by a law or regulation, the Supreme Court ruled last year in *Azar vs. Allina Health Services, et al.*<sup>[4]</sup>

### Physical Therapists Are Not NPPs

The 2009 regulation that introduced retroactive billing applied it to physicians (e.g., medical doctors, doctors of osteopathic medicine and podiatrists) and NPPs, including physician assistants, certified nurse midwives, clinical psychologists, nurse practitioners, anesthesiology assistants, audiologists, certified registered nurse anesthetists, clinical social workers, psychologists billing independently, speech language pathologists, and

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registered dietitians or nutrition professionals, Marting explained in her Nov. 13 appeal to the Departmental Appeals Board. Although the proposed regulation included occupational and physical therapists in private practice in the list of NPPs, when a commenter pointed out that physical and occupational therapists aren't considered NPPs, CMS removed them from the final regulation.

As if to underscore that CMS knew the addition of a provider or supplier to the 30-day retroactive max had to be done by regulation, that's the route it took when it added ambulance suppliers to the list in 2014, she noted.

Some other MACs interpret the retroactive billing the same way she does—that physical and occupational therapists are not bound by the 30 days. But what mattered in this case was the MAC for the therapy practice wouldn't recognize claims going back five months for the three physical therapists. Marting's appeal, however, affected a CMS attorney. "We got settlement offers on all three," she says. "We had to enter into agreements on what the effective dates would be, and then we withdrew our appeals." After the affected claims are resubmitted and paid, the physical therapists will receive a collective \$55,000, which represents payments for services dating five months before they filed their enrollment applications.

Marting encourages providers not expressly included in the 30-day limit to address this when they enroll. "If you need your enrollment effective date to be prior to your application date, consider calling the manager of the MAC enrollment process to explain the basis and authority for doing so," she says. "That's the best opportunity to get an approval [for a retroactive billing date] without the time and expense of an appeals process."

Providers also can submit a letter making the request and explaining it with their application even on the Provider Enrollment, Chain and Ownership System (PECOS).

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**1** CMS, *Medicare Program Integrity Manual*, Pub. 100-08, <https://go.cms.gov/3aiwH5h>.

**2** 42 C.F.R. § 424.44(a).

**3** Pub 100-08 Medicare Program Integrity, Update to Chapter 15 of Publication (Pub.) 100-08, Trans. 865, (February 21, 2019), <https://go.cms.gov/2RmxM38>.

**4** Nina Youngstrom, "In Ruling That Will Shake Up How CMS Issues Guidance, Supreme Court Rejects DSH Formula," *Report on Medicare Compliance* 28, no. 21 (June 10, 2019), <http://bit.ly/2AEa7TU>.

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