

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Alexander Eugene Istomin
Docket No. A-12-108
Decision No. 2484
November 8, 2012

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Alexander Eugene Istomin (Petitioner) appeals the June 19, 2012 decision by Administrative Law Judge (ALJ) Joseph Grow sustaining the determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare enrollment and billing privileges as a nurse practitioner in Florida. *Alexander Eugene Istomin*, DAB CR2555 (2012) (ALJ Decision). The ALJ concluded that Petitioner failed to meet the Medicare enrollment requirements that he supply complete and accurate information in his Medicare enrollment application and maintain an "operational" practice location. Because each of these determinations would provide a separate legal basis for revoking Petitioner's enrollment and billing privileges, the Board need only affirm one of the ALJ's conclusions to sustain the revocation. For the reasons stated below, we affirm the ALJ Decision on the ground that Petitioner did not maintain an "operational" practice location in Florida within the meaning of the regulations. Accordingly, we need not and do not consider the ALJ's alternative conclusion that Petitioner supplied inaccurate information in his enrollment application.

Statutory and Regulatory Background

Health care "suppliers" like Petitioner must formally enroll to participate in the Medicare program. *See* 42 C.F.R. §§ 400.202 (defining "supplier"), 424.500, 424.505. Once enrolled, suppliers receive "billing privileges," the right to claim and receive Medicare payments for health care services provided to program beneficiaries. *See id.* §§ 424.502, 424.505. Because different Medicare contractors oversee the Medicare program in different parts of the country, when a supplier practices in more than one region, he must complete a separate enrollment application for each region in which he has a practice location. *See id.* § 424.510(a), (d)(1) (requiring suppliers to submit enrollment information on the "applicable" application and to the "designated" contractor).

Regulations at 42 C.F.R. Part 424, subpart P set out the requirements for enrolling in Medicare and maintaining enrollment in the program. Section 424.535 enumerates the specific circumstances under which CMS or its contractors may revoke a supplier's enrollment and billing privileges. As is relevant here, CMS may revoke a supplier's enrollment if the supplier "certified as 'true' misleading or false information" on his enrollment application. 42 C.F.R. § 424.535(a)(4). CMS also may revoke a supplier's enrollment if CMS determines, based on on-site review, that the supplier "is no longer operational to furnish Medicare covered items or services." *Id.* § 424.535(a)(5)(ii). Under the regulations, a supplier is "operational" if the supplier:

has 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 type of facility or organization, provider or supplier specialty, or the services or items being rendered), to furnish these items or services.

Id. § 424.502.

If CMS decides to revoke a supplier's enrollment, the supplier may ask for reconsideration of the revocation determination. 42 C.F.R. §§ 424.545(a), 498.5(1)(1), 498.22(a). If the supplier is dissatisfied with the reconsidered determination, he may request a hearing before an ALJ, and then may request review of the ALJ's decision by the Board. *Id.* § 498.5(1)(2), (3).

Case Background¹

Petitioner submitted a Medicare enrollment application in June 2008 in which he indicated he was already enrolled but was adding several practice locations, including one in Florida, effective January 3, 2008. CMS Ex. 3, at 12, 21. At the time of his application, Petitioner was also licensed as a nurse practitioner in New York.² CMS Ex. 5, at 4. In the application, Petitioner listed his Florida practice location as a numbered address on "S. Ocean Drive, Suite #16D, Hallandale, FL, 33009-5954" and indicated that the location was a "private practice office setting." CMS Ex. 3, at 12.

¹ Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for his findings.

² The ALJ correctly noted that Petitioner's address in Florida was "his only U.S. practice location listed" on the enrollment application, as the other two practice locations listed were in Russia. ALJ Decision at 6; *see* CMS Ex. 3, at 1, 12. The record does not clearly establish that Petitioner was already enrolled with Medicare in New York.

At the request of First Coast Service Options, Inc. (First Coast), a Medicare Administrative Contractor, and after earlier proceedings we discuss below, Petitioner supplemented his enrollment application with additional information in early May 2011. CMS Ex. 4. First Coast approved the application later that month. P. Ex. 14.

According to CMS, on June 2, 2011, SafeGuard Services, LLC (SafeGuard), a Medicare Zone Program Integrity Contractor, attempted to conduct an on-site review of Petitioner's Florida practice location. CMS Ex. 16, at 1. The SafeGuard representatives did not find Petitioner operational to furnish Medicare covered services at the location, which was a private condominium residence. *Id.* One of the representatives later learned that Petitioner was in New York and tried to conduct a phone interview with him. CMS Ex. 15; CMS Ex. 16, at 1. Petitioner refused to be interviewed, stating that he felt the representative had failed to provide adequate proof of her identity and professional affiliation. CMS Ex. 15.

In October 2011 First Coast notified Petitioner by corrected letter that it was retroactively revoking his Medicare enrollment and billing privileges effective January 3, 2008. The letter also explained that Petitioner would not be eligible to reapply for enrollment in Medicare for three years following January 3, 2008. CMS Ex. 1, at 1.³ Petitioner requested reconsideration of the revocation decision, but on reconsideration First Coast again determined that revocation was appropriate. CMS Ex. 2. Petitioner then requested a hearing before an ALJ.

The ALJ Decision

The ALJ upheld CMS's decision to revoke Petitioner's Medicare enrollment and billing privileges. The ALJ determined that revocation was appropriate under section 424.535(a)(5) because, he concluded, Petitioner had not maintained an "operational" practice location. The ALJ noted that Petitioner admitted he had not provided services as a nurse practitioner in Florida since 2008 and conceded he was in New York on the date, June 2, 2011, that the CMS contractor, SafeGuard, stated it had attempted to conduct an on-site review of the Florida practice location. ALJ Decision at 6. The ALJ acknowledged that Petitioner contested that SafeGuard had tried to conduct an on-site visit on June 2, 2011, but the ALJ concluded that he had "no reason to doubt" the sworn statement submitted by CMS from a SafeGuard representative. In that sworn statement, the representative averred that she went to the address Petitioner listed for his Florida practice location on that date and found a private condominium. *Id.* at 6-7, citing CMS Ex. 16.

³ Petitioner does not challenge the effective date or the length of the revocation period, which has now expired.

The ALJ also concluded that “Petitioner’s own evidence corroborates that his alleged practice location is a private condominium.” ALJ Decision at 7. The ALJ cited to a letter from the president of the condominium association affiliated with the Florida address in which the president referenced Petitioner’s “Apt. 16D,” not “Suite 16D” as Petitioner had referred to the location in his enrollment application. *Id.*, citing P. Ex. 1. The ALJ also cited to a security policy for the condominium complex that required security personnel to identify people who appeared to be non-residents, suggesting that non-residents were not expected to be present, and to a police report that referred to the location as Petitioner’s “apartment” and noted that it contained “personal items.” *Id.*, citing P. Exs. 2, 7. The ALJ concluded that, even if he were to assume that the SafeGuard representative had not gone to the listed Florida location, the fact that the practice location was “actually a private residential condominium” was sufficient to persuade him that the location was not operational, “especially when considered in conjunction with Petitioner’s own admission that he has not been providing medical services in Florida since 2008.” *Id.*

Petitioner timely requested review of the ALJ Decision.

Standard of Review

Our standard of review on a disputed issue of fact is whether the ALJ’s decision is supported by substantial evidence in the record as a whole. Our standard of review on a disputed issue of law is whether the ALJ’s decision is erroneous. *See* Departmental Appeals Board, *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s or Supplier’s Enrollment in the Medicare Program (Guidelines)*, at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>.

Analysis

We uphold the ALJ Decision sustaining the revocation by First Coast of Petitioner’s Medicare enrollment and billing privileges.

Substantial evidence supports the ALJ’s finding that Petitioner failed to maintain an operational practice location at the Florida address, the only U.S. practice location listed on his application.⁴ Section 424.535(a)(5) provides that CMS may revoke a supplier’s enrollment if “CMS determines, upon on-site review, that the supplier is no longer

⁴ Petitioner does not challenge the ALJ Decision based on having one or more operational practice locations in Russia. Before the ALJ, Petitioner specifically claimed that he “understands that Medicare coverage does not extend beyond U.S. jurisdiction, and has not ever submitted or intends to submit any claim for the patients [he] serviced abroad.” P. Br. at 12.

operational . . .”. The ALJ credited the SafeGuard representative’s sworn statement in finding that Medicare’s contractor went to the location on June 2, 2011 to conduct an on-site visit. ALJ Decision at 6-7, citing CMS Ex. 16. On appeal, Petitioner takes no exception to the ALJ’s finding.

In any event, Petitioner specifically admitted before the ALJ that he had not practiced in Florida since 2008. ALJ Decision at 6, citing P. Br. at 10. He also failed to produce any evidence showing that his Florida practice location was ever “open to the public for the purpose of providing health care related services” and “properly staffed, equipped, and stocked” to furnish health care related services. *See* 42 C.F.R. § 424.502 (defining “operational”). Petitioner did not, for example, produce evidence showing that he regularly saw patients at the Florida address during specific business hours or specific times of the year, or evidence showing that the location contained medical equipment and supplies as opposed to purely personal items.

The undisputed fact that Petitioner’s listed practice location is a private, secured condominium apartment provides additional support for the ALJ’s finding that the Florida address did not function as an operational practice location under the facts here. While the CMS 855I application form for practitioners allows them to supply their home addresses as their “practice location” if they only make house calls and do not actually have an office, the form provides that such a practitioner must explain on the application form that the address is for “administrative purposes only.” CMS Ex. 3, at 11. Petitioner did not, however, provide such an explanation with respect to the Florida address listed in his enrollment application. *Id.* at 11, 17. Nor did he assert before the ALJ that he made solely house calls and intended to provide the Ocean Drive address for “administrative purposes only.”

In addition, the undisputed fact that Petitioner was in New York on June 2, 2011 raises a question about how, given its distance from New York, the Florida location could have been “open to the public for the purpose of providing health care related services” on that date. *See* 42 C.F.R. § 424.502. Yet, Petitioner offered no explanation of how he could meet the “operational” requirement at the Florida location while in New York.

Petitioner makes a number of meritless challenges to the ALJ Decision. He argues that his revocation is the result of a “conspiracy of federal personnel, national origin discrimination, and record falsifications.” Appeal Req. at 1. Petitioner relies on a letter from First Coast dated September 7, 2011 that stated SafeGuard representatives had conducted an on-site visit at Petitioner’s Florida practice location on “January 3, 2008.”

P. Ex. 16, at 1.⁵ Petitioner points out that he did not submit his Medicare enrollment application listing the Florida practice location until June 2008, so there is no reason SafeGuard representatives would have visited the location before this date. Petitioner ignores the letter from First Coast dated October 13, 2011 captioned “*Revised Letter*” in which the date of the referenced on-site visit was changed to “June 2, 2011.” CMS Ex. 1, at 1. This is the letter and the date of the attempted on-site visit on which CMS relied throughout the revocation proceedings.

Petitioner also emphasizes that it took CMS three years to process his Medicare enrollment application and asserts the delay “clearly indicates” that CMS violated its own requirements and intentionally discriminated against him based on his national origin. Appeal Req. at 3-4. While we understand Petitioner’s concern about the length of time that it took CMS to process his application, CMS’s processing time did not violate any CMS requirements, and Petitioner did not provide any evidence that the delay was motivated by discrimination. To the contrary, Petitioner produced evidence showing that the delay was mainly due to the fact that CMS erroneously sent correspondence regarding Petitioner’s pending enrollment application to the address Petitioner listed for his Florida practice location, rather than to Petitioner’s mailing address in New York, and to the administrative proceedings that resulted from this oversight. *See* P. Ex. 15.

Finally, Petitioner contends that the ALJ “mocked” his educational degree from the Soviet Union, which, Petitioner argues, indicates that the ALJ was prejudiced against him. Appeal Req. at 3. Petitioner completely mischaracterizes the ALJ’s reference to Petitioner’s educational background. The ALJ noted that Petitioner signed his Medicare enrollment application and his correspondence “Alexander Istomin, M.D” and explained that Petitioner received a Doctor of Medicine degree in the U.S.S.R. but is not a licensed doctor in the U.S. ALJ Decision at 1, n.1. The ALJ’s recitation of undisputed facts about Petitioner’s educational background and application does not contain any hint of prejudice, much less any kind of bias that might be disqualifying.

⁵ Petitioner submitted with his notice of appeal renumbered copies of several exhibits or excerpts of exhibits that either he or CMS submitted to the ALJ. In referring to those exhibits, we use their numbering and pagination before the ALJ.

Conclusion

For the foregoing reasons, we conclude that the ALJ did not err in sustaining CMS's revocation of Petitioner's Medicare enrollment and billing privileges pursuant to section 424.535(a)(5).

/s/

Sheila Ann Hegy

/s/

Constance B. Tobias

/s/

Judith A. Ballard
Presiding Board Member