

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Santa Rosa Orthopaedic Medical Group Inc.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-719

Decision No. CR4722

Date: October 18, 2016

**DECISION**

I sustain the determination of a Medicare contractor, as subsequently ratified by the Centers for Medicare & Medicaid Services (CMS), to revoke the Medicare participation of Petitioner, Santa Rosa Orthopaedic Medical Group, Inc. I modify the effective revocation date from February 18, 2016 to April 20, 2016.

**I. Background**

Petitioner is a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). A Medicare contractor notified Petitioner that it had revoked Petitioner's participation in Medicare. A reconsideration determination affirmed the initial determination and Petitioner requested a hearing. CMS moved for summary judgment and filed a brief plus 13 proposed exhibits, identified as CMS Ex. 1-CMS Ex. 13. Petitioner opposed the motion and cross-moved for summary judgment. CMS filed a reply brief. I receive CMS Ex. 1-CMS Ex. 13 into the record.

Although both parties moved for summary judgment, I find it unnecessary that I decide whether the criteria for summary judgment are met here. Neither side offered witness

testimony. Consequently, there is no need for an in-person hearing. I decide the case based on the parties' written submissions.

## **II. Issue, Findings of Fact and Conclusions of Law**

### **A. Issue**

The issue is whether CMS may revoke Petitioner's Medicare participation.

### **B. Findings of Fact and Conclusions of Law**

The facts of this case are uncomplicated and undisputed. Raymond Severt, M.D. owned a partnership interest in Petitioner until July 23, 2013, when Petitioner purchased that interest and terminated its relationship with him. CMS Ex. 8. Previously, Petitioner filed a form with the contractor advising it that Dr. Severt owned a partnership interest. CMS Ex. 2 at 32.

Petitioner ended its relationship with Dr. Severt after several events occurred affecting his professional credentials. On March 4, 2013, the State of California suspended his license to practice medicine. CMS Ex. 4. On that same date, CMS revoked his Medicare billing privileges. CMS Ex. 5.

On May 14, 2013, Petitioner notified the contractor that Petitioner would terminate the reassignment of Dr. Severt's Medicare billing privileges. CMS Ex. 6. Effectively, that meant that Petitioner would no longer claim reimbursement for any Medicare items or services provided by Dr. Severt.

The State of California revoked Dr. Severt's medical license on August 21, 2015. CMS Ex. 9. The Inspector General excluded Dr. Severt from participating in Medicare on February 18, 2016. CMS Ex. 10.

Petitioner did not inform the contractor that it had terminated its relationship with Dr. Severt in July 2013 until April 7, 2016, when it sought reconsideration of the contractor's initial determination and filed a notice (CMS-855S) removing his name from the list of Petitioner's partners and managing employees. CMS Ex. 12.

CMS asserts that these facts establish two grounds for revoking Petitioner's Medicare participation. First, CMS contends that Petitioner's failure – until April 7, 2016 – to notify the contractor of the end of its relationship with Dr. Severt is basis to conclude that, as of February 18, 2016, Petitioner maintained a partnership relationship with Dr. Severt. That, asserts CMS, establishes that Petitioner violated the requirements of 42 § 424.535(a)(2). In relevant part, the regulation allows for revocation of Medicare participation if a provider, supplier, or its owner, managing employee or certain other

individuals are excluded from participating in Medicare or debarred, suspended or otherwise excluded from participating in certain programs.

Second, CMS contends that it may revoke Petitioner's participation because Petitioner allegedly failed to comply with the requirements of 42 C.F.R. § 424.57(c)(2). This regulation allows a DMEPOS supplier 30 days to notify CMS or its contractor of a material change in the supplier's status. CMS may revoke a supplier's participation for failure to comply with this regulation. 42 C.F.R. § 424.57(d). CMS asserts that Petitioner failed, until April 7, 2016, to notify the contractor of Dr. Severt's termination as a partner in July 2013. This, according to CMS, is a clear violation of the regulation.

I do not agree with CMS that Petitioner's participation may be revoked pursuant to 42 C.F.R. § 424.535(a)(2). That regulation allows for revocation of a provider or supplier's participation if it *currently* has a manager or owner who is excluded. The regulation predicates revocation on the involvement in the affairs of a provider or supplier by an excluded individual. However, in this case, Petitioner terminated its relationship with Dr. Severt more than two years prior to the date of his exclusion. He was not an owner or manager of Petitioner on February 18, 2016 and therefore, there is no basis to revoke Petitioner's participation pursuant to the regulation.

CMS conflates Petitioner's failure to notify the contractor of its termination of its relationship with Dr. Severt with its status as of February 18, 2016. CMS seems to argue that, if a provider or supplier fails to notify a contractor of its termination of a relationship with an owner or manager that relationship remains alive for purposes of establishing a basis to revoke pursuant to 42 C.F.R. § 424.535(a)(2). I find nothing in the regulation that supports this theory. The regulation addresses the *status* of a provider or a supplier – i.e., who owns or manages it as of a particular point in time. It does not address failure to notify of a change of status.

Moreover, as Petitioner argued, pursuant to 42 C.F.R. § 424.535(e), CMS may reverse a revocation, if the revocation was due to adverse activity (sanction, exclusion or felony) against an owner, managing employee or delegated official if the provider or supplier terminates and submits proof within 30 days of the revocation notification that it has terminated its business relationship with that individual. *See also* CMS Ex. 11 at 2 (Revocation Notice Letter). If I were to accept CMS's contention with respect to 42 C.F.R. § 424.535(a)(2), that would render 42 C.F.R. § 424.535(e) meaningless.

Although I find no basis for revocation pursuant to 42 C.F.R. § 424.535(a)(2), I conclude that CMS may exercise discretion to revoke Petitioner's participation for failure to comply with the requirements of 42 C.F.R. § 424.57(c)(2). That regulation plainly requires a DMEPOS supplier such as Petitioner to notify a contractor of a material change in its status. Dr. Severt's departure in July 2013 was such a change and Petitioner was obligated to notify the contractor of it. The regulation gave Petitioner 30 days to do

so. Petitioner failed to comply with that requirement by not formally notifying the contractor and CMS of Dr. Severt's departure until April 7, 2016. That failure by Petitioner authorizes CMS to revoke its participation. 42 C.F.R. § 424.57(d).

Petitioner argues that revoking its participation pursuant to 42 C.F.R. §§ 424.57(c)(2) and (d) denies it due process. It asserts that the initial rationale for revoking its participation failed to refer to the notification requirement. The reconsideration determination cited Petitioner's failure to comply with the notification requirement but, according to Petitioner, the contractor could not rely on that failure as a rationale for its reconsideration determination inasmuch as it had not been cited previously.

I find no denial of due process. On reconsideration a contractor may, among other things "affirm or modify" the rationale for the initial determination. 42 C.F.R. § 498.24. Adding a ground for revocation at reconsideration is a permissible modification of the initial rationale. There is no due process denial if a provider or supplier receives notice of the modified rationale – as was the case here – and has the opportunity to address that modified rationale with argument and evidence at an administrative hearing.

Petitioner argues also that it effectively gave notice of Dr. Severt's departure in May 2013 when it advised the contractor that it would no longer accept reassignment of his billing privileges. But, that notification is not the same as a notification of the departure of a partner in an entity. An individual may retain an equitable stake or a managing position in an entity even if that individual is no longer providing billable services on the entity's behalf. The contractor is not obligated to draw inferences from a DMEPOS supplier's notification. The duty to notify requires the supplier to be specific about the change in status.

Finally, Petitioner argues that its failure to notify CMS was inadvertent and that it should not be penalized for that failure. The failure in this case may be inadvertent, but the authority to revoke extends to inadvertent errors. There is nothing in the regulation that distinguishes willful from mistaken failure to notify the contractor of a material change in a supplier's status. The duty is absolute.

CMS could have determined to exercise its discretion and not revoke Petitioner's enrollment pursuant to 42 C.F.R. § 424.57(c)(2) when Petitioner submitted timely proof that it had terminated its business relationship with Dr. Severt. Obviously, it chose not to do so.

CMS determined to revoke Petitioner's participation retroactively to February 18, 2016, based on its alleged failure to comply with the requirements of 42 C.F.R. § 424.535(a)(2). It argues that 42 C.F.R. § 424.535(g) allows it to revoke retroactively. However, that section allows for retroactive revocation only in instances where revocation occurs pursuant to 42 C.F.R. § 424.535. In other cases, such as this one, where other authority

allows for revocation, the governing regulation is 42 C.F.R. § 424.57(e)(1). That regulation provides for revocation effective 30 days from the date of notice of revocation. CMS sent its notice to Petitioner on March 21, 2016. Consequently, the effective revocation date is April 20, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
Steven T. Kessel  
Administrative Law Judge