

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Zakiya O. Antoine, DO, PLLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-843

Decision No. CR3267

Date: June 19, 2014

DECISION

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), affirming the determination to revoke the billing privileges of Petitioner, Zakiya O. Antoine, DO, PLLC, and also affirming CMS's subsequent determination to deny Petitioner's application to change her practice location.

I. Background

Petitioner requested a hearing to challenge the determinations that I cite in the opening paragraph of this decision. CMS moved for summary judgment and filed eight exhibits, identified as CMS Ex. 1 - CMS Ex. 8, in support of its motion. Petitioner opposed the motion and filed 10 exhibits, identified as P. Ex. 1 - P. Ex. 10, in opposition.

II. Issues, Findings of Fact and Conclusions of Law

A. Issue

The issue in this case is whether the undisputed material facts establish grounds to grant CMS's motion for summary judgment and to affirm its determinations to revoke

Petitioner's Medicare billing privileges and to deny her application to change her practice location.

B. Findings of Fact and Conclusions of Law

I find the following facts to be undisputed.

On September 25, 2013, a contractor working for CMS sent a letter to Petitioner revoking her Medicare billing privileges effective August 28, 2013. CMS Ex. 3 at 3 - 4. The letter informed Petitioner that revocation of her billing privileges meant that she would be barred from re-enrolling in Medicare for a period of two years. *Id.*

The contractor premised its letter to Petitioner on a site inspection that an inspector made on August 28, 2013, at Petitioner's purported practice location at 555 Brush Street, # 1711, Detroit, Michigan 48226. CMS Ex. 3 at 9 - 12. In her Medicare enrollment application, dated April 29, 2013, Petitioner had listed this address as her practice location and had stated that it was a "Group practice office/clinic." CMS Ex. 1 at 10. Petitioner neither stated nor suggested in her application that the 555 Brush Street location was only for administrative purposes or that she would be using that address as a place from which she would make house calls. *See Id.* at 13.

The inspector discovered that 555 Brush Street was a residential apartment building known as the Millender Center Apartments. CMS Ex. 3 at 11 - 12. The building's property manager denied the inspector entry into the building and informed him that he would be allowed entry only with a court warrant. *Id.* at 9 - 10. The property manager averred that there were no businesses on the premises and that it was solely a residential building. *Id.*

On September 16, 2013, Petitioner filed an application seeking to add an additional practice location to her purported Brush Street practice location. She alleged that the additional location was at 15565 Northland Drive, Suite 606W, Southfield, Michigan 48075. CMS Ex. 2 at 7 - 16. The contractor subsequently denied this application premised on its finding that the alleged new practice location was not operational. This finding was, in turn, premised on a site visit made to the new location on October 2, 2013, in which an inspector determined that the office location was dark and locked and that there was no one present at this location.

CMS may terminate a supplier's enrollment in Medicare and revoke that supplier's billing privileges if the supplier is not "operational." 42 C.F.R. §§ 424.530(a)(5)(ii), 424.535(a)(5)(ii). A supplier is "operational" only 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 times being rendered) to furnish these items or services.

42 C.F.R. § 424.502.

The undisputed material facts plainly establish that Petitioner was not “operational” at 555 Brush Street. She listed that address in her enrollment application as the location of a group practice office or clinic. It was no such thing. It was not an office location at all, but Petitioner’s private residence. It was not open to the public for the purpose of providing health care services. Nor had Petitioner applied for enrollment on the basis that the Brush Street location was a base of operations for her making house calls.

Petitioner has offered no facts to dispute any of this. She has offered no evidence that she ever saw a patient or treated one at the Brush Street location, nor has she claimed that she made house calls from that location. The facts are thus unequivocal. Petitioner did not have an operational practice location at 555 Brush Street. Based on that, CMS was amply justified when it determined to revoke Petitioner’s Medicare billing privileges.

As for Petitioner’s application to open an additional practice location, that application must be denied whether or not Petitioner actually had an operational practice at the 15565 Northland Drive address. It is irrelevant whether or not she had an operational practice at 15565 Northland Drive because beginning August 28, 2013, she was ineligible to claim Medicare reimbursement for services that she provided at that address or any other address. Her billing privileges were revoked effective August 28, 2013, based on the fact that she had no operational practice at the 555 Brush Street location. That revocation terminated Petitioner’s supplier agreement. 42 C.F.R. § 424.535(b). The revocation, by law, remains in effect for a minimum of one year (CMS elected to impose a two-year revocation in this case). 42 C.F.R. § 424.535(c). Petitioner no longer had a valid supplier agreement with CMS on September 16, 2013, when she filed an application for an additional practice location and, therefore, she was not qualified to file that application.

Petitioner makes a number of arguments in opposition to CMS’s motion and I find all of them to be without merit. In addressing these arguments I note that Petitioner does not challenge any of the facts offered by CMS concerning Petitioner’s purported 555 Brush Street practice location. Indeed, Petitioner admits that she never provided services from the Brush Street location, stating that she “did not see patients in her apartment.” Petitioner’s pre-hearing brief at 21.

Petitioner actually seems to be arguing that she always provided Medicare items or services from the 15565 Northland Drive location. She does not explain why this assertion, assuming it to be true, would serve as a defense to CMS's determination that she did not maintain an operational location at the Brush Street address. She seems to contend that, if in fact, she operated a practice in good faith from Northland Drive, that excuses her failure to maintain an operational location at Brush Street. She is incorrect if that is, in fact, her contention. She claimed in her enrollment application that she was operating her practice from Brush Street. In order to remain qualified, she either had to have an operational site at Brush Street or she had to amend her application to show her new practice location. She did neither prior to being found out of compliance in August 2013. Her failure is not excused by her after-the-fact assertion that she was actually operating her practice out of a location that is different from the Brush Street address.

She contends that she began providing services from the Northland Drive address in November 2012. Petitioner's pre-hearing brief at 5 - 6, 8 - 9. That assertion is no challenge to the facts offered by CMS. As I have discussed, it is irrelevant to my decision whether or not Petitioner ever had a practice location at 15565 Northland Drive because her asserted practice location in her Medicare enrollment application was at 555 Brush Street. Indeed, Petitioner's contention that she was providing services from the Northland Drive location merely underscores the falseness of her original enrollment application's claim that she would be providing services at a group practice office or clinic at Brush Street. It certainly provides no basis for me to conclude that she maintained an operational office at the Brush Street location.

Petitioner seems to assert that the Brush Street address should qualify as an operational location under Medicare regulations even if no services were provided from that address and even if it was not open to the general public because at some point a CMS enrollment analyst performed a telephone search that established that Petitioner maintained a phone at the Brush Street address, and she subsequently contacted Petitioner at that number. Petitioner's brief at 15 - 16. That argument has no merit. A location does not meet the test for being "operational" merely because a supplier maintains a phone at that location or because the contractor or CMS lists the number as the supplier's phone and contacts the supplier at that number. 42 C.F.R. § 424.502.

Petitioner also seems to assert that CMS or its contractor should have known that the 555 Brush Street address was, in reality, Petitioner's residence because her phone number at that address was a residential number and not a business number. But, even if that were so, it does not excuse Petitioner from failing to maintain an operational location at Brush Street. Moreover, there is nothing in the regulations that suggests that CMS implicitly waives regulatory requirements under any circumstances.

Petitioner also contends that there were various errors in the contractor's revocation notices to Petitioner. Whether or not that is so is irrelevant. Petitioner has not shown that

any purported errors in these notices denied her due process. More importantly, no errors in the notices – if there were any at all – undercut the undisputed material facts that I have described above. Petitioner has not produced anything to show that the recitation of what happened during the August 28, 2013 site visit is inaccurate.

Petitioner makes fact arguments concerning the Northland Drive address, effectively contending that she actually provided services from that site. However, and as I discuss above, it is irrelevant to my decision whether or not Petitioner maintained an operational location at Northland Drive. What is undeniable is that she did not maintain an operational location at Brush Street notwithstanding her claim that this location was her principal office location. The revocation in this case is premised on that and not on what she may or may not have maintained at Northland Drive.

Petitioner argues also that CMS should have accepted a corrective action plan from her. However, Petitioner did not file a timely plan and CMS was under no obligation to accept Petitioner's untimely filing. CMS Ex. 6 at 3. More significantly, Petitioner's purported corrective action plan corrected nothing. It did not address in any respect Petitioner's failure to maintain an operational site at Brush Street. It merely averred that Petitioner was in compliance with Medicare participation requirements and that no corrective action was necessary. *Id.* at 2.

/s/

 Steven T. Kessel
 Administrative Law Judge