Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jason R. Bailey, M.D., P.A.,
(NPI: 1699054270),
(PTAN: TXB138718),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-911

Decision No. CR4793

Date: February 17, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare Administrative Contractor, Novitas Solutions (Novitas), revoked the Medicare enrollment and billing privileges of Jason R. Bailey, M.D., P.A. (Petitioner or Dr. Bailey). Novitas cited two grounds for revocation: 1) Dr. Bailey did not have an operational medical practice at the location reported on his enrollment application; and 2) Dr. Bailey failed to report a change in his practice location to Novitas within 30 days of the change. As explained more fully below, CMS properly concluded that Dr. Bailey was not operational at his reported practice location because that location was a mailbox unit at a United Parcel Service (UPS) Store. CMS also properly concluded that Dr. Bailey failed timely to report a change in his practice location. I therefore affirm CMS's revocation of Dr. Bailey's Medicare enrollment and billing privileges.

I. Background

Petitioner is a medical doctor specializing in plastic and reconstructive surgery. He maintains privileges at 13 hospitals in Texas and is certified by the American Board of Plastic Surgery. Petitioner's Exhibit (P. Ex.) 6.

On August 25, 2011, Petitioner entered into a Billing Services Agreement with First Call Business Solutions to perform billing services for his practice. P. Ex. 4. The company prepared a Medicare enrollment application for Petitioner using Form CMS-885I. P. Ex. 16.[1] The application requested to change Petitioner's billing information. P. Ex. 16 at 14. The application also requested to change Petitioner's correspondence address, special payments address, *and* practice location to 21175 Tomball Parkway, Suite 173, Houston, Texas 77070-1655 (Tomball Parkway). P. Ex. 16 at 2, 9, 11. Petitioner signed the certification statement of the application on January 17, 2012. P. Ex. 16 at 19. In 2011 and 2012, the address of Petitioner's office practice was 3100 Timmons Lane, Suite 445, Houston, Texas 77027 (Timmons Lane). P. Ex. 13 at 1-2; *see also* P. Ex. 3 at 1.

In or around October 2014, Petitioner signed a lease for medical office space at 12121 Richmond Avenue, Suite 104, Houston, Texas 77082 (Richmond Avenue). P. Ex. 11 at 75-101. In or around November 2014, Petitioner moved his practice from Timmons Lane to Richmond Avenue. P. Ex. 13 at 2. On or about November 18, 2014, MedEnEx, LLC (MedEnEx), a credentialing entity employed by Petitioner, submitted a Form CMS-855I on Petitioner's behalf to update his enrollment information by changing his correspondence address and special payments address. P. Ex. 13 at 3; P. Ex. 18 at 3, 4, 18. The November 2014 update did not request a change in Petitioner's practice location. P. Ex. 18 at 16.

On November 6, 2015, Petitioner's office staff updated his practice location information in the National Plan and Provider Enumeration System (NPPES) database to reflect the Richmond Avenue address. P. Ex. 13 at 3. Petitioner received letters from the NPPES contractor, dated November 6, 2015, confirming the change. P. Exs. 9, 10.

On January 11, 2016, a CMS contractor sent an inspector to conduct an on-site verification at Tomball Parkway, the address listed for Petitioner's practice location in Petitioner's enrollment application on file with CMS. P. Ex. 16 at 9; CMS Ex. 2. The inspector reported that the practice location was not open for business; no employees/staff were present; there were no signs of customer activity; and the facility was not operational. The investigator found that the listed practice location was a UPS store that provided commercial mailbox services. CMS Ex. 2.

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[1] CMS Ex. 1 and P. Ex. 16 purport to be copies of the same enrollment application (Form CMS-855I) submitted to Novitas on or around January 17, 2012. However, CMS Ex. 1 does not include section 2.B of the application but includes two copies of the page containing section 2.D of the application. CMS Ex. 1 at 4-7. Further, CMS Ex. 1 includes two certification pages, one signed by Dr. Bailey on January 17, 2012, and another signed by Dr. Bailey on July 19, 2011. CMS Ex. 1 at 28, 29. Because of these discrepancies in CMS Ex. 1, I refer to P. Ex. 16 as the more reliable copy of the January 2012 application.

By letter dated April 19, 2016, Novitas notified Petitioner that his Medicare enrollment and billing privileges were being revoked effective January 11, 2016, pursuant to 42 C.F.R. §§ 424.535(a)(5) and 424.535(a)(9). CMS Ex. 3. By letter dated May 13, 2016, Petitioner requested reconsideration of the revocation. CMS Ex. 4. By letter dated July 18, 2016, a Novitas hearing specialist upheld the revocation on the grounds that Petitioner did not provide evidence to show full compliance with the standards for which he was revoked. CMS Ex. 5. The reconsidered determination stated the following:

> The reconsideration request indicates due to a series of clerical errors by the supplier's third party billing agency and administrative staff, the Tomball address was erroneously provided to Medicare as a practice location. The supplier never practiced at this location. The Tomball address was a post office box and should only have been used for correspondence. The supplier's staff was unaware of the error. The reconsideration goes on to say the supplier does not deny the inadvertent failure to update the Medicare enrollment, but asserts that the supplier has been operational and furnishing Medicare covered items and services at the Richmond address.
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> A corrective action plan (CAP) can only be submitted for revocation reason 42 CFR §424.535(a)(1) – Noncompliance per 42 CFR §405.809. The revocation letter from Novitas Solutions dated April 19, 2016 only offered reconsideration appeal rights since the revocation reasons listed were for 42 CFR §424.535(a)(5) – On-Site Review and 42 CFR §424.535(a)(9) – Failure to Report Changes and not 42 CFR §424.535(a)(1) – Noncompliance.
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> Jason R Bailey MD PA did not notify Medicare [of] the change of practice location per the requirements for enrolling and maintaining active enrollment status in the Medicare program under 42 CFR §424.516. A CMS-855B enrollment application was not submitted to the Medicare contractor, Novitas Solutions, to notify of any changes of the practice location until the reconsideration request was received.
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> DECISION:
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> Jason R Bailey MD PA does not dispute the practice location of 21175 Tomball Parkway, Ste. 173, Houston, TX 77070-1655 on the PECOS [Provider Enrollment, Chain and Ownership System] file is non-operational since this address should have been used for correspondence only. Therefore, the reconsideration is denied and the revocation is upheld.

CMS Ex. 5 at 2.

Petitioner requested a hearing before an administrative law judge by letter dated September 15, 2016. The case was assigned to me, and I issued an Acknowledgement and Pre-Hearing Order dated October 3, 2016 (Order). My Order directed each party to file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Order ¶ 4. In response to the October 3, 2016 Order, CMS filed a brief (CMS Br.), including a motion for summary judgment and five exhibits (CMS Exs. 1-5). Petitioner, through counsel, filed a brief (P. Br.) and 22 exhibits (P. Ex. 1-22), including Petitioner's declaration (P. Ex. 13). Neither party objected to the exhibits offered by the opposing party. Therefore, in the absence of objection, I admit CMS Exs. 1-5 and P. Exs. 1-22 into the record.

Petitioner opposed CMS's motion for summary judgment and asked to cross-examine "CMS officials regarding their utilization of the NPPES database to maintain provider enrollment." P. Br. at 10. However, CMS did not offer the written direct testimony of any witness as part of its pre-hearing exchange. As stated in my October 3, 2016 Order, "An in-person hearing to cross-examine witnesses will be necessary only if a party files admissible, written direct testimony, and the opposing party asks to cross-examine." Order ¶ 10. CMS filed a request to cross-examine Petitioner. For the reasons explained below, I grant CMS's motion for summary judgment. Therefore, an in-person hearing to cross-examine Petitioner is not necessary.

II. Issues

The issues in this case are:

1. Whether summary judgment is appropriate; and

2. Whether CMS had a legal basis to revoke Dr. Bailey's Medicare enrollment and billing privileges.

III. Jurisdiction

I have jurisdiction to decide this case. 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

1. Summary judgment is appropriate.[2]

An administrative law judge 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

[2] My findings of fact/conclusions of law appear as headings in bold italic type.

F.3d 168, 172 (6th Cir. 2004) (citing *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743 (6th Cir. 2004)). "Matters presented to the administrative law judge for summary judgment will follow Rule 56 of the Federal Rules of Civil Procedure and federal case law . . . ." Civil Remedies Division Procedures § 19(a)(iii).

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Senior Rehab. & Skilled Nursing Ctr*., DAB No. 2300 at 3 (2010) (and cases cited therein); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 .

Viewing the evidence before me in a light most favorable to Petitioner and drawing all inferences in Petitioner's favor, I conclude that there is no genuine dispute as to any material fact pertinent to revocation under 42 C.F.R. § 424.535(a)(5) or 42 C.F.R. § 424.535(a)(9) that would require a hearing in this case. Petitioner's contentions that CMS improperly revoked his Medicare enrollment and billing privileges must be resolved against him as a matter of law. The undisputed evidence shows that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges. Accordingly, summary judgment is appropriate.

2. A CMS-contracted inspector attempted to conduct a site visit of Dr. Bailey's practice location on January 11, 2016, at the address on file with CMS (21175 Tomball Parkway, Suite 173, Houston, Texas 77070-1655); however, a UPS Store, and not Dr. Bailey's medical office, occupied that location.

On or about January 17, 2012, Dr. Bailey signed a Medicare enrollment application (Form CMS-855I) that had been prepared by his contract billing service. P. Ex. 16 at 15, 19. Section 4.C of the enrollment application form reported Dr. Bailey's practice location as 21175 Tomball Parkway, Suite 173, Houston, Texas 77070-1655. P. Ex. 16 at

9. In signing Form CMS-855I, Dr. Bailey certified that he had read the contents of the application and that it was "true, correct, and complete."[3] P. Ex. 16 at 18.

On January 11, 2016, a CMS-contracted inspector visited Petitioner's reported address at the Tomball Parkway location to conduct an on-site review. CMS Ex. 2. The inspector documented that the location was a UPS Store and not a medical office. *Id.* Petitioner admits that the Tomball Parkway address has never been his practice address, but instead was his correspondence address at the time of the attempted on-site review. P. Br. at 4.

3. CMS had a legal basis to revoke Dr. Bailey's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5) because Dr. Bailey was not operational at the practice location on file with CMS.

A supplier is "operational" when it:

> [H]as 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 or other reliable evidence, CMS determines that the provider or supplier is . . .

[3] Dr. Bailey avers that he read only the certification statement, and not the entire application, before signing the Form CMS-855I. P. Ex. 13 at 2. I accept Dr. Bailey's statement as true for purposes of summary judgment. But, Dr. Bailey's unawareness of the contents of the Form CMS-855I is not a defense to revocation under 42 C.F.R. § 424.535(a)(5). Appellate panels of the Departmental Appeals Board and administrative law judges have frequently held that a provider or supplier is ultimately responsible for the accuracy of claims and other information submitted to Medicare and cannot avoid the consequences of noncompliance by blaming an employee or agent. *See, e.g., Louis J. Gaefke, D.P.M.*, DAB No. 2554 at 5-6 (2013); *see also George E. Anderson, M.D.*, DAB CR4631 at 12 (2016).

> (i) No longer operational to furnish Medicare-covered items or services.

42 C.F.R. § 424.535(a)(5)(i).[4]

The regulatory definition of the term "operational" refers to the "qualified physical practice location" of a supplier. 42 C.F.R. § 424.502. The Medicare enrollment application requests the address of the supplier's practice location. *See, e.g.*, P. Ex. 16 at 8-9. Additionally, a supplier must be able to provide documentation of its "practice location" with its enrollment application. 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). CMS has explained, "[T]he primary purpose of an unannounced and unscheduled site visit is to ensure that a provider or supplier is operational *at the practice location found on the Medicare enrollment application*." 76 Fed. Reg. 5862, 5870 (February 2, 2011) (emphasis added). Thus, CMS's interpretation of the regulation ties the practice location to the information entered on the enrollment application.

Petitioner admits that the Tomball Parkway address listed as his practice location on the Form CMS-855I is not (and has never been) a practice location. Petitioner nonetheless argues that he was "fully operational" at the Richmond Avenue address. P. Br. at 2. For purposes of ruling on CMS's motion for summary judgment, I accept that Petitioner was "operational" at Richmond Avenue. However that fact is not material to the outcome of this case because there is no dispute that Petitioner was not "operational" at the practice location on file with the Medicare Administrative Contractor.

Petitioner concedes that he did not update his enrollment information in the PECOS database. P. Br. at 6. He argues that he should nevertheless be deemed in compliance because CMS had actual notice that his correct practice location was at Richmond Avenue. P. Br. at 7-8. Petitioner contends that CMS had notice of the Richmond Avenue practice location because he entered that information into the NPPES database.

The fact that Petitioner may have updated the NPPES database with the Richmond Avenue address does not relieve him of the duty to update his enrollment information, via PECOS or paper submission. Moreover, Petitioner's contention that I should impute constructive knowledge of his change of practice location to CMS because he updated the

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[4] The reconsidered determination cited 42 C.F.R. § 424.535(a)(5) as the basis for revoking Petitioner's Medicare enrollment and billing privileges. CMS Ex. 5. It did not specify whether subsection (i) or (ii) was applicable. However, because the reconsidered determination concluded that Petitioner was "nonoperational," I infer that the revocation was pursuant to 42 C.F.R. § 424.535(a)(5)(i).

NPPES database ignores the reality of how the Medicare program is administered. As a Medicare supplier, Petitioner is undoubtedly aware that CMS does not directly administer the Medicare program, but relies on a host of contract entities to do so. Novitas, as the Medicare Administrative Contractor for Medicare Part B in Texas, is responsible for supplier enrollment in that state. By contrast, CMS has contracted with a different entity, Cognosante, LLC, to serve as the NPI Enumerator, operating NPPES. *See https://nppes.cms.hhs.gov/NPPES/Help.do?topic=CntInfAndAnnouncement* (last accessed February 7, 2017). I am not persuaded that notice to one CMS contractor for one purpose constitutes notice to all CMS contractors for all purposes.

The essence of Petitioner's argument is that, if CMS or Novitas had pursued additional avenues of inquiry, *i.e.* by accessing the NPPES database, such inquiry may have revealed the actual physical location of Dr. Bailey's practice. While I am required to decide whether CMS had a legal basis to revoke Dr. Bailey's enrollment, I am not required to assess whether CMS could have made additional efforts to identify his practice location, and Petitioner has not cited any authority showing CMS had such an obligation. *See Wendell Foo, M.D.*, DAB CR4580 at 8-9 (2016); *see also Robert Miles, Jr., D.P.M.*, DAB CR4674 at 9 (2016). Moreover, given the vast scope of the data collection and analysis required to enroll and revalidate Medicare providers and suppliers, it is not unreasonable for CMS and its contractors to place the burden on the provider or supplier to report accurately its practice location or locations when completing an application for enrollment or revalidation purposes. *See Foo*, DAB CR4580 at 9 n.8; *see also Miles*, DAB CR4674 at 9.

In summary, to determine whether CMS had a legal basis to revoke Dr. Bailey's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)(i), I must answer two questions: 1) What was the practice location address on file with the Medicare Administrative Contractor on the date of the on-site visit? and 2) Was Dr. Bailey operational at that address on the date of the on-site visit? *See Care Pro Home Health, Inc.*, DAB No. 2723 at 15 (2016). Here, CMS provided undisputed evidence that Dr. Bailey was not operational at the Tomball Parkway address, which was the only practice address Dr. Bailey had on file with Novitas at the time of the January 11, 2016 attempted site visit. P. Ex. 16 at 9; CMS Ex. 2; P. Br. at 5. Therefore, I conclude that CMS had a legal basis to revoke Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5)(i). Moreover, even if I were to conclude that CMS lacked a basis to revoke Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)(i), I would nevertheless find that CMS was authorized to revoke Petitioner's privileges pursuant to 42 C.F.R. § 424.535(a)(9).

4. CMS had a legal basis to revoke Dr. Bailey's Medicare enrollment and billing privileges because Dr. Bailey failed to comply with the reporting requirements of 42 C.F.R. § 424.535(a)(9).

The regulations specify that a change in practice location is a "reportable event" that must be reported to the Medicare Administrative Contractor within 30 days:

> Physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations must report the following reportable events to their Medicare contractor within the specified timeframes:
>
> (1) Within 30 days—
> (i) A change of ownership;
> (ii) Any adverse legal action; or
> (iii) A change in practice location.

42 C.F.R. § 424.516 (d)(1). Pursuant to 42 C.F.R. § 424.535(a)(9), CMS may revoke a supplier's enrollment and billing privileges for failing to comply with these reporting requirements.

In or around November 2014, Petitioner moved his office practice from Timmons Lane to Richmond Avenue. P. Br. at 5; P. Ex. 13 at 2. Petitioner concedes that neither he nor his billing agents timely updated the PECOS database with the correct physical practice location. P. Br. at 6. He also concedes that MedEnEx did not update his practice location when it submitted a Form CMS-855I on his behalf in November 2014. P. Br. at 5. However, Petitioner argues that, by updating the NPPES database to reflect the Richmond Avenue address, he notified CMS of his practice location change as of November 6, 2015. P. Br. at 6; P. Exs. 9, 10.

The undisputed facts demonstrate that Petitioner failed to comply with the reporting requirements specified in 42 C.F.R. § 424.516(d)(1)(iii). Accepting Petitioner's own argument, the earliest date I could find that he complied with the reporting requirement would be November 6, 2015, when he updated the NPPES database.[5] By November 6, 2015, approximately one year had passed since Dr. Bailey moved his practice location to the Richmond Avenue address. Therefore, he did not report a change in his practice location within 30 days as he was required to do. Accordingly, I conclude that CMS had

[5] For the same reasons discussed in the previous section of this decision, I would find that Petitioner did not comply with the requirement to report to Novitas that his practice location had changed by entering the Richmond Avenue address into the NPPES database. However, I need not address the issue here, because even Petitioner's NPPES entry was not timely under 42 C.F.R. § 424.516(d)(1)(iii).

a legal basis to revoke Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(9).

5. I am not authorized to grant Petitioner's request for equitable relief.

Petitioner argues that if CMS's revocation of his billing privileges is upheld, it would allow CMS to obtain recoupment/repayment from Petitioner of actual, legitimate, and medically necessary services Petitioner provided to Medicare beneficiaries. P. Br. at 6. Petitioner's argument is, at root, an equitable one in that he argues that it would be unjust for him to have to repay CMS for services he provided in good faith. CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances. *Letantia Bussell, M.D.*, DAB No. 2196 at 13 (2008). Rather, "the right to review of CMS's determination by an [administrative law judge] serves to determine whether CMS had the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the [administrative law judge's] discretion about whether to revoke." *Id*. (citation omitted) (emphasis in original). Once CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review. *See Id*. at 10; *see also Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2nd 167 (D. Mass. 2010) (if CMS establishes the regulatory elements necessary for revocation, an administrative law judge may not substitute his or her "discretion for that of CMS in determining whether revocation is appropriate under all the circumstances").

V. Conclusion

I grant CMS's motion for summary judgment and affirm the revocation of Petitioner's Medicare enrollment and billing privileges.

/s/
Leslie A. Weyn
Administrative Law Judge