

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

East Tennessee Community Open MRI, LLC,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-497

Decision No. CR2141

Date: May 28, 2010

DECISION

I deny the motion of the Centers for Medicare and Medicaid Services (CMS) that I dismiss the hearing request of Petitioner East Tennessee Community Open MRI, LLC (ETCOM). I deny CMS's motion for summary judgment on the merits, and I grant Petitioner's cross-motion for summary judgment. In doing so, I find that CMS's Medicare contractors, CIGNA and Cahaba, incorrectly denied Petitioner's application for Medicare supplier enrollment.

I. Background

In February 2009, Petitioner filed an application for enrollment in the Part B Medicare program as an independent diagnostic testing facility.¹ On July 18, 2009, CIGNA denied the application. In denying the application, CIGNA concluded that Petitioner failed to comply with two supplier standards governing applications for participation: standard 2,

¹ Neither Petitioner nor CMS supplied me with the precise date of Petitioner's application. Both parties state only that it was filed in February 2009. For that reason, I do not give a precise date of application. It may be necessary for CMS to determine the precise date of Petitioner's application to effectuate this decision.

which requires that an applicant provide complete and accurate information on its enrollment application; and standard 10, which requires that an applicant disclose any person having ownership, financial, or control interest, or any other legal interest in the supplier at the time of enrollment.

Petitioner requested reconsideration of this determination. On December 21, 2009, Cahaba (CIGNA's successor as a Medicare contractor) denied reconsideration. Petitioner then requested a hearing, and the case was assigned to me for a hearing and a decision.

CMS moved, alternatively, to dismiss Petitioner's hearing request and for summary judgment affirming its contractors' determination to deny Petitioner's application. Petitioner opposed the motion to dismiss and cross-moved for summary judgment. CMS submitted four exhibits in support of its motion, which it designated as CMS Ex. 1 – CMS Ex. 4. Petitioner submitted a single exhibit in opposition, which it designated as P. Ex. 1. I receive all of these exhibits into the record.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner timely filed a request for hearing; and
2. CMS's contractors had a lawful basis for denying Petitioner's application to participate as a supplier in Medicare.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law.

1. Petitioner timely filed its request for hearing.

Regulations governing hearings in cases involving CMS require a party to file its request within 60 days from the date that it receives notice of an adverse determination from CMS. 42 C.F.R. § 498.40(a)(2). An administrative law judge may dismiss an untimely hearing request absent a showing of good cause for the untimely filing. 42 C.F.R. § 498.70(c).

Petitioner filed its hearing request on February 24, 2010. CMS contends that Petitioner's counsel actually received the notice of denial of reconsideration on December 23, 2009 and that Petitioner's request was not filed until 63 days after the date of actual receipt. Therefore, according to CMS, Petitioner filed the hearing request untimely, and I should dismiss it. As proof for its contention, CMS cites to the fact that the notice was sent to

Petitioner's counsel by certified mail return receipt requested and that an individual named Libby Haun signed for the document on December 23, 2009. CMS Ex. 4 at 5.

However, Petitioner produced an affidavit from Ms. Haun showing that Ms. Haun is not employed by Petitioner and in fact works on another floor of the building, which houses Petitioner's counsel's office. P. Ex. 1. In her affidavit, Ms. Haun avers that Petitioner's counsel's office was closed for the Christmas holiday on December 23, 2009 and that she signed for the document; however, she further avers that she actually delivered it to Petitioner's counsel on December 28, 2009.

Nothing in the record suggests that Ms. Haun's statement is not credible. I conclude, therefore, that counsel did not actually receive the notice until December 28, 2009. Consequently, the February 24, 2010 filing was timely.

2. Petitioner did not misrepresent or omit relevant data in its application concerning individuals who had financial, ownership, or control interest in Petitioner. Therefore, there is no basis for CMS or its contractors to deny the application.

CMS contends that Petitioner's application for participation violated supplier standards in that the application inaccurately failed to disclose that an individual, Dr. Jack Scariano, had an equitable interest in Petitioner. It contends that this alleged omission contravened the requirement stated at 42 C.F.R. § 410.33(g)(2) and (10) that an applicant for participation in Medicare provide complete and accurate information on its enrollment application.

However, the undisputed facts of this case do not show that Dr. Scariano had an equitable interest in Petitioner as of February 2010 nor did he have an ownership or control interest. Rather, the facts prove that Dr. Scariano had severed all ownership ties to Petitioner and was an unsecured creditor without an equitable interest in Petitioner. Petitioner's application for participation did not misrepresent or omit to state Dr. Scariano's interest in Petitioner.

Here are the undisputed facts. Petitioner, also known as "ETCOM", was formed in 2007 by three parties, Michael Gragg, Cynthia Gragg, and Dr. Scariano, through his wholly-owned medical practice, West Knoxville Neurological Associates, P.C. (WKNA). On January 2, 2009, ETCOM entered into an agreement with WKNA and another entity known as West Knox Open MRI, LLC, or "WKOM." Pursuant to this agreement, ETCOM agreed to purchase WKOM and all membership interest in ETCOM (WKNA's interest in ETCOM), and any interest that Dr. Scariano may have in ETCOM. CMS Ex.

1. It provided that, upon signing the agreement, “any interest Dr. Scariano may have in ETCOM is hereby transferred to ETCOM.” *Id.* The agreement provided that its terms would become null and void in the event that ETCOM was unable to obtain an identification number (an enrollment) from Medicare. *Id.*

The purchase agreement enumerated the purchase price and terms of sale as follows:

3. **Purchase Price and Terms.** In consideration of WKNA’s sale of membership interest in ETCOM, the sale of WKOM to ETCOM, and Dr. Scariano’s transfer of interest he may have in ETCOM, and property interests incident thereto, ETCOM shall pay the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) to WKNA and ETCOM shall assume the liabilities and obligations of ETCOM. The purchase price is payable by December 31, 2011, as allowed by the operating profit of ETCOM. Should the operating profit of ETCOM not allow full payment by December 31, 2011, parties agree to renegotiate payments based on actual profit history. After establishing and setting aside 3 months operating expenses, ETCOM shall use profits to pay down debt in the following order:
 1. Any debts for those products and services purchased for business use to date, including but not limited to, Construction, Software, Legal costs;
 2. \$50,000 to WKNA;
 3. \$40,000 to Cindy Gragg and an initiation of monthly salary for her;
 4. \$50,000 to Mike Gragg;
 5. \$50,000 to WKNA;
 6. \$60,000 to Mike Gragg;
 7. \$50,000 to WKNA;
 8. An additional 3 months operating expenses set aside;
 9. Net-net Operating profits as available, paid each month to WKNA until the \$250,000 is paid.

CMS Ex. 1 at 2.

CMS contends that this document proves that Dr. Scariano, or WKNA, retained an ownership interest in Petitioner after the sale. As legal support, it cites to the definition of ownership interest in 42 C.F.R. § 420.201 as constituting:

possession of equity in the capital, the stock, or the profits of the disclosing entity.

According to CMS, Dr. Scariano continued to have an ownership interest in ETCOM after the sale, because he continued to “possess” equity in the profits of ETCOM. That, CMS contends, is established by language in the purchase agreement, which provides that the listed indebtedness of ETCOM would be renegotiated if the operating profit of that entity did not allow full payment of the purchase price by December 31, 2011.

I disagree. Nothing in the purchase agreement, including the language that CMS relied on, gave Dr. Scariano any guaranteed interest in the profits of ETCOM. The contract provides only that the debt to Dr. Scariano (actually WKNA) and to other creditors would be renegotiated and based on the entity’s profits if ETCOM was unable to pay off its debt by December 31, 2011. That language gave no guarantees to any of the creditors about how much they could expect to receive or even as to what percentage of the profits they were entitled to inasmuch as everything would be subject to renegotiation.

Moreover, and as Petitioner correctly points out, nothing in the contract gave the creditors secured interests in ETCOM. The agreement made Dr. Scariano (WKNA) an unsecured creditor. He had no right to a percentage of ETCOM’s equity or to its profits in the event that the entity failed to make payments to him, nor was his debt secured by any of the entity’s assets. Consequently, Dr. Scariano (WKNA) had no equity interest in the entity.

CMS points to an e-mail that Dr. Scariano sent to CIGNA on June 23, 2009 as additional proof that he had an equity interest in ETCOM that continued after the sale. In the e-mail, Dr. Scariano states:

I am owner of WKOM . . . and 25% owner of ETCOM, the IDTF applicant. The owner of 75% of . . . [ETCOM] has made a case that . . . [in] order to be a IDTF, only one provider can bill medicare/medicaid under Medicare Regulations. The owner of ETCOM has made an offer to buy my interest but I am quite concerned about Medicare and Stark policy in reference to me. . . .

CMS Ex. 2 at 14. On its face, this communication would support a finding that Dr. Scariano retained an ownership interest in ETCOM after the execution of the purchase agreement. He contends that he has a 25% ownership interest in the entity. I find this assertion not to be credible, however, because it is belied by the purchase agreement and because there exists no supporting documentation to corroborate Dr. Scariano’s assertion. In the absence of corroboration, it constitutes a naked claim that is contrary to the contract that Dr. Scariano signed.

Moreover, Dr. Scariano effectively repudiated his assertions in the e-mail in a subsequent letter to CIGNA dated October 19, 2009. CMS Ex. 2 at 18-19. I am convinced by the repudiation that there is simply no evidence to support a finding that Dr. Scariano or WKNA retained any ownership interest in ETCOM after January 2, 2009.

In the letter, Dr. Scariano avers that WKNA was “formerly” a 25 percent owner of ETCOM but that WKNA and he conveyed their interests in ETCOM to ETCOM pursuant to the January 2, 2009 purchase agreement. *Id.* at 18. Dr. Scariano adds that there was a dispute between himself and Michael Gragg concerning the effective date of the sale of WKNA’s interest in ETCOM but that the dispute had been resolved. He then affirms that WKNA’s entire interest in ETCOM was conveyed effective January 2, 2009. *Id.*

CMS also notes that there is a statement in Dr. Scariano’s June 23, 2009 e-mail in which he recites that he is the cosigner of a loan that was made from Mountain Commerce Bank for \$850,000. CMS Ex. 2 at 14. This assertion, according to CMS, establishes that Dr. Scariano retained an equitable interest in ETCOM even after the sale of WKNA’s ownership interest in the entity.

However, there is nothing in the e-mail to suggest that the loan was a secured loan or that Dr. Scariano retained an equitable interest in ETCOM as a consequence of the loan. He appears to have guaranteed an indebtedness and, presumably, would bear some personal liability if there was a default. But, nothing exists to show that he had some secured right to the assets of ETCOM that would compensate him for his guarantee.

Finally, CMS points to language in the purchase agreement that states that the agreement would become null and void should ETCOM fail to obtain a supplier number from the Medicare program as constituting proof that Dr. Scariano and WKNA had not actually conveyed their interests in ETCOM as of January 2, 2009. CMS Ex. 1 at 2. However, this contingency gave neither Dr. Scariano nor WKNA any equitable interest in ETCOM, nor did it give them any control over the entity’s affairs. It recites a contingency that was beyond these parties’ ability to control.

Consequently, the undisputed facts establish that Dr. Scariano and WKNA remained nothing more than unsecured creditors of ETCOM after January 2, 2009. That is not an ownership interest in ETCOM and the failure to list Dr. Scariano or WKNA as owners on the application for supplier certification is no defect in the application.

/s/
Steven T. Kessel
Administrative Law Judge