Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Optimart, Inc. d/b/a Optimart, Inc. #02,
(Supplier Number: 0895780021),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-744

Decision No. CR3238

Date: May 22, 2014

DECISION

I reverse the determination of the Centers for Medicare & Medicaid Services, as affirmed on reconsideration, to revoke the Medicare billing privileges of Petitioner, Optimart, Inc. d/b/a Optimart, Inc. #02. CMS alleged that Petitioner failed in two respects to comply with Medicare participation requirements: (1) it had allowed its comprehensive liability insurance policy to expire, in violation of the requirements of 42 C.F.R. § 424.57(c)(10); and (2) it was not operating at the location that was on file with a Medicare contractor as Petitioner's business address, in violation of the requirements of 42 C.F.R. § 424.57(c)(7). However, the preponderance of the evidence proves that Petitioner has maintained continuous liability insurance and that it notified CMS when it changed its business address to its current location.

I. Background

On September 3, 2013, CMS notified Petitioner that its Medicare billing privileges were being revoked. Petitioner requested reconsideration. CMS's determination was affirmed on reconsideration and Petitioner then requested a hearing. The case was assigned to me.

CMS moved for summary judgment, asserting that the undisputed material facts of the case supported its initial determination. Petitioner opposed the motion. CMS filed five exhibits in support of its motion, which it identified as CMS Ex. 1 – CMS Ex. 5. Petitioner filed three exhibits in opposition, which it identified as P. Ex. A, P. Ex. B, and P. Ex. C.

I receive the parties' exhibits into the record. I rule that good cause exists to receive Petitioner's exhibits even though Petitioner did not offer these exhibits at reconsideration.

In a case such as this one I am required to rule whether good cause exists for any documentary evidence offered by a provider or a supplier that it did not offer at reconsideration. 42 C.F.R. § 498.56(e). I find that Petitioner would likely have been misled by the language of the notice letter sent to it by CMS on September 3, 2013 into believing that it was not imperative to submit new evidence on reconsideration. The notice letter not only does not advise Petitioner of the requirement to submit all relevant documentary evidence, in speaking of reconsideration it contains the following misleading language: "You *may* submit additional information with the reconsideration that you believe may have a bearing on the decision." CMS Ex. 1 at 2 – 3 (emphasis added). That language clearly suggests to an unsophisticated party that it has discretion to submit additional evidence at reconsideration and it contains nothing warning of adverse consequences later on if that evidence is not submitted. Furthermore, that sentence is offered in the context of several other sentences in the same paragraph, governing timing of a reconsideration request and the contents of the request, which talk about what a party *must* do. The additional language reinforces the impression that submission of additional documentary evidence at reconsideration is a penalty-free choice.

The three exhibits that I receive from Petitioner create a dispute as to the material facts of the case and for that reason I deny CMS's motion for summary judgment. However, I am proceeding to decide this case on the merits and evaluating the parties' evidence without an in-person hearing because neither party requested that I convene one. Petitioner has not proposed calling any witnesses and it has not asked to cross-examine CMS's one witness. *See* CMS Ex. 3; Acknowledgement and Pre-Hearing Order at ¶¶ 9-11.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether Petitioner failed to comply with Medicare participation requirements governing suppliers and providers, thereby justifying CMS's determination to revoke Petitioner's Medicare billing privileges.

B. Findings of Fact and Conclusions of Law

CMS contends, first, that Petitioner allowed its liability insurance policy to lapse on May 1, 2008 and that Petitioner failed to prove that its policy was renewed. However, Petitioner presented evidence, consisting of a summary of its insurance coverage from the Continental Insurance Company, showing that it has been covered continuously for liability since May 1, 2008. P. Ex. B. I find, based on that evidence, that Petitioner remains in compliance with the requirements of 42 C.F.R. § 424.57(c)(10).

CMS also argues that on July 29, 2013, a site inspector employed by the Medicare contractor went to Petitioner's place of business and discovered that Petitioner's office suite was empty and that Petitioner was not operating. CMS Ex. 2 at 6.

The evidence offered by Petitioner establishes that it was, in fact, open for business and operating on July 29, 2013. On March 1, 2013, Petitioner signed a lease for a new business location and it began operations there on June 1, 2013. P. Ex. C. The evidence establishes further that Petitioner made a good-faith effort on April 29, 2013 to notify CMS of its change of address. On that date Petitioner completed a Medicare Enrollment Application, Form 855S, and mailed it to CMS. P. Ex. A. Thus, all of Petitioner's evidence suggests that it maintained a physical office location and was in compliance with the requirements of 42 C.F.R. § 424.57(c)(7) on July 29, 2013.

CMS contends that it has no record of ever having received the change of business address information from Petitioner. I do not doubt CMS's assertion. But, I conclude based on the evidence presented that Petitioner provided CMS with the requisite notification of its change of address by mailing the form to CMS. That the form may have been lost in either the mail or in processing is not a basis to revoke Petitioner's Medicare billing privileges.[1]

[1] At no point in the case (in the initial revocation letter, the reconsideration decision, or in CMS's Motion for Summary Judgment) has CMS specifically alleged Petitioner was in violation of 42 C.F.R. § 424.57(c)(2), for not reporting to

I am not just taking Petitioner's word that it mailed the change of address information to CMS on April 29. All of the evidence supports the conclusion that Petitioner remained operating continuously in 2013. It is unlikely that Petitioner would continue to pay liability insurance premiums if it had ceased operating and it unlikelier still that it would have executed a lease for new premises if it had ceased operating. There is no reason to believe that the copy of the Form 855S provided by Petitioner was backdated to make it appear after the fact that Petitioner had attempted to notify CMS of its change of address. I find, based on that evidence, that CMS has not shown that Petitioner failed to maintain a physical facility on an appropriate site in violation of the requirements of 42 C.F.R. § 424.57(c)(7).

/s/
Steven T. Kessel
Administrative Law Judge

CMS any changes in Medicare enrollment information on file with CMS within 30 days of the change, and therefore this issue is not properly before me.