

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

American Generations Home Health, Inc.
(NPI No.: 1548435142)
(PTAN: 10-9271),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1198

ALJ Ruling No. 2014-45

Date: September 25, 2014

ORDER DENYING MOTION TO DISMISS

The Centers for Medicare & Medicaid Services (CMS) revoked the Medicare billing privileges of Petitioner, American Generations Home Health, Inc., because Petitioner failed to comply with Medicare enrollment requirements. Petitioner disputed the revocation and filed a request for hearing (RFH). CMS subsequently filed a motion to dismiss Petitioner's RFH because CMS obtained evidence that Petitioner closed its facility. Although Petitioner admits it is now closed, it disputes the date on which CMS indicates it closed. For the reasons stated below, I deny CMS's motion to dismiss. I also order the parties to submit their pre-hearing exchanges by the dates stated below.

Petitioner, a home health agency (HHA), was a provider in the Medicare program. In a December 23, 2013 initial determination, a CMS administrative contractor stated that it was revoking Petitioner's Medicare billing privileges effective January 16, 2014. Revocation was based on a statement in which Dr. Manual Fernandez-Gonzalez claimed that he did not sign documentation ordering home health services that Petitioner submitted to CMS when it billed CMS for services provided to 20 Medicare beneficiaries. The initial determination stated that revocation was warranted because

Petitioner failed to comply with Medicare enrollment requirements when Petitioner submitted bills for services for which there was no valid physician order. The initial determination established a three-year reenrollment bar. CMS Exhibit (Ex.) 1.

Petitioner requested reconsideration of the initial determination. On March 25, 2014, CMS issued a reconsidered determination upholding the revocation of Petitioner's Medicare billing privileges effective January 16, 2014. RFH, Attach.

In its RFH, Petitioner asserted that it provided evidence to CMS that Dr. Fernandez-Gonzalez in fact treated the Medicare beneficiaries referenced in CMS's initial determination and that CMS failed to consider that evidence. On June 4, 2014, I issued an Acknowledgment and Pre-hearing Order (Pre-hearing Order). In response to the Pre-hearing Order, CMS filed a motion to dismiss Petitioner's RFH. CMS alleges in the motion to dismiss that Petitioner ceased operations in January 2014. CMS, therefore, argues that Petitioner's RFH is moot because even if I reverse the revocation, Petitioner cannot be reinstated as a provider. CMS submitted seven exhibits (CMS Exs. 1-7) in support of the motion to dismiss, including: statements from two CMS surveyors who attempted to conduct a site visit of Petitioner's office on June 30, 2014, but found Petitioner's facility to be vacant (CMS Exs. 2-3); a site visit report with pictures of Petitioner's vacant facility (CMS Ex. 4); and documentation showing that Petitioner turned in its license to operate as an HHA to the state. CMS Exs. 6-7.

Petitioner asserts in opposition to the motion to dismiss that it was open until May 1, 2014. Petitioner points out that CMS's evidence that Petitioner has been closed since January 2014 was based on the June 30, 2014 site visit in which the CMS surveyors spoke with an individual who stated that Petitioner vacated its office space about six months earlier. However, the CMS surveyors presumed that the person with whom they spoke worked for the company that owns or manages the building in which Petitioner's office had been located. CMS Exs. 2 ¶7; 3 ¶7. Petitioner also submitted cancelled checks from the first several months of 2014 purporting to show proof of payment for rent for Petitioner's office, and for internet and phone services provided by Comcast. Supporting Documentation accompanying Petitioner's August 6, 2014 letter at 13-23.

CMS's motion to dismiss is based on the theory that Petitioner's case is moot. Although CMS cites federal court opinions as support, CMS does not cite to applicable regulations or any administrative decisions on this issue. Since the regulations do not mention mootness, I interpret CMS's argument to seek dismissal on the grounds that Petitioner "does not . . . have a right to a hearing." 42 C.F.R. § 498.70(b).

A provider whose Medicare billing privileges have been revoked has the right to seek a hearing before an administrative law judge. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2). Such a provider is considered an "affected party" (*see* 42 C.F.R. § 498.40(a)), which "means a provider . . . that is affected by an initial determination or by any subsequent

determination” 42 C.F.R. § 498.2 (definition of *Affected party*). CMS’s argument is that because Petitioner is no longer a licensed and operating HHA, Petitioner cannot benefit from further adjudication of this case. If I were to interpret CMS’s argument in regulatory terms, it would probably be that Petitioner is no longer an affected party with hearing rights because Petitioner ceased operations in January 2014, the same month that CMS’s revocation of Petitioner’s billing privileges became effective.

CMS has failed to provide sufficient evidence to show that Petitioner ceased operations in January 2014. Although Petitioner admits that it is no longer licensed or operating, Petitioner asserts this occurred on May 1, 2014. Based on Petitioner’s admission, CMS is correct that if Petitioner prevails in proving that it was in compliance with Medicare enrollment requirements, I would not be able to reinstate Petitioner as a provider because Petitioner is no longer licensed as an HHA or operating. However, this does not mean that Petitioner is not an affected party with a right to a hearing.

Petitioner continues to be affected by CMS’s revocation. Although no longer operating, Petitioner could receive important relief if I reverse the revocation in this case. For example, Petitioner might have continued to provide home health services to Medicare beneficiaries for several months after the effective date of revocation and would be able to submit claims for services provided during that time period. 42 C.F.R. §§ 405.806(c), 424.545(a)(2). Further, if Petitioner prevails, Petitioner will not be barred for three years from seeking enrollment and Medicare billing privileges because a reenrollment bar is only imposed following revocation of billing privileges. *See* 42 C.F.R. § 424.535(c). Finally, even if Petitioner does not prevail on the merits of its case, Petitioner might succeed in obtaining a later effective date of revocation because the effective date is supposed to be 30 days after CMS or its contractor mails the initial determination and, in this case, CMS set the effective date 24 days following mailing of the initial determination. *See* 42 C.F.R. § 424.535(g). A change in the effective date could result in Petitioner submitting claims for additional services. Because Petitioner is still an affected party entitled to a hearing, CMS’s motion to dismiss is denied.

CMS filed a motion to dismiss without its pre-hearing exchange. CMS is ordered to file its pre-hearing exchange, as specified in my Pre-hearing Order, by **October 10, 2014**. Petitioner will file its pre-hearing exchange by **October 30, 2014**.

It is so ordered.

/s/
Scott Anderson
Administrative Law Judge