Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lynwood Medical Imaging,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-708

ALJ Ruling No. 2013-18

Date: August 1, 2013

RULING AND ORDER DISMISSING CASE

On April 17, 2013, Petitioner filed a request for a hearing (RFH) before an Administrative Law Judge (ALJ). Petitioner's one-page RFH states that Petitioner requests "a hearing in front of an ALJ on our case, since we highly disagree with the decision that was made on our reconsideration appeal. Attached please find a copy of C2C Solutions decision." Petitioner did not include this decision with its RFH; however, Petitioner subsequently faxed a dismissal dated April 4, 2013 issued by C2C Solutions, Inc., a Medicare Part B Qualified Independent Contractor (QIC), to the Civil Remedies Division. Shortly thereafter, Petitioner faxed a letter dated January 4, 2013, from Palmetto GBA regarding a Medicare overpayment appeal.

Based on Petitioner's RFH and subsequent filings, counsel for the Centers for Medicare & Medicaid Services (CMS) inquired as to whether the Civil Remedies Division had jurisdiction over what appeared to be an appeal regarding a Medicare overpayment.[1]

[1] The Director of the Civil Remedies Division forwarded Petitioner's RFH to the Office of Medicare Hearings and Appeals (OMHA), which reviews overpayment appeals. Generally, appeals regarding Medicare claims for coverage and payment as well as overpayment are guided by the appeal provisions at 42 C.F.R. Part 405, Subpart I, whereas appeals regarding revocation of enrollment in the Medicare program are guided

However, Petitioner stated it also wished to appeal the revocation of its Medicare billing privileges. Thus, the case was docketed and I permitted CMS the opportunity to file a motion to dismiss explaining CMS's position and for Petitioner to respond.

On May 23, 2013, CMS moved for dismissal pursuant to 42 C.F.R. § 498.70(b) and argued that Petitioner failed to submit a request for ALJ hearing that meets regulatory requirements and that this tribunal lacks jurisdiction to consider the subject matter of Petitioner's request. CMS argued that neither the statute nor the regulations authorize me to review the QIC dismissal dated April 4, 2013, as the Civil Remedies Division is limited to reviewing initial determinations under 42 C.F.R. Part 498. CMS contends that the QIC dismissal is not an initial determination under Part 498 and jurisdiction is lacking.

Petitioner filed a response and essentially contends that its enrollment in the Medicare program was revoked and therefore I have jurisdiction to hear the appeal. Petitioner's owner appears to argue that the medical imaging company applied for "recertification in the Medicare program" in January of 2012 and this process lasted until April of 2013. Petitioner asserts that around December of 2012, it learned that Petitioner's enrollment as a supplier in the Medicare program was revoked when it received a letter from Medicare about an overpayment. After receiving the December 2012 letter, Petitioner reports that it submitted a rebuttal and "reconsideration statement" to CMS. Petitioner also asserts that from January to April 2013, it submitted many letters to CMS. Then, on April 4, 2013, Petitioner received the QIC dismissal indicating that a revoked supplier number (PTAN/NPI) was not appealable. Petitioner believes it has a right to a hearing on a determination regarding its status as a supplier and believes the CMS motion to dismiss should be denied and its appeal go forward to a decision on the merits.

The process for appealing the revocation of a supplier's Medicare enrollment differs from the process for appealing a Medicare overpayment. Petitioner is correct in asserting that there is a right to a hearing on a revocation of Medicare enrollment, provided certain requirements are met. Although the QIC stated that a revoked supplier number was not an appealable action, it should be clarified that it is not an appealable action within that appeal process. The QIC is part of the appeal process governed by the regulations at 42 C.F.R. Part 405, of which I do not have jurisdiction to review.

In order to appeal a determination by CMS to revoke a supplier's Medicare enrollment, the supplier must first receive a notice of initial revocation determination. 42 C.F.R. § 498.20(a). Under the review procedures in Part 498, a supplier "dissatisfied with an initial determination or revised initial determination related to the . . . revocation of Medicare billing privileges may request reconsideration in accordance with § 498.22(a)."

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the provisions of 42 C.F.R. Part 498. These are separate and distinct appeal procedures and they are governed by the regulations applicable to the specific type of appeal.

42 C.F.R. § 498.5(l)(1). CMS or one of its contractors "reconsiders an initial determination that affects a prospective provider or supplier . . . if the affected party files a written request in accordance with paragraphs (b) and (c) of this section." 42 C.F.R. § 498.22(a). CMS then makes a reconsidered determination pursuant to 42 C.F.R. § 498.24. A supplier dissatisfied with a reconsidered determination may request a hearing before an ALJ. 42 C.F.R. § 498.5(l)(2).

Petitioner has provided me with neither a notice of an initial revocation determination by CMS nor a reconsidered determination of an initial determination to revoke. Section 1866(h)(1) of the Social Security Act (Act) provides: "[a]n institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services or with a determination described in subsection (b)(2) shall be entitled to a hearing thereon." The implementing regulations further specify that review is limited to "initial determinations" under Part 498 and individuals and entities may appeal only initial determinations. *See Better Health Ambulance*, DAB No. 2475 (2012); *Hiva Vakil, M.D.*, DAB No. 2460 (2012); *High Tech Home Health, Inc.*, DAB CR1583 (2007); *Mira Vista Care Center, Inc.*, DAB No. 1789 (2001); *Comprehensive Mental Health Center of Baton Rouge, et al.*, DAB No. 1774 (2001). A list of initial CMS determinations is set forth at 42 C.F.R. § 498.3(b).

The QIC dismissal Petitioner requests that I review is not an "initial determination" included in the exhaustive list at 42 C.F.R. § 498.3(b). The list of reviewable initial determinations includes a determination by CMS "to deny or revoke a provider or supplier's Medicare enrollment in accordance with 42 C.F.R. § 424.530 or 42 C.F.R. § 424.535." 42 C.F.R. § 498.3(b)(17). However, the April 4, 2013 QIC dismissal is not a reconsidered determination on CMS's decision to revoke Petitioner's Medicare enrollment, but rather states the finding by the QIC that Petitioner's request for reconsideration is not appealable pursuant to 42 C.F.R. § 405.926.[2] As the Departmental Appeals Board (Board) has explained, under the regulations "only reconsidered determinations related to the denial or revocation of billing privileges are eligible for ALJ review." *Denise A. Hardy, D.P.M.*, DAB No. 2464, at 4 (2012); *cf. Hiva Vakil, M.D.*, DAB No. 2460, at 5 (noting that "the regulations plainly require that CMS or one of its contractors issue a 'reconsidered determination' before the affected party is entitled to request a hearing before an ALJ"). The record in this matter does not indicate that Petitioner ever received a reconsidered determination regarding a decision by CMS to

[2] A QIC's dismissal is not reviewable by this tribunal. As CMS noted, a QIC's dismissal or decision may be reviewable elsewhere. The regulations at 42 C.F.R. Part 405, Subpart I, 42 C.F.R. § 405.900 *et seq*., establish a structure for providers and suppliers to challenge adverse claims determinations, including the dismissal by a QIC of a request for reconsideration. CMS asserts that a party to a QIC dismissal has a right to have the dismissal reviewed by an OMHA ALJ, provided certain filing requirements are met. 42 C.F.R. § 405.1004.

revoke its Medicare enrollment and therefore I do not have jurisdiction to hear this matter. *Better Health Ambulance*, DAB No. 2475.

Petitioner also makes a number of arguments that essentially amount to claims of equitable estoppel. It is established by federal case law, and in Board precedent, that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. It is well settled that those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009); *U.S. Ultrasound*, DAB No. 2302, at 8 (2010). Therefore, Petitioner's equitable estoppel arguments must be rejected.

An ALJ may dismiss a hearing request when the party requesting the hearing is either not a proper party or "does not otherwise have a right to a hearing." 42 C.F.R. § 498.70(b). For the reasons explained above, I conclude that this matter should be, and it is, DISMISSED.

/s/
Richard J. Smith
Administrative Law Judge