

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Nova Home Care Agency, Inc.
(NPI: 1477793867),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-3680

Decision No. CR4518

Date: February 2, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS) revoked the Medicare enrollment and billing privileges of Nova Home Care Agency, Inc. (Nova or Petitioner) because Nova failed to report that its Administrator was an officer of another Medicare provider that CMS had revoked. Because applicable regulations only require Nova to report this information when next surveyed, I reverse CMS's revocation of Nova.

I. Background

Nova was enrolled in the Medicare program as a home health agency. *See* CMS Exhibit (Ex.) 7 at 5. In a March 26, 2015 initial determination, a CMS administrative contractor revoked Nova's Medicare billing privileges effective April 5, 2015, and barred Nova from reenrollment for one year. CMS Ex. 1. The initial determination stated:

42 CFR §424.535(a)(1) Noncompliance

With its authorized official's signature on the Medicare enrollment 855A application, Nova Home Care Agency, Inc.

agreed to abide by Medicare laws, rules, and program instructions.

Nova Home Care Agency's Medicare enrollment record reflects Tamara Rodriguez as CEO and authorized Official. Tamara Rodriguez is also listed as Owner, Authorized Official, W-2 Managing employee, and Director for Maju's Home Health Care, Inc. Maju's Home Health Care Agency, Inc. was revoked from Medicare by CMS on July 19, 2013. Nova Home Care Agency, Inc. failed to report final adverse legal action on the 855A enrollment application within 90 days as required in 42 CFR 424.516, regarding CEO/Authorized Official Tamara Rodriguez.

CMS Ex. 1 at 1.

On May 20, 2015, Nova, through counsel, requested reconsideration of the revocation. CMS Ex. 3. Nova asserted that Ms. Rodriguez did not have a provider number revoked in her personal capacity; therefore, Nova did not have an obligation to report the revocation of Maju's Home Health Care, Inc. (Maju). CMS Ex. 3 at 2.

On June 12, 2015, CMS issued a reconsidered determination upholding the revocation. CMS Ex. 4. CMS stated in response to Nova's arguments that the enrollment application for providers (CMS-855A) requires disclosure of final adverse legal actions against Nova's managers, such as Ms. Rodriguez, including sanctions imposed on Ms. Rodriguez' "business identity." CMS Ex. 4 at 2. CMS also quoted 42 C.F.R. § 420.206(a)(3), which requires a provider to disclose an administrative sanction imposed on another entity that is owned in part by a manager of the provider. CMS Ex. 4 at 2.

Nova timely filed a request for hearing. In response to my Acknowledgement and Pre-hearing Order (Order), CMS filed a brief and motion for summary judgment (CMS Br.), as well as 12 exhibits (CMS Exs. 1-12). Nova submitted a brief and opposition to summary judgment (P. Br.), as well as five exhibits (P. Exs. A-E).

II. Decision on the Record

I admit all of the proposed exhibits into the record because neither party objected to any of them. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e).

I issue this decision based on the written record because CMS did not submit written direct testimony for any witnesses and did not request to cross-examine the witness for

whom Petitioner filed written direct testimony (P. Ex. D). Order ¶¶ 8-11; CRDP §§ 16(b), (d), 19(b).

III. Issue

Whether CMS had a legitimate basis to revoke Nova's Medicare enrollment and billing privileges because Nova did not report to CMS that another provider with whom Nova's Administrator had an ownership interest was revoked by CMS.

IV. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 405.803(a), 424.545(a)(1), 498.3(b)(17), 498.5(1)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

V. Findings of Fact

1. Nova was enrolled in the Medicare program as a home health agency. *See* CMS Ex. 7 at 5.
2. Tamara Rodriguez became Nova's Administrator on January 25, 2013. CMS Ex. 7 at 19.
3. Tamara Rodriguez did not have an ownership interest in Nova. P. Ex. D ¶ 2.
4. Maju was enrolled in the Medicare program as a home health agency. *See* CMS Ex. 8; CMS Ex. 11 at 8.
5. Tamara Rodriguez became an officer of Maju on March 28, 2013, and, by no later than January 31, 2014, was president of Maju. CMS Ex. 3 at 2; CMS Ex. 11 at 12.
6. Maju was organized as a corporation and was "a separate and independent legal entity" from Tamara Rodriguez. CMS Ex. 11 at 9; P. Ex. D ¶ 3.
7. Effective July 19, 2013, CMS revoked the Medicare enrollment and billing privileges of Maju because Maju filed claims for reimbursement for home health services without a valid physician's certification. CMS Ex. 8 at 1.
8. Maju requested a hearing before an administrative law judge; however, in December 2013, an administrative law judge dismissed the case at Maju's request. CMS Exs. 9-10.
9. Nova did not report to CMS that Maju had been revoked. *See* CMS Ex. 3 at 2.

10. On May 18, 2015, Tamara Rodriguez resigned from her position at Nova. CMS Ex. 5 at 2, 7.

VI. Conclusions of Law and Analysis¹

A home health agency is considered a “provider of services” in the Medicare program. 42 U.S.C. § 1395u; *see also* 42 C.F.R. § 400.202 (definition of *Provider*). The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers. 42 U.S.C. §§ 1302, 1395cc(j). Under the Secretary’s regulations, a provider or supplier that seeks billing privileges under the Medicare program must “submit enrollment information on the applicable enrollment application. 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). Providers and suppliers must report changes in their enrollment information to CMS. 42 C.F.R. § 424.516. CMS may revoke a provider or supplier’s Medicare enrollment or billing privileges for a variety of reasons. 42 C.F.R. § 424.535. One basis for revocation is a provider or supplier’s failure to be in compliance with enrollment requirements described in the regulations or the appropriate enrollment application. 42 C.F.R. § 424.535(a)(1).

- 1. CMS did not legitimately revoke Nova based on an alleged failure to comply with enrollment requirements under 42 C.F.R. § 424.535(a)(1) because Nova was not obligated to report Maju’s revocation under 42 C.F.R. § 424.516(e) or the requirements stated in the enrollment application for providers (CMS-855A).***

CMS revoked Nova based on 42 C.F.R. § 424.535(a)(1), which permits revocation if a provider is not in compliance with the enrollment requirements stated in the regulations or the applicable enrollment application. In its reconsidered determination, CMS primarily relied on the provisions of the provider enrollment application (CMS-855A) to conclude that Nova had a duty to report Maju’s revocation to CMS because Maju was the “business identity” of Tamara Rodriguez, Nova’s Administrator, based on Ms. Rodriguez’ ownership of Maju. *See* CMS Ex. 2 at 39. That determination stated:

However, section 6B of Form CMS 855-A states, “has the individual in Section 6A [i.e., individuals with an ownership interest or managing control], under any current or former name or business identity, ever had a final adverse legal action listed on page 16 of this application imposed against him/her?” Page 16 list “revocation” as a final adverse legal

¹ My numbered conclusions of law appear in bold and italics.

action and Ms. Rodriguez, as an owner, is part of the business identity of Maju’s Home Health Care.

CMS Ex. 4 at 2 (emphasis added). In this proceeding, CMS points out that the provider enrollment application certification statement states that a provider agrees to report any future changes to the information contained in the application within the time frames indicated in 42 C.F.R. § 424.516(e). CMS Br. at 2, 6; CMS Ex. 2 at 49.

Nova asserts in opposition that Ms. Rodriguez was not sanctioned in her individual capacity when CMS revoked Maju. P. Br. at 4. Ms. Rodriguez testified that:

Maju’s Home Health Care, Inc. . . . wasn’t my alter ego. It [was] a separate and independent legal entity and it observed standard corporate formalities. For instance, it established and maintained its own books and records; I didn’t commingle my personal and [Maju’s] business accounts; and I did not pay my personal expenses directly from [Maju’s] bank account.

P. Ex. D ¶ 3. Nova argues that the CMS-855A does not define what a “business identity” is, but that it could not be applicable in this case because Maju “was a corporation owned by several persons, which observed appropriate corporate formalities, and thus is the ‘business identity’ of none of them specifically.” P. Br. at 5. Nova also observes that if CMS contends that Maju was Ms. Rodriguez’ “alter ego,” CMS provided no evidence to support that contention. P. Br. at 6.

I conclude that a revocation of a provider’s Medicare enrollment and billings privileges is a final adverse action that a provider must report to CMS within 90 days. 42 C.F.R. § 424.502 (definition of *Final adverse action*); 424.516(e)(2); *see also* CMS Ex. 2 at 17, 49. However, I conclude that Nova was not required to report Maju’s revocation based on the requirements in the enrollment application because Maju was not Ms. Rodriguez’ “business identity.” I agree with Petitioner’s argument, summarized above, that the term “business identity,” left undefined in the enrollment regulations and the enrollment application, is too ambiguous for me to conclude that Maju was Ms. Rodriguez’ “business identity.”

I accept Ms. Rodriguez’ uncontroverted testimony that Maju was a separate and distinct legal entity from herself. Because Maju was not Ms. Rodriguez’ “business identity,” Nova was not required to report Maju’s revocation under the requirements in the enrollment application or 42 C.F.R. § 424.516(e), and consequently, did not fail to comply with enrollment requirements under 42 C.F.R. § 424.535(a)(1).

- 2. CMS did not legitimately revoke Nova based on an alleged failure to comply with the disclosure provisions in 42 C.F.R. § 420.206 because Nova was only obligated to disclose Maju's revocation when CMS next surveyed Nova, following Maju's revocation, and there is no evidence of record that CMS surveyed Nova after Maju's revocation.**

In the reconsidered determination, CMS quoted 42 C.F.R. § 420.206(a)(3) to support its contention that Nova had the duty to report Maju's revocation to CMS. The reconsidered determination then stated:

Here, Ms. Rodriguez is a managing employee and authorized official for NOVA and has had, in the previous three years, an ownership interest in an entity that has had an administrative sanction related to participation in Medicare (i.e., she was an owner of Maju's Home Health which was revoked July 2013).

CMS Ex. 4 at 2.

In these proceedings, CMS argues that section 420.206(a)(3) created a duty for Nova to disclose the revocation of Maju and that Nova's failure to disclose that information violated 42 C.F.R. § 424.535(a)(1) because Nova did not comply with all applicable Medicare regulations. CMS Br. at 6. Nova responded that section 420.206(b) provides triggering events for disclosure and that CMS did not make any showing that a triggering event actually occurred in Nova's case. P. Br. at 7-8.

I agree with CMS that section 420.206(a)(3) generally required Nova to disclose Maju's revocation to CMS. However, I agree with Nova that there was no trigger event to require disclosure to CMS yet.

The Act establishes the general requirement that providers must disclose information related to their ownership. 42 U.S.C. § 1320a-3. In so doing, it authorized the Secretary to promulgate regulations to effectuate that requirement and permitted the Secretary to make the disclosure requirements a condition of participation. *Id* § 1320a-3(a)(1)(A). The Secretary promulgated the necessary regulations in 42 C.F.R. §§ 420.206 and 484.12, which established the information disclosure requirement as a condition of home health agency participation. Consistent with this approach, the Secretary authorized the termination of the Medicare provider agreement for any home health agency that failed to comply with section 420.206. 42 C.F.R. §§ 420.206(c)(2) (authorizing termination for providers and revocation for Medicare part B suppliers), 489.53(a)(8); *see also Horizon Health Care, Inc.*, DAB CR1689, at 12 (2007).

CMS cited section 420.206 in the reconsidered determination even though it is a condition of participation and not an enrollment requirement. CMS Ex. 4 at 2. However, there is nothing in the record to indicate that CMS intended to terminate Nova's provider agreement based on a violation of section 420.206. Rather, it appears that CMS is attempting to use the disclosure requirements in section 420.206(a)(3) as a predicate violation justifying revocation under section 424.535(a)(1). If this is CMS's intent, I do not believe that the conditions of participation in section 420.206 may be grafted onto the enrollment requirements for providers and suppliers in 42 C.F.R. part 424, subpart P. However, even if section 420.206 could be viewed as an enrollment requirement, Nova did not violate section 420.206.

Section 420.206 requires a provider to disclose the following information:

The name of any other disclosing entity in which any person with an ownership or control interest, or who is a managing employee in the reporting disclosing entity, has, or has had in the previous three-year period, an ownership or control interest or position as managing employee, and the nature of the relationship with the other disclosing entity. If any of these other disclosing entities has been convicted of a criminal offense or received a civil monetary or other administrative sanction related to participation in Medicare, Medicaid, title V (Maternal and Child Health) or title XX (Social Services) programs, such as penalties assessments and exclusions under sections 1128, 1128A or 1128B of the Act, the disclosing entity must also provide that information.

42 C.F.R. § 420.206(a)(3). This provision applies to Nova. Under the definitions in 42 C.F.R. § 420.201, Nova was a "disclosing entity" and Maju was an "other disclosing entity." It is undisputed that Ms. Rodriguez was a managing employee for Nova and, in the previous three years, was a partial owner of Maju, a provider that was revoked from participation in the Medicare program. Therefore, Nova was required to disclose Maju's revocation "in the manner specified in paragraph (b) of [section 420.206]." 42 C.F.R. § 420.206(a).

Section 420.206(b) establishes the "*Time and manner of disclosure.*" Nova, as a home health agency, is a provider that is subject to periodic survey and certification at least every 36 months. 42 C.F.R. §§ 488.710, 488.730, 488.740. Therefore, the following provision governs Nova's disclosure of Maju's revocation:

Any disclosing entity that is subject to periodic survey and certification of its compliance with Medicare standards **must supply the information specified in paragraph (a) of this**

section to the State survey agency at the time it is surveyed. The survey agency will promptly furnish the information to the Secretary.

42 C.F.R. § 420.206(b)(1) (emphasis added).

The record in this case does not indicate when Nova was last surveyed. However, neither in the reconsidered determination nor in CMS's brief does CMS assert that Nova was surveyed between June 19, 2013 (the date of Maju's revocation notice) and March 26, 2015 (the date of Nova's revocation notice). *See* CMS Exs. 1, 8. Therefore, in the absence of evidence to the contrary, I conclude that Nova was not under an obligation to disclose Maju's revocation until Nova was surveyed, and that a survey had not occurred by the time CMS revoked Nova.

VII. Conclusion

For the reasons stated above, I reverse CMS's revocation of Nova's Medicare enrollment and billing privileges.

/s/
Scott Anderson
Administrative Law Judge