Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

BioniCare Medical Technologies, Inc.
Docket No. A-10-67
Decision No. 2338
September 30, 2010

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

BioniCare Medical Technologies, Inc. (Petitioner) appeals the April 14, 2010 decision of Administrative Law Judge Carolyn Cozad Hughes (ALJ). In that decision, the ALJ sustained a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare enrollment. *BioniCare Medical Technologies, Inc.*, DAB CR2113 (2010) (ALJ Decision). We affirm the ALJ Decision for the reasons discussed below.

Background

The material facts of this case are undisputed.

In 2004, Petitioner enrolled in the Medicare program as a supplier of durable medical equipment (DME). Request for Review (RR) at 4, 8.

On July 26, 2007, Petitioner filed a petition for bankruptcy under chapter 7 of the Bankruptcy Code and ceased supplying DME on that date.[1] RR at 6-8.

Since July 26, 2007, Petitioner's principal business has been to secure and liquidate the bankruptcy estate's assets. *See* P. Exs. 1, 4, 5; RR at 7. These assets allegedly include Medicare payment claims for DME that Petitioner provided to Medicare beneficiaries prior to the bankruptcy filing. P. Ex. 1, ¶ 2.

On May 4, 2009, Palmetto GBA, a CMS contractor, revoked Petitioner's Medicare enrollment and billing privileges effective March 17, 2009 based on site visits during January and March 2009. P. Ex. 7, ¶ 5; CMS Exs. 1, 3. The contractor issued the

[1] This appeal is being pursued by BioniCare's court-appointed bankruptcy trustee.

revocation determination pursuant to 42 C.F.R. § 424.535(a)(5), which authorizes CMS to revoke the enrollment and billing privileges of a supplier that is "no longer operational to furnish Medicare items and services." CMS's Br. in Support of the Revocation (Jan. 6, 2010) at 1-2.

Petitioner challenged the revocation by first filing a request for reconsideration, which was denied by a contractor hearing officer. Petitioner then requested an ALJ hearing. In support of its hearing request, Petitioner chiefly contended that CMS was unlawfully relying on the revocation to justify the denial of Medicare payment claims for items that Petitioner supplied to Medicare beneficiaries prior to the revocation's effective date. Petitioner also contended that the revocation was void because it violated the automatic stay arising from its bankruptcy filing.

The ALJ held that CMS had lawfully revoked Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5) because Petitioner was not, in fact, operating as a DME supplier on March 17, 2009 (the revocation's effective date). ALJ Decision at 2. In addition, the ALJ dismissed (pursuant to 42 C.F.R. § 498.70) the part of the hearing request that she construed as seeking a judgment about whether CMS was improperly denying Petitioner's pre-revocation claims for Medicare payment, finding that she lacked jurisdiction to address that issue. *Id.* at 1, 3. Finally, the ALJ rejected Petitioner's contention that the May 4, 2009 revocation determination violated the automatic stay. *Id.* at 3.

Discussion

In this appeal, Petitioner challenges the ALJ's conclusion that CMS lawfully revoked its Medicare enrollment, although, as we discuss below, Petitioner does not question the reasoning advanced by the ALJ to support that conclusion. RR at 2. Petitioner also contends that the ALJ erred in refusing to rule on the merits of its contention that CMS was improperly using the revocation to justify the denial of Medicare payment claims. RR at 2, 9, 16-17. Finally, Petitioner contends, as it did before the ALJ, that the revocation violated the automatic stay that arose from its 2007 bankruptcy filing and is therefore void. RR at 1-2, 13-16. According to Petitioner, the revocation is an action that CMS is using to exercise control over assets of the bankruptcy estate and is therefore covered by the automatic stay. RR at 14.

Based on these contentions, Petitioner requests that the Board: (1) "rescind[ ] the revocation . . . and cessation of Medicare payments because the revocation/cessation violates the Bankruptcy Code"; (2) "declar[e] that the revocation, if effective, does not, by itself, authorize CMS to refuse to pay BioniCare for the claims it has submitted to Medicare because all of these claims were submitted before the revocation went into effect on March 17, 2009"; and (3) authorize subpoenas for "testimony and documents" that are relevant to its concerns about the allegedly improper denial of Medicare payment

claims and "hold the record for this appeal open to allow [the bankruptcy trustee] time to review such testimony and/or documents and to respond." RR at 2, 18.

We conclude that there is no basis to reverse the ALJ Decision or to grant the other relief requested by Petitioner.[2] Section 424.535(a)(5) authorizes CMS to revoke the Medicare enrollment of a supplier that is found to be "no longer operational to furnish Medicare covered items or services." CMS issued the challenged revocation determination pursuant to that regulation. As the ALJ found and Petitioner admits, Petitioner ceased supplying DME to Medicare beneficiaries in 2007 and has never resumed that activity or claimed to have been "operational" as a DME supplier on or after March 17, 2009, the effective date of the revocation. *See* RR at 6-8. Therefore, CMS had sufficient grounds under section 424.535(a)(5) to revoke Petitioner's Medicare enrollment and billing privileges effective March 17, 2009.

Petitioner nonetheless urges us to overturn the revocation because "[t]here is no factual basis to support the revocation to the extent that CMS has constructively implemented an effective date prior to March 17, 2009." RR at 11. We do not construe the above-quoted passage as challenging the effective date of the revocation, which was March 17, 2009. Petitioner does not contend that the effective date chosen by the contractor is unsupported by the facts or inconsistent with the regulation that governs how the effective date of a revocation is set. What Petitioner apparently means by the quoted passage is that CMS has allegedly relied improperly on the revocation to justify the denial of Medicare payment claims for services furnished to program beneficiaries prior to the revocation's effective date. RR at 17-18. However, even if that allegation were true (and we make no finding that it is), it would not be a proper basis on which to overturn the revocation.

To the extent that Petitioner is seeking to have the Board adjudicate the merits of its Medicare payment claims, the ALJ correctly indicated that Petitioner's recourse for any improper denial of those claims is to appeal the denial through the Medicare claims appeals process established by section 1869(b) of the Social Security Act (Act), 42 U.S.C. § 1395ff(b). In that process, Medicare beneficiaries, and in some cases providers and suppliers, may appeal the denials of individual claims for Medicare coverage or benefits through Medicare contractors and then to administrative law judges of the Office of Medicare Hearings and Appeals and to the Medicare Appeals Council. *See* 42 C.F.R. Part 405, Subparts G, H, I; 74 Fed. Reg. 65,295 (Dec. 9, 2009); *see also* 42 C.F.R. § 405.874 (explaining the effect of a revocation on Medicare claims processing). Denials of individual Medicare payment claims are not among the initial determinations in Part 498 that the Board or its administrative law judges are authorized to review.

[2] As the summary of Petitioner's appeal reveals, Petitioner does not dispute any factual findings by the ALJ, only certain of her legal conclusions. We review disputed conclusions of law de novo. *Victor Alvarez, M.D.*, DAB No. 2325, at 1 (2010).

Petitioner does not explain why the Medicare claims appeals process could not provide meaningful relief from any alleged improper reliance by CMS or its contractors on the May 4, 2009 revocation determination. Instead, Petitioner suggests that 42 C.F.R. § 498.20 brings the issues concerning its Medicare payment claims within the scope of the Board's review. RR at 4.

Petitioner has misconstrued section 498.20. That regulation has two purposes: first, it establishes conditions that CMS must meet in notifying an affected party about an adverse determination; second, it specifies the circumstances in which an initial determination by CMS will not have "binding" effect. Concerning the first purpose, section 498.20(a)(1) states that "CMS . . . mails notice of an initial determination to the affected party, setting forth the basis for reasons for the determination, the *effect of the determination*, and the party's right to reconsideration, if applicable, or to a hearing" (italics added). Relying on the italicized words, Petitioner contends that section 498.20 authorized the ALJ to rule on its contention that CMS has unlawfully denied its Medicare payment claims because that action constitutes a consequence or "effect" of the revocation determination. RR at 4, 12. In their context, however, the words "effect of the determination" do not serve to identify issues that may be appealed to an administrative law judge under Part 498 or authorize an administrative law judge to review or nullify the collateral consequences of an appealable determination. Section 498.20(a)(1) is merely a *notice* provision which requires CMS to inform an affected supplier in writing about the legal effect and possible consequences of an adverse initial determination under the applicable statute and regulations.[3]

For the foregoing reasons, we affirm the ALJ's conclusion that CMS lawfully revoked Petitioner's enrollment and billing privileges pursuant to section 424.535(a)(5). We further hold that the ALJ committed no error in refusing to rule on the merits of Petitioner's contention that CMS is improperly using the May 4, 2009 revocation determination to justify the denial of – or refusal to pay – pre-revocation Medicare claims. Because the legality of CMS's payment denials is an issue beyond the scope of an appeal under the Part 498 procedures, we also deny Petitioner's request for authorization to issue subpoenas for testimony and documents relevant to that issue.

Finally, we affirm the ALJ's holding that the revocation determination did not violate the automatic stay arising from Petitioner's bankruptcy, but for a different reason than the ALJ gave. Under section 362(a) of the Bankruptcy Code, the filing of a petition for bankruptcy operates as a stay of actions or proceedings against the debtor or the property of the debtor. 11 U.S.C. § 362(a). The categories of actions covered by the stay are described in section 362(a). The automatic stay's scope, as defined in section 362(a), is subject to certain exceptions set out in section 362(b)(1)-(28). The ALJ concluded that the revocation determination issued to Petitioner is not subject to the automatic stay

[3] Petitioner does not contend that the May 4, 2009 notice of revocation inaccurately described the legal effect of the initial determination or otherwise failed to comply with section 498.20(a).

under section 362(b)(28), which exempts from the stay an "exclusion by the Secretary of Health and Human Services of the debtor from participation in the [M]edicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act)." ALJ Decision at 3.

Although Petitioner indicates that it challenges the ALJ's holding that the automatic stay is inapplicable, the request for review does not mention section 362(b)(28) – the automatic-stay exception that the ALJ found applicable – or advance any legal argument for why section 328(b)(28) does not apply.[4] Furthermore, it was unnecessary for the ALJ to invoke any of the exceptions in section 362(b) because Petitioner never made or attempted to make a threshold showing that the revocation in itself fell within the scope of the automatic stay as described in section 362(a). Moreover, the issue of the stay's applicability is more properly resolved by the Bankruptcy Court. For all of these reasons, we do not need to decide whether the ALJ correctly determined that CMS's May 4, 2009 revocation determination is exempt from the automatic stay under section 362(b)(28).

Conclusion

For the reasons stated above, we affirm the ALJ Decision to sustain the revocation of Petitioner's Medicare enrollment effective March 17, 2009.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Stephen G. Godek
Presiding Board Member

[4] Instead of focusing on section 362(b)(28), Petitioner challenges the ALJ's finding that the revocation determination did not afford CMS some "pecuniary advantage" concerning bankruptcy estate assets. *See* ALJ Decision at 3; RR at 13-16. However, the "pecuniary advantage" issue is irrelevant to the issue of section 362(b)(28)'s applicability. The pecuniary advantage issue relates instead to the exemption in section 362(b)(4). *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1108-09 (9th Cir. 2005); *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 385 (6th Cir. 2001).