Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dennis Zamzow, DPM
(PTAN: 00E20332/NPI: 1376683953),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-110

Decision No. CR4855

Date: May 25, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, Noridian Healthcare Solutions (Noridian), revoked the Medicare enrollment and billing privileges of Dennis Zamzow, DPM (Petitioner), pursuant to 42 C.F.R. § 424.535(a)(5).[1] Noridian found that Dr. Zazmow did not have an operational medical practice at the location on record with CMS. Specifically, the location on record with CMS was a mailbox unit at a Mail Service Center. Dr. Zamzow does not contend that he actively provided podiatry services from this location. Thus, CMS properly concluded that Dr. Zamzow was not operational at that location. I therefore affirm CMS's revocation of Dr. Zamzow's Medicare enrollment and billing privileges.

[1] The initial determination also stated that Petitioner violated 42 C.F.R. § 424.535(a)(9); however, I need not address this basis as I have determined that revocation was proper under 42 C.F.R. § 424.535(a)(5).

I. Background and Procedural History

Dr. Zamzow is a podiatrist. He does not maintain an office that is open to the public, but rather provides podiatry services at several nursing homes. *See, e.g.*, Petitioner's Brief[2] (P. Br.) at 2. Dr. Zamzow was enrolled as a Medicare supplier of podiatry services. On or about May 1, 2012, Dr. Zamzow submitted a Form CMS-855I web application via the Provider Enrollment, Chain and Ownership System (PECOS) to revalidate his Medicare enrollment information. CMS Exhibit (Ex.) 1. Under the practice location section of the enrollment form, Dr. Zamzow reported that his practice location was "65 Washington St [#]88 Santa Clara California 95050-6138" (Washington Street address). CMS Ex. 1 at 4.

According to a "Site Verification Survey Form" offered by CMS, a representative of MSM Security, a CMS contractor, visited the Washington Street address on January 6, 2016, to conduct an on-site review. During the January 6, 2016 visit, the contractor documented that a Mail Service Center occupied the Washington Street address. CMS Ex. 2.

By letter dated May 6, 2016, Noridian informed Dr. Zamzow of its initial determination to revoke his Medicare billing privileges retroactive to January 6, 2016, and to impose a two-year reenrollment bar. CMS Ex. 3. The letter stated the following, in pertinent part:

> **42 CFR §424.535(a)(5) – On-Site Review/Other Reliable Evidence that Requirements Not Met**
>
> You are no longer operational to furnish Medicare covered items or services. A site visit conducted on January 6, 2016 at 65 Washington St., Suite 88, Santa Clara, CA 95050-6138 confirmed that you are non-operational.

CMS Ex. 3 at 1 (bold type original).

In a letter dated June 13, 2016, Petitioner requested reconsideration of the May 6, 2016 revocation determination. CMS Ex. 4. Petitioner explained that he performs podiatry services at approximately eight nursing home facilities. *Id*. Petitioner further explained that he has not treated any patients outside of nursing homes for the last twenty-eight years. *Id*. Petitioner stated that the Washington Street address was his mailing address. *Id*.

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[2] The document I have identified as Petitioner's Brief is styled "Answer to Order" in the DAB E-File system. It appears Petitioner uploaded each page of his brief as a separate item in E-File.

On September 8, 2016, Noridian issued an unfavorable reconsidered determination. CMS Ex. 5. The reconsidered determination stated the following:

> *[Dr. Zamzow] had not provided evidence to show full compliance with the standards for which [he was] revoked. Therefore, Noridian Healthcare Solutions is not granting . . . access to the Medicare Trust Fund (by way or issuance) of a Medicare number.*

CMS Ex. 5 at 2 (italic type original).

Petitioner submitted a hearing request on October 30, 2016. CMS Ex. 6. I issued an Acknowledgment and Pre-Hearing Order dated November 28, 2016 (Pre-Hearing Order), which directed each party to file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Pre-Hearing Order ¶ 4. The Order also explained that the parties should submit written direct testimony for any witnesses in lieu of in-person direct testimony. Order ¶ 8. Finally, the Order explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Order ¶ 10.

In response to the Pre-Hearing Order, CMS filed a brief (CMS Br.) and exhibits (CMS Exs. 1-6). CMS also filed a motion for summary judgment simultaneously with its brief. Petitioner filed a brief (P. Br.) and supporting documents.[3] Neither party submitted written direct testimony nor did either party object to the exhibits offered by the opposing party. Therefore, in the absence of objection, I admit the proffered exhibits into the record. I further find the motion for summary judgment filed by CMS to be ready for a decision.

II. Issue

The issue in this case is whether CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5).

[3] As he did with his brief (see n.2, above), it appears Petitioner uploaded each page of his supporting documents as a separate item in E-File. Thus, while DAB E-File identifies Petitioner's supporting documents as Exhibits (Exs.) 1-6, Petitioner's supporting documents in fact consist of two pieces of correspondence. The first is a two-page letter from Noridian to Petitioner, dated January 16, 2017 (labeled as Exs. 1-2). The second is a four-page letter from Noridian to Petitioner, dated December 9, 2016 (labeled as Exs. 3-6).

III. Jurisdiction

I have jurisdiction to hear and decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(1); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Discussion

A. Statutory and Regulatory Background

As a podiatrist, Dr. Zamzow is a "supplier" for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(3). In order to participate in the Medicare program as a supplier, an individual must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke the enrollment and billing privileges of a supplier for any reason stated in 42 C.F.R. § 424.535. When CMS revokes a supplier's Medicare billing privileges, CMS establishes a reenrollment bar for a period ranging from one to three years. 42 C.F.R. § 424.535(c). Generally, a revocation becomes effective 30 days after CMS mails the initial determination revoking Medicare billing privileges, but if CMS finds a supplier to be non-operational, as it did here, the revocation is effective from the date that CMS determines that the supplier was not operational. 42 C.F.R. § 424.535(g).

On-site review is addressed in 42 C.F.R. § 424.535(a)(5). Pursuant to subsections 424.535(a)(5)(i) and (ii), CMS may revoke a supplier's Medicare enrollment and billing privileges if CMS determines upon on-site review that the supplier is "[n]o longer operational to furnish Medicare-covered items or services" or that the supplier "fails to satisfy any Medicare enrollment requirement."

B. Findings of Fact, Conclusions of Law, and Analysis[4]

1. Summary judgment is appropriate.

Summary judgment is appropriate if "the record shows that there is no genuine issue as to any 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) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials

[4] My findings of fact and conclusions of law appear as numbered headings in bold italic type.

in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab.*, DAB No. 2300 at 3 (citations omitted). To determine whether there are genuine issues of material fact for hearing, an administrative law judge must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.*

There is no genuine dispute as to any material fact in this case. CMS has offered evidence that the address Dr. Zamzow reported as his practice address is a Mail Service Center and not a medical office. Dr. Zamzow does not dispute this. Nor does he contend that he operated a medical practice at the listed address. Instead, he argues that he mistakenly entered the Mail Service Center address as his practice address. He further represents that he does not maintain an office practice, but is nevertheless fully "operational" in that he sees patients in the nursing homes where they reside. I accept Dr. Zamzow's representations as true for purposes of ruling on CMS's motion for summary judgment. However, as explained below, neither the fact that Dr. Zamzow may have made an error in completing his enrollment application nor the fact that he sees patients in nursing homes is material to CMS's authority to revoke his Medicare enrollment and billing privileges. Accordingly, summary judgment is appropriate.

2. A CMS contractor attempted to conduct a site visit of Dr. Zamzow's practice location on January 6, 2016, at the address on file with CMS (65 Washington Street, #88, Santa Clara, California 95050-6138); however, a Mail Service Center, and not Dr. Zamzow's medical office, occupied that location.

On or about May 1, 2012, Dr. Zamzow completed a Form CMS-855I enrollment application using PECOS. CMS Ex. 1. At the prompt for "practice location," Dr. Zamzow reported that his practice location was "65 Washington St [#]88 Santa Clara California 95050-6138." CMS Ex. 1 at 4. In response to the prompt "Date you saw your first Medicare patient at practice location," Dr. Zamzow entered "06/22/1976." *Id.* Dr. Zamzow also listed the Washington Street address as his correspondence address and the address to which special payments should be sent. CMS Ex. 1 at 3, 4.

CMS offered a document headed "Site Verification Survey Form" (survey form), that appears to have been prepared by a CMS contractor, MSM Security. CMS Ex. 2. The survey form includes photographs showing that the Washington Street address is a Mail Service Center and not a medical office. *Id.* The survey form is dated January 6, 2016. *Id.* Dr. Zamzow does not dispute that the Washington Street address is a Mail Service Center. CMS Ex. 4 at 1. Nor does he dispute that the CMS site visit contractor completed the site visit on January 6, 2016.

3. CMS had a legal basis to revoke Dr. Zamzow's Medicare enrollment and billing privileges because Dr. Zamzow was not operational under 42 C.F.R. § 424.535(a)(5) at the practice location on file with CMS.

Petitioner admits that the Washington Street address is a Mail Service Center and not a practice location, but argues that he was nonetheless fully operational to see patients at various nursing homes. CMS Ex. 4 at 1. This argument is unavailing because CMS may revoke a supplier's Medicare enrollment and billing privileges if the supplier is not "operational" at the practice location the supplier has provided to CMS.

A supplier is "operational" when it –

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

42 C.F.R. § 424.502. CMS may revoke a currently enrolled supplier's Medicare billing privileges if "[u]pon on-site review or other reliable evidence, CMS determines that the provider or supplier is . . . [n]o longer operational to furnish Medicare-covered items or services." 42 C.F.R. § 424.535(a)(5)(i).

The regulatory definition of the term "operational" refers to the "qualified physical practice location" of a supplier. 42 C.F.R. § 424.502. The Medicare enrollment applications request the address of the supplier's practice location. Additionally, a supplier must be able to provide documentation of its "practice location" with its enrollment application. 42 C.F.R. § 424.510(d)(2)(ii). CMS may perform on-site inspections to verify that the enrollment information submitted by a supplier is accurate and to determine compliance with Medicare requirements. 42 C.F.R. § 424.517(a). CMS has explained, "[T]he primary purpose of an unannounced and unscheduled site visit is to ensure that a provider or supplier is operational *at the practice location found on the Medicare enrollment application*." 76 Fed. Reg. 5862, 5870 (February 2, 2011) (emphasis added).

In summary, to determine whether CMS had a legal basis to revoke Dr. Zamzow's Medicare enrollment and billing privileges, I must answer two questions: 1) What was the practice location address on file with the Medicare contractor on the date of the on-site visit? 2) Was Dr. Zamzow operational at that address on the date of the on-site visit? *See Care Pro Home Health, Inc.*, DAB No. 2723 at 15 (2016). Here, CMS provided undisputed evidence that Dr. Zamzow was not operational at the Washington Street

address, which was the only practice address Dr. Zamzow had on file with the Medicare contractor at the time of the January 6, 2016 attempted site visit. Therefore, I conclude that CMS had a legal basis to revoke Dr. Zamzow's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5).

4. None of Dr. Zamzow's arguments provides a basis to overturn the revocation of his billing privileges.

In his reconsideration request, Dr. Zamzow contends that any error in his forms was merely a clerical error and that he had been treating patients solely at nursing homes for over twenty years. CMS Ex. 4 at 1. In his hearing request, Dr. Zamzow argues that Noridian is responsible for his failure to complete his enrollment application correctly. CMS Ex. 6 at 1-2. He further argues that his "career as a podiatrist treating patients in nursing homes should not be ended based on an unintended clerical error of omission on an 855 application." CMS Ex. 6 at 2. These arguments do not establish that CMS erred in revoking Dr. Zamzow's Medicare enrollment and billing privileges.

First, characterizing Dr. Zamzow's failure to report a valid practice address on his enrollment application as a "clerical error" does not invalidate the basis for revocation. As the drafters of the regulations explained with regard to other "record-keeping" requirements,[5] "we do not view these as mere administrative requirements. The reporting mandates . . . help ensure that CMS has correct, up-to-date information on the provider so CMS can determine if a provider or supplier is still in compliance with Medicare requirements." 79 Fed. Reg. 72,500, 72,524 (Dec. 5, 2014). The same is equally true of the requirement to provide CMS an accurate address for a supplier's practice. Absent accurate, up-to-date information regarding a supplier's practice location, CMS or its contractor would be unable to verify that the supplier is legitimately offering health care services at that location.

Second, Dr. Zamzow's attempt to cast responsibility on Noridian for his error in completing the Form CMS-855 misses the point. Contrary to Dr. Zamzow's contention that Noridian should have explained to him the need to list on his enrollment application all the nursing homes at which he practices, it was Dr. Zamzow's responsibility to read the application instructions carefully and fill out the application accurately. Further, even if Noridian's initial revocation notice had explicitly stated that Dr. Zamzow's application was deficient because he failed to list the nursing homes at which he practices, and if Dr. Zamzow had provided the names and addresses of the nursing homes with this reconsideration request, this would not have removed the basis for revocation. At best, providing the names and addresses of the nursing homes at the time he requested reconsideration would represent a corrective action plan (CAP). However, under the

[5] The drafters specifically referred to the requirements found at 42 C.F.R. § 424.535(a)(9) and (a)(10). 79 Fed. Reg. at 72,524.

regulations, a CAP is available only in response to revocations imposed pursuant to 42 C.F.R. § 424.535(a)(1). *See* 42 C.F.R. § 405.809(a)(1). Because Dr. Zamzow's enrollment and billing privileges were revoked pursuant to 42 C.F.R. § 424.535(a)(5), he would not have the opportunity to submit a CAP. 42 C.F.R. §§ 405.809(a)(1), 424.535(a)(1); *see also* 79 Fed. Reg. at 72,523 ("providers and suppliers generally should not be exonerated from failing to fully comply with Medicare enrollment requirements simply by furnishing a CAP, for it is the duty of providers and suppliers to always maintain such compliance").

Third, by suggesting that CMS's revocation of his Medicare enrollment and billing privileges will, in effect, end his career as a podiatrist, Dr. Zamzow appears to contend that the revocation is unfair. However, CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances. *Letantia Bussell, M.D.*, DAB No. 2196 at 13 (2008). Rather, "the right to review of CMS's determination by an [administrative law judge] serves to determine whether CMS had the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the [administrative law judge's] discretion about whether to revoke." *Id*. (citation omitted, emphasis in original). Once CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review. *See id*. at 10; *see also Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2nd 167 (D. Mass. 2010) (if CMS establishes the regulatory elements necessary for revocation, an administrative law judge may not substitute his or her "discretion for that of CMS in determining whether revocation is appropriate under all the circumstances").

V. Conclusion

For the reasons stated, I grant CMS's motion for summary judgment and affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

/s/
Leslie A. Weyn
Administrative Law Judge