Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

MRI of Oak Lawn, LLC,
(NPI: 1366692733),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-55

Decision No. CR2097

Date: March 26, 2010

DECISION

Petitioner's application for enrollment in Medicare as an Independent Diagnostic Testing Facility (IDTF) was properly denied.

I. Background

The Medicare contractor for the Centers for Medicare & Medicaid Services (CMS), Wisconsin Physicians Service Insurance Corporation (WPS), notified Petitioner by letter dated April 2, 2009, that its request to enroll in Medicare as an IDTF was denied. CMS Exhibit (CMS Ex.) 1 at 10-12. Petitioner submitted a corrective action plan on April 27, 2009 that WPS received on April 29, 2009. WPS rejected the corrected application because it was not signed by the Authorized Official. CMS Ex. 1 at 8-9. Petitioner submitted a corrective action plan on May 15, 2009 (CMS Ex. 1 at 7), which was rejected by WPS, because it was late (CMS Ex. 1 at 5-6). Petitioner requested reconsideration of the initial denial of April 2, 2009, by letter dated June 29, 2009, which was received by the contractor on July 6, 2009. CMS Ex. 1 at 3-4. WPS notified Petitioner by letter dated September 10, 2009, that the decision on reconsideration was to deny Petitioner's enrollment as an IDTF. CMS Ex. 1 at 1-2.

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated September 29, 2009. On October 22, 2009, the case was assigned to me for hearing and decision and an Acknowledgement and Prehearing Order was issued at my direction. On November 23, 2009, CMS filed a motion for summary judgment, supporting brief (CMS Brief), and CMS exhibits 1 through 3. On December 21, 2009, Petitioner filed: a brief opposing summary judgment and advising that it did not waive an oral hearing (P. Brief); Petitioner's exhibits 1 through 6; and the affidavits of Aatif Rahman, Petitioner's Administrator, and Jeff Dornburg, the contact for Petitioner listed on the enrollment application. CMS filed its reply brief (CMS Reply) and objections to Petitioner's exhibits on January 5, 2010. Petitioner did not object to CMS exhibits 1 through 3, and they are admitted. The CMS objection to Petitioner's exhibits 1 through 6 is sustained, because, as discussed hereafter, I conclude that Petitioner's exhibits are not relevant to the issue before me.

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. Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[1] Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Administration of the Part B program is through contractors, in this case WPS. Act § 1842(a) (42 U.S.C. § 1395u(a)). The Act requires the Secretary to 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 provider or 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-

---

[1] 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) and 1835(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.

eligible beneficiary. If enrollment is approved, a supplier is issued a National Provider Identifier (NPI) to use for billing Medicare and a Provider Transaction Access Number (PTAN), an identifier for the supplier for inquiries. Medicare Program Integrity Manual (MPIM), Chapter 10, Healthcare Provider/Supplier Enrollment, § 6.1.1.

An IDTF, such as Petitioner, is a type of supplier. The requirements for enrollment in Medicare as an IDTF are set forth at 42 C.F.R. § 410.33. CMS may deny a supplier's enrollment application if a supplier is not in compliance with Medicare enrollment requirements. 42 C.F.R. § 424.530(a)(1). A supplier enrollment is considered denied when a supplier is determined to be "ineligible to receive Medicare billing privileges for Medicare covered items or services provided to Medicare beneficiaries" for one or more of the reasons listed in 42 C.F.R. § 424.530. 42 C.F.R. § 424.502. The CMS contractor notifies a supplier in writing when it denies enrollment and explains the reasons for the determination and information regarding the supplier's right to appeal. 42 C.F.R. § 498.20(a); MPIM Ch. 10, §§ 6.2, 13.2. The supplier may submit a written request for reconsideration to CMS. 42 C.F.R. § 498.22(a). CMS 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. 42 C.F.R. § 498.25. If the CMS decision on reconsideration is unfavorable to the supplier, the Act provides for a hearing by an ALJ and judicial review. Act § 1866(j)(2).

B. Issue

Whether Petitioner met the requirements for participation in Medicare when the reconsideration decision was made. 73 Fed. Reg. 36,448, 36,452 (June 24, 2008).

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

1. Summary judgment is appropriate.

2. The statements of Petitioner's employees dated September 29, 2009, are not relevant evidence because they were executed after the reconsideration decision and do not reflect knowledge of the staff on or before the date of the reconsideration.

Summary judgment is appropriate and no hearing is required where either: there are no disputed issues of material fact and the only questions that must be decided involve application of law to the undisputed facts; or, the moving party must prevail as a matter of law even if all disputed facts are resolved in favor of the party against whom the motion is made. *See White Lake Family Medicine, P.C.,* DAB No. 1951 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). A party opposing summary judgment must allege facts which, if true, would refute the facts relied upon by the

moving party. *See, e.g.*, Fed. R. Civ. P. 56(c); *Garden City Medical Clinic*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997) (in-person hearing required where non-movant shows there are material facts in dispute that require testimony); *Thelma Walley*, DAB No. 1367 (1992); *see also New Millennium CMHC, Inc.*, DAB CR672 (2000); *New Life Plus Center, CMHC,* DAB CR700 (2000).

Petitioner argues that its enrollment application was denied based upon a requirement that is not found in the pertinent regulation. Petitioner further argues that it nevertheless presented sufficient evidence to show that it was in compliance with the requirement, or at least sufficient evidence to raise a disputed issue of fact. However, Petitioner concedes that the evidence it offers for my consideration was not presented to the contract hearing officer on reconsideration, but argues that there is good cause for me to consider the evidence now.[2] P. Brief at 1. The evidence Petitioner offers me is not relevant to the issue I must decide, and it is not admitted for that reason. However, even if I admitted and considered the evidence in a light most favorable to Petitioner, I would nevertheless be required to decide this case against Petitioner as a matter of law. Petitioner offers six unsworn statements dated September 29, 2009, which is after the reconsideration decision date of September 10, 2009. The statement of Abdul Amine, MD, certifies that the technicians and other employees of Petitioner have been notified and are aware that Amjad Safvi, MD, is Petitioner's supervising physician; that his contact information is available at the front desk, and that staff will be advised of changes in the supervising physician. P. Ex. 1. Each of the other five statements indicate that the signatory was notified that Petitioner's supervising physician is Amjad Safvi, MD, and that his contact information was provided and is available at the front desk. The names of the signatories of the five statements are reflected but their positions with Petitioner are not. P. Exs. 2-6. Even if I infer that the statements are made by Petitioner's staff, Petitioner's exhibits do not establish the identity of Petitioner's supervising physician at the time of the reconsideration decision, September 10, 2009. At most, the statements of Petitioner's employees permit the inference that Petitioner's technicians knew the identity of Petitioner's supervising physician on the date the statements were signed, September 29, 2009, which is after the reconsideration decision was issued on September 10, 2009. Petitioner's proffered exhibits are not relevant to and do not raise a genuine issue of fact that is material to the issue before me. Even considering Petitioner's proffered exhibits in a light most favorable to Petitioner, Petitioner has not shown it was ever in compliance with enrollment requirements, specifically 42 C.F.R. § 410.33(b), on or before the date of reconsideration, and Petitioner's application must be denied as a matter of law. 42 C.F.R. § 424.530(1).

---

[2] A Petitioner must show good cause for why documentary evidence is submitted for the first time at the ALJ-level. Absent a showing of good cause the documents offered for the first time at the ALJ-level must be excluded. 42 C.F.R. § 498.56(e).

3. Petitioner did not meet the requirements for enrollment as an IDTF at the time of the reconsideration decision.

The requirements to enroll in Medicare as an IDTF are set forth at 42 C.F.R. § 410.33.

Petitioner submitted a CMS 855B application to enroll as an IDTF supplier in the Medicare program in December 2008, and the application was received by WPS, on December 9, 2008. CMS Ex. 1 at 113. The enrollment application reflected that Petitioner was incorporated on July 22, 2008 (CMS Ex. 1 at 127) and began seeing Medicare-eligible patients at its practice location on August 1, 2008. The initial application alleged that Petitioner met all enrollment requirements as of August 1, 2008. CMS Ex. 1 at 139, 143. The initial enrollment application listed Abdul Amine, MD, one of Petitioner's owners, as the authorized official and Jeff Dornburg as the contact person. CMS Ex. 1 at 133, 136, 137-38. Under Attachment 2.E. of the application, titled "Supervising Physicians," Petitioner listed Amjad Safvi, MD, Timothy Cotter, MD, and Brian Herman, MD, as providing personal, direct, and general supervision; and Dr. Abdul Amine as providing general supervision. CMS Ex. 1 at 202-09; CMS Brief at 3.

WPS acknowledged receipt of Petitioner's application by letter dated December 16, 2008, and provided Petitioner with a list of corrections or additional information that was required before the initial application could be processed. WPS requested, among other things, that Petitioner provide: the name of one or more supervising physicians who would assume all responsibilities of the IDTF; documentation that Dr. Armine was qualified to perform as supervising physician given that the CPT Codes required either a radiologist or a cardiologist; and, if Dr. Armine did not meet the requirements, the notice letter advised Petitioner that it was required to submit the name of a qualified physician who could provide the required supervision. Additionally, the notice letter advised Petitioner that it needed to verify that Dr. Armine was not supervising more than three IDTF sites.[3] CMS Ex. 1 at 113-14; CMS Brief at 3.

On February 20, 2009, an on-site inspection was performed at Petitioner's IDTF by Theresa Dahlk. According to the inspection report completed by Ms. Dahlk, several of Petitioner's technicians were interviewed by her, and each reported to her that Dr. Albovias was their supervising physician and that when they encountered problems with diagnostic tests they would contact her if she was at their IDTF site, and if she was not they would reach her by page or by calling 911. CMS Ex. 1 at 291, 294-96; CMS Ex. 2. Dr. Albovias was not listed as a supervising physician in Petitioner's application. The WPS call-log indicates that on March 30, 2009, one of its representatives, Ms. Denise

---

[3] The regulation requires that each supervising physician not provide general supervision to more than three IDTF sites at a time. 42 C.F.R. § 410.33(b)(1).

Lord, telephoned Mr. Dornburg. The call-log shows that Ms. Lord left a message for Mr. Dornburg in which she asked who the supervising physician was and which physician provided on-site direct supervision at Petitioner's IDTF, as Dr. Susan P. Albovias was identified by the technicians during the on-site inspection but she was not listed on Petitioner's enrollment application. The call-log shows that Mr. Dornburg returned the call the same day and said he would contact the technicians and determine who the supervising physician was supposed to be. The call-log further shows that Ms. Lord advised Mr. Dornburg that she needed signed statements from the technicians stating who the supervising physician was and how they were to contact him or her. CMS Ex. 1 at 116. The WPS record also contains email communication on March 31, 2009 between Ms. Lord and Aatif Rahman, Petitioner's Administrator, in which Mr. Rahman states that Dr. Albovias is the only supervising physician for Petitioner. CMS Ex. 1 at 312-15. The record further shows that on March 31, 2009, Petitioner submitted to WPS an updated list of "Supervising Physicians" that listed Susan P. Albovias, MD, as providing direct supervision at Petitioner's IDTF. CMS Ex. 1 at 304, 328-30. On April 1, 2009, Ms. Lord, interviewed Dr. Safvi, Dr. Cotter, and Dr. Herman, and they denied that they provided direct supervision for Petitioner, contrary to what was represented in Petitioner's initial application. CMS Ex. 1 at 306-11, 316-27; CMS Ex. 3.

WPS advised Petitioner by letter dated April 2, 2009 that it was denying Petitioner's application to enroll as an IDTF because Petitioner failed to meet the following standards: (1) each supervising physician can provide general supervision to no more than three IDTF sites (fixed and mobile) (42 C.F.R. § 4109.33(b)(1)); (2) the supervising physician must be proficient in the performance and interpretation of each type of diagnostic procedure performed by the IDTF (42 C.F.R. § 410.33(b)(2)); and (3) the IDTF must provide complete and accurate information on its enrollment application (42 C.F.R. § 410.33(g)(2)). The April 2, 2009 notice advised Petitioner that one of the supervising physicians listed on its application, Dr. Cotter, was already supervising at three other IDTFs and that three other physicians whose names were submitted by Petitioner after the on-site survey, Dr. Kim, Dr. Baronofsky, and Dr. Ramsey, were also ineligible, because they were supervising three other IDTFs. Petitioner was further advised by the letter that, while its application indicated that Dr. Cotter, Dr. Herman, and Dr. Safvi provided all levels of supervision for Petitioner, they stated in interviews that they never provided direct supervision for Petitioner. Furthermore, during the on-site inspection, the technicians did not identify Dr. Cotter, Dr. Herman, or Dr. Safvi as supervising physicians, but rather, identified Dr. Albovias who was not qualified to be the supervising physician for Petitioner. Petitioner was also advised that it did not provide complete and accurate information on its application because the application listed technicians not associated with Petitioner, and the application did not correctly identify the supervising physicians. CMS Ex. 1 at 10-11. The record of the on-site inspection

conducted on February 20, 2009 (CMS Ex. 1 at 287-96) and the declaration of Surveyor Theresa Dahlk, are consistent with the findings set forth in the April 2, 2009 initial denial letter. Petitioner was advised by the April 2, 2009 notice that it could submit a corrective action plan within 30 days. CMS Ex. 1 at 11-12.

Petitioner filed a corrective action plan by letter dated April 27, 2009, signed by Petitioner's Administrator Aatif Rahman. Petitioner requested that Amjad Safvi, MD, be added as the supervising physician for Petitioner's IDTF. Petitioner submitted a letter from Dr. Safvi in which he requested that he be removed as supervising physician from any IDTF other than Petitioner and two other IDTFs. Petitioner also submitted updated application pages reflecting Dr. Safvi as the supervising physician. CMS Ex. 1 at 30-35. WPS acknowledged receipt of Petitioner's corrective action plan by letter dated May 11, 2009. However, WPS advised Petitioner that the corrective action plan was being returned, because it was not signed by the correct Authorized Official. Petitioner's Administrator Rahman signed the plan (CMS Ex. 1 at 30) rather than Abdul Amine, MD, who was listed on the initial enrollment application as the Authorized Official. CMS Ex. 1 at 133, 137-38. WPS also advised Petitioner that Dr. Safvi failed to properly complete the forms submitted by Petitioner with its corrective action plan. CMS Ex. 1 at 9.

Petitioner submitted a second corrective action plan by letter dated May 15, 2009, that was received by WPS on June 12, 2009. CMS Ex. 1 at 4, 7. Dr. Amine signed the corrective action plan consistent with his being listed as the Authorized Official on the initial application. Petitioner also submitted corrected forms completed by Dr. Safvi. CMS Ex. 1 at 7. WPS advised Petitioner by letter dated June 18, 2009, that Petitioner's corrective action plan was being returned and that no further action would be taken because it was received by Petitioner more than 30 days after the WPS initial denial letter dated April 2, 2009. Petitioner was advised of the right to request reconsideration. CMS Ex. 1 at 5, 73-74; CMS Brief at 7.

Petitioner requested reconsideration by letter dated June 29, 2009. Petitioner asserts in the reconsideration request that it did not intend to allow its application to lapse but the person responsible for processing the application had a family emergency that caused the delay. Petitioner concedes in the reconsideration request that its second corrective action plan was not post-marked until June 10, 2009, and that it was not received by WPS until June 12, 2009. CMS Ex. 1 at 4.

The reconsideration decision was issued on September 10, 2009, and was unfavorable. CMS Ex. 1 at 1-2. Unfortunately, the reconsideration decision is not a model of clarity. In the section "Rationale" the Redetermination Supervisor states:

> Because you have not provided all the information requested, you have not met the compliance requirements. Specifically, you did not submit documentation indicating that the

> technicians were made aware of who the supervising physician is or provide information as to how the IDTF maintains documentation of who the supervising physician is during all hours of operation as indicated in 42 C.F.R. § 410.33(b)(2).

CMS Ex. 1 at 1. The rationale stated on reconsideration is inaccurate and confusing. I agree with Petitioner's assertion that 42 C.F.R. § 410.33 imposes no requirement upon Petitioner to submit written statements of its technicians attesting that they know who the supervising physician is and how to contact him or her. P. Brief at 1-5. Petitioner does not prevail however, on its theory that its application was improperly denied by WPS because Petitioner's technicians did not provide writings correctly identifying the supervising physician. P. Brief at 2-5. The WPS initial denial dated April 2, 2009 is clear that Petitioner's application was denied for three reasons. First, Petitioner submitted names for supervising physicians who were already supervising three IDTF sites (fixed and mobile) contrary to the limitation imposed by 42 C.F.R. § 410.33(b)(1). Second, Dr. Albovias was not qualified to be supervising physician, because she was not proficient in the performance and interpretation of each type of diagnostic procedure performed by the IDTF, in violation of the requirement of 42 C.F.R. § 410.33(b)(2). Third, Petitioner did not provide complete and accurate information on its enrollment application, in violation of the requirement of 42 C.F.R. § 410.33(g)(2), as evidenced by the facts that: technicians were listed in the application who did not work for Petitioner; the application listed supervising physicians who denied being supervising physicians; and the technicians who were present during the inspection did not identify as a supervising physician any of the supervising physicians listed on the enrollment application. Petitioner's efforts to submit corrective action plans failed because the first was not properly signed and the attached forms were not properly completed, and the second because it was not timely submitted. Petitioner does not dispute the reasons for denial set forth in either the initial determination or either of the subsequent notices rejecting its two corrective action plans. Considering all the facts, I conclude that Petitioner's enrollment application was not denied because its technicians did not provide writings correctly identifying the supervising physician. Rather, Petitioner's enrollment application was properly denied because Petitioner did not meet the conditions for enrollment established by 42 C.F.R. § 410.33. I further conclude that the confusing reconsideration decision did not prejudice Petitioner, as the other notices from WPS were clear as to the basis for denial of Petitioner's application and rejection of its attempts to correct its application.

III. Conclusion

For the foregoing reasons, I conclude that Petitioner's application for enrollment in Medicare was properly denied.

/s/
Keith W. Sickendick
Administrative Law Judge