

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Professional Medical Ultrasound, Inc.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-42

ALJ Ruling No. 2017-14

Date: March 23, 2017

DISMISSAL

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, denied the reactivation enrollment application of Professional Medical Ultrasound, Inc. (Petitioner). In response to the denial, Petitioner submitted a corrective action plan (CAP) to the CMS administrative contractor. The CMS administrative contractor denied the CAP, but informed Petitioner that it could request a hearing before an administrative law judge (ALJ), which Petitioner did. In this proceeding, CMS asserts that Petitioner has no right to a hearing because Petitioner does not have a right to ALJ review of the denial of a CAP. Petitioner argues in response that it should receive ALJ review because it complied with the CMS administrative contractor's instructions to file a CAP and later an ALJ hearing request.

I dismiss Petitioner's hearing request because Petitioner did not request that the CMS administrative contractor reconsider its initial determination to deny its reactivation enrollment application and, consequently, the CMS administrative contractor never issued a reconsidered determination that is appealable to an ALJ. Although Petitioner filed a CAP and the CMS administrative contractor denied the CAP, Petitioner does not have a right to ALJ review of that denial.

I. Background

Petitioner was incorporated in the state of California in January 1999. In an April 19, 2013 initial determination, a CMS administrative contractor enrolled Petitioner in the Medicare program as an independent diagnostic testing facility (IDTF), with a November 28, 2012 effective date of billing privileges. Hearing Request, Supporting Documents. An IDTF, like Petitioner, is considered to be a supplier in the Medicare program. 42 C.F.R. § 498.2 (definition of *Supplier*); *see also* 42 C.F.R. § 424.502.

At some time following enrollment, Petitioner's Medicare billing privileges became deactivated. On April 22, 2016, the CMS administrative contractor received an enrollment application from Petitioner to reactivate its Medicare billing privileges. CMS Exhibit (Ex.) 1 at 1. On the application, Petitioner indicated that its "Base of Operations" was 1320 Eaton Road, San Dimas, CA 91773-2831. CMS Ex. 1 at 2.

On May 10, 2016, at 2:00 p.m., an inspector with the CMS administrative contractor attempted a site visit at the address Petitioner provided as its "Base of Operations." The inspector noted that the address was a residence. No one answered the door when he knocked. The inspector left his business card with a note to call the inspector; however, the inspector never received a return phone call. The inspector returned to Petitioner's address on May 18, 2016, at 10:15 a.m. Again, no one responded to his knocks on the door. The inspector noted that the business card he left was no longer there and that there was no sign on the residence indicating that it was an office of an IDTF. The inspector took pictures of the house at Petitioner's address. CMS Exs. 2, 5.

In an initial determination dated May 31, 2016, the CMS administrative contractor denied Petitioner's reactivation enrollment application. The determination provided the following reason:

(42 CFR §424.530(a)(5))-On-Site Review/Other Reliable Evidence that Requirements Not Met

An onsite review was conducted on May 10, 2016 and May 18, 2016. The reviews were conducted at 1320 Eaton Rd, San Dima CA 91773. Both onsites failed.

CMS Ex. 3 at 2 (emphasis in original).

The initial determination further stated that if Petitioner thought that he was able to correct the deficiencies and establish eligibility to participate in the Medicare program, then Petitioner could submit a CAP. If Petitioner thought that the initial determination

was not correct, then Petitioner could request reconsideration of the determination before a hearing officer. Enclosed with the initial determination was a form for Petitioner to use to indicate if it wanted to submit a CAP or a reconsideration request. CMS Ex. 3 at 2-4.

Petitioner marked on the form that it was submitting a CAP. CMS Ex. 3 at 4. Along with the form, Petitioner submitted a statement indicating that it performs ultrasound testing at different locations around California, but that its base of operations was 1320 Eaton Rd., San Dimas, California. CMS Ex. 3 at 5. Petitioner also included a copy of a sign that it would presumably post indicating its name, phone numbers, business hours of Monday to Saturday, 8:00 a.m. to 5 p.m., but that access to Petitioner's office was "By appointment only." CMS Ex. 3 at 4, 5, 7.

On August 22, 2016, the CMS administrative contractor denied Petitioner's CAP because Petitioner "did not send sufficient evidence to support that they are in compliance with Medicare standards. [Petitioner] will need to submit a new application for reactivation." CMS Ex. 4 at 1-2. The CMS administrative contractor also notified Petitioner that it could request an ALJ hearing. CMS Ex. 4 at 3.

Petitioner timely requested an ALJ hearing. In the hearing request, Petitioner's owner stated that he is the only employee of a mobile ultrasound business. He also stated that it was inappropriate for an inspector to make unannounced visits to such a business and denied ever finding the inspector's business card. Petitioner also submitted a number of documents to show that it was in business, such as a business license, incorporation documents, and a tax payer identification number.

On October 21, 2016, I issued an Acknowledgement and Pre-hearing Order that provided dates for the submission of exchanges by the parties. In response, CMS filed a pre-hearing brief and motion for summary judgment (CMS Br.), which included an argument that Petitioner had no right to an ALJ hearing, along with five exhibits. Petitioner filed a brief opposing summary judgment and arguing that it did have the right to an ALJ hearing (P. Br.) along with two exhibits.

II. Discussion

CMS asserts that Petitioner never requested reconsideration of the denial of his reactivation enrollment application and that CMS did not issue a reconsidered determination. Without a reconsidered determination, CMS argues, Petitioner has no right to a hearing because a CAP denial is not subject to ALJ review. CMS Br. at 2, 5-6.

In response, Petitioner admits that he filed a CAP. But, Petitioner asserts that it filed both the CAP and later the hearing request in compliance with the appeal rights listed on the initial determination and the CAP denial decision. Petitioner indicates that he believes that he has the right to a hearing. P. Br. at 2.

A supplier seeking to reactivate enrollment generally must submit an enrollment application to CMS. *See* 42 C.F.R. § 424.540(b)(1). Denial of enrollment is an appealable initial determination. 42 C.F.R. § 498.3(b)(17). When denying enrollment, CMS or one of its administrative contractors must issue a notice providing the reasons for the denial and notice of the right to appeal the denial. 42 C.F.R. §§ 405.800(a), 498.20(a). A supplier has the right to appeal the denial as stated in 42 C.F.R. part 498. 42 C.F.R. §§ 405.803(a), 424.545(a). For the denial of enrollment, the first level of appeal is a request for reconsideration of the initial determination. 42 C.F.R. § 498.5(l)(1)). If a supplier requests reconsideration and CMS or its administrative contractor issues a reconsidered determination, then the supplier may request a hearing before an ALJ. 42 C.F.R. §§ 498.5(l)(2), 498.25(a)(3), 498.40(a). Essential to the right to ALJ review is that CMS or the CMS administrative contractor first issue a reconsidered determination. *Denise A. Hardy, D.P.M.*, DAB No. 2464 at 4-5 (2012); *Hiva Vakil, M.D.*, DAB No. 2460 at 4 (2012). If a supplier does not timely request reconsideration, then the initial determination becomes binding. 42 C.F.R. § 498.20(b).

In the present case, the record shows and Petitioner admits that it submitted a CAP rather than requesting reconsideration. But, CMS's refusal to accept a CAP is not an initial determination with appeal rights. 42 C.F.R. § 405.809(b)(2); *DMS Imaging*, DAB No. 2313 at 6-8 (2010); *see also* 42 C.F.R. § 498.3(b). As a result, the initial determination denying Petitioner's reactivation enrollment application is binding and Petitioner has no right to an ALJ hearing. Although the CMS administrative contractor incorrectly informed Petitioner that it could request ALJ review of the CAP denial, this is not true and such notice does not create a right to a hearing when none exists.

A supplier's request for hearing is subject to dismissal when the supplier has no right to an ALJ hearing. 42 C.F.R. § 498.70(b). Therefore, I dismiss Petitioner's hearing request.

III. Conclusion

I dismiss Petitioner's request for hearing.

_____/s/_____
Scott Anderson
Administrative Law Judge