

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Foot Specialists of Northridge,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-3864

Decision No. CR4529

Date: February 9, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, Palmetto GBA National Supplier Clearinghouse (NSC), revoked the enrollment and Medicare billing privileges of Foot Specialists of Northridge (Northridge or Petitioner) as a Medicare supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) because Northridge was not operational at the practice location on file with CMS. Northridge requested a hearing to dispute the revocation, arguing that it was operational at a new address and that Northridge had attempted to timely inform CMS of its change of address through CMS's online Provider Enrollment, Chain, and Ownership System (PECOS), but that both PECOS and an NSC employee indicated that Northridge could not update its address until NSC completed processing Northridge's previously filed revalidation enrollment application.

CMS moves for summary judgment because it is undisputed that Northridge was not operational at the last address Northridge provided to CMS. Northridge opposes summary judgment arguing that PECOS and an NSC employee are to blame for Northridge's inability to timely update its address with CMS. Based on the undisputed facts in this case, I grant CMS's motion for summary judgment.

I. Background

Northridge was enrolled in the Medicare program as a DMEPOS supplier. Drs. Stefan Feldman and Charles Kelman own Northridge. CMS Exhibit (Ex.) 3 at 6; Petitioner (P.) Ex. 2 ¶ 2. Northridge's address was: 9335 Reseda Boulevard, Suite 500, Northridge, California 91324.

On or about December 10, 2014, Northridge received notice that it had to vacate its 9335 Reseda Boulevard location within 30 days. P. Ex. 1 ¶ 3; P. Ex. 3. Northridge ultimately secured an extension of time before it had to leave that address. P. Ex. 2 ¶ 3.

In a January 7, 2015 notice, NSC informed Northridge that it had 60 days to submit a revalidation Medicare enrollment application. P. Ex. 4; *see also* P. Ex. 1 ¶ 4. On January 23, 2015, Northridge filed its revalidation enrollment application through PECOS and, on January 27, 2015, Northridge mailed paper documents to NSC related to its revalidation enrollment application. P. Ex. 1 ¶¶ 5-6; P. Ex. 5; P. Ex. 6. Because Northridge did not yet have new offices, Northridge indicated on the revalidation enrollment application that 9335 Reseda Boulevard was its address. CMS Ex. 1 ¶ 4; P. Ex. 1 ¶¶ 5-6; P. Ex. 5.

Shortly after submitting the revalidation enrollment application and supporting documentation, Northridge found a new location for its offices: 10515 Balboa Boulevard, Suite 140, Granada Hills, California 91344. P. Ex. 1 ¶ 7; P. Ex. 7. On February 3, 2015, Northridge filed an enrollment application (CMS-855I) through PECOS to change Dr. Feldman's practice address with CMS. P. Ex. 1 ¶ 7; P. Ex. 9. CMS approved this application. P. Ex. 7 at 3. At about that time, Northridge also successfully changed its address with the IRS. P. Ex. 1 ¶ 10; P. Ex. 10. However, when Northridge attempted, on or about February 3, 2015, to file an enrollment application (CMS-855S) to change its address with CMS through PECOS, Northridge could not do so because Northridge's revalidation enrollment application was still pending. P. Ex. 1 ¶ 8. A Northridge employee spoke with an NSC employee, who stated that a change of address (CMS-855S) could not be completed while a revalidation enrollment application was pending. P. Ex. 1 ¶ 8; P. Ex. 7 at 1.

On February 19, 2015, the same NSC employee who spoke to the Northridge employee sent a letter to Northridge in which she listed six deficiencies in Northridge's revalidation enrollment application. One of the listed items was the omission of a physical address in the business location portion of the CMS-855S. NSC gave Northridge 30 days to provide the missing information. P. Ex. 1 ¶ 11; P. Ex. 11; P. Ex. 12. Northwood responded that its business location was 9335 Reseda Boulevard. P. Ex. 1 ¶ 11.

On March 1, 2015, Northridge moved to its new offices at 10515 Balboa Boulevard. P. Ex. 2 ¶ 4. Northridge posted notices on the front and rear doors of the Reseda

Boulevard office stating that it moved to the 10515 Balboa Boulevard location. P. Ex. 1 ¶ 12; P. Ex. 8.

On April 14, 2015, an NSC inspector attempted to visit Northridge's offices. NSC informed the inspector that 9335 Reseda Boulevard was Northridge's address on file with CMS. CMS Ex. 1 ¶ 4. Although the inspector found 9335 Reseda Boulevard and a sign with Northridge's name on it, the inspector concluded that Northridge was not operational at that address. CMS Ex. 1 ¶ 5; CMS Ex. 4 at 1. The inspector's report stated the following:

Supplier is not operational at location. Building is under demolition/construction. Per construction worker on site during visit, they started the demolition 2 weeks prior and that tenants of building were no longer at the building when they started demo. He does not know who the tenants were and if they moved.

CMS Ex. 4 at 1. The inspector took photographs of the 9335 Reseda Boulevard location. CMS Ex. 4 at 2.

In a May 20, 2015 initial determination, NSC revoked Northridge's Medicare enrollment and billing privileges. CMS Ex. 5. NSC provided the following reason for its decision:

Recently, a representative of the NSC attempted to conduct a visit of your facility on April 14, 2015; however, the visit was unsuccessful because the facility was found to be in the process of demolition/construction. Because we could not complete an inspection of your facility, we could not verify your compliance with the supplier standards. Based upon a review of the facts, we have determined that your facility is not operational to furnish Medicare covered items and services. Thus, you are considered to be in violation of 42 CFR §§ 424.535(a)(5) and all supplier standards as defined in 42 CFR 424.57(c).

CMS Ex. 5 at 2. NSC made the effective date for revocation retroactive to April 14, 2015, the date of the attempted site visit, and barred Northridge from reenrolling in the Medicare program for two years. CMS Ex. 5 at 1.

In a May 20, 2015 letter, Northridge requested reconsideration of the initial determination. Northridge stated that its office moved on March 1, 2015, and that in February 2015, Northridge had been told that it only needed to inform "Medicare/Noridian" of the change and that they would in turn notify NSC. Northridge

indicated that it had now learned how to change its address with NSC and was submitting, with the reconsideration request, a CMS-855S enrollment application. CMS Ex. 1 ¶ 13; CMS Ex. 6; CMS Ex. 7.

On June 25, 2015, an NSC hearing officer issued a reconsidered determination (CMS Ex. 9) and then an amended reconsidered determination. CMS Ex. 8. After summarizing the initial determination, the reconsideration request, and the facts and law related to this case, the hearing officer concluded:

The fact remains that the site inspector could not access Foot Specialists of Northridge facility to verify compliance with the supplier standards because the facility location on file with the NSC was not operational or accessible to the site inspector.

CMS Ex. 8 at 3.

On August 13, 2015, Northridge requested a hearing before an administrative law judge (ALJ) to dispute the revocation. I issued an Acknowledgement and Pre-hearing Order (Order) on September 3, 2015. In response to my Order, CMS filed a brief and motion for summary judgment, as well as nine exhibits, one of which was the written direct testimony of an NSC employee (CMS Ex. 1). Petitioner, through counsel, filed a brief and opposition to summary judgment (P. Br.), as well as 12 exhibits, two of which were written direct testimony for two witnesses (P. Exs. 1, 2).

CMS and Petitioner requested to cross-examine the witnesses for which written direct testimony had been submitted. Petitioner also requested that I issue subpoenas for the testimony of the NSC employee who spoke on the phone with a Northridge employee regarding the submission of a change of address in PECOS, the NSC site inspector who attempted the April 14, 2015 site visit to 9335 Reseda Boulevard, and an unnamed CMS expert on the PECOS system. Further Petitioner sought a subpoena to compel CMS to produce all documents related to Northridge's efforts to notify NSC of the change in its address. P. Br. 12-14; P. Witness & Ex. List at 3-5.

CMS objected to Petitioner's subpoena requests and to Petitioner Exhibits 5, and 8 through 12, primarily because Petitioner failed to submit these documents with its reconsideration request. CMS Objections to Exs. & Witnesses. Petitioner objected to copies of photographs in CMS Exhibit 4 because they are allegedly blurry. P. Br. at 3.

For reasons indicated below, I grant CMS's motion for summary judgment. Therefore, it is unnecessary for me to rule on the parties' evidentiary objections and Petitioner's subpoena requests.

II. Issues

This case presents two issues:

1. Whether CMS is entitled to summary judgment; and
2. Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges for failing to be operational (42 C.F.R. § 424.535(a)(5)(ii)).

III. Jurisdiction

I have jurisdiction to decide these issues. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis

The Secretary of Health and Human Services (Secretary) has the authority to create regulations that establish enrollment standards for providers and suppliers, and to create supplier requirements for DMEPOS suppliers. 42 U.S.C. §§ 1395m(j)(1)(B)(ii), 1395cc(j). The Secretary promulgated a regulation that requires providers and suppliers to be operational. 42 C.F.R. § 424.535(a)(5)(ii). CMS or its contractors may conduct inspections of a supplier's premises at any time to determine if a supplier is in compliance with Medicare enrollment requirements or the DMEPOS supplier standards. *See* 42 C.F.R. §§ 424.57(c)(8), 424.510(d)(8), 424.515(c), 424.517(a), (a)(8).

1. Summary judgment is appropriate in this case.

When appropriate, an ALJ may decide a case arising under 42 C.F.R. part 498 by summary judgment. *Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F.3d 168, 172 (6th Cir. 2004) (citing *Crestview Parke Care Ctr. v. Thomson*, 373 F.3d 743 (6th Cir. 2004)). "Matters presented to the ALJ for summary judgment will follow Rule 56 of the Federal Rules of Civil Procedure and federal case law" Civil Remedies Division Procedures § 19(a).

As stated by the United States Supreme Court:

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By its very terms, this standard provides that the mere

existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original).

To determine whether there are genuine issues of material fact for an in-person hearing, the ALJ must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted).

There is no genuine dispute of any material fact in this case. It is undisputed that Northridge no longer occupied its former offices at 9335 Reseda Boulevard by March 1, 2015. P. Ex. 1 ¶ 12; P. Ex. 2 ¶ 4. It is undisputed that an NSC inspector attempted to visit the 9335 Reseda Boulevard location on April 14, 2015, but that the location was vacant. CMS Ex. 4; P. Br. at 3. It is also undisputed that in January 2015 Northridge indicated that its business address was 9335 Reseda Boulevard in its Medicare revalidation enrollment application and again in February 2015 in response to a request for additional information related to the revalidation enrollment application. P. Ex. 1 ¶¶ 5, 11. In addition, there is no dispute that Northridge attempted to file a CMS-855S through PECOS to change its address, but was unsuccessful, and that the first time Northridge successfully filed with NSC a CMS-855S to change its address with CMS was on May 20, 2015. P. Br. at 3-4, 6; CMS Ex. 6; CMS Ex. 7; P. Ex. 1 ¶¶ 8, 13; P. Ex. 2 ¶ 5; *see also* CMS Ex. 1 ¶ 6. Therefore, there is no material fact in dispute that, on April 14, 2015, the NSC site inspector went to Northridge's address that was on file with CMS. *See* P. Br. at 3.

I accept as true for purposes of summary judgment that Northridge attempted to submit a CMS-855S on or about February 3, 2015, through PECOS in order to notify CMS of its impending change of address. I also accept as true that PECOS would not accept the change of address because Northridge's revalidation enrollment application was still pending with NSC and that an NSC employee told a Northridge employee that a CMS-855S could not be submitted to change an address while a revalidation application was still being processed. P. Ex. 1 ¶ 8; P. Ex. 7 at 1.

For purposes of summary judgment, I draw all reasonable inferences in favor of Northridge. As explained below, CMS is entitled to judgment as a matter of law and Petitioner's defenses are insufficient to justify reversal of the revocation CMS imposed on Petitioner.

- 2. CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges because Petitioner was not operational at its qualified practice location (9335 Reseda Boulevard) on file with CMS on April 14, 2015, when an NSC inspector attempted to visit that practice location.**

Northridge does not dispute that it indicated its address was 9335 Reseda Boulevard when it filed its Medicare revalidation enrollment application with NSC in January 2015, and again stated that same address to NSC in response to NSC's February 2015 request for additional information concerning its business location. CMS Ex. 1 ¶ 4; P. Ex. 1 ¶¶ 6, 11; P. Ex. 5 at 1. Further, there is no dispute that until May 2015, Northridge did not provide notice to CMS on a CMS-855S form of the change in Northridge's address to 10515 Balboa Boulevard, either electronically through PECOS or with a paper form sent through the mail, although Northridge unsuccessfully attempted to file that form electronically through PECOS in February 2015. CMS Ex. 1 ¶ 6; P. Br. at 4, 6; P. Ex. 1 ¶¶ 8, 13; P. Ex. 2 ¶ 5. Finally, there is no dispute that an NSC inspector attempted a site visit to Northridge's 9335 Reseda Boulevard location on April 14, 2015, and that Northridge was no longer operating from that location on that date. CMS Ex. 1 ¶ 5; CMS Ex. 4; P. Br. at 3; P. Ex. 1 ¶ 12; P. Ex. 2 ¶ 4.

A supplier is "operational" when it:

has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered) to furnish these items or services.

42 C.F.R. § 424.502. CMS may revoke a currently enrolled supplier's Medicare billing privileges in the following circumstance.

Upon on-site review, CMS determines that-

- (i) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii).

Although Northridge asserts that it was operational on April 14, 2015, at its new 10515 Balboa Boulevard location (P. Br. at 3), the regulatory definition of the term “operational” refers to the “qualified physical practice location” of a supplier. 42 C.F.R. § 424.502. This practice location is the address provided by a supplier on an enrollment application. *Cf.* 42 C.F.R. § 424.510(d)(2)(ii). CMS may perform on-site inspections to verify that the enrollment information submitted by a supplier is accurate and to determine compliance with Medicare requirements. 42 C.F.R. § 424.517(a). This means that CMS will inspect the “qualified physical practice location” that has been provided by the supplier and is currently on file with CMS. *See, e.g., JIB Enterprises, LLC, DAB CR3010*, at 9 (2013). Therefore,

when CMS or [its] contractor determines that a provider or supplier is no longer operating at the practice location provided to Medicare on a paper or electronic Medicare enrollment application that the revocation should be effective with the date that CMS or [its] contractor determines that the provider or supplier is no longer operating at the practice location.

73 Fed. Reg. 69,725, 69,865 (Nov. 18, 2008).

In the present matter, NSC’s inspector went to Northridge’s practice location that was on file with CMS on April 14, 2015, and it is undisputed that Northridge was no longer present at that location. Therefore, Northridge was not operational at its “qualified practice location.”¹

3. *The allegedly inaccurate information that an NSC employee provided to Northridge is not legally sufficient to require reversal of the revocation in this case.*

Although Northridge does not dispute that its location at 9335 Reseda Boulevard was vacant on April 14, 2015, when the site inspector attempted a visit, Northridge asserts that it unsuccessfully attempted to report its change of address through PECOS on or about February 3, 2015, and was the victim of an NSC employee who falsely told Northridge that it could not report a change of its address until NSC processed Northridge’s previously filed revalidation enrollment application. Northridge believes that the NSC employee’s conduct is grounds for equitable relief. P. Br. at 10-12.

¹ Because I conclude that Northridge was not operational under 42 C.F.R. § 424.535(a)(5), I do not need to decide whether Northridge violated any of the DMEPOS supplier standards in 42 C.F.R. § 424.57.

DMEPOS suppliers like Northridge “must report to CMS any changes in the information supplied on the [enrollment] application within 30 days of the change.” 42 C.F.R. §§ 424.57(c)(2), 416.516(c). As indicated above, a supplier provides its practice location on the enrollment application. Therefore, Northridge had 30 days from March 1, 2015, to report its change of address to CMS, but did not do so until May 20, 2015.

A Northridge employee testified by declaration that on or about February 3, 2015, she attempted to use PECOS to file a CMS-855S to report the up-coming change in Northridge’s address. However, PECOS indicated that it could not accept the CMS-855S because Northridge’s revalidation enrollment application was still being processed. A Northridge employee spoke with an NSC employee and the NSC employee allegedly said that “while the revalidation was pending, changes to Northridge’s address and filing of Form 855S could not be processed.” P. Ex. 1 ¶ 8. It is this testimony that is the basis for Northridge’s allegation that CMS should be estopped on equitable grounds from revoking Northridge. For purposes of summary judgment, I accept as true that the NSC employee told Northridge that it could not file a CMS-855S form while a reenrollment application was pending.

In its most basic form, “[e]stoppel is an equitable doctrine invoked to avoid injustice in particular cases,” in which:

the party claiming the estoppel must have relied on its adversary’s conduct “in such a manner as to change his position for the worse.” and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary’s conduct was misleading.

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 59 (1984). However, estoppel is not easily applied against the government. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419 (1990) (“From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants.”). The United States Supreme Court, however, has indicated “that some type of ‘affirmative misconduct’ might give rise to estoppel against the Government.” *Id.* at 421. It is under this specific theory that Petitioner seeks relief in this case.

Although I have accepted for purposes of summary judgment that the NSC incorrectly stated that Northridge could not submit a CMS-855S while a revalidation enrollment application was pending, I cannot conclude that the testimony of the Northridge employee on which this supposition is based supports the conclusion that the NSC employee engaged in “affirmative misconduct.” See *US Ultrasound*, DAB No. 2302, at 8 (2010); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009). At worst, I can only reasonably infer that the NSC employee provided incorrect information.

Everyone is charged with knowledge of duly promulgated regulations, and individuals cannot prevail if a government agent provides incorrect information “regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance.” *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947). In the present case, Northridge was under a clear regulatory obligation to report the change in its address within 30 days of the change. 42 C.F.R. §§ 424.57(c)(2); 424.516(c). Regardless of the statements made by the NSC representative, Northridge needed to comply with the regulations. Its failure to comply provides CMS with sufficient legal basis to revoke Northridge.

Related to its estoppel argument, Northridge submitted documents that show that the same NSC employee who allegedly engaged in affirmative misconduct wrote to Northridge on February 19, 2015, and stated that the “[p]hysical address as listed in business location section of CMS 855S” was either “missing or incomplete.” P. Ex. 12 at 1. The NSC employee gave Northridge 30 days to provide the information requested. P. Exs. 11, 12. Northridge asserts that this letter, taken in conjunction with the previous telephone conversation earlier in February, required Northridge to provide the 9335 Reseda Boulevard address in response to this query, even though Northridge would move to the 10515 Balboa Boulevard before the 30-day period to provide its business address to NSC expired. *See* P. Ex. 1 ¶ 11.

Although I must make reasonable inferences in Petitioner’s favor when considering summary judgment, I do not agree that Petitioner’s interpretation of the February 19 letter is reasonable. The letter clearly asked for missing or incomplete information from the revalidation enrollment application and indicates Petitioner’s business address is one of the items that is missing or incomplete. This was an opportunity for Petitioner to timely provide its new address, which Petitioner failed to do.

V. Conclusion

For the reasons stated above, I grant CMS’s motion for summary judgment and affirm CMS’s revocation of Northridge’s Medicare enrollment and billing privileges.

/s/
Scott Anderson
Administrative Law Judge