

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Diplomat Pharmacy, Inc.
(NPIs: 1043405954, 1063431195, 1427250448, 1548375181, 1558307462)
(PTANs: OP12320, MI1331),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-87

Decision No. CR4610

Date: May 17, 2016

DECISION

The Medicare enrollment and billing privileges of Petitioner, Diplomat Pharmacy, Inc., are revoked pursuant to 42 C.F.R. § 424.535(a)(1),¹ effective August 16, 2015.

I. Background

Wisconsin Physicians Service Insurance (WPS), a Centers for Medicare & Medicaid Services (CMS) Medicare contractor, notified Petitioner by letter dated July 17, 2015, that its Medicare billing number and billing privileges were revoked effective August 17, 2015. WPS cited 42 C.F.R. § 424.535(a)(1) as the basis for the revocation. WPS alleged that Petitioner had not complied with “42 C.F.R. § 424.518(C) [sic]” because Petitioner failed to comply with the April 17, 2015 request of WPS to submit fingerprints for two individuals with five percent or greater ownership interests in Petitioner. CMS Exhibit (Ex.) 15 at 1. The two individuals listed in the July 17, 2015 WPS initial determination

¹ Citations are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

were Jeffrey Rowe and Philip Hagerman. WPS also notified Petitioner that it was imposing a one-year bar to re-enrollment pursuant to 42 C.F.R. § 424.535(c). CMS Ex. 15. Petitioner requested reconsideration on July 22, 2015. CMS Ex. 16. On September 11, 2015, WPS upheld the revocation on reconsideration. WPS cited 42 C.F.R. § 424.535(a)(1) as the basis for revocation alleging that Petitioner violated 42 C.F.R. § 424.518(c)(2)(B) because Petitioner failed to submit fingerprint cards for all of its owners with a five percent or greater ownership interest in Petitioner. CMS Ex. 17.

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated October 27, 2015 that was received by my office on November 4, 2015. On November 12, 2015, the case was assigned Judge Joseph Grow to hear and decide and an “Acknowledgement and Pre-hearing Order” (Prehearing Order) was issued dated November 12, 2015. On April 1, 2016, the parties were notified that this case was reassigned to me upon Judge Grow’s reassignment to a different component of the Department of Health and Human Services (HHS).

On December 17, 2015, CMS filed a motion for summary judgment (CMS Br.), with CMS Exs. 1 through 19. On January 21, 2016, Petitioner filed its opposition to CMS’s motion for summary judgment (P. Br.), with Petitioner’s Exhibits (P. Exs.) 1 and 2. Petitioner has not objected to my consideration of CMS Exs. 1 through 19 and they are admitted as evidence. On January 27, 2016, CMS filed objections to my consideration of P. Exs. 1 and 2. CMS argues that Petitioner had not shown good cause to offer the evidence for the first time before me. Petitioner responded to the objections on February 12, 2016. The CMS objections are overruled and P. Exs. 1 and 2 are admitted. Both P. Ex. 1 and P. Ex. 2, show on their face that they are printed from the National Plan and Provider Enumeration System (NPPES), National Provider Identifier (NPI) registry which is maintained by CMS. CMS does not object to the authenticity of the documents. CMS does not object on grounds that the information contained in those documents is not an accurate representation of the registry maintained by CMS. P. Ex. 1 shows that NPI 1558307462 was issued on June 20, 2006, to Diplomat Pharmacy, Inc., with the additional name “Diplomat Specialty Pharmacy,” with the mailing address 4100 South Saginaw Street, Flint, Michigan and a practice address of G3320 Beecher Road, Flint Michigan; the NPI was in active status; and the last update was October 8, 2015. P. Ex. 2 shows that NPI 1063431195 was issued on July 19, 2006, also to Diplomat Pharmacy, Inc., with the additional name “Diplomat Specialty Pharmacy,” with the mailing address 4100 South Saginaw Street, Flint, Michigan and a practice address of 214 Fulton Street E, Grand Rapids, Michigan; the NPI was in active status; and the last update was May 8, 2014. Both P. Ex. 1 and P. Ex. 2 were captured from the NPPES website on January 20, 2016. Although these documents were not previously offered as evidence, the facts included in the documents are clearly not new evidence or subject to an objection that they are. The association of Petitioner’s practice locations is also reflected in the CMS exhibits, e.g., CMS Ex. 4 at 10, 16 (NPI: 1063431195, 214 E. Fulton Street, Grand Rapids); CMS Ex. 5 (NPI: 1063431195, 214 E. Fulton Street, Grand Rapids); CMS Ex. 6

at 16 (NPI: 1063431195, 214 E. Fulton Street, Grand Rapids), 17 (NPI: 1558307462, G3320 Beecher Road, Flint, Michigan); CMS Ex. 7; CMS Ex. 8; CMS Ex. 13 at 8 (NPI: 1063431195, 214 E. Fulton Street, Grand Rapids, deleted as a practice location effective November 22, 2014); CMS Ex. 14 (NPI: 1063431195, 214 E. Fulton Street, Grand Rapids, deletion as a practice location accepted by WPS effective November 22, 2014); CMS Ex. 18; and CMS Ex. 19. It may be argued that P. Exs. 1 and 2 are cumulative of other evidence and not admissible for that reason. However, because P. Exs. 1 and 2 reflect the status of the NPI registry information, that is, information that is part of the records of CMS as of January 20, 2016, the documents are not truly cumulative of other evidence and subject to exclusion on that basis. The information in P. Exs. 1 and 2 is also relevant to Petitioner's theory that WPS erred in its April 17, 2015 request for the submission of fingerprint cards, as discussed hereafter.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as WPS. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.² Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395u(h)(1)).

The Act requires the Secretary of HHS (Secretary) to issue regulations that establish a process for enrolling providers and suppliers in Medicare, including the requirement to provide the right to a hearing and judicial review of certain enrollment determinations, such as revocation of enrollment and billing privileges. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, suppliers such as Petitioner must be

² A "supplier" furnishes services under Medicare and includes physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) (42 U.S.C. § 1395f(g)) and 1835(e) (42 U.S.C. § 1395n(e)) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its Medicare contractor may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. If CMS revokes a supplier's Medicare billing privileges, the revocation becomes effective 30 days after CMS or one of its contractors mails the revocation notice to the supplier, subject to some exceptions not applicable in this case. After a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for a minimum of one year, but no more than three years. 42 C.F.R. § 424.535(c).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a). A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination and specifying the conditions or requirements the supplier failed to meet, and the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act unless waived. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate.

Whether there was a basis for the revocation of Petitioner's billing privileges and enrollment in Medicare.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by my findings of fact and analysis. The findings of fact are based on the documents admitted as exhibits.

1. Summary judgment is appropriate.

CMS requested summary judgment.³ As noted above, a supplier whose enrollment has been revoked has a right to a hearing and judicial review, and a hearing on the record is required under the Act. Act §§ 205(b), 1866 (h)(1), (j); 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17), 498.5; *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing but must do so affirmatively in writing. 42 C.F.R. § 498.66. In this case, Petitioner has not waived the right to oral hearing or otherwise consented to a decision based only upon the documentary evidence or pleadings. Accordingly, disposition on the written record alone is not permissible, unless summary judgment is appropriate.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations at 42 C.F.R. pt. 498 that establish the procedures to be followed in adjudicating Petitioner's case do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g., Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. P. 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy by Judge Grow in his Prehearing Order, paragraph 4, which was within his authority to regulate the course of proceedings.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary

³ CMS styled its motion as a motion for summary disposition. Summary disposition is a broad and non-specific phrase that could refer to any disposition such as dismissal, remand, or any other means for disposing of a case without a hearing and/or decision on the merits. Summary disposition is not a term of art and there are no rules or procedures specific to summary disposition. I treat the CMS motion for summary judgment as provided for by Prehearing Order paragraph 4; the Civil Remedies Division Procedures § 19; Fed. R. Civ. P. 56; and various decisions of the Board cited in this decision. Petitioner's opposition to the CMS motion reflects that Petitioner also treated the motion to be for summary judgment.

judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 5 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 5-6 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differ from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden of persuasion. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

Viewing the evidence before me in a light most favorable to Petitioner and drawing all inferences in Petitioner's favor, I conclude that there are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(1) that requires a hearing in this case. The issues in this case raised by Petitioner related to revocation of its Medicare enrollment and billing privileges must be resolved against it as a matter of law. The undisputed evidence shows that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges. Accordingly, summary judgment is appropriate.

- 2. Petitioner is responsible to meet and maintain enrollment requirements to “bill either the Medicare program or its beneficiaries for Medicare covered services or supplies.” 42 C.F.R. § 424.500.**
- 3. Petitioner was required to submit fingerprints for its owner with a five percent or greater, direct or indirect, ownership interest in Petitioner based on the request of the Medicare contractor.**
- 4. Petitioner’s refusal to submit fingerprints within 30 days as required by 42 C.F.R. § 424.518(d)(1)(ii), triggers 42 C.F.R. § 424.518(d)(2)(ii) requiring revocation of Petitioner’s Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(1).**
- 5. There is a basis for revocation of Petitioner’s Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(1).**
- 6. For purposes of summary judgment, Petitioner’s assertion that the WPS demand for fingerprints dated April 17, 2015, included clerical errors is accepted as true; but those errors are no defense to revocation under 42 C.F.R. § 424.535(a)(1), as required by 42 C.F.R. § 424.518(d)(2), as what was required of Petitioner to maintain compliance was clear despite the clerical errors and Petitioner’s affirmative election not to comply.**
- 7. The effective date of revocation in this case is August 16, 2015, 30 days after the date of the notice of initial determination to revoke. 42 C.F.R. § 424.535(g).**
- 8. I have no authority to review the imposition or duration of a bar to re-enrollment. 42 C.F.R. §§ 424.545, 498.5(l)(1)-(2).**

a. Undisputed Facts

The material facts are not disputed.

On January 1, 2005, Philip Hagerman and Jeffrey Rowe signed an application (CMS-855B) to enroll Petitioner, doing business as (d/b/a) Diplomat Specialty Pharmacy, in Medicare. The mailing address and practice location listed was G3320 Beecher Road, Flint, Michigan. CMS Ex. 1. On March 23, 2005, WPS notified Petitioner that it was assigned “PIN Number” OP12320 effective January 1, 2005. CMS Ex. 2.

In February 2008, Petitioner filed a CMS-855B to enroll a new practice location as Diplomat Pharmacy, Inc., d/b/a Diplomat Specialty Pharmacy of Grand Rapids. The practice location was listed as Diplomat Specialty Pharmacy of Grand Rapids, LLC, 214 E. Fulton Street, Grand Rapids, Michigan. The NPI listed was 1063431195. The application added, effective October 16, 2007, Diplomat Pharmacy, Inc., Phillip Hagerman, Mark Chaffee, and Jeffrey Rowe, as having a five percent or more ownership interests. CMS Ex. 4. WPS notified Diplomat Pharmacy, Inc. by letter dated April 10, 2008 and addressed to 214 E. Fulton Street, Grand Rapids, Michigan, that its Medicare enrollment was changed effective October 16, 2007. The letter listed PTAN: OP12320 and NPI 1063431195. The letter lists Hagerman, Rowe, and Chaffee as owners added effective October 16, 2007. CMS Ex. 5.

On February 13, 2009, WPS notified Petitioner that its Medicare enrollment application as a Mass Immunization Roster Biller was approved effective October 21, 2008. The practice location listed was G-3320 Beecher Road, Flint, Michigan. The PTAN was MI1331 and the NPI 1558307462. CMS Ex. 18.

In October 2014, Petitioner filed a CMS-855B to revalidate its Medicare enrollment. Petitioner listed itself as a Mass Immunization (Roster Biller Only) as its supplier type. Petitioner validated that it continued under the d/b/a Diplomat Specialty Pharmacy name. Petitioner validated a practice location for Diplomat Specialty Pharmacy at 214 E. Fulton Street, Grand Rapids, Michigan with the PTAN OP12320 and NPI 1063431195. Petitioner validated a practice location for Diplomat Specialty Pharmacy at G-3320 Beecher Road, Flint, Michigan, also with the PTAN OP12320 rather than MI1331 as approved effective October 21, 2008, and NPI 1558307462. Petitioner deleted effective August 1, 2014, a practice location for Diplomat Specialty Pharmacy at 2029 S. Elms Road, Swartz Creek, Michigan, also with the PTAN OP12320 but NPI 1043405954. Philip Hagerman was listed as the only person with a five percent or more ownership interest. Hagerman was listed as acquiring his ownership January 18, 2005. Jeffrey Rowe was listed as an owner since February 16, 2005, but not with an ownership interest of five percent or greater. CMS Ex. 6. On November 15, 2014, WPS advised Petitioner that its Medicare revalidation enrollment was approved. WPS listed the G3320 Beecher Road, Flint, Michigan and 214 E. Fulton Street, Grand Rapids, Michigan as practice locations for Petitioner. WPS acknowledged that the practice location at 2029 S. Elms Road, Swartz Creek, Michigan was deleted. WPS referred only to NPI 1063431195 and PTAN OP12320, and did not mention PTAN MI1331 or NPI 1558307462. CMS Ex. 7.

On January 9, 2015, Petitioner filed an "Application Record Data Report" using the CMS web-based system to revalidate its Medicare enrollment information. Petitioner listed its NPIs as 1043405954, 1063431195, 1427250448, 1548375181, and 1558307462. Petitioner listed a single practice location at G3320 Beecher Road, Flint, Michigan with the NPI 1558307462. Philip Hagerman was the only individual reported to have a five percent or greater ownership interest. CMS Ex. 8. On February 9, 2015, WPS notified

Petitioner that its Medicare revalidation was approved. Petitioner's practice location was listed as G3320 Beecher Road, Flint, Michigan, with NPI 1558307462 and PTAN MI1331 with an effective date of October 21, 2008. CMS Ex. 19.

On April 17, 2015, WPS sent Petitioner a letter stating that all owners with a five percent or greater ownership interest needed to submit fingerprints within 30 days. The WPS letter listed "1063431195" as the reference number. WPS erroneously listed both Jeffrey Rowe and Philip Hagerman as having a five percent or greater ownership interest in Petitioner. CMS Ex. 9. The evidence shows that only Philip Hagerman had a five percent or greater ownership interest and CMS concedes that fact. CMS Br. at 6, n.7. The April 17, 2015 WPS letter specifically stated that failure to submit fingerprints within 30 days may result in revocation of Medicare enrollment. CMS Ex. 9.

On May 12, 2015, Petitioner responded to the April 17, 2015 WPS letter. Petitioner's Executive Vice President Jeffrey Rowe advised WPS that its April 17, 2015 letter referenced NPI 1063431195, which Petitioner believes was associated with its Grand Rapids pharmacy that had ceased operations in November 2014. Petitioner advised WPS that, therefore, it would not be submitting the requested fingerprints. CMS Ex. 10.

On May 27, 2015, as reflected by the Julian date represented by the first five numerals printed vertically in the upper left corner of each page of CMS Ex. 11 as well as the UPS Proof of delivery (CMS Ex. 11 at 51), WPS received a CMS-855B from Petitioner, dated November 22, 2014, and signed by Jeffrey Rowe. For purposes of summary judgment I accept that Jeffrey Rowe, in fact, signed and dated the CMS-855B on November 22, 2014; and I need not inquire further as to the cause for the delayed receipt by WPS. The CMS-855B notified WPS that Petitioner voluntarily terminated its Medicare enrollment. CMS Ex. 11 at 5. The CMS-855B does not specify that a particular practice location was to be deleted from Petitioner's enrollment, suggesting that Petitioner may have voluntarily terminated its Medicare enrollment for all practice locations. CMS Ex. 11. WPS sent Petitioner a letter dated June 2, 2015, that memorialized a telephone conversation in which Petitioner's representative purportedly told the WPS representative that the intention was to delete a practice location not terminate Petitioner's enrollment. The WPS letter gave direction for how to properly complete the CMS-855B to accomplish that result. CMS Ex. 12.

On June 22, 2015, Petitioner sent WPS corrected pages for the prior CMS-855B with a new certification page signed and dated by Rowe on June 19, 2015. The CMS-855B was corrected to show that Petitioner was changing its Medicare information rather than voluntarily terminating its enrollment, and specifically listed NPI 1063431195 and PTAN OP12320. CMS Ex. 13 at 5. The corrected CMS-855B showed that Petitioner deleted its Diplomat Specialty Pharmacy practice location at 214 E. Fulton Street, Grand Rapids, Michigan effective November 11, 2014. Petitioner listed NPI 1063431195 and PTAN OP12320 as associated with that practice location. On June 25, 2015, WPS sent

Petitioner a letter acknowledging the deletion of the 214 E. Fulton Street, Grand Rapids, Michigan effective November 22, 2014. WPS listed Petitioner's enrollment information as including a practice location at G3320 Beecher Road, Flint, Michigan; NPI 1063431195; PTAN OP12320; and an effective date of January 1, 2005. The letter specifically requested that Petitioner verify the accuracy of its enrollment information and submit any updates or changes to WPS. CMS Ex. 14. There is no evidence before me that Petitioner notified WPS of any error in the NPI or PTAN listed for the G3320 Beecher Road practice location.

WPS notified Petitioner by letter dated July 17, 2015, of the initial determination to revoke Petitioner's Medicare enrollment and billing privileges effective August 17, 2015, for failure to provide fingerprints for Hagerman and Rowe. WPS cited 42 C.F.R. § 424.535(a)(1) as the legal authority for revocation. The letter advised Petitioner of the right to submit a corrective action plan and to request reconsideration. CMS Ex. 15.

Petitioner requested reconsideration by letter dated July 22, 2015. CMS Ex. 16.

WPS issued its reconsidered determination by letter dated September 11, 2015, upholding revocation pursuant to 42 C.F.R. § 424.535(a)(1), on grounds Petitioner failed to submit fingerprints as requested. The hearing officer rejected Petitioner's argument that it voluntarily ceased operations at the 214 E. Fulton Street, Grand Rapids, Michigan location in November 2014. The hearing officer pointed out that Petitioner continued to operate its G3320 Beecher Road, Flint, Michigan practice location with the same owners and that the fingerprints were still required. CMS Ex. 17.

On January 20, 2016, the NPPES NPI registry showed that Petitioner, d/b/a Diplomat Specialty Pharmacy, was assigned NPI 1558307462, with an enumeration date of June 20, 2006, with Petitioner's mailing address was 4100 S. Saginaw Street, Flint, Michigan, and that Petitioner had a practice location of G3320 Beecher Road, Flint, Michigan. P. Ex. 1. On January 20, 2016, the NPPES NPI registry showed that NPI 1063431195 was also assigned to Petitioner d/b/a Diplomat Specialty Pharmacy, with an enumeration date of July 19, 2006, Petitioner's mailing address, and a practice location of 214 Fulton Street E, Grand Rapids, Michigan. P. Ex. 2. Both NPIs are listed as being active and there is no mention of the deletion of the Grand Rapids practice location or the revocation of Petitioner's enrollment. However, the information for NPI 1063431195 had not been updated since May 8, 2014, which was before WPS received the CMS-855B deleting the Grand Rapids practice location. P. Ex. 2. The information for NPI 1558307462 was updated on October 8, 2015, but the revocation of Petitioner's enrollment is subject to my review and appeal to the Board and is not administratively final. P. Ex. 1.

The evidence shows and it is undisputed that:

Petitioner is Diplomat Pharmacy, Inc.

Petitioner has operated as many as three practice locations.

Petitioner ceased operating its practice location as Diplomat Specialty Pharmacy at 2029 S. Elms Road, Swartz Creek, Michigan effective August 1, 2014.

Petitioner ceased operating its practice location as Diplomat Specialty Pharmacy at 214 E. Fulton Street, Grand Rapids, Michigan effective November 22, 2014.

Petitioner continued to operate its practice location as Diplomat Specialty Pharmacy at G3320 Beecher Road, Flint, Michigan until revocation by WPS.

Philip Hagerman is the only owner of Petitioner and its practice locations with a disclosed ownership interest of five percent or more.

Petitioner has been issued NPIs 1043405954, 1063431195, 1427250448, 1548375181, and 1558307462.

Petitioner has been issued PTANs OP12320 and MI1331.

WPS demanded on April 17, 2015 that Petitioner submit fingerprints of Hagerman.

Petitioner received the April 17, 2015 demand for Hagerman's fingerprints.

On May 12, 2015, Petitioner informed WPS that it would not submit fingerprints as demanded.

b. Analysis

The requirements for establishing and maintaining Medicare billing privileges are found in 42 C.F.R. pt. 424, subpt. P. Petitioner is responsible to meet and maintain enrollment requirements in order to "bill either the Medicare program or its beneficiaries for Medicare covered services or supplies." 42 C.F.R. § 424.500. Pursuant to sections 1124 and 1124A of the Act and 42 C.F.R. § 424.502, a provider or supplier is required to disclose to the Secretary full and complete information regarding an owner of a provider or supplier, which is any individual or entity that has any partnership interest or a five percent or more direct or indirect ownership of the provider or supplier.

Voluntary termination means that a provider or supplier submits written confirmation to CMS that it is discontinuing its enrollment in Medicare. 42 C.F.R. § 424.502. The evidence does not show that Petitioner, Diplomat Pharmacy, Inc., voluntarily terminated its enrollment in Medicare.

In order to maintain Medicare billing privileges after being enrolled, a provider or supplier must meet the requirements of 42 C.F.R. § 424.515 for revalidation and 42 C.F.R. § 424.516 for reporting changes, maintaining documents, and other requirements set forth in that regulation.

Generally, a mass immunization roster biller, such as Petitioner, is categorized by CMS as a “limited categorical risk.” 42 C.F.R. § 424.518(a)(1)(x). However, in this case Petitioner was categorized by CMS as a “high categorical risk,” which is permitted by 42 C.F.R. § 424.518(c)(3). The reasons that authorize CMS to adjust a categorization to high are listed in 42 C.F.R. § 424.518(c)(3)(i)-(iii). It is not clear from the evidence why CMS designated Petitioner a high categorical risk but Petitioner was aware of the categorization and does not dispute the classification. P. Br. at 5, 9. It is not necessary to resolve why CMS adjusted Petitioner’s categorization to high, because it is undisputed that CMS did so. Because Petitioner was categorized as a high categorical risk by CMS, WPS was required to conduct a fingerprint-based criminal history check on all individuals with a five percent or greater direct or indirect ownership interest in Petitioner. 42 C.F.R. § 424.518(c)(2)(B). WPS notified Petitioner by letter dated April 17, 2015, that Petitioner’s owners with a five percent or greater ownership interest had to submit fingerprints within 30 calendar days from the postmark of the April 17 letter. CMS Ex. 9. To maintain Medicare enrollment Petitioner’s owners with a five percent or more ownership interest, either direct or indirect, were required by regulation to submit a set of fingerprints for a background check upon submission of a Medicare enrollment application or within 30 days of a request by WPS. 42 C.F.R. § 424.518(d). Petitioner concedes that it was required to submit a set of fingerprints for any owner with a five percent or greater, direct or indirect, ownership interest in Petitioner. P. Br. at 5. Pursuant to 42 C.F.R. § 424.518(d)(2) if fingerprints are not submitted as required the Medicare billing privileges of an enrolled provider or supplier are revoked pursuant to 42 C.F.R. § 424.535(a)(1). Pursuant to 42 C.F.R. § 424.535(a)(1), CMS may revoke an enrolled supplier’s Medicare billing privileges and supplier agreement if:

(1) *Noncompliance*. The provider or supplier is determined not to be in compliance with the enrollment requirements described in this section, or in the enrollment application applicable for its provider or supplier type

42 C.F.R. § 424.535(a)(1). However, under 42 C.F.R. § 424.518(d)(2) revocation is directed if fingerprints are not submitted, the regulation grants no discretion to CMS, WPS, or me not to revoke pursuant to 42 C.F.R. § 424.535(a)(1).

Petitioner concedes that it received the April 17, 2015 WPS letter directing that Jeffrey Rowe and Philip Hagerman submit fingerprints. In fact, Petitioner informed WPS by letter dated May 12, 2015, that it would not submit fingerprints as directed by the April 17 letter. CMS Ex. 10; RFH at 1; P. Br. at 1-2, 3. It is undisputed that only Hagerman

had a five percent or greater, direct or indirect ownership interest in Petitioner. Therefore, WPS was in error in demanding fingerprints for Rowe. CMS Br. at 6, n.7. It is undisputed that Petitioner never sent WPS fingerprints for Hagerman, though Petitioner has repeatedly offered even during this proceeding to submit Hagerman's prints. Petitioner stated in its brief "Diplomat remains ready to submit the required fingerprint information upon any request related to a current and active NPI or practice location." P. Br. at 10. In its request for hearing Petitioner states that "[s]hould CMS request fingerprints for the owners of 5% or more of NPI 1558307462, which is operational at Beecher Road, Diplomat would be willing to comply." RFH.

It is undisputed that Petitioner was a high categorical risk. It is undisputed that WPS made a demand for fingerprints of Hagerman. It is undisputed that Hagerman has a five percent or greater, direct or indirect ownership of Petitioner. It is undisputed that Petitioner refused to submit Hagerman's fingerprints and has not done so. Accordingly, pursuant to 42 C.F.R. § 424.518(d)(2)(ii), Petitioner's Medicare enrollment and billing privileges must be revoked pursuant to 42 C.F.R. § 424.535(a)(1).

The gist of Petitioner's defense is that the April 17, 2015 WPS letter demanding fingerprints referred to the incorrect NPI number. In its May 12, 2015 letter to WPS declining to submit the requested fingerprints, Petitioner acknowledged that Petitioner had received a request from WPS dated April 17, 2015 for fingerprints. Petitioner stated that the "reference number listed on the Letter is the NPI for Diplomat's Grand Rapids pharmacy." CMS Ex. 10. Petitioner went on to state:

However, Diplomat voluntarily ceased operations in November 2014 at this location. Therefore, Diplomat is not submitting fingerprints as instructed. . . .

CMS Ex. 10. Petitioner's letter is clear. Petitioner did not request clarification. Petitioner did not request an extension of time to comply. Rather, Petitioner deliberately refused to comply with the April 17, 2015 WPS request for Petitioner to submit fingerprints.

In its request for reconsideration, Petitioner stated that on May 12, 2015 it notified WPS that it had closed the location associated with the NPI listed in the April 17, 2015 WPS request for fingerprints. Petitioner further stated that "[w]e request that the revocation be reconsidered based on the facts that notice was provided to WPS by Diplomat Pharmacy, Inc." CMS Ex. 16.

In its request for hearing Petitioner argues that because WPS and "CMS never requested fingerprints for NPI 1558307462, . . . Diplomat believes that its PTAN should be reinstated." RFH at 2.

In its brief Petitioner also argues that WPS erred by requesting fingerprints for five percent or greater owners associated with NPI 1063431195, which was the NPI for the Grand Rapids practice location and Petitioner had ceased operations at that location in November 2014, prior to the WPS request. Petitioner argues that the WPS request for fingerprints was exclusive to NPI 1063431195 and WPS should have corrected or clarified its request for fingerprints. P. Br. at 1, 5. Petitioner argues that CMS relies upon the WPS error as the basis for revocation. P. Br. at 11.

Petitioner also argues that the WPS error is a material fact that prevents deciding this case on summary judgment. P. Br. at 13. For purposes of summary judgment, I accept that NPI 1063431195 was listed as the reference number on the WPS April 17, 2015 demand for fingerprints in error. Therefore, this fact is not in dispute. However, even accepting that fact as true will not permit a judgment in Petitioner's favor. Applying the law to the undisputed facts requires a judgment in favor of CMS as a matter of law, even though all favorable inferences are drawn in Petitioner's favor.

Petitioner's defense is without merit. Revocation of Petitioner's Medicare enrollment was not based on any error of WPS. Revocation in this case is based on Petitioner's failure to comply with the demand for fingerprints for its owners with a five percent or greater, direct or indirect, ownership interest in Petitioner.

Petitioner's revalidations in October 2014 and January 2015 show that Diplomat Pharmacy, Inc., the Petitioner before me, is the supplier enrolled in Medicare with Medicare billing privileges. In October 2014, Petitioner changed its enrollment to reflect two practice locations, one in Flint and one in Grand Rapids, both doing business as Diplomat Specialty Pharmacy. Petitioner deleted at that time a practice location in Swartz Creek. The October 2014 revalidation application referred to NPIs 1063431195 and 1558307462 and PTAN OP12320. The January 2015 revalidation application referred to NPIs 1043405954, 1063431195, 1427250448, 1548375181, and 1558307462. The October 2014 revalidation also shows that Petitioner and its two practice locations had only one owner with a five percent or greater ownership, direct or indirect ownership interest, Philip R. Hagerman. The January 2015 revalidation application listed only one practice location and the only owner with a five percent or greater ownership interest was Hagerman. CMS Exs. 6, 8. Therefore, CMS records reflect that Petitioner was the enrolled supplier with multiple NPIs associated but only one owner, Philip R. Hagerman, for whom Petitioner concedes it was required to submit fingerprints.

Petitioner's alleged confusion about the April 17, 2015 WPS demand for fingerprints is baseless. The April 17, 2015 WPS letter demanding fingerprints (CMS Ex. 9) is addressed to Petitioner, Diplomat Pharmacy, Inc., at the correspondence address 4100 S. Saginaw Street, Flint, Michigan listed in its October 2014 and January 2015 revalidation applications (CMS Ex. 6 at 10; CMS Ex. 8 at 2). The April 17, 2015 WPS letter is not addressed to and does not make reference to Petitioner's practice location name,

“Diplomat Specialty Pharmacy” or a practice location address. CMS Ex. 6 at 16, 17; CMS Ex. 8 at 3. The April 17, 2015 WPS letter erroneously demands fingerprints for Jeffrey Rowe, but Petitioner was clearly not confused by that fact. The letter also demands fingerprints for Philip Hagerman and Petitioner does not dispute that he was the only owner of Petitioner and its practice locations with five percent or greater, direct or indirect, ownership interest. Petitioner also does not dispute that it was required to submit fingerprints for Hagerman. Even accepting as true that WPS listed the incorrect NPI as the reference number on its April 17, 2015 letter; and considering the incorrect demand for fingerprints for Rowe and an incorrect reference to Petitioner as a provider; the letter was a clear enough demand for Diplomat Pharmacy, Inc., the Medicare enrolled supplier and Petitioner before me, to produce the fingerprints of Philip R. Hagerman. Petitioner’s purported confusion and desire to correct WPS are simply no defense to Petitioner’s failure to submit Hagerman’s fingerprints within 30 days of April 17, 2015.

To the extent Petitioner’s arguments may be construed as a request for equitable relief, I have no authority to grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”). I am also required to follow the Act and regulations and have no authority to declare statutes or regulations invalid. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (ALJ is bound by applicable laws and regulations).

III. Conclusion

For the foregoing reasons, the Medicare enrollment and billing privileges of Petitioner are revoked pursuant to 42 C.F.R. § 424.535(a)(1) for noncompliance with 42 C.F.R. § 424.518(d), effective August 16, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge