Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

MVG, Inc. d/b/a Enery Home Health Care, Inc.
(PTAN 10-8073),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-116

Decision No. CR3125

Date: February 20, 2014

DECISION

The Centers for Medicare & Medicaid Services (CMS) revoked the Medicare enrollment of Petitioner, MVG, Inc., doing business as Enery Home Health Care, Inc., for not complying with Medicare laws applicable to home health agencies. Petitioner appealed and CMS moved for summary judgment. I deny CMS's motion for summary judgment and reverse the revocation of Petitioner's Medicare enrollment and billing privileges. Petitioner has come forward with evidence that disproves the factual basis upon which CMS based the revocation of Petitioner's Medicare enrollment.

I. Case Background

Petitioner is a home health agency in Miami-Dade County, Florida. A CMS investigation determined that a large number of home health claims submitted in and around the Miami region listed Fernando Barquero, M.D., as the certifying physician. CMS examined Petitioner's claims and found that several beneficiaries for whom Petitioner submitted claims listed Dr. Barquero as the certifying physician. CMS concluded that based on Dr. Barquero's own Medicare claims history, he did not see the beneficiaries in Petitioner's claims and did not certify their need for home health services. On August 29, 2013, CMS

notified Petitioner that its billing privileges were revoked pursuant to 42 C.F.R. § 424.535(a)(1)[1] effective September 22, 2013.[2] Petitioner requested reconsideration. On October 7, 2013, the CMS contractor upheld the revocation of Petitioner's billing privileges, stating that Petitioner submitted claims "for home health services without a valid physician certification." CMS Exhibit (Ex.) 1, at 5.

Petitioner then requested a hearing. CMS filed a brief (CMS Br.) and moved for summary judgment. CMS identified 11 beneficiaries for whom Petitioner listed Dr. Barquero as the certifying physician, but argued that Dr. Barquero's Medicare claims history shows that he never submitted claims for evaluating or treating those 11 beneficiaries. CMS submitted eight exhibits (CMS Exs. 1-8). Petitioner opposed summary judgment, and submitted a total of 15 exhibits, although Petitioner marked some exhibits as "2a," "2b," and so on.

Petitioner did not object to CMS's proposed exhibits, so I admit CMS Exs. 1-8. CMS did not object to Petitioner's proposed exhibits; nevertheless, 42 C.F.R. § 498.56(e) governs the admission of those exhibits. It was unclear from the reconsidered determination whether Petitioner submitted its proposed exhibits at that level. On February 3, 2014, I ordered that the parties each submit a statement addressing whether Petitioner had submitted its proposed exhibits at a lower level and, if not, whether good cause existed to admit Petitioner's proposed exhibits at this level. *See* 42 C.F.R. § 498.56(e)(1). In response, CMS acknowledged that it had not identified the 11 beneficiaries at the lower level of appeal, so there was no way for Petitioner to have submitted its proposed exhibits until this level. Petitioner similarly stated that the "11 beneficiaries weren't mentioned or in question originally . . . . The 11 beneficiaries now being used were not a part of that original list that was sent to us by Medicare." P. Resp. to Feb. 3, 2014 Order. I find that good cause exists to admit Petitioner's proposed exhibits because CMS did not provide notice of these 11 beneficiaries before this level of appeal and there was no opportunity for Petitioner to have submitted these documents before this level. Therefore, I admit P. Exs. 1-2, 2a, 2b, 3-11, 11a, and 12.

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[1] 42 C.F.R. § 424.535(a)(1) authorizes CMS to revoke a provider's billing privileges if the "provider or supplier is determined not to be in compliance with the enrollment requirements described in this section, or in the enrollment application applicable for its provider or supplier type . . . ."

[2] Because I conclude that CMS did not have a basis to revoke Petitioner's Medicare billing privileges, I need not address any error in the effective date of revocation. *See* 42 C.F.R. § 424.535(g) (providing that a revocation based on a provider's noncompliance is effective 30 days after CMS or its contractor mails its notice letter).

II. Findings of Fact & Conclusions of Law

1. *Summary judgment is not appropriate because Petitioner has raised a genuine dispute of material fact.*

Summary judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010). Here, Petitioner submitted documentary evidence that CMS has not refuted. When viewing the evidence in a light most favorable to Petitioner for purposes of summary judgment, there is a dispute about whether Dr. Barquero evaluated the 11 Medicare beneficiaries referred to in CMS's motion, and whether he prescribed home health services for them. CMS premised the revocation of Petitioner's billing privileges on the fact that Dr. Barquero had not seen the 11 specific beneficiaries; thus, the dispute of fact is material to the outcome. Therefore, I deny summary judgment.

Petitioner did not request an opportunity to cross-examine CMS's sole witness (CMS Ex. 7), and Petitioner did not offer the written direct testimony of any witnesses. Therefore, an in-person hearing is unnecessary. I decide this case based on the parties' written argument and evidence already submitted. *See* Acknowledgment & Pre-Hr'g Order, Nov. 6, 2013, at 6 ¶¶ 10-11.

2. *CMS has not established a factual basis for revoking Petitioner's Medicare enrollment and billing privileges.*

Medicare will pay for home health services only if a physician certifies that a Medicare beneficiary requires home health services. 42 C.F.R. § 424.22(a). The certification must, among other things, be the result of a face-to-face encounter between the beneficiary and certifying physician that occurred no more than 90 days prior to the start of home health care services. *Id.* § 424.22(a)(1)(v).

CMS argues that Dr. Barquero could not have certified the need for home health services of 11 beneficiaries for whom Petitioner billed Medicare and listed Dr. Barquero as the certifying physician. CMS offered for comparison the Medicare billing records of Petitioner and Dr. Barquero. These records show that Dr. Barquero did not bill Medicare for any services provided to the 11 beneficiaries at issue. For example, Petitioner billed for services provided to beneficiary "N.C." between June 28 and July 27, 2013, with Dr. Barquero listed as the certifying physician. CMS Ex. 5, at 29. However, Dr. Barquero's claims for the same period do not list N.C. as a beneficiary for any claimed services. The same is true for the 10 other named beneficiaries. *See generally* CMS Exs. 5-6; *see also* CMS Br. App'x. CMS infers from this evidence that Dr. Barquero did not see any of the 11 beneficiaries and could not have certified their need for home health services; if he had, he would have submitted a claim to Medicare. CMS Br. at 10-12. That is a reasonable inference of Dr. Barquero's billing records and, when unrebutted, is sufficient

to establish that Petitioner did not comply with the physician certification requirement when submitting claims for home health services. Under CMS's theory, Petitioner's failure to comply with the billing requirements demonstrates it was not in compliance "with the requirements of Medicare law applicable to home health providers," and thus there is a basis to revoke Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(1) for noncompliance with the requirements stated in Petitioner's Medicare enrollment application. CMS Br. at 12.

However, Petitioner's evidence directly rebuts the inference drawn from Dr. Barquero's billing records. Petitioner provided a prescription for home health services, a care plan, and a face-to-face certification form for each of the 11 beneficiaries at issue, all bearing Dr. Barquero's signature. Continuing to use beneficiary "N.C." as an example (Petitioner billed Medicare for services provided to N.C. from June 28 to July 27, 2013), Petitioner offered as evidence a prescription for home health services for N.C. dated June 27, 2013, with Dr. Barquero's signature. P. Ex. 6, at 1. Petitioner also provided N.C.'s care plan for home health services between June 28 and August 26, 2013. Dr. Barquero's signature is on all pages of the care plan. P. Ex. 6, at 2-4. Petitioner submitted a face-to-face certification bearing Dr. Barquero's signature, which certifies that he saw N.C. on June 27, 2013. P. Ex. 6, at 6. Any inferences that CMS may have drawn from Dr. Barquero's billing records about Dr. Barquero seeing these 11 beneficiaries (or not) simply do not hold as much weight as documents actually bearing his signature.

Moreover, CMS has not challenged Petitioner's evidence or questioned its authenticity. CMS vaguely asserts in a reply brief that "paperwork initiating home health services can be obtained or generated in a variety of ways, not all of them legitimate." But, other than relying on general claims about other home health agencies, CMS has provided no direct argument or evidence (direct or circumstantial) that calls into question the authenticity or veracity of Petitioner's evidence.[3] Therefore, based on the record before me, I refrain from accepting that Petitioner's exhibits bearing Dr. Barquero's signature are not authentic or anything other than what they purport to be. The evidence establishes that Dr. Barquero saw the 11 beneficiaries in question, prescribed home health services to each of them for the billing periods in question, established a care plan for each beneficiary for the billing periods in question, and certified that he conducted a face-to-face evaluation of those beneficiaries. The evidence establishes that, for the 11 specific beneficiaries at issue here, Petitioner met the physician certification requirement for submitting a claim for home health services. *See* 42 C.F.R. § 424.22(a).

[3] The CMS contractor stated in its initial and reconsidered determinations that Dr. Barquero made a written statement wherein he said that he only referred a total of 12 patients to home health care providers since January 2012. CMS Ex. 1, at 2, 5. CMS has not offered that alleged statement as evidence in this proceeding, so I have no way of considering it.

Accordingly, I find that CMS has not proven the factual premise upon which it based the revocation of Petitioner's billing privileges. Therefore, I must reverse the revocation of Petitioner's Medicare enrollment and billing privileges.

III. Conclusion

For the reasons stated above, CMS's motion for summary judgment is denied and the revocation of Petitioner's Medicare enrollment and billing privileges is reversed.

/s/
Steven T. Kessel
Administrative Law Judge