Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Miracle Blessed Care Enterprises, Inc.,

Petitioner,

v.

Center for Medicare & Medicaid Services.

Docket No. C-15-1911

Decision No. CR4081

Date: July 31, 2015

DECISION

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) sustaining its determination to revoke the Medicare enrollment and billing privileges of Petitioner, Miracle Blessed Care Enterprises, Inc. The undisputed material facts establish that Petitioner did not comply with Medicare enrollment requirements. Revocation is therefore justified pursuant to 42 C.F.R. § 424.435(a)(1).

I. Background

Petitioner, a home health agency in Hialeah, Florida, filed a hearing request to challenge CMS's revocation determination. CMS moved for summary judgment and it filed 12 exhibits, identified as CMS Ex. 1 – CMS Ex. 12. Petitioner opposed the motion and filed four exhibits, identified as P. Ex. A – D. I receive these exhibits into the record and for the purpose of deciding the motion.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether the undisputed material facts establish that Petitioner failed to comply with Medicare enrollment requirements, thereby justifying revocation of its Medicare enrollment and billing privileges.

B. Findings of Fact and Conclusions of Law

The essence of this case is this: CMS contends that the undisputed material facts prove that Petitioner submitted home health reimbursement claims for care rendered to Medicare beneficiaries, which falsely listed a physician, Mariali Alvarez-Rohena, M.D., as having certified these beneficiaries as eligible for home health care. To support this contention CMS offers the following facts.

- Petitioner submitted at least seven Medicare reimbursement claims naming Dr. Alvarez-Rohena as the alleged certifying physician. CMS Ex. 7 at ¶ 13; CMS Ex. 5.

- Dr. Alvarez-Rohena denied that she ever treated the beneficiaries named in the claims and denied that she ever certified these beneficiaries for home health services. CMS Ex. 5; CMS Ex. 6; CMS Ex. 7 at ¶ 10; CMS Ex. 9.[1]

These facts, if undisputed, certainly are a basis for CMS to revoke Petitioner's Medicare enrollment and billing privileges. CMS may revoke a provider or supplier's participation and billing privileges if the provider or supplier fails to comply with Medicare enrollment requirements. 42 C.F.R. § 424.435(a)(1). The Medicare enrollment requirements that apply to a home health agency require the agency to provide certification by a treating physician for each beneficiary for whom services are claimed that the beneficiary requires home health services. 42 U.S.C. § 1395f(a)(2)(C), 42 U.S.C. § 1395n(a)(2)(A).

The certification requirement encompasses more than a physician's signature on a document. The physician must certify that the beneficiary needs skilled nursing care or equivalent care and the physician must also certify that in general the patient is confined to his or her home. 42 U.S.C. § 1395f(a)(2)(C), 42 U.S.C. § 1395n(a)(2)(A). The certification must be based on an actual treating relationship between the physician and

[1] CMS offers evidence to corroborate the physician's denial that she treated or certified these beneficiaries for home health care in the form of Medicare billing records showing that she never filed Medicare reimbursement claims for services provided to the beneficiaries. CMS Ex. 5.

the beneficiary. The physician must base his or her findings of need at least in part on a face-to-face encounter with the beneficiary, and that encounter must be related to the patient's primary reason for requiring home health services. 42 C.F.R. § 424.22(a)(1)(v). In other words, the physician must actually see, assess, and treat a beneficiary before certifying that he or she is eligible for home health services.

The facts offered by CMS would, if undisputed, prove that Petitioner failed to obtain the required certifications in seven instances, because the alleged certifications by Dr. Alvarez-Rohena are false. Thus, in these instances, Petitioner failed to provide the requisite certifications of need for home health care, an essential requirement for home health services reimbursement. Submitting false certifications clearly is a violation of Medicare enrollment requirements and, therefore, a basis for revoking Petitioner's Medicare enrollment and billing privileges.

Petitioner asserts that there are two reasons for not granting summary judgment. First, it contends that, if false certifications were filed, they were generated under the aegis of an individual named Kleydson Da Silva. Mr. Da Silva, according to Petitioner, was affiliated with an entity called Sunset Medical Network, which employed Dr. Alvarez-Rohena. Petitioner identifies Mr. Da Silva as the perpetrator of the fraud. It argues that Mr. Da Silva had a financial incentive to commit fraud and had access to Sunset Medical Network's patient records, thereby giving him the means to commit fraud. Petitioner asserts that it was as much a victim of Mr. Da Silva's fraud as was the Medicare program and it should not be held accountable for that fraud. Petitioner contends that it should be given a hearing to determine whether Mr. Da Silva was the source of the false certifications.

Second, Petitioner asserts that there are disputed issues of material fact surrounding CMS's contention that Dr. Alvarez-Rohena did not certify the seven beneficiaries whose care is at issue and that an in-person hearing is necessary to resolve those fact issues.

Both of Petitioner's arguments are without merit. To begin with, it is irrelevant whether Mr. Da Silva or some other person falsified Dr. Alvarez-Rohena's certifications. Petitioner represented that those certifications were accurate when it filed them in order to obtain Medicare reimbursement. If Petitioner was victimized by some other person's fraud, as it now contends, that is no defense to its failure to assure that the certifications were accurate. The responsibility for assuring the accuracy of those certifications was Petitioner's and Petitioner's alone.[2]

[2] Moreover, Petitioner has provided no persuasive explanation as to how it was victimized by Mr. Da Silva's alleged fraud. Petitioner benefitted financially from fraud if, in fact, some third party committed fraud. Petitioner had a financial incentive to file the claims at issue and it was remunerated for those claims.

Petitioner claims, baldly, that:

> Neither the Social Security Act (Act) nor the regulations that implement the Act and govern providers, require a home health agency to conduct an investigation of the authenticity of physician signatures provided by the physician's medical practice to the home health agency. . . Instead, . . . [Petitioner] was entitled to rely on the representations of the ordering physician's medical practice and the signed . . . [certifications] provided by the physician's medical practice.

Petitioner's brief at 12 (footnote omitted). I profoundly disagree.

Petitioner's obligation as a Medicare participant is not limited to serving as a conduit for certifications. It has a duty to verify that physicians' certifications are true. It cannot sit back passively and contend that its duties ended when it received a piece of paper with a physician's signature. It had the obligation to communicate with the physician to assure that the physician's representation meant what it said. Indeed, as a home health agency, Petitioner is supposed to work with each beneficiary's treating physician. It bears the same relationship to a beneficiary's physician as a nursing home has to a resident's physician. It is supposed to provide care pursuant to a physician's orders. It defies reality that a home health care agency could be defrauded into believing that a beneficiary is under a physician's care when, in fact, no treating relationship exists.

The regulations requiring certification would be meaningless if a home health agency could simply function as a conduit for paper. As I have explained, acting as a conduit would mean that the home health agency had no knowledge of the actual treating relationship, or lack of one, between a physician and a beneficiary. Under such circumstance, if the certifications were false, then all of the care that the home health agency provided to the beneficiary would be invalid because the home health agency would not be acting with legitimate certifications and under the direction and orders of a treating physician.

Petitioner offered no evidence to show that it maintained any relationship with Dr. Alvarez-Rohena involving the care of the seven beneficiaries. If, in fact, the physician maintained a treatment relationship with these beneficiaries, then Petitioner's treatment records ought to reflect that. There should be records of consultations with the physician and there should be orders signed by the physician. Petitioner has offered absolutely nothing that shows that this type of relationship existed.

Petitioner's second argument – that there are fact disputes about the veracity of Dr. Alvarez-Rohena's denial that she certified the seven beneficiaries whose care is at issue – is also without merit.

Petitioner does not deny the essence of Dr. Alvarez-Rohena's assertion that she did not treat or certify for home health care services the beneficiaries whose care is at issue. Nowhere does Petitioner contend that any of these beneficiaries actually had a treating relationship with Dr. Alvarez-Rohena and nowhere does Petitioner contend that the physician actually certified any of these beneficiaries for home health care. Instead, Petitioner raises a series of collateral fact questions about Dr. Alvarez-Rohena. None of the questions raised by Petitioner address the core of the physician's denial that she treated the seven beneficiaries whose care is at issue.

Petitioner contends that although Dr. Alvarez-Rohena denies having a working relationship with a nurse (Rosa Espinosa) after February 20, 2014, she may have continued to work with that individual for some time after February 20. *See* CMS Ex. 9 at 1. Whether or not that is a discrepancy in Dr. Alvarez-Rohena's account is irrelevant. Petitioner has provided no explanation of why this alleged discrepancy raises a dispute as to a *material fact* in this case.

Petitioner asserts also that there is a fact dispute as to whether Dr. Alvarez-Rohena authorized Sunset Medical Network to create a prescription pad using her name. *See* CMS Ex. 9 at 3. Petitioner's contention is that Sunset Medical Network obtained such authorization "through (Mr.) Da Silva." Whether or not the physician authorized her employer to obtain a prescription pad is irrelevant to the central issue of this case – Petitioner's reliance on false certifications for home health agency services. It doesn't matter that Sunset Medical Network may have had a prescription pad authorized by Dr. Alvarez-Rohena. That fact, even if true, does not support a conclusion that the physician certified any of the beneficiaries as being eligible for home health agency services. Nowhere does Petitioner contend that the prescriptions issued by Dr. Alvarez-Rohena were legitimate in that they grew out of an actual treating relationship with the seven beneficiaries whose care is at issue.

Finally, Petitioner refers to a statement made by Dr. Alvarez-Rohena that: "I have never signed or co-signed or prescribed for Sunset Medical Network" and contends that this statement is somehow significant. Petitioner's brief at 14; *See* CMS Ex. 11 at 4. But, Petitioner offers no coherent explanation as to why this statement is significant. It contends that: " – if true – this would mean that Dr. Alvarez-Rohena *could not* have been the physician who referred the examined beneficiaries to . . . [Petitioner]." *Id.* That assertion adds nothing to Petitioner's defense. The statement is entirely consistent with the physician's assertion that she did not sign certifications for the seven beneficiaries.

Petitioner contends that in order to get to the bottom of its assertions it must depose Dr. Alvarez-Rohena. I have no authority to order that a deposition be taken. This case, procedurally, is governed by regulations at 42 C.F.R. Part 498 and those regulations do not allow for depositions. More important, Petitioner has made no showing as to what Dr. Alvarez-Rohena might say if she were questioned under oath. As I note above,

Petitioner has not contended that the physician actually certified the seven beneficiaries as being eligible for home health services.

In the same vein, Petitioner asserts that it must cross-examine Ms. Liliana Mederos. Ms. Mederos is a CMS employee who provided an affidavit, which includes her recollection of conversations that she had with Dr. Alvarez-Rohena. CMS Ex. 7. But, Petitioner has not explained why it needs to cross-examine this witness. It doesn't contend that she possesses facts that, if true, would call into question the veracity of Dr. Alvarez-Rohena's statements. It doesn't contend that Ms. Mederos' recall of what the physician told her is faulty. Nor does Petitioner contend that Ms. Mederos is aware of facts that are not contained in her affidavit that are material to the outcome of this case. In short, Petitioner wants to cross-examine the witness because it speculates that she *might* say something that would be helpful to Petitioner. That is insufficient grounds for me to order that this witness be made available for cross-examination. CMS moved for summary judgment based on specific facts that, if not disputed, support a finding in its favor. It is incumbent on Petitioner to come up with facts that, if true, create a genuine fact dispute. Speculating that a witness might possess such facts is insufficient basis for me to deny CMS's motion.

/s/
Steven T. Kessel
Administrative Law Judge