

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

ProMedical Equipment Supplies, LLC  
(PTAN: 4929730001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-114

Decision No. CR4552

Date: March 23, 2016

**DECISION**

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, Palmetto GBA National Supplier Clearinghouse (NSC), revoked the Medicare enrollment and billing privileges of ProMedical Equipment Supplies, LLC (ProMedical or Petitioner) because the Inspector General (IG) of the United States Department of Health and Human Services revoked one of ProMedical's owners, Augustus Ejere, from participation in all federal health care programs. NSC assigned a retroactive effective date of June 18, 2015, which is the date that the IG excluded Mr. Ejere. ProMedical requested reconsideration and asserted that Mr. Ejere sold his ownership in ProMedical before the IG excluded him. An NSC hearing officer issued a reconsidered determination in which she upheld the revocation; however, she did so based on ProMedical's failure to report timely Mr. Ejere's divestiture of an ownership interest in ProMedical.

As explained below, I affirm the revocation of ProMedical's Medicare enrollment and billing privileges because ProMedical failed to report timely to CMS that Mr. Ejere ceased to be an owner of ProMedical. However, because NSC ultimately did not revoke ProMedical based Mr. Ejere's exclusion, I modify the effective date of revocation to August 21, 2015, which is 30 days after NSC's initial determination.

## **I. Background and Procedural History**

ProMedical was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). *See* CMS Exhibit (Ex.) 1. In a July 22, 2015 initial determination, NSC revoked ProMedical's Medicare enrollment and billing privileges because ProMedical allegedly violated two regulations. CMS Ex. 1. NSC found that ProMedical violated 42 C.F.R. § 424.535(a)(2) and stated the following as the basis for the violation:

NSC records identify Augustus Ejere as an owner and managing employee of [ProMedical]. It has been determined that this individual has been listed on the [IG's] exclusion database.

CMS Ex. 1 at 1. NSC also found ProMedical violated 42 C.F.R. § 424.57(c)(10) (Supplier Standard 10), which requires ProMedical to have a comprehensive liability insurance policy. CMS Ex. 1 at 2. NSC made the effective date for revocation retroactive to June 18, 2015, which was the date of Mr. Ejere's exclusion. CMS Ex. 1 at 1. NSC also barred ProMedical from reenrollment for three years. CMS Ex. 1 at 1.

ProMedical requested that NSC reconsider the revocation. ProMedical asserted that it informed NSC in March 2014 that Victor Anjorin and Sebastian Okafor were the new owners of ProMedical, and provided proof of insurance coverage. CMS Ex. 3.

On September 25, 2015, an NSC hearing officer upheld the revocation. CMS Ex. 4. Although the hearing officer found ProMedical complied with 42 C.F.R. § 424.57(c)(10), the hearing officer found that ProMedical violated 42 C.F.R. § 424.57(c)(2) (Supplier Standard 2), which required ProMedical to report any changes in the information ProMedical provided on its enrollment application within 30 days of the change. CMS Ex. 4 at 2-3. The hearing officer stated that: "According to information on file with the NSC at the time, the NSC did not receive documentation to have Augustus Ejere removed from the supplier's file . . . ." CMS Ex. 4 at 3.

On November 9, 2015, Petitioner timely requested a hearing. Along with the hearing request, Petitioner submitted exhibits marked A through G (P. Exs. A-G). On November 23, 2015, I issued an Acknowledgement and Pre-hearing Order (Order). In response to the Order, CMS filed a motion for summary judgment with four exhibits (CMS Exs. 1-4). Petitioner filed a brief in response (P. Br.).

## **II. Decision on the Record**

I admit CMS Exs. 1-4 and P. Exs. A-G into the record without objection. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e).

I note that the parties were to mark and paginate their exhibits. Order ¶ 5; CRDP § 14. CMS submitted four exhibits, but failed to properly mark or paginate them. Further, although CMS and Petitioner relied on exhibits that Petitioner submitted with its hearing request, neither resubmitted those exhibits as properly marked and paginated exhibits. Because Petitioner uploaded all of its exhibits together with the hearing request, I will cite the exhibit by its letter designation, but will reference the specific page as it appears as part of the single upload. Counsel should note that if I receive improperly marked and paginated exhibits in the future, I may reject them. CRDP § 14(d).

The parties neither identified any proposed witnesses nor submitted any written direct testimony for witnesses. Order ¶ 8; CRDP § 19(b). Therefore, I issue this decision based on the written record. Order ¶¶ 10-11; CRDP § 19(d).

### **III. Issue**

Whether CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.57(c)(2) for failing to report that an individual sold his ownership interest in ProMedical within 30 days of the sale.

I do not consider Petitioner's alleged violation of 42 C.F.R. § 424.535(a)(2) to be an issue in this case. Although NSC's initial determination found that Petitioner violated section 424.535(a)(2) (CMS Ex. 1 at 1), the reconsidered determination does not appear to uphold this finding. The reconsidered determination only cites to section 424.535(a)(2) twice, both in string cites, without any explanation or analysis. CMS Ex. 4 at 2-3. This is insufficient to show that the reconsidered determination relied on a violation of section 424.535(a)(2) as a basis for revocation. *See Neb Group of Arizona LLC*, DAB No. 2573, at 7 (2014). Further, both parties' briefs reflect that the only issue in this case is the alleged violation of 42 C.F.R. § 424.57(c)(2). CMS Br. at 6-8; P. Br. at 2.

### **IV. Jurisdiction**

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

### **V. Findings of Fact, Conclusions of Law, and Analysis<sup>1</sup>**

- 1. Augustus Ejere held 100% ownership of ProMedical until January 3, 2014, when he sold his ownership interest; however, ProMedical did not report to CMS that Mr. Ejere no longer owned ProMedical until November 9, 2015.***

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<sup>1</sup> My numbered findings of fact and conclusions of law appear in bold and italics.

In July 2008, Mr. Ejere signed an Operating Agreement to establish ProMedical as a limited liability company. *See* P. Ex. C at 49-54. The agreement indicates that Mr. Ejere owned “100%” of ProMedical. P. Ex. C at 50, 54. At some time between July 2008 and January 2015, ProMedical became a DMEPOS supplier enrolled in the Medicare program. *See* CMS Ex. 1.

On January 3, 2014, Mr. Ejere transferred his 100% ownership interest in ProMedical to Sebastian Okafor. P. Ex. C at 48; *see also* P. Ex. A at 22. In November 2014, Mr. Ejere pled guilty to health care fraud (18 U.S.C. § 1035), and in June 2015, the IG excluded him from participation in all federal health care programs. P. Ex. A at 22; CMS Ex. 2.

In or about February 2014, ProMedical filed a CMS-855S enrollment application with NSC in order to inform CMS that it was adding two additional individuals as owners of ProMedical: Mr. Okafor, whose 5% or more ownership in ProMedical commenced on January 3, 2014; and Victor Anjorin, whose 5% or more ownership in ProMedical commenced on March 3, 2014. P. Ex. B at 31-44. Although ProMedical reported that it had two new owners, ProMedical did not indicate that Mr. Ejere was no longer an owner. NSC accepted the addition of two new owners on March 11, 2014. P. Ex. E at 58.

On November 9, 2015, ProMedical filed a CMS-855S with its request for hearing in which ProMedical indicated that CMS should delete from its records that Mr. Ejere was an owner of ProMedical as of January 3, 2014. Hearing Request at 3; P. Ex. A at 6-29.

***2. ProMedical violated 42 C.F.R. § 424.57(c)(2) because it did not report to CMS within 30 days of January 3, 2014, that Augustus Ejere was no longer an owner of ProMedical.***

In order to participate in the Medicare program as a supplier, a prospective supplier must complete the applicable CMS-855 enrollment application. The enrollment application requires disclosure of the owners of the business that seeks to be a supplier. *See* 42 C.F.R. § 424.510(a)(1), (a)(2), (d)(2)(ii); P. Ex. B at 39-41. Once enrolled, a DMEPOS “supplier must report to CMS any changes in the information supplied on the [enrollment] application within 30 days of the change.” 42 C.F.R. § 424.57(c)(2); *see also* 42 C.F.R. § 424.516(c); *Main Street Pharmacy, LLC*, DAB No. 2349, at 2 (2010).

In the present case, the record is clear that Mr. Ejere ceased to be an owner of ProMedical on January 3, 2014. However, ProMedical did not report this to CMS on a CMS-855S enrollment application form until November 2015. Therefore, I conclude that ProMedical violated 42 C.F.R. § 424/57(c)(2).

Petitioner argues that its omission of information regarding Mr. Ejere in the CMS-855S that it filed in February 2014 was “inadvertent, unintentional, and not willful.” P. Br. at 2. Petitioner avers that “[o]f significance is that nowhere on the form 855S application

does it affirmatively or in any way indicate that the former owner had to include a separate Section 9 so that he would be removed from the agency’s database . . . . Certainly, this change of ownership could have been reasonably inferred.” P. Br. at 3; Hearing Request at 3. Petitioner also asserts that the individual facts of this case should be considered and that I should not formulaically apply the regulations. P. Br. at 6. Petitioner also asserted that fairness and equity should be applied in this case. P. Br. at 6.

I reject Petitioner’s argument that there was no indication on the CMS-855S that a supplier must report when an owner sells his ownership interest in that supplier. In the instructions for “Currently Enrolled Medicare DMEPOS Suppliers” on the CMS-855S, it states under the title “Change of Information Other than Adding a New Location” that “[a]ny change to your existing enrollment data must be reported within 30 days of the effective date of the change.” P. Ex. B at 32. Further, at the top of section 9 (i.e., the ownership interest section) of the CMS-855S application that Petitioner completed, it states: “If you are changing information about a currently reported individual owner . . . **or removing an individual owner** . . . check the applicable box . . . .” P. Ex. B at 39 (emphasis added). Immediately below this text are boxes to check, one of which is to “Remove.” P. Ex. B at 39. Petitioner even completed section 9 twice to add Mr. Okafor and Mr. Anjorin as 5% or greater owners in March 2014, suggesting that Petitioner read and understood the instructions for that section. I conclude that the CMS-855S is sufficiently clear that Petitioner ought to have known that it needed to report Mr. Ejere’s sale of his ownership in ProMedical.

To the extent that Petitioner requests that I provide equitable relief, I am unable to do so. *See US Ultrasound*, DAB No. 2302, at 8 (2010). Further, CMS may revoke a DMEPOS supplier for violating the Supplier Standards. 42 C.F.R. 424.57(e)(1).

***3. Because the reconsidered determination only revoked Petitioner based on a violation of 42 C.F.R. § 424.57(c)(2) and not 42 C.F.R. § 424.535(a)(2), the retroactive effective date of the revocation imposed by CMS in the initial determination is no longer appropriate, and the effective date must be changed from June 18, 2015, to August 21, 2015, which is 30 days after the date CMS sent its initial determination to revoke Petitioner.***

NSC’s July 22, 2015 initial determination imposed an effective date of revocation that was retroactive to June 18, 2015, the date that the IG excluded Petitioner’s former owner from participation in all federal programs. CMS Ex. 1 at 1; CMS Ex. 2 at 1. A retroactive effective date is appropriate under 42 C.F.R. § 424.535(g) when CMS imposes a revocation based on an exclusion. However, because the reconsidered determination did not indicate that Petitioner violated 42 C.F.R. § 424.535(a)(2), there is no longer a reason to impose a retroactive effective date of revocation. Therefore, I set a new revocation effective date of August 21, 2015, which is 30 days after the date that NSC sent notice of the revocation determination. *See* 42 C.F.R. § 424.57(e)(1).

