**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Integrated Diagnostic of South Florida, Inc.,
(NPI: 1316045792),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-754

Decision No. CR2508

Date: February 24, 2012

# DECISION DISMISSING PETITIONER'S REQUEST FOR HEARING

I dismiss the hearing request of Petitioner, Integrated Diagnostic of South Florida, Inc. Petitioner has no right to a hearing to challenge the determination by First Coast Service Options, Inc. (First Coast), a Medicare contractor, to reinstate Petitioner as a Medicare participant effective December 20, 2010.

Petitioner is an Independent Diagnostic Testing Facility (IDTF) that has been enrolled as a participating supplier in the Medicare program. Following an on-site inspection completed on August 6, 2010, the Centers for Medicare and Medicaid Services (CMS) revoked Petitioner's Medicare enrollment and billing privileges effective August 6, 2010, and instituted a one-year bar on reenrollment. Petitioner filed a corrective action plan (CAP). On February 17, 2011, First Coast approved Petitioner's CAP and reinstated Petitioner's enrollment effective December 20, 2010, the date that First Coast received the CAP. On April 4, 2011, Petitioner requested reconsideration of the contractor's February 17, 2011 decision, challenging the effective date of reinstatement.

On July 14, 2011, First Coast issued a review of the reinstatement date as a result of the CAP. CMS Ex. 15. The contractor determined that the correct effective date for

reinstatement remained December 20, 2010. CMS Ex. 15. The contractor, however, incorrectly informed Petitioner that it had the right to an Administrative Law Judge (ALJ) hearing on this unfavorable CAP effective date review. CMS Ex. 15.

Pursuant to this misinformation, on August 30, 2011, Petitioner filed a hearing request. I was assigned the case and issued an Acknowledgement and Pre-Hearing Order, in which I established a briefing schedule. Accordingly, CMS filed a brief and seventeen proposed exhibits (CMS Exs. 1 – 17). In its submission, CMS moved to dismiss Petitioner's hearing request or, alternatively, that I enter summary judgment in CMS's favor. Petitioner replied to the motion and filed sixteen proposed exhibits (P. Exs. 1 – 16). I receive all of the parties' exhibits into the record.

To be entitled to a hearing before an ALJ, a supplier must be dissatisfied with a determination authorized under 42 C.F.R. § 498.5(l)(1). *See* 42 C.F.R. § 498.5(l)(2). A determination by CMS, or one of its contractors, to revoke a supplier's participation in Medicare is an appealable initial determination. 42 C.F.R. § 498.3(b)(6). Similarly, a supplier who seeks to participate in Medicare may appeal a determination by a contractor or CMS to certify it as of a particular effective date. 42 C.F.R. § 498.3(b)(15). However, a CMS contractor's refusal to reinstate a supplier's billing privileges based on a CAP is clearly not an initial determination under 42 C.F.R. Part 498 and is not appealable. 42 C.F.R. § 405.874(e); *see DMS Imaging, Inc.*, DAB No. 2313, at 5-10 (2010).

Petitioner argues that its November 30, 2010, letter of revocation was an initial determination subject to a reconsideration decision and related appeal rights. P. Br. at 9. I agree it was an initial determination to which it had a right to a reconsideration review, but Petitioner did not request one within the sixty-day regulatory time period. 42 C.F.R. §§ 498.5(l)(1); 498.22(b)(3). Petitioner did, however, timely request a CAP, which is a separate process than a reconsideration and has no right to an ALJ hearing. CMS Ex. 2; *see also DMS Imaging, Inc.*, DAB No. 2313, at 7-8 (discussing how a CAP process addresses corrective measures for a revocation while a reconsideration process challenges the basis of a revocation).

Petitioner claims that its April 4, 2011 reconsideration request was timely filed following the February 17, 2011 notice of reinstatement. However, First Coast's notice of reinstatement was based on CMS's discretion to accept Petitioner's CAP. First Coast's February 17, 2011 notice was not an initial determination subject to appeal rights pursuant to 42 C.F.R Part 498. 42 C.F.R. § 405.874(e); s*ee DMS Imaging, Inc.*, DAB No. 2313, at 5-10; *Pepper Hill Nursing & Rehab. Ctr.*, DAB No. 2395, at 9-10 (2011).

Petitioner argues that because First Coast issued a reconsideration decision discussing the case merits, CMS now cannot escape ALJ review. P. Br. at 7. I disagree. In its July 14, 2011, letter, First Coast incorrectly stated that Petitioner timely requested reconsideration. CMS Ex. 15, at 2. Although it is regrettable that based on this language

Petitioner believed it had an extended right to reconsideration and a related ALJ review, I cannot create a right where one does not exist. I have no authority to review the merits of Petitioner's case because CMS, or its contractor, gave misleading information, particularly at that late stage of the CAP process.

Petitioner simply chose not to challenge the basis of its Medicare revocation until it received an undesired decision on its effective date following submission of a CAP. Petitioner may not now challenge the basis for the revocation well outside of the regulatory period provided. Petitioner's arguments are equitable in nature and are not a basis for me to grant Petitioner a hearing. *Pepper Hill Nursing & Rehab. Ctr.*, DAB No. 2395, at 10-11; *US Ultrasound*, DAB No. 2302 (2010); *Community Hospital of Long Beach*, DAB No. 1938 (2004).

Accordingly, I dismiss Petitioner's hearing request pursuant to 42 C.F.R. § 498.70(b) considering Petitioner did not timely request a reconsideration, and it has no right to appeal the Medicare contractor's determination regarding its CAP under 42 C.F.R. Part 498.

/s/
Joseph Grow
Administrative Law Judge