Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joseph Emergency Medical Services, Inc.
(PTAN: 202G592961)
(NPI: 1831433515),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-304

Decision No. CR4931

Date: August 29, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Petitioner, Joseph Emergency Medical Services, Inc., because Petitioner was not operational at the practice location on record with CMS. Specifically, the practice location on record with CMS was a location that it had vacated nearly five months prior to an attempted site visit in May 2016. For the reasons stated herein, I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

I. Background

Petitioner is an ambulance company that provides medical transportation services. *See* CMS Exhibit (Ex.) 1 at 1, 3 (Petitioner's enrollment application reporting that it is an ambulance service supplier); *see also* CMS Ex. 1 at 21 (Georgia Department of Public Health Ambulance Service License). In connection with its initial Medicare enrollment application, Petitioner reported that its address for both "practice location" and "correspondence" purposes was "2192 CAMPBELLTON SWRD [sic] 202" in Atlanta,

Georgia (herein "Campbellton Road"). CMS Ex. 1 at 4. On January 31, 2013, Cahaba GBC, LLC (Cahaba), a Medicare administrative contractor, informed Petitioner that it had approved Petitioner's Medicare enrollment application and confirmed that its practice location address was the location on Campbellton Road. CMS Ex. 2 at 1.

On May 31, 2016, a site visit contractor visited Petitioner's reported address on Campbellton Road, at which time the contractor reported that the "Provider does not provide services at this location" and that he "went inside to verify . . . and [s]poke with [the] leasing manager who stated they had been gone for several months . . . ." CMS Ex. 5 at 1.

On August 1, 2016, Cahaba informed Petitioner that it had revoked Petitioner's Medicare enrollment and billing privileges, effective May 31, 2016, based, in part, on the following:

> **42 [C.F.R. §] 424.535(a)(5) On Site Review**
>
> You are no longer operational to furnish Medicare covered items or services. A site visit conducted on May 31, 2016 at 2192 Campbellton Rd. SW, Ste 202, Atlanta, GA 30311-4618 confirmed that you are non-operational. [1]

CMS Ex. 6 at 1 (emphasis in original). Cahaba also informed Petitioner, that pursuant to 42 C.F.R. § 424.535(c), it had imposed a two-year bar to re-enrollment that would begin 30 days from the date of postmark of the letter. CMS Ex. 6 at 2.

On or about August 16, 2016, Petitioner submitted a letter requesting reconsideration of the August 1, 2016 initial determination. CMS Ex. 7 at 3. Petitioner explained, in pertinent part:

> On May 18th[th] [sic] 2016 Joseph Emergency Medical Services, Inc.[ ] made the decision to no longer use Affordable Ambulance Billing Services (AABS) for their billing needs after failed miscommunication and suspicion of misconduct on the part of AABS. It was discovered that AABS had failed to honor many requests to do a change of address for Joseph EMS, insurance information had not been updated on some of the claims, a large amount of claims were never sent resulting in Joseph EMS suffering huge losses. It was this discovery that forced Joseph EMS to decide to do their own billing and relieve AABS of all duties.

[1] Cahaba also cited 42 C.F.R. § 424.535(a)(9) as a basis for revocation. CMS Ex. 6 at 1. CMS has abandoned that basis for revocation. CMS Brief (Br.) at 4.

> It was during this transition time when misleading information had been given to delay the process. AABS claimed to be helpful and Joseph EMS was under the impression that the address change, Submitter ID was applied for in addition to so much more. Joseph EMS was being delayed time and time again due to the gross neglect of what was what they thought was being handled by AABS.
>
> Bernadette Moore, Operations Manager at Joseph EMS then decided to handle all of the necessary steps in this transition. By the advice of EMS Consultants (the vendor for billing) she was told to apply for the submitter ID and then do the address change. Once the submitter ID was issued and Ability was set up after many phone calls to EMS Consultants and Cahaba it appeared that everything was getting in order.
>
> A test batch was tried and the billing person was unable to submit any claims to Medicare . . . it was then discovered that the billing privileges were revoked; due to the address change not being done when we thought it was being done by AABS it resulted in this outcome . . . Joseph EMS assures that it was fully operational and was under the impression that they were compliant with Cahaba by AABS. Joseph EMS is diligently handling the situation that has come up with the discoveries on the damages done by AABS which has ultimately resulted in this outcome.

CMS Ex. 7 at 3.

On November 7, 2016, Novitas issued an unfavorable reconsidered determination. CMS Ex. 10. The reconsidered determination stated the following, as relevant here:

> **Revocation Reason # 1: On Site Review 42 [C.F.R. §] 424.535(a)(5)**
>
> *Upon on-site review or other reliable evidence, CMS determines that the provider or supplier is either of the following: (i) No longer operational to furnish Medicare-covered items or services.*

CMS Ex. 10 at 1 (emphasis in original). The reconsidered determination explained that "Joseph EMS asserts that it had relied upon a contracted third party to complete all required updates/submission to Medicare," and that "[t]he failure of the third party contracted by Joseph EMS to perform its duties does not nullify Joseph EMS' reporting requirements as a Medicare supplier." CMS Ex. 10 at 2. The determination further explained that "[n]o evidence of submission of CMS-855I change of information to update Joseph EMS' practice location prior to the site visit and subsequent revocation action could be identified." CMS Ex. 10 at 2.

Petitioner, through counsel, submitted a request for an administrative law judge (ALJ) hearing dated December 20, 2016, and received on December 29, 2016. On February 6, 2017, I issued an Acknowledgment and Pre-Hearing Order (Order), at which time I directed the parties to each file a pre-hearing exchange consisting of a brief and supporting documents by specified deadlines. Order, § 4. I also explained that the parties should submit written direct testimony for any witnesses in lieu of in-person direct testimony. Order, § 8. In the Order, I explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Order, §§ 9, 10.

In response to my February 6, 2017 Order, CMS filed a brief and motion for summary judgment, along with 12 exhibits (CMS Exs. 1-12). Petitioner filed a brief and response to CMS's motion for summary judgment (P. Br.), and nine exhibits (P. Exs. 1-9). CMS thereafter submitted objections to Petitioner's witness list and a reply to Petitioner's cross-motion for summary judgment. As neither party has objected to any exhibits, I admit the parties' exhibits into the record.

CMS offered the written direct testimony of two witnesses. CMS Exs. 11, 12. While Petitioner stated in its witness list that it "reserve[d] the right to cross-examine any witnesses on the Respondent's list should there be a hearing in this matter," Petitioner did not request an opportunity to cross examine either of these witnesses. Further, while Petitioner, in its witness list, identified a witness, Bernadette Moore, who would testify "[i]f the court determines that a hearing is needed in this matter," CMS correctly objected to Ms. Moore being listed as a witness because Petitioner did not submit her written direct testimony as required by my Order. Order, § 8; *see, e.g., Lena Lasher, aka Lena Contang, aka Lena Congtang*, DAB No. 2800 at 4 (2017) (discussing that when neither party submits written direct testimony as directed, "no purpose would be served by holding an in-person hearing"). I consider the record to be closed and the matter ready for a decision on the merits.[2] Order, §§ 9, 10.

II. Issue

Whether CMS has a legal basis to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner was not operational at the practice location on file with CMS.

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

[2] As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS's motion for summary disposition.

IV. Findings of Fact, Conclusions of Law, and Analysis[3]

Petitioner is a "supplier" for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1). In order to participate in the Medicare program as a supplier, entities must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke the enrollment and billing privileges of a supplier for any reason stated in 42 C.F.R. § 424.535. When CMS revokes a supplier's Medicare billing privileges, CMS establishes a reenrollment bar for a period ranging from one to three years. 42 C.F.R. § 424.535(c). Generally, a revocation becomes effective 30 days after CMS mails the initial determination revoking Medicare billing privileges, but if CMS finds a supplier to be non-operational, as it did here, the revocation is effective from the date that CMS determines that the supplier was not operational. 42 C.F.R. § 424.535(g).

On-site review is addressed in 42 C.F.R. § 424.535(a)(5). Pursuant to 42 C.F.R. § 424.535(a)(5)(i), (ii), a supplier is non-operational if CMS determines upon an on-site review that it is "no longer operational to furnish Medicare covered items or services" or that it otherwise fails to satisfy any Medicare enrollment requirement.

1. ***On May 31, 2016, a site visit contractor was unable to conduct a site visit of Petitioner's Campbellton Road practice location, which was the practice location on file with Cahaba at that time, because Petitioner had relocated to another location and no longer occupied the Campbellton Road location.***

In December 2012, Petitioner submitted an application to enroll as an ambulance services supplier. CMS Ex. 1. At that time, Petitioner reported that the Campbellton Road location was its practice location. CMS Ex. 1 at 4. On May 31, 2016, a site visit contractor attempted a "site verification survey" at the reported practice location on Campbellton Road. CMS Ex. 5. The site visit contractor determined that Petitioner did not have an office at that location. CMS Ex. 5 at 1.

In seeking reconsideration of the determination revoking its enrollment, Petitioner did not dispute that it was not operational at Campbellton Road location, but rather, argued that its billing company "had failed to honor many requests to do a change of address for Joseph EMS." CMS Ex. 7 at 3. At the time Petitioner submitted its request for reconsideration, it submitted a new enrollment application reporting a new practice location, effective January 6, 2016. CMS Ex. 8 at 18.

[3] My numbered findings of fact and conclusions of law appear in bold and italics.

Petitioner, in its brief, does not contend it was operational at the Campbellton Road location. In fact, Petitioner states:

> The Appellant does not argue that they should not have updated their address, on the contrary, the Appellant concedes that it should have updated its address. However, this requirement falls under 42 [C.F.R. §] 424.535(a)(1) . . . [4]

P. Br. at 3. Further, with respect to Cahaba's determination that it was not operational at the Campbellton Road practice location, pursuant to 42 C.F.R. § 424.535(a)(5), Petitioner limits its discussion to the following statement:

> The on-site review under [42 C.F.R. § 424.535](a)(5) only found that the provider had moved, not that they were "no longer in operation", therefore [42 C.F.R. § 424.535](a)(5) is not a proper basis for revocation . . .

P. Br. at 3. The crux of Petitioner's argument is that while it "should have updated [its] address," the failure to do so warranted an "opportunity to submit a corrective action plan." P. Br. at 3-4. Petitioner further acknowledges that it was "'non-compliant' with its enrollment form update" and that the site visit "merely showed that the ambulance service had relocated . . . ." P. Br. at 5.

Petitioner misdirects its attention by focusing on the basis for revocation cited under 42 C.F.R. § 424.535(a)(9) for failing to timely update its enrollment information, rather than addressing the sole basis for revocation, 42 C.F.R. § 424.535(a)(5), that CMS addressed in its brief. In fact, CMS clearly limited its arguments to Petitioner's revocation based on section 424.535(a)(5), explaining:

> CMS concedes that 42 C.F.R. § 424.535(a)(9) is not applicable to the facts of this case. Section 424.535(a)(9) incorporates by reference section 424.516(d)(1)(ii) and (iii). Joseph EMS is an ambulance service supplier and is not subject to subsection (d), but instead, is subject to subsection (e).

CMS Br. at 4. As such, CMS presented the narrow argument that it "properly revoked Joseph EMS's enrollment because it was not operational at its authorized practice location." CMS Br. at 7. CMS further explained that Petitioner was not eligible to submit a corrective action plan because Cahaba determined it was non-operational pursuant to 42 C.F.R. § 424.535(a)(5). CMS Br. at 7; *see* 42 C.F.R. § 424.535(a)(1) (permitting submission of a corrective action plan for a revocation based only on subsection 424.535(a)(1)).

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[4] Petitioner refers to itself as Appellant, rather than Petitioner, in its brief.

Petitioner does not dispute that it was not operational at the Campbellton Road location it provided on its enrollment application, and it previously reported that it had relocated from the Campbellton Road location months prior to the date of the attempted site visit. *See* P. Br. at 5 (Petitioner's statement that it had relocated); CMS Ex. 7 at 3 (Petitioner's statement that its billing company had not reported its change of address); CMS Ex. 8 at 18 (enrollment application reporting that it moved to its new practice location on January 6, 2016).[5] Further, while Petitioner argues that section 424.535(a)(9) is not an appropriate basis for revocation, CMS had already abandoned that basis for revocation. Petitioner has not presented any substantive argument, or supporting evidence, demonstrating that it was operational at the Campbellton Road location at the time of the site visit.

2. CMS and its contractor had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner was not operational pursuant to 42 C.F.R. § 424.535(a)(5) at the practice location on file with CMS at the time of the site visit.

Petitioner focuses its arguments on the purported inapplicability of section 424.535(a)(9), and contends that it "should have updated its address" pursuant to 42 C.F.R. § 424.535(a)(1) rather than 42 C.F.R. § 424.535(a)(9). However, Petitioner fails to make any cognizable arguments regarding the sole basis for revocation cited by CMS in its brief, 42 C.F.R. § 424.535(a)(5).

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 may revoke a currently enrolled supplier's Medicare billing privileges in the following circumstance:

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[5] I note that even if Petitioner's billing company had reported the change of practice location, it would have done so by submitting an updated enrollment application. Petitioner would have been required to sign the certification statement on the updated enrollment application; Petitioner has not alleged that it signed an enrollment application reporting updated information. *See* Form CMS-855B, *https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/cms855b.pdf* (last visited July 17, 2017).

> Upon on-site review or other reliable evidence, CMS determines that the provider or supplier is either of the following-
>
> (i) No longer operational to furnish Medicare-covered items or services.
>
> (ii) Otherwise fails to satisfy any Medicare enrollment requirement.

42 C.F.R. § 424.535(a)(5)(i),(ii).

While Petitioner appears to argue, at least to some extent, that it is not subject to all enrollment requirements because it is an ambulance service supplier, I observe that the Secretary of the Department of Health and Human Services (Secretary) has specifically directed that ambulance service suppliers will be subject to site visits because he has determined that ambulance service suppliers, as a category of suppliers, have a "moderate" risk for fraud, waste, and abuse. 42 C.F.R. § 424.518(b)(1)(i); *see* Section 1866(j)(2)(a) of the Social Security Act, codified at 42 U.S.C. § 1395cc(j)(2)(A) (directing the Secretary to establish levels of screening based on the risk for waste, fraud, and abuse). The Secretary has directed, through regulation, that when a provider or supplier is in the moderate risk category, the Medicare administrative contractor conducts on-site visits, to include after receiving an initial application *or* upon receipt of an application for a new practice location. 42 C.F.R. § 424.518(b)(1)(i). However, in this case, Petitioner did not report its new practice location when it relocated in January 2016, and therefore, CMS was unable to perform a site visit at its location, as required by regulation.[6] 42 C.F.R. § 424.518(b)(1)(i).

The regulatory definition of the term "operational" refers to the "qualified physical practice location" of a supplier, 42 C.F.R. § 424.502. When Petitioner submitted its enrollment application in December 2012, it reported that its practice location was at the Campbellton Road location. CMS Ex. 1 at 4. CMS, in its performance of an on-site inspection "to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements" as required by 42 C.F.R. § 424.517(a), discovered that Petitioner did not have an office at the Campbellton Road location. CMS Ex. 5 at 1. In assessing that Petitioner was not

[6] The same Final Rule implementing the assignment of ambulance service suppliers to the moderate risk category also explained that site visits were necessary "to ensure that ambulance providers and suppliers were in compliance with applicable program requirements." 76 Fed. Reg. 5,862, 5,878 (February 2, 2011). In response to a comment addressing site visits to ambulance service suppliers, CMS explained that "such visits [are] an extremely effective tool in fighting fraud" and that "[w]e believe that site visits are appropriate for ambulance companies, especially considering that we have uncovered several instances where an enrolling ambulance company—contrary to the information it furnished on the [Form] CMS-855B—had no base of operations." *Id.*

operational at a practice location on Campbellton Road, CMS unsuccessfully attempted to inspect the "qualified physical practice location" that Petitioner provided and was on file with CMS at the time of the attempted site visit. CMS Ex. 5 at 1; *see* 42 C.F.R. § 424.517(a).

Because the physical practice location on file with CMS was an abandoned location, CMS had a legal basis to revoke Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)(i). CMS was unable "to perform onsite review . . . to verify that the enrollment information . . . is accurate and to determine compliance with Medicare enrollment requirements." 42 C.F.R. § 424.517(a), (b). Petitioner was not operational at the Campbellton Road location. *See Care Pro Home Health Care*, DAB No. 2723 at 6 (2016) (holding that CMS lawfully revoked a supplier's Medicare enrollment based on its non-operational status at a single location); *see also Viora Home Health, Inc.*, DAB No. 2690 at 13 (2016) (holding that CMS properly revoked Medicare enrollment when a practice location of record was not operational upon onsite review). Unfortunately, even if Petitioner was operational elsewhere, it was not operational at the location reported on its enrollment application. Therefore, for purposes of section 424.535(a)(5), Petitioner was not operational because it was not operational at the location provided in its enrollment record.

My determination is not premised on whether CMS's action was required, but rather, whether CMS or its contractor has a "legal basis" for the revocation action. Based on Petitioner's reported enrollment information that its practice location was at a location on Campbellton Road, CMS has a legal basis for revocation when, upon on-site review, it determined that Petitioner was not operational at the Campbellton Road location. *Letantia Bussell, M.D.*, DAB No. 2196 at 10 (2008); *see Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010) (stating if CMS establishes that the regulatory elements necessary for revocation are satisfied, an ALJ may not substitute his or her "discretion for that of CMS in determining whether revocation is appropriate under the circumstances.").

Petitioner has not demonstrated that CMS and its contractor improperly revoked its enrollment based on a failed site visit to a location where it claimed to be operational. The revocation of Petitioner's enrollment and billing privileges, and my affirmance of that determination, is proper based on Petitioner's failure to be operational at the practice location it reported on its enrollment application.

V. Conclusion

I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges, along with the two-year bar to re-enrollment.

/s/
Leslie C. Rogall
Administrative Law Judge