

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Doris U. Tan, M.D., P.C.
(PTAN: A100078224;
NPI: 1356685077),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-42

Decision No. CR4501

Date: January 8, 2016

DECISION

Petitioner, Doris U. Tan, M.D., P.C. (herein Petitioner) is a professional corporation owned by Doris U. Tan, M.D., a physician who is a board certified obstetrician and gynecologist. Petitioner participated in the Medicare program until the Centers for Medicare & Medicaid Services (CMS) revoked its Medicare supplier number because it employed a managing employee who was excluded from all federal health care programs, including the Medicare program. Petitioner appeals the revocation of its supplier number.

For the reasons discussed below, I find that Petitioner was not compliant with Medicare requirements and that CMS properly revoked its supplier number.

I. Background

In a letter dated June 22, 2015, the Medicare contractor, National Government Services (NGS), notified Petitioner that its supplier number would be revoked effective June 19, 1996, and that it was barred from reenrollment for a period of three years. CMS Exhibit (Ex.) 2 at 1. In its letter, NGS explained that it had discovered that an employee of Petitioner, Sung Dam Tan, had been excluded by the Inspector General from participation in federally funded health care programs pursuant to section 1128(b)(4) of the Social Security Act (Act). NGS also explained that this individual had been listed as a managing employee on Petitioner's Form CMS-855I (Medicare Enrollment Application for Physicians and Non-Physician Practitioners), therefore, CMS was authorized to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(2). *See* 42 U.S.C. § 1320a-7.

Petitioner submitted a request for reconsideration on or about July 1, 2015. CMS Ex. 8. In its request, Petitioner's owner, Dr. Tan, explained the following:

While I do trust the integrity of said employee, at the time that his services were engaged, we were not aware that he was barred from participating in Medicare billing after an incident some years prior when his license was revoked. Since receiving your letter, he was terminated as an employee at my practice and his responsibilities have been transferred to another member of my staff. I hope my ignorance in this matter and my swift action in correcting the error will inspire leniency and understanding as you consider the revocation of my Medicare enrollment and billing privileges.

Id.

In a reconsidered determination dated August 21, 2015, R.F., an NGS employee, affirmed the revocation of Petitioner's supplier number pursuant to 42 C.F.R. § 424.535(a)(2). CMS Ex. 9. Petitioner submitted a timely request for hearing on October 20, 2015.

In an order dated October 27, 2015, I directed the parties to submit pre-hearing briefs addressing all issues of law and fact, including any motions for summary judgment, along with any proposed exhibits, including written direct testimony in the form of an affidavit or declaration, of any proposed witness. Acknowledgment and Pre-Hearing Order at 3-5, ¶¶ 4-8. The order advised the parties that a hearing for the purpose of cross-examining witnesses "will be necessary only if a party files admissible, written direct testimony, and the opposing party asks to cross-examine." Acknowledgment and Pre-Hearing Order at 6, ¶ 10.

CMS submitted a brief and motion for summary judgment disposition (CMS Br.), along with ten proposed exhibits. Petitioner submitted its brief (P. Br.), which also sought summary disposition, and four proposed exhibits. In the absence of any objections, I admit into evidence CMS Exs. 1-10 and P. Exs. 1-4.¹

Neither party has expressed a desire to cross-examine any witnesses. I consider the record in this case to be closed, and the matter is ready for a decision on the merits.²

II. Applicable law

Section 1831 of the Act establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. 42 U.S.C. § 1395j. Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.³ Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). The Act requires that the Secretary of Health and Human Services issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review in the event of denial or non-renewal. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a supplier must be 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.

CMS may revoke an enrolled supplier's Medicare billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. Pursuant to 42 C.F.R. § 424.535(a)(2)(i), CMS may revoke a supplier's enrollment if it is determined that a managing employee of the supplier is excluded from participation in Medicare, Medicaid, or any other federal health care program. A managing employee is defined as "a general manager, business manager, administrator, director, or other individual that exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-

¹ CMS has argued that a declaration submitted in conjunction with the October 20, 2015 request for hearing is inadmissible. However, CMS has not objected to P. Ex. 4, which contains similar information. *See* Acknowledgment and Prehearing Order at 5, ¶ 8 (directing that any written direct testimony should be submitted at the time of the pre-hearing exchange). The evidence considered in my decision is limited to the evidence contained in CMS Exs. 1-10 and P. Exs. 1-4.

² The parties have each argued that summary disposition is appropriate. It is unnecessary in this instance to address the issue of summary disposition, as neither party has requested an in-person hearing.

³ For purposes of the Act, Petitioner is a Medicare supplier. Act § 1861(d) (42 U.S.C. § 1395x(d)).

day operation of the provider or supplier, either under contract or through some other arrangement, whether or not the individual is a W-2 employee of the provider or supplier.” 42 C.F.R. § 424.502.

III. Discussion

1. ***CMS was authorized to revoke Petitioner’s enrollment and billing privileges.***⁴
2. ***The September 24, 2012 Form CMS-855I Petitioner submitted listed a managing employee who had been excluded from participation in Medicare and federal health care programs.***

This case hinges on whether an employee Petitioner identified as an individual having managing control on the Form CMS- 855I was in fact a managing employee. Petitioner concedes that the individual listed on the form had his medical license revoked and has been excluded from participation in federal health care programs, so the factual question before me is whether the employee at issue was a managing employee. *See* 42 C.F.R. § 424.502.⁵

Sung Dam Tan is the sole managing employee listed on the Form CMS-855I at issue.⁶ The New York State Administrative Review Board for Professional Medical Conduct revoked Mr. Tan’s license to practice medicine. CMS Ex. 10 at 1. Thereafter, the Inspector General of the Department of Health and Human Services, in May 1996, notified Mr. Tan that he would be excluded from Medicare and other federal health care programs until such time as he regains his medical license and applies for and is granted reinstatement as a Medicare provider. *Id.* The May 1996 letter explained to Mr. Tan that “payment will not be made to any entity in which you are serving as an employee, administrator, operator, or in any other capacity for any services that you furnish, order or prescribe on or after the effective date of this exclusion.” *Id.* at 2. The effective date of

⁴ Findings of fact and conclusions of law are set forth in bold and italics.

⁵ Petitioner limits its arguments to contesting CMS’s revocation of its billing privileges and does not dispute either the effective date assigned or the length of the reenrollment bar.

⁶ I will refer to Petitioner’s owner as “Dr. Tan” throughout this decision. Sung Dam Tan is Petitioner’s husband (P. Ex. 4 at 2) and, like Dr. Tan, holds a medical degree. P. Ex. 4 at 1, 2; CMS Ex. 10. As such, Sung Dam Tan can appropriately be addressed as “Dr. Tan,” as well. For the sake of clarity, I will refer to Sung Dam Tan as “Mr. Tan,” which is how both parties refer to him in their briefs.

Mr. Tan's exclusion is June 19, 1996, which is the same effective date of revocation that is listed in Petitioner's initial and reconsidered determinations. CMS Exs. 2, 9, 10.

Petitioner submitted a Form CMS-855I on or about September 24, 2012. In Section 6 of the form, entitled "Individuals Having Managing Control," the following guidance is provided to applicants:

This section captures information about all managing employees. A managing employee means a general manager, business manager, director, or other individual who exercises operational or managerial control over, or who directly or indirectly conducts, the day-to-day operations of the supplier, either under contract or through some other arrangement, regardless of whether the individual is a W-2 employee of the supplier.

All managing employees at any of your practice locations in Section 4 must be reported in this section. If there is more than one managing employee, copy and complete this section as needed.

CMS Ex. 1. Petitioner listed only one managing employee in its application, Mr. Tan.⁷ Petitioner reported that Mr. Tan had the job title of "office manager," and his Social Security number, date of birth, and place of birth were printed on the application. *Id.* The effective date Mr. Tan acquired managing control was listed as March 16, 1996.⁸ *Id.* Section 13 (Contact Person) was also completed, indicating that Mr. Tan was the person to be contacted regarding the enrollment application, even though the form instructed that the physician would be contacted directly if no one was listed in that section. CMS Ex. 1 at 23. In Section 6 of the completed form, Dr. Tan checked "NO" in response to a question asking whether "the individual in Section 6A above, under any current or former name or business identity, had a final adverse legal action listed on page 12 of this application imposed against him/her." This negative response was inaccurate, in that the types of legal actions listed on page 12 included "revocation or suspension of a license to provide health care by any State licensing authority" and "[a]ny suspension or exclusion from participation in, or any sanction imposed by, a Federal or State health care

⁷ Despite Dr. Tan's declaration that Xiaofang Qyu (referred to by Dr. Tan as "Winnie") had been the "assistant manager" of the practice for approximately ten years, this individual is not listed as a managing official on the Form CMS-855I. I observe that Dr. Tan reported that "[e]ach of the responsibilities of the 'managing employee' for my practice were performed either personally by me, or by Winnie under my supervision." P. Ex. 4 at 3.

⁸ This date pre-dates the June 19, 1996 effective date of Mr. Tan's exclusion from participation in Medicare and other federal health care programs.

program.” CMS Ex. 1 at 12, 13. Petitioner has conceded that Mr. Tan’s medical license is currently revoked and he continues to be excluded from participation in federal health care programs. P. Ex. 4.

In Petitioner’s request for reconsideration, which is Dr. Tan’s initial response to CMS’s notice that it was revoking Petitioner’s supplier number pursuant to section 434.535(a)(2), Dr. Tan did not indicate that she misunderstood the meaning of the term “managing employee” or that she had committed a clerical error. Rather, Dr. Tan explained that she was previously unaware that a managing employee could not “have had their licenses revoked or surrendered.” CMS Ex. 8. Dr. Tan further acknowledged that she was “not aware that [Mr. Tan] was barred from participating in Medicare billing.” Dr. Tan reported that she took “swift action in correcting the error” and that she had terminated Mr. Tan and transferred his responsibilities to “another member of [her] staff.” *Id.*

In a December 2015 declaration admitted as P. Ex. 4, Dr. Tan alleges that she committed a “clerical error” by listing Mr. Tan as a managing official in Section 6 of the Form CMS-855I. She explains that Mr. Tan performed only simple clerical tasks, and that she and her “assistant manager,” Xiaofang Qyu, ran the practice together. Furthermore, Dr. Tan contends in the same declaration that she did not understand the meaning of the term “managing employee” when she completed the Form CMS 855I, even though the form clearly explained who should be listed as a managing employee. As explained below, I do not find Dr. Tan’s statements in this regard to be credible.

While Dr. Tan explains that she was “not aware” that a managing employee “is a specific legal term,” she fails to give any explanation of why she listed Mr. Tan as a managing employee, as opposed to listing her assistant manager or not listing anyone, which would have resulted in her being the point of contact for the Medicare contractor. Although she explained that she and the assistant manager managed the practice’s operations together, Dr. Tan did not list the assistant manager, rather than Mr. Tan, as a managing employee on the Form CMS-855I. Furthermore, even though Dr. Tan currently expresses her belief that Mr. Tan’s listing was a clerical error and a result of the failure to understand a legal definition of managing employee, it is striking that she omits any discussion in her declaration of why Mr. Tan was listed as holding the job title of “office manager” even though he was purportedly not a managing employee. While Dr. Tan contends that she was confused because the term “managing employee” is a “term of art,” it is unclear to me how her designation of an employee as holding the position of “office manager” could refer to someone who held no managerial responsibilities. Even though she now claims that she was ignorant of the specific meaning of the term managing employee, she previously expressed, only months earlier in July 2015, that her “error” was based on her lack of knowledge that an individual whose medical license had been revoked could not serve as a managing employee and her lack of knowledge that Mr. Tan had been

excluded.⁹ Dr. Tan's statements at P. Ex. 4 are inconsistent with her prior statements and are given little probative weight. Petitioner has failed to show that there was any clerical error when it stated that Mr. Tan was the "office manager" in Section 6 of the form, or that there was any error in listing Mr. Tan as a managing employee. Neither Dr. Tan's declaration nor Petitioner's brief disputes, or even acknowledges, that Petitioner identified Mr. Tan as its office manager, and absent any contradictory evidence, I find that the contemporaneous evidence shows that Mr. Tan held the position of office manager in Petitioner's office. Although Dr. Tan explained in her declaration that Mr. Tan, a non-practicing medical doctor, performed only simple duties such as ordering and maintaining office supplies, maintaining the copier and printer, and ordering water for the water cooler, these claims are not credible in light of his designation as "office manager" and his being listed as a managing employee and point of contact for the application. Petitioner has not presented any probative or credible evidence that Mr. Tan was not a managing employee, and has not demonstrated that Dr. Tan's statements on the application or in the request for reconsideration were made in error.

CMS has submitted evidence showing that Mr. Tan and CMS were in contact regarding the enrollment application. CMS Exs. 4, 5, 6, 7. Petitioner argues that these exhibits do not support CMS's arguments. These documents, which consist of letters addressed to Mr. Tan and the report of a telephone call between Mr. Tan and CMS, have some evidentiary value but do not independently establish whether Mr. Tan was a managing employee. While these documents show that Mr. Tan did, in fact, serve as a point of contact for Petitioner's Medicare enrollment, I reiterate that the most significant evidence consists of Petitioner's own assertion that Mr. Tan was its "office manager" and the statements made in Dr. Tan's reconsideration request. While Petitioner contends that Mr. Tan was not a "managing employee" pursuant to section 424.502, it has not reconciled how an employee who holds the position of "office manager" was not a managing employee, or how its previously asserted defense of being unaware of the requirements of section 424.535(a)(2) would be relevant if Mr. Tan were merely an employee who handles only low-level clerical tasks.

While Petitioner alleges that it committed an "honest mistake" and a "clerical error" in completing the application, I disagree. P. Br. at 4, 8. Petitioner has not shown that the information provided on the Form CMS-855I in September 2012 was inaccurate.

⁹ An individual whose medical license has been revoked can, in theory, serve as a managing employee so long as the individual has not also been *excluded* from participating in all federal health care programs, as Mr. Tan was. Nothing in section 424.535(a)(2) requires CMS to revoke a supplier's billing privileges for employing an individual whose license has been revoked.

