Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

I & S Home Health Agency, Inc.
(NPI No.: 1740310341)
(PTAN: 10-9079),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-855

ALJ Ruling No. 2014-44

Date: September 16, 2014

ORDER OF REMAND

The Centers for Medicare & Medicaid Services (CMS) revoked the Medicare billing privileges of Petitioner, I & S Home Health Agency, Inc., because Petitioner failed to comply with Medicare enrollment requirements. Petitioner disputed the revocation and requested a hearing. Because CMS has raised new issues and facts related to Petitioner's compliance with Medicare enrollment requirements in its submission to me, I remand this case to CMS to provide Petitioner with an opportunity to respond to those new issues and render a new determination. If Petitioner is unsatisfied with the new determination, Petitioner may file a new request for an administrative law judge hearing.

Petitioner, a home health agency (HHA), has been enrolled in the Medicare program as a provider. By letter dated January 30, 2014, a CMS administrative contactor informed Petitioner that it was revoking Petitioner's Medicare billing privileges and terminating its provider agreement effective February 12, 2014. This initial determination indicated that revocation was based on a review of the records of five Medicare beneficiaries who all had Frances Glicksman, M.D., as their attending physician. The review showed that Dr.

Glicksman had not signed orders, prescriptions, and plans of care related to Petitioner's bills for HHA services. The initial determination concluded that Petitioner "failed to abide by the Medicare laws, regulations, and program instructions by submitting claims for Medicare patients for home health services without a valid order from a physician when it submitted claims using Dr. Frances Glicksman's NPI for Medicare patients from January 1, 2012 through December 1, 2013." Petitioner Exhibit (P. Ex.) 12.

In response to the initial determination, Petitioner submitted a corrective action plan (CAP) and a request for reconsideration. In a March 11, 2014 document, which appears to serve as both a CAP decision and reconsidered determination, CMS upheld the decision to revoke based on failure to comply with enrollment requirements located in the Form CMS-855A enrollment application that Petitioner submitted to CMS, *see* 42 C.F.R. § 424.535(a)(1), and refused to reinstate Petitioner based on the CAP. CMS Ex. 1.

Petitioner filed a timely request for hearing before an administrative law judge to dispute the revocation of billing privileges. Petitioner disputed the facts and law related tothe basis for revocation as stated in the initial determination and upheld in the reconsidered determination. On April 4, 2014, I issued an Acknowledgment and Pre-hearing Order (Order). In response to the Order, CMS filed a motion for summary judgment (CMS Mot.) and 14 exhibits (CMS Exs. 1-14) as its pre-hearing exchange. Petitioner filed both an opposition to summary judgment and a brief, and 18 exhibits (P. Exs. 1-18) as its pre-hearing exchange. CMS subsequently filed a reply brief (CMS Reply).

In its exchange, CMS significantly changed its basis for revocation. Although CMS still generally premised revocation on a failure to comply with enrollment requirements (i.e., 42 C.F.R. § 424.535(a)(1)), CMS's argument changed from its original premise that Dr. Glicksman failed to sign various necessary documents related to home health services to an assertion that Dr. Glicksman could not properly sign these documents to order home health services because she was not the treating physician of Medicare beneficiaries for whom Petitioner had billed Medicare. CMS Mot. at 10, 14-15. Further, CMS's argument involved 11 beneficiaries, rather than five as indicated in the initial determination. CMS Mot. at 10-12, 14. Further, a comparison of documents submitted in this case shows that claims involving only two of the original five beneficiaries apparently were included among the new group of 11 beneficiaries in CMS's summary judgment motion. *Compare* CMS Mot. Appendix *with* CMS Ex. 10 *and* P. Ex. 16. In addition, CMS added arguments in support of revocation that involved doctors other than Dr. Glicksman. CMS Mot. at 13.

Although CMS raised a new theory for revocation in its exchange, Petitioner properly identified as the issue in this case as the original basis for the initial determination, which was upheld in the reconsidered determination. P. Br. at 2. Petitioner's exchange in this case provides documentation regarding the claims involving the original five beneficiaries. P. Exs. 14, 15.

CMS, in a somewhat minimalistic way, acknowledged that it was changing the basis for revocation in its motion, but cited *Green Hills Enterprises, LLC*, DAB No. 2199 (2008) for the position that CMS is permitted to modify its basis for revocation at the administrative law judge level of appeal. CMS Mot. at 3 n.2. Although CMS is correct that this was true, recent cases have, in effect, overruled *Green Hills Enterprises.* Specifically, those decisions indicate that an administrative law judge may only consider the basis for revocation stated in the reconsidered determination when deciding whether to affirm or reverse the revocation. *Ortho Rehab Designs Prosthetics and Orthotics, Inc*., DAB No. 2591, at 8 (2014); *Keller Orthotics, Inc*., DAB No. 2588, at 7 (2014); *Neb Group of Arizona LLC*, DAB No. 2573, at 7 (2014); *see also Cornerstone Medical Inc*., DAB No. 2585 (2014); *Norpro Orthotics & Prosthetics, Inc*., DAB No. 2577 (2014); *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572, at 8-9 (2014). In the present case, where CMS is raising a new basis and providing new facts not included in either the initial or reconsidered determinations, this prohibition on considering new issues is consistent with the regulations, which prohibit new issues from being considered by an administrative law judge in provider/supplier denial and revocation cases. *See* 42 C.F.R. § 498.56(a)(2); *Improving Life Home Care, LLC*, DAB CR3076, at 5 (2014). However, even though an administrative law judge may not consider new issues in provider/supplier enrollment cases, the regulations expressly permit an administrative law judge to remand a case for CMS to consider new issues and to render a new determination. *See* 42 C.F.R. § 498.56(d).

Therefore, because CMS has raised a new basis for revocation and new facts to support such revocation, and I am not able to consider such issues, as once I would have been able to do, I remand this case to CMS. On remand, CMS will:

1) Provide Petitioner an opportunity to respond to the new reason for revocation;

2) Consider that response and all documents submitted by Petitioner; and

3) Issue a new determination setting out the specific factual and legal basis or bases for revocation (or for reversing the revocation).

If Petitioner is unsatisfied with the new determination on remand, then Petitioner may again request a hearing before an administrative law judge.

It is so ordered.

/s/
Scott Anderson
Administrative Law Judge