

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Infusion Therapy of Texas, LLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-506

Decision No. CR2900

Date: August 22, 2013

DECISION

Palmetto GBA National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), found Petitioner, Infusion Therapy of Texas, Inc. (Supplier No. 6631240001), not to be operational and revoked Petitioner's billing privileges as a supplier in the Medicare program. Petitioner appealed. For the reasons stated below, I affirm the determination to revoke Petitioner's enrollment.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, orthotics, prosthetics, and supplies (DMEPOS). Petitioner's location on file with NSC was 1830 East Interstate 30, Suite 7, Rockwell, Texas 75087. CMS Exhibits (Exs.) 1, at 3; 9, at 2-3. In early September 2012, Petitioner vacated the 1830 East Interstate 30 location and relocated to 1748 North Greenville Avenue, Richardson, Texas 75082. CMS Exs. 6, 11.

On November 1, 2012, an NSC site inspector attempted to conduct an on-site inspection of Petitioner at the 1830 East Interstate 30 address. CMS Ex. 9. The site inspector observed that Petitioner did not appear to be operational or open for

business, or to have staff present, customer activity, a sign indicating the business name, or inventory. CMS Ex. 9, at 3. The inspector documented with photographs that the 1830 East Interstate 30 address had a sign on the window with the words:

Texas Novachem Corporation
ProSoap Inc.
Warehouse Pro
Self Trailer Storage

CMS Ex. 9, at 4. The inspector went into the building at 1830 East Interstate 30 and spoke with a receptionist for ProSoap, Inc., who stated that Petitioner had moved out of the building and was now located at the 1748 North Greenville Avenue address. CMS Ex. 9, at 3.

In a December 7, 2012 letter sent to the 1748 North Greenville Avenue address, NSC informed Petitioner that it needed to verify its address or submit a Form CMS-855S change of address application because the U.S. Postal Service returned a Medicare payment check or remittance notice. CMS Ex. 11, at 1. In a December 18, 2012 letter sent to the 1748 North Greenville Avenue address, NSC informed Petitioner of its initial determination to revoke Petitioner's enrollment as a supplier in the Medicare program, effective November 1, 2012. CMS Ex. 5. The initial determination stated that because Petitioner was no longer at the location on file with NSC and the November 1, 2012 site inspection could not be completed to verify compliance with supplier standards, Petitioner was in violation of 42 C.F.R. §§ 424.535(a)(5)(ii) and 424.57(c)(7). CMS Ex. 5, at 2.

Petitioner completed and signed a change of address form (Form CMS-855S) on December 19, 2012, which NSC apparently received on January 2, 2013. CMS Ex. 11; Petitioner (P.) Ex. D; *see also* CMS Ex. 6. On December 26, 2012, Petitioner requested reconsideration of the revocation, in which Petitioner indicated that Petitioner had relocated by the time of the November 1, 2012 site inspection, but had failed to inform NSC of the change in address. CMS Ex. 6. On February 22, 2013, NSC issued an unfavorable reconsidered determination. CMS Ex. 1. In affirming the revocation, NSC noted that: "The fact remains that the site inspector could not access [Petitioner's] facility to verify compliance with the supplier standards." CMS Ex. 1, at 3.

Petitioner timely filed a request for a hearing (RFH) with the Departmental Appeals Board, Civil Remedies Division. Attached to its RFH were 17 pages of supplemental documents. In response to my March 13, 2013 Acknowledgment and Pre-hearing Order (Order), CMS filed a Motion for Summary Judgment (CMS Br.) and 12 proposed exhibits (CMS Exs. 1-12). CMS listed one witness and

included a declaration from the witness. *See* CMS Ex. 9. In response to CMS's Motion for Summary Judgment, Petitioner filed a two page brief (P. Br.) with four exhibits (P. Exs. A-D), labeled as "attachments" by Petitioner.

II. Decision on the Record

Neither party objected to any of the marked exhibits submitted by the parties. Therefore, I admit CMS Exs. 1-12 and P. Exs. A-D into the record.¹

Petitioner failed to affirmatively state that it wishes to cross-examine CMS's witness. Order ¶¶ 9-10. Accordingly, the record is closed and I will issue this decision based on the written record. *See* Order ¶ 11.

III. Discussion

In order to participate in the Medicare program as a supplier, a prospective supplier must complete the applicable Form CMS-855 enrollment application, which requires disclosure of the supplier's address. *See* 42 C.F.R. § 424.510(a). Once enrolled, a DMEPOS supplier must report within 30 days any changes in its enrollment information. *See* 42 C.F.R. §§ 424.57(c)(2), 424.516(c). CMS may perform periodic revalidations and on-site reviews to verify the enrollment information submitted to CMS, determine the supplier's compliance with Medicare enrollment requirements, and determine whether the supplier is operational. 42 C.F.R. §§ 424.510(d)(8), 424.515(c), 424.517(a). CMS may revoke a supplier's enrollment if it is not operational. 42 C.F.R. § 424.535(a)(5).

¹ In a supplemental statement submitted with the RFH, Petitioner asserted for the first time that it submitted to NSC a CMS Form-855S in September 2012 to change its address. *See* RFH, Supplemental Documents at 1-2. Petitioner submitted a copy of the Form CMS-855S that was allegedly signed and submitted in September 2012. RFH Supplemental Documents at 4-16. Petitioner does not provide a specific reason why this documentation was not provided on reconsideration. RFH Supplemental Documents at 1. CMS objects to this new evidence under 42 C.F.R. § 498.56(e) and further disputes the authenticity of the Form CMS-855S, noting that it appears identical to the one submitted in December 2012 with the exception of the signature page. Petitioner did not respond to the objection in his brief, did not resubmit the Form CMS-855S as a marked exhibit, and did not provide good cause why it had not been submitted previously. *See* Order ¶¶ 4-6. Therefore, I am uncertain whether Petitioner continues to seek admission of this document. However, because Petitioner has not provided good cause for me to accept this document, I must exclude it from the record. 42 C.F.R. §§ 405.803(e), 498.56(e).

CMS may revoke a DMEPOS supplier's enrollment if it fails to comply with any of the supplier standards. 42 C.F.R. § 424.57(d). Supplier standard seven requires a supplier to maintain a physical facility on an appropriate site. 42 C.F.R. § 424.57(c)(7).

A. Issue

Whether CMS has a legitimate basis to revoke Petitioner's enrollment as a supplier in the Medicare program based on a determination that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5) and that it failed to comply with supplier standard seven under 42 C.F.R. § 424.57(c)(7).

B. Findings of Fact, Conclusions of Law, and Analysis²

1. Petitioner did not file a Form CMS-855S to change its address within 30 days of leaving the location on file with NSC.

It is undisputed that Petitioner relocated in early September 2012. CMS Ex. 6; CMS Ex. 11. NSC attempted to conduct an inspection of Petitioner's facility located at the 1830 East Interstate 30 address on November 1, 2012, but concluded that Petitioner was no longer at that location. CMS Ex. 9. Petitioner did not notify NSC of the address change until December 2012. CMS Ex. 11; *see also* P. Ex. C (indicating that its address change with CMS contractor Novitas Solutions, Inc. was not effective until December 1, 2012, thus indicating that the change of address was not submitted in the 30-day window to that contractor); P. Ex. D (return receipt card for NSC showing a January 2013 date, again indicating that a change of address form was not submitted within the 30-day window to the contractor).

Further, Petitioner admits that it "missed a very important 30 day window in which our new address was not processed correctly" and "I have read through [CMS's] Motion for Summary Judgment. It is very clear and I find no discrepancies." P. Br. at 1. In Petitioner's request for reconsideration dated December 26, 2012, Petitioner states:

Somewhere along the line I made a mistake. Instead of contacting NSC in early September, we were told by an agent with CGS that they would "update our address in the system." Not fully thinking through the entire process of our DMEPOS supplier number, I did not immediately contact NSC. . . . For several months after this conversation, we were unaware of the process of submitting a

² My findings of fact and conclusions of law are set forth, in italics and bold font.

change of address form on the 855S application. . . . We filled out this form and submitted it for our change of address with NSC. This was mailed off in early December.

CMS Ex. 6.

In a supplemental statement attached to the RFH, Petitioner asserted, for the first time, that it had submitted notice of the address change to NSC in September 2012. RFH Supplemental Documents at 1. As support, Petitioner submitted a copy of the Form CMS-855S that was allegedly signed and submitted in September 2012. RFH Supplemental Documents at 4-16. As indicated above, I excluded this document as a substantive exhibit in this case. However, even if I did not exclude that document, in light of Petitioner's admissions, which occurred both before (CMS Ex. 6) and after (P. Br. at 1) the RFH, I would still conclude that Petitioner failed to notify NSC of its address change within 30 days of Petitioner's move.³

2. During the November 1, 2012 site inspection of Petitioner's address on record with NSC (1830 East Interstate 30, Suite 7, Rockwell, Texas 75087), the site inspector observed that Petitioner's offices were no longer located at that address.

NSC's site inspector conducted his site visit of Petitioner's business location on November 1, 2012. CMS Ex. 1, at 1; CMS Ex. 9, at 1-4. The site inspector went to Petitioner's 1830 East Interstate 30 address, which was the address on record with NSC for Petitioner. The inspector observed that another company was occupying this location and confirmed with the receptionist for the company occupying the space that Petitioner was at the 1748 North Greenville Avenue address. CMS Ex. 9, at 3. Based on his observations, the site inspector determined that Petitioner was not operational at the location on file with NSC. CMS Ex. 9, at 3. Petitioner has not disagreed with the site inspector's observations. Therefore, I find that Petitioner was no longer operating from the

³ Petitioner's supplemental statement to the RFH also provides an entirely new reason why Petitioner decided to change locations. In the reconsideration request, Petitioner asserted that "[a]fter outgrowing our space in Rockwall, I spent 2 months searching for a new site." CMS Ex. 6. However, in the supplemental statement to the RFH, Petitioner stated: "In late August I was approached by our Landlord at 1830 E. Interstate 30 Suite 7 Rockwall, TX 75087. He regretted to inform me we would need to find a new location within 30 days." RFH Supplemental Documents at 1. Such diverging assertions reduce the credibility of the statements made in the supplemental statement to the RFH.

1830 East Interstate 30 address at the time of the November 1, 2012 site inspection.

3. *CMS has a legitimate basis to revoke Petitioner's enrollment in the Medicare program because Petitioner was not operational pursuant to 42 C.F.R § 424.535(a)(5).*

CMS may revoke a currently enrolled supplier's Medicare billing privileges if:

CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services. . . . Upon on-site review, CMS determines that-

* * * *

(ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii).

A supplier is "operational" when it "has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered) to furnish these items or services." 42 C.F.R. § 424.502. CMS has authority to perform off cycle revalidations that may be accompanied by site visits. 42 C.F.R. § 424.515(d). The purpose of a site visit is to verify information on file with the contractor and to confirm compliance with Medicare supplier standards. 42 C.F.R. § 424.517(a).

In the present matter, CMS provided evidence, which is undisputed, that Petitioner was not operational on November 1, 2012, at its business address listed in Petitioner's enrollment application and that Petitioner had not been operational at that location since early September 2012. Petitioner did not notify NSC of the change of address within 30 days as required by Medicare regulations. *See* 42 C.F.R. §§ 424.57(c)(2), 424.516(c). The site inspector was unable to access Petitioner's facility to verify compliance with the supplier standards. Therefore, I

conclude that CMS had a legal basis to revoke Petitioner's billing privileges under 42 C.F.R. § 424.535(a)(5).⁴

Petitioner argues that another supplier was sent a revocation letter but was permitted to file a Corrective Action Plan (CAP). P. Br at 1; P. Exs. A, B. Petitioner asserts that it too should have had an opportunity to submit a CAP. CMS's notification of revocation, dated December 18, 2012, revoked Petitioner's supplier number, effective November 1, 2012, pursuant to 42 C.F.R. §§ 405.800, 424.57(c), 424.535(a)(1), 424.535(a)(5)(ii), and 424.535(g). In the December 18, 2012 notice letter, NSC did not afford Petitioner an opportunity to submit a CAP. However, NSC was not required to offer Petitioner an opportunity to file a CAP because Petitioner's revocation was based, in part, on section 424.535(a)(5). This basis for revocation is expressly exempt from the requirement that a supplier be permitted to correct deficient compliance. 42 C.F.R. § 424.535(a)(1). Therefore, NSC's conduct was permissible under the regulations.

Petitioner also indicates that its billing manager informed CGS of the address change and that an agent at CGS stated that CGS would update Petitioner's address with NSC. RFH Supplemental Documents at 1, 17; CMS Ex. 6. Apparently, this did not occur. Petitioner's argument amounts to a claim of equitable estoppel. It is well-established that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct; and (3) I am not authorized to order payment contrary to law based on equitable grounds. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hosp.*, DAB No. 2183, at 16 (2008); *Wade Pediatrics*, DAB No. 2153, at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009). Therefore, I am unable rule in Petitioner's favor based on the alleged statements of an employee of a Medicare contractor.

Finally, it should be noted that revocation of enrollment is a discretionary act of CMS or its contractors, *see* 42 C.F.R. § 424.535(a), and through the reconsideration process, CMS or its contractors can decide to exercise its discretion not to revoke a supplier should the circumstances warrant such action.

⁴ Petitioner presented evidence that suggests he may have maintained a "physical facility on an appropriate site," *see* 42 C.F.R. § 424.57(c)(7), when he moved to 1748 North Greenville Avenue, although this was not the address in NSC's file at the time of the on-site inspection. However, whether Petitioner may have technically complied with section 424.57(c)(2) is not dispositive here because section 424.535(a)(5) authorizes CMS to revoke its billing privileges regardless of any compliance with specific subsections of 424.57(c).

See 42 C.F.R. § 498.24. However, I do not have the authority to review CMS's discretionary act to revoke a provider or supplier. *Letantia Bussell*, DAB No. 2196, at 13 (2008). Rather, "the right to review of CMS's determination by an [administrative law judge] serves to determine whether CMS has the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the [administrative law judge's] discretion about whether to revoke." *Id.* Once CMS establishes a legal basis on which to proceed with a revocation, then the action to revoke is a permissible exercise of discretion. *See id.* at 10.

VI. Conclusion

Because Petitioner was not operational at the business location listed in its enrollment application when CMS conducted a site visit and Petitioner did not timely notify CMS of a change of address, CMS's revocation of Petitioner's enrollment and billing privileges in the Medicare program is affirmed.

/s/

Scott Anderson
Administrative Law Judge