Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mary C. Manesis, DPM, PA,

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-640

Decision No. CR2646

Date: October 15, 2012

DECISION DISMISSING REQUEST FOR HEARING AND REMANDING FOR RECONSIDERATION DETERMINATION

The Centers for Medicare and Medicaid Services (CMS) revoked the Medicare billing privileges of Petitioner Mary C. Manesis, DPM, PA, a podiatrist and supplier of durable medical equipment, prosthetics, orthotics, and supplies. Petitioner requested a hearing, which I do not have jurisdiction to provide at this time. In accordance with CMS's suggestion, I dismiss and remand this case so that a Medicare contractor may provide a reconsidered determination to Petitioner.

In a letter dated October 13, 2011, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse (NSC), notified Petitioner it was revoking her supplier number, retroactive to October 4, 2011, the date CMS determined that Petitioner's practice location was not operational. Specifically, the letter stated that its inspector attempted to conduct an inspection of Petitioner's facility on October 3 and 4, 2011, but the facility had been closed during its posted hours of operation on both attempts. The letter concluded that Petitioner was found to be not operational and in violation of 42 C.F.R. § 424.535(a)(5)(ii).

In response to the Medicare contractor's letter, Petitioner submitted a letter on November 10, 2011, in which she stated "[t]his letter serves as both notification of our reconsideration request and our Corrective Action Plan [CAP]." CMS Ex. 3. In describing its CAP, Petitioner stated that, as an orthotics provider providing diabetic shoes and custom inserts, she was exempted from the requirement that a supplier be open to the public for a minimum of 30 hours per week and instead was allowed to be open "by appointment only." Petitioner stated that she had changed the posted hours of operation to "By Appointment Only." Petitioner noted that staff would be available for consultations by appointment at the office location. Petitioner also stated that within the next 60 days she would be finalizing plans to move the office to a better location. Petitioner stated that once the move was finalized she would submit an application to NSC to change the practice location. CMS Ex. 3.

By letter dated December 13, 2011, NSC informed Petitioner that it was "acknowledg[ing] the receipt of your action plan regarding the revocation of your supplier number." The letter concluded that Petitioner was not operational during attempted site inspections and that she was barred from re-enrolling in the Medicare program for two years from the effective date of revocation. CMS Ex. 2.

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated April 16, 2012. The case was assigned to me, and I issued a prehearing order. CMS has filed a pre-hearing brief/motion for summary judgment (CMS Br.) with six exhibits (CMS Exs. 1-6). Petitioner filed a pre-hearing brief with three exhibits (P. Exs. 1-3).

CMS or its agent may revoke a supplier's Medicare billing privileges and the corresponding supplier agreement if CMS or its agent determines upon on-site review that the supplier is "no longer operational to furnish Medicare covered items or services," has failed to satisfy Medicare enrollment requirements, or has failed to furnish covered items or services as required by statute or regulation. 42 C.F.R. § 424.535(a)(5)(ii). The decision to revoke a supplier's Medicare enrollment is an "initial determination" that is subject to the review procedures set forth in 42 C.F.R. Part 498. 42 C.F.R. § 498.3(a)(1), (b)(17).

Under those procedures, a supplier "dissatisfied with an initial determination or revised initial determination related to the denial or revocation of Medicare billing privileges" may request reconsideration by filing a request for reconsideration within 60 days from receipt of the notice of initial determination, unless CMS or its agent determines there is "good cause" for extending the deadline. 42 C.F.R. §§ 498.5(l)(1), 498.22. A supplier "dissatisfied with a reconsidered determination . . . is entitled to a hearing before an ALJ." 42 C.F.R. § 498.5(l)(2). An ALJ may dismiss a hearing request "for cause" when the requesting party "does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b).

CMS states that NSC's December 13, 2011 letter erroneously informed Petitioner that she did not request reconsideration of the initial determination when, in fact, Petitioner had timely requested reconsideration (CMS Ex. 3 – Petitioner's November 10, 2011 letter to NSC), but NSC failed to act on that request. CMS Br. at 8. Although CMS provides arguments on the merits of NSC's revocation, CMS alternatively suggests that this case could be dismissed without prejudice and remanded to allow NSC to process Petitioner's reconsideration request. Due to jurisdictional concerns that Petitioner is not able to properly proceed at the ALJ appeal level without a reconsideration determination, I agree with CMS's suggestion. *See Better Health Ambulance*, DAB No. 2475 (2012).

Accordingly, I dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 498.70(b) and remand this case to the Medicare contractor pursuant to 42 C.F.R. § 498.78 to make a reconsideration determination. If Petitioner is not satisfied with that determination, she may then exercise her right to request an ALJ hearing in accordance with 42 C.F.R. § 498.40.

/s/
Joseph Grow
Administrative Law Judge