Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Monique Barbour, M.D.,
(PTAN: 27420W)
(NPI: 11043398175)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-178

Decision No. CR5015

Date: January 30, 2018

DECISION

Petitioner, Monique Barbour, M.D., is an ophthalmologist, practicing in Florida, who owns and operates Clear Vue Laser Eye Center, Inc., a group medical practice. Until recently, Petitioner Barbour and her group practice participated in the Medicare program. The Centers for Medicare & Medicaid Services (CMS) has revoked their billing privileges, citing abusive billing practices; specifically, CMS charges that Petitioner Barbour billed for services to Medicare beneficiaries that she could not have provided because she was out of the country on the dates she ostensibly provided them.

Petitioner appeals. The parties agree on the dispositive facts and have filed cross-motions for summary judgment. I agree that this case presents no genuine issues of material fact and that summary judgment is appropriate.

The undisputed evidence establishes that Petitioner Barbour repeatedly billed the Medicare program for services she could not have provided and, in fact, did not provide. CMS therefore properly revoked her billing privileges.

Background

In a letter dated June 24, 2015, the Medicare contractor, First Coast Service Options, Inc., advised Petitioner Barbour that her Medicare billing privileges were revoked, effective July 24, 2015. The contractor took this action pursuant to 42 C.F.R. § 424.535(a)(8) because it found that Dr. Barbour submitted multiple claims for services that she could not have rendered because she was outside the country on the purported dates of service. CMS Exhibit (Ex.) 3.

Petitioner requested reconsideration. CMS Ex. 2. In a reconsidered determination, dated October 19, 2015, CMS upheld the revocation. CMS Ex. 1.[1]

Petitioner appealed, and her appeal is now before me. CMS has moved for summary judgment. With its memorandum in support of summary judgment (CMS Br.), it submits 41 exhibits (CMS Exs. 1-41). Petitioner filed a cross-motion for summary judgment (P. Br.), accompanied by 29 exhibits (P. Exs. 1-29). CMS responded to Petitioner's cross-motion (CMS Response), and Petitioner filed a reply (P. Reply).

Discussion

> ***CMS is entitled to summary judgment because the undisputed evidence establishes that Petitioner Barbour was out of the country and could not have provided the services for which she billed the Medicare program. CMS therefore properly revoked her Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(8) and is entitled to summary judgment.[2]***

Program rules. CMS regulates the Medicare enrollment of providers and suppliers. Social Security Act (Act) § 1866(j)(1)(A). It may revoke a supplier's billing privileges if she abuses them by submitting a claim or claims for services that she could not have furnished to a specific individual on the date of service, such as where "the directing physician . . . is not in the state or country when services were furnished . . . ." 42 C.F.R. § 424.535(a)(8).[3]

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[1] In a separate notice and reconsidered determination, the contractor revoked the billing privileges of Dr. Barbour's medical practice, Clear Vue, Inc., which filed a separate appeal. That appeal is docketed as C-16-179.

[2] I make this one finding of fact/conclusion of law.

[3] The regulation was amended effective February 2015 and is currently found at 42 C.F.R. § 424.535(a)(8)(i)(B). *See* 79 Fed. Reg. 72,532 (December 5, 2014). Here, all but one of the purported dates of service occurred prior to that effective date, so the old

The plain language of the regulation authorizes CMS to revoke billing privileges based on a single bogus claim. 42 C.F.R. § 424.535(a)(8) (authorizing revocation if the supplier submits "a claim or claims for services that could not have been furnished . . ."). CMS has decided not to enforce the rule so strictly, however; it will not revoke unless the supplier has submitted at least three bogus claims. 73 Fed. Reg. 36,448, 36,455 (June 27, 2008).

Summary judgment. The Departmental Appeals Board has, on multiple occasions, discussed the well-settled principles governing summary judgment. *See, e.g.*, *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 2-3 (2009). Summary judgment is appropriate if a case presents no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 2; *Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009), and cases cited therein.

The Board has delineated the "facts material" to determining whether CMS properly revoked a supplier's Medicare participation under section 424.535(a)(8): 1) whether Petitioner was out of the country on the dates alleged; and 2) whether she billed Medicare for services she claimed to have provided to specific individuals on those dates. *Zille Shah, M.D. and Zille Huma Zaim, M.D., PA*, DAB No. 2688 at 5 (2016); *Mohammad Nawaz, M.D. and Mohammad Zaim, M.D., PA*, DAB No. 2687 at 5 (2016).

To establish that it is entitled to summary judgment, the moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Ctr. v. Dep't of Health & Human Servs.*, 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); s*ee also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004). The non-moving party may not simply rely on denials, but must furnish admissible evidence of a dispute concerning a material fact. *Ill. Knights Templar*, DAB No. 2274 at 4; *Livingston Care Ctr.*, DAB No. 1871 at 5 (2003), *aff'd*, 388 F.3d 168 (6th Cir. 2004).

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *Livingston Care Ctr.*, 388 F.3d at 172; *Guardian Health Care Ctr.*, DAB No. 1943 at 8 (2004); *but see Brightview Care Ctr.*, DAB No. 2132 at 10 (2007) (entry of

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citation applies. In any event, the amendments did not change the substantive provisions that underlie this case.

summary judgment upheld where inferences and views of non-moving party are not reasonable). However, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cf. Guardian Health Care Ctr.*, DAB No. 1943 at 11 ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.").

Undisputed material facts. Petitioner Barbour is a physician practicing in Lake Worth, Florida. The parties agree that, over a period of six years, she billed the Medicare program for services provided while she was out of the country:

- July 9-19, 2009 two claims submitted. CMS Ex. 2 at 17.
- September 24-27, 2009 18 claims submitted. CMS Ex. 2 at 18.
- December 1-5, 2009 20 claims submitted. CMS Ex. 2 at 19.
- June 27-July 3, 2010 one claim submitted. CMS Ex. 2 at 20.
- June 17-21, 2011 10 claims submitted. CMS Ex. 2 at 20.
- August 14-21, 2011 three claims submitted. CMS Ex. 2 at 21.
- January 3-8, 2012 one claim submitted. CMS Ex. 2 at 21.
- July 30–August 8, 2012 seven claims submitted. CMS Ex. 2 at 21.
- July 30-August 10, 2013 32 claims submitted. CMS Ex. 2 at 22.
- February 14-26, 2014 43 claims submitted. CMS Ex. 2 at 23.
- May 2-7, 2014 four claims submitted. CMS Ex. 2 at 24.
- March 19-22, 2015 one claim submitted. CMS Ex. 2 at 24.

Petitioner Barbour concedes that, for almost all of these 142 claims, she was out of the country on the dates she ostensibly provided the services for which she billed Medicare. P. Br. at 7, 13; *see* CMS Ex. 2 at 4, 29-30 (Barbour Decl. ¶¶ 6, 7).

She acknowledges that other judges have upheld revocations where physicians billed for services ostensibly provided while they were out of the country, but she distinguishes

herself from those cases by claiming (gratuitously) that she "did not say that she provided the services to the beneficiaries herself, for the claims with dates of services when she was traveling and unavailable." P. Br. at 9. While Petitioner may have admitted *during these proceedings* that she did not provide the services, she concedes that, when she submitted bills to the Medicare program, she represented that she had provided the services. Petitioner excuses these as billing errors: modifiers were omitted or incorrect dates of service were provided. P. Br. at 11-12.

The Board has repeatedly observed that the Medicare rules provide no exceptions "for inadvertent or accidental billing errors." *John M. Shimko, D.P.M.*, DAB No. 2689 at 6 (2016), *quoting Louis J. Gaefke, D.P.M.*, DAB No. 2554 at 7 (2013). Nothing in section 424.535(a)(8) (or its preamble) requires CMS to establish that the improper claims were not accidental. *Howard B. Reife, D.P.M.*, DAB No. 2527 at 6 (2013). Physicians are responsible for Medicare claims submitted on their behalf and at their direction. Their efforts to assign the blame elsewhere (billing agent, assistants) "do not relieve [them] of [their] responsibility for the improper claims or bar CMS from revoking [their] billing privileges." *Id.* at 8.

Petitioner was out of the country on the dates alleged, and she billed the Medicare program for services she claimed to have provided to specific individuals on those dates. Thus, both of the "facts material" to determining whether CMS properly revoked Petitioner Barbour's Medicare enrollment are resolved in CMS's favor, and CMS is entitled to summary judgment.

Nor am I persuaded that Petitioner's additional arguments should alter this result. She asserts that she is not subject to revocation because the services billed for were, in fact, provided to Medicare beneficiaries, just not by her. She offers four categories of explanation:

First, for three of the 142 claims – dated July 13, 2009, June 29, 2010, and August 16, 2011 – she asserts that she provided the services while she was in the country, but the dates listed on the billing forms were inaccurate. The bills should have indicated July 7, 2009, June 25, 2010, and August 11, 2011. P. Br. at 5; P. Exs. 4-6.[4]

[4] This is a bit of a departure from Petitioner's position at the reconsideration level. In the written declaration she filed during those proceedings, she claimed that a technician provided "ancillary ophthalmological testing services" while she was out of the country from July 9 through 19, 2009. CMS Ex. 2 at 29 (Barbour Decl. ¶ 7). But she also maintained that three other claims were provided while she was in the country, and her billing personnel entered incorrect dates of service. She did not then identify those three claims. CMS Ex. 2 at 5.

Petitioner has come forward with evidence that she provided services to three individuals on two of the dates claimed (July 7, 2009 and June 25, 2010). P. Exs. 4, 6. With respect to the third, the date of service is August 10, 2011, not August 11; that apparent error is inconsequential because she was in the country on both days. P. Ex. 5. For purposes of summary judgment, I accept that Petitioner provided services on those dates and, drawing all reasonable inferences in her favor, that the service dates submitted to Medicare were in error. P. Exs. 4-6. However, based on the Board's sound reasoning in *Shimko* and *Gaefke*, she does not escape responsibility by showing that her billing agent submitted erroneous claims.

Moreover, even if I eliminate these claims (which I could not justify doing), CMS has come forward with ample other examples of her billing for services that she did not provide.

Second, Petitioner maintains that "some of the services provided and billed while [Petitioner] was out of the country were provided by substitute practitioners . . . ." P. Br. at 5. But she concedes that the claims she submitted indicated that *she* provided the services. P. Br. at 6; CMS Exs. 7-25.[5]

As a threshold matter, I note that CMS may revoke a physician's billing privileges if she knowingly allows another individual to use her billing number. 42 C.F.R. § 424.535(a)(7); *see Kermit E. White, M.D., & Kermit E. White M.D., P.C.*, DAB No. 2765 (2017).

In any event, Petitioner has again come forward with some evidence that other physicians covered for her while she was out of the country. In a written declaration, Catherine Ford, O.D., asserts that she worked for Petitioner at Clear Vue from December 2014 until June 2015; that she "routinely" provided services for Petitioner's patients when Petitioner was out of town; and that she did so on March 20, 2015. P. Ex. 1 at 1 (Ford Decl. ¶¶ 5, 7). However, Petitioner proffers no evidence to show that Dr. Ford provided any of the services for which she submitted claims. Similarly, Brian Haft, M.D., and Kevin Kelly, M.D., state, generally, that they "routinely provided coverage" for Petitioner Barbour when she was out of town but, again, they do not cite any specific services for which they submitted claims using Petitioner's name and billing number. P. Ex. 2 (Haft Decl. ¶ 6); P. Ex. 3 (Kelly Decl. ¶ 7).

[5] At the reconsideration level, Petitioner also maintained that "some of the services provided" while she was out of the country were provided by substitute physicians. CMS Ex. 2 at 4, 7 n.5. She provided no numbers, although she submitted a written declaration listing the periods of travel during which the services were provided: July 24 through 27, 2009; December 1 through 5, 2009; and March 19 through 22, 2015. CMS Ex. 2 at 4, 29 (Barbour Decl. ¶ 6). For these periods, she submitted 18 claims, 20 claims, and one claim, respectively. CMS Ex. 2 at 18-19, 24.

Petitioner also submits some treatment notes, which, she represents, show that Dr. Karen Rojas provided services on dates that Petitioner was out of the country: September 25, 2009, and December 1 through 4, 2009. P. Br. at 6; P. Exs. 7-25. Petitioner does not mention Dr. Rojas's qualifications, and she submits no written declaration from Dr. Rojas.

Viewed in the light most favorable to Petitioner, and accepting Petitioner's otherwise unsupported representation, the treatment notes show that Dr. Rojas provided some services for which claims were submitted. P. Exs. 7-25. At best, however, these account for 35 claims for services provided to 20 patients, leaving a significant number of erroneous claims to justify revocation.

Third, Petitioner alludes to "other claims" (number not specified) for services provided by technicians "under general supervision" of physicians, as provided for in 42 C.F.R. § 410.32. P. Br. at 6.[6] She has come forward with no additional evidence that any of the claims submitted fall into this category but simply cites to the same proffered exhibits (P. Exs. 7-25) she submitted to show that Dr. Karen Rojas provided the services.

Finally, on some travel dates -- she mentions January 3, 2012 -- Petitioner asserts that she left the country late in the day and provided the services on the dates of her departure. P. Br. at 7. But she offers evidence of the time she left the country for two dates only: 5:45 p.m. on **July 30, 2013**, and 4:03 p.m. on **May 2, 2014**. P. Exs. 27, 28. None of the challenged claims for services provided were submitted on either of those dates. CMS Ex. 2 at 21, 24.

Thus, at best, Petitioner has proffered evidence disputing fewer than 40 of the 142 claims. To consider those submissions material, I would have to disregard the reasoning of *Shimko* and *Gaefke*, and I would have to find it permissible for her to bill Medicare, representing that she provided services that were, in fact, provided by others. I therefore do not consider the evidence material.

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[6] This represents a significant change from Petitioner's earlier representation. At the reconsideration level, Petitioner claimed that *she* (not other physicians) had provided supervision pursuant to section 410.32. CMS Ex. 2 at 4, 7 n.6. Again, she provided no specific numbers, but listed, in her written declaration, the periods of travel during which the services were provided: July 9 through 19, 2009; June 17 through 21, 2011; January 3 through 8, 2012; July 30 through August 8, 2012; July 30 through August 10, 2013; February 14 through 26, 2014; and May 2 through 7, 2014. CMS Ex. 2 at 29-30 (Barbour Decl. ¶ 7). For these periods she submitted 2 claims; 10 claims; 1 claim; 7 claims; 32 claims; 43 claims; and 4 claims, respectively. CMS Ex. 2 at 17, 20-24. It is well-settled that a physician who is out of the country cannot provide the level of supervision required by section 410.32. *Zille Shah, M.D.*, DAB No. 2688 at 9-10.

Conclusion

The evidence establishes that Petitioner Monique Barbour, M.D., submitted multiple claims to the Medicare program, representing that she provided the services for which she billed. She concedes that, with a few exceptions, she was out of the country and did not provide the services for which she billed Medicare. CMS therefore properly revoked her Medicare enrollment.

/s/
Carolyn Cozad Hughes
Administrative Law Judge