Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Presbyterian Imaging Centers, LLC,
(Reference Numbers 29072 and 29073),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket Nos. C-10-434, C-10-435

Decision No. CR2190

Date: July 22, 2010

DECISION

This case is before me on the Centers for Medicare and Medicaid Services' (CMS) Motion for Summary Disposition. I find and conclude that CMS properly denied Petitioner Presbyterian Imaging Centers, LLC's (Petitioner), applications for enrollment in Medicare as an Independent Diagnostic Testing Facility (IDTF) supplier, based on Petitioner's failure to enroll its mobile MRI unit separately. Accordingly, I grant CMS's Motion for Summary Disposition.

I. Procedural History

Petitioner submitted two applications to enroll as an IDTF to the Medicare contractor for CMS, Cigna Government Services (Cigna). On August 28, 2009, Cigna denied Petitioner's applications, stating that Petitioner had failed to meet all of the performance standards as set forth in 42 C.F.R. § 410.33. *See* CMS Ex. 1. On September 2 and September 9, 2009, Petitioner requested reconsideration of Cigna's decisions.

In two decisions dated January 27, 2010, the contractor's Hearing Officer affirmed the denial of Petitioner's applications. The Hearing Officer found that the documentation provided by Petitioner indicated that the unit housing the testing equipment was a mobile

unit that was shared by and moved between three different and separately enrolled IDTFs. The Hearing Officer found that Petitioner had failed to enroll the mobile unit separately from the fixed locations, and, therefore, failed to meet all the standards for Medicare enrollment by an IDTF as set out in 42 C.F.R. § 410.33.

By letters dated February 9, 2010, Petitioner requested a hearing before an Administrative Law Judge (ALJ). On February 22, 2010, the cases were docketed as Nos. C-10-434 and C-10-435, and were assigned to me for hearing and decision.

I convened a prehearing telephone conference on March 16, 2010, the substance of which is memorialized in my order dated March 17, 2010. During the prehearing conference, based on Petitioner's suggestion and for good cause shown, I ordered that the two cases be consolidated under the instant docket number, C-10-434. I set a briefing schedule for the parties.

CMS moved for summary disposition and submitted a brief and three exhibits. Petitioner opposed the Motion and submitted a brief and five exhibits. CMS filed a reply brief. I have admitted all proffered exhibits into the evidentiary record before me.

II. Legal Background

Section 1866(j)(1) of the Act, 42 U.S.C. § 1395cc(j)(1), authorizes the Secretary of Health and Human Services (Secretary) to establish a process for the enrollment in the Medicare program of providers of services and suppliers. The Secretary published a final rule governing the enrollment of providers and suppliers, with an effective date of June 20, 2006 (71 Fed. Reg. 20,754, 20,776 (April 21, 2006)). These regulations are found at 42 C.F.R. Part 424, subpart P, and establish requirements for enrollment:

> To receive payment for covered Medicare items or services from either Medicare (in the case of an assigned claim) or a Medicare beneficiary (in the case of an unassigned claim), a provider or supplier must be enrolled in the Medicare program. Once enrolled, the provider or supplier receives billing privileges and is issued a valid billing number effective for the date a claim was submitted for an item that was furnished or a service that was rendered.

42 C.F.R. § 424.505.

The Medicare enrollment process begins with submission of an enrollment application on the form CMS-855. A prospective provider or supplier must provide all documentation required by CMS to ascertain whether the provider or supplier is eligible to furnish services. 42 C.F.R. § 424.510(d)(2). Prospective providers and suppliers may also be

subject to specific enrollment requirements relative to their particular specialization. Applicable certification standards for IDTFs are found at 42 C.F.R. § 410.33(g).

Regulations define the circumstances in which CMS may reject the application of a provider or supplier to participate in the Medicare program, or may revoke an enrollment already granted. CMS may deny a provider or supplier's enrollment in Medicare if "[t]he provider or supplier at any time is found not to be in compliance with the Medicare enrollment requirements described in this section or on the applicable enrollment application to the type of provider or supplier enrolling, and has not submitted a plan of corrective action as outlined in part 488 of this chapter." 42 C.F.R. § 424.530(a)(1).

Section 1866(j)(2) of the Act, 42 U.S.C. § 1395cc(j)(2), gives providers and suppliers appeal rights for certain determinations involving enrollment, using the procedures that apply under section 1866(h)(1)(A) of the Act, 42 U.S.C. § 1395cc(h)(1)(A). These procedures are set out at 42 C.F.R. Part 498, *et seq.*, and provide for hearings before ALJs of this forum, and for review of the resulting ALJ decisions by the Departmental Appeals Board (Board).

In provider and supplier appeals under section 1866(j)(1) of the Act and 42 C.F.R. Part 498, CMS must make a *prima facie* showing that the provider or supplier has failed to comply substantially with federal requirements. *See Medisource Corp.*, DAB No. 2011 (2006). To prevail, the provider or supplier must overcome CMS's *prima facie* showing by a preponderance of the evidence. *Batavia Nursing and Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing and Convalescent Ctr. v. Thompson*, 129 Fed. Appx. 181 (6th Cir. 2005).

III. Issue

The issue in this case is whether CMS is entitled to summary disposition on the ground that Petitioner's applications for enrollment in Medicare as an IDTF were properly denied based on its failure to separately enroll its mobile MRI unit.

IV. Findings of fact and Conclusions of law

A. Applicable Standard

The Board has set out the standard for summary judgment as follows:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . While the Federal Rules of Civil Procedure (FRCP) are not binding in this administrative appeal, we are guided by those rules and by judicial decisions on summary judgment in determining whether the ALJ properly granted summary judgment. . . . The

> party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . If the moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Village at Notre Dame, Inc.*, DAB No. 2291, at 4-5 (2009).

In this case the parties agree that there are no disputed issues of material fact. Their disagreement lies in their views with regard to their position on the application of the law to the facts. Thus, in this case, decision by summary disposition is appropriate.

B. Discussion

CMS is entitled to summary disposition because the undisputed evidence establishes that Petitioner did not enroll its mobile MRI unit separately in the Medicare program, as required by 42 C.F.R. § 410.33(g)(16).[1]

The pertinent regulations governing IDTF enrollment in the Medicare program are found at 42 C.F.R. § 410.33. An IDTF may be a fixed location, a mobile entity, or an individual non-physician practitioner. 42 C.F.R. § 410.33(a)(1). An IDTF applying to Medicare must certify that it meets 17 application certification standards set forth in 42 C.F.R. § 410.33(g), or CMS will revoke its billing privileges. 42 C.F.R. § 410.33(h). The standard listed at 42 C.F.R. § 410.33(g)(16) requires that an IDTF:

> [e]nrolls for any diagnostic testing services that it furnishes to a Medicare beneficiary, regardless of whether the service is furnished in a mobile or fixed base location.

42 C.F.R. § 410.33(g)(16).

[1] I make this one finding of fact/conclusion of law.

CMS asserts that Petitioner's enrollment application was properly denied because Petitioner, an IDTF, failed to separately enroll its mobile MRI unit, as required by 42 C.F.R. § 410.33(g)(16). Petitioner concedes that it did not submit a separate application for enrollment in Medicare for its mobile MRI unit; it argues, however, that the Medicare contractor has incorrectly interpreted 42 C.F.R. § 410.33(g)(16) and (17).

Petitioner argues that the plain reading of 42 C.F.R. §§ 410.33(g)(16) and (g)(17) contains no requirement that IDTFs are required to separately enroll a mobile unit, such as an MRI. P. Brief at 6, 10. Petitioner, moreover, attempts to suggest that the term "enrolls," as it is used in 42 C.F.R. § 410.33(g)(16), does not mean "initial enrollment only," but also "includes updates made to an enrolled provider's enrollment application." P. Brief at 6. Petitioner asserts that it was already enrolled in Medicare as an IDTF, and, pursuant to 42 C.F.R. § 410.33(g)(4)(iii), submitted an update to its application, notifying the contractor of the addition of an MRI unit, located in a mobile trailer.[2] P. Brief at 1, 6. In Petitioner's words, "[t]here is nothing in 42 C.F.R. § 410.33(g)(16), or for that matter in 42 C.F.R. § 410.33(g)(4)(iii) that in any way speaks to [CMS's] assertion that this section calls for **separate** enrollment." P. Brief at 7 (emphasis in original).

I find no support for Petitioner's interpretation of the regulations. The language of 42 C.F.R. § 410.33(g)(16) on its face states that an IDTF must enroll in Medicare, "regardless of whether the service is furnished in a mobile or fixed base location." Petitioner does not deny that the additional equipment in question is a mobile MRI unit. Petitioner states that the MRI unit is located inside a trailer and travels from place to place from one fixed IDTF location to another. P. Brief at 6, 8. Therefore, based on the plain meaning of 42 C.F.R. § 410.33(g)(16), Petitioner was required to submit a separate enrollment application for its mobile MRI unit. While Petitioner is correct that it is required to update any changes to its equipment, its submission of an application update to the contractor did not constitute a separate enrollment of its MRI unit, as required by 42 C.F.R. § 410.33(g)(16). There is nothing in the regulations to indicate that the term "enroll" in 42 C.F.R. § 410.33(g)(16) also means to update enrollment information.

Moreover, a recent ALJ decision, *DMS Imaging, Inc.*, DAB CR2040 (2009), and the Board's decision affirming it, *DMS Imaging, Inc.*, DAB No. 2313 (2010), more than amply support CMS's position that Petitioner was required to separately enroll its mobile unit. In *DMS Imaging, Inc.*, the ALJ found that CMS had properly revoked the provider enrollment of four of the petitioner's mobile diagnostic imaging units because the petitioner had combined them under a single Medicare enrollment number, in violation of Medicare enrollment requirements governing IDTFs. In his discussion, the ALJ noted that one approach CMS takes to maintain oversight of IDTFs is "by requiring that an

[2] An IDTF must "[m]aintain a current inventory of the diagnostic testing equipment, including serial and registration numbers and provide this information to the designated fee-for-service contractor upon request, and notify the contractor of any changes in equipment within 90 days." 42 C.F.R. § 410.33(g)(4)(iii).

IDTF with multiple practice locations separately enroll each practice location into the Medicare program." *DMS Imaging, Inc.*, DAB CR2040, at 2.

Further, the ALJ in *DMS Imaging* quoted Section 4.19.1.C. of Chapter 10 of the Medicare Program Integrity Manual (MPIM), which states:

> The IDTFs must separately enroll each of their practice locations (with the exception of locations that are used solely as warehouses or repair facilities). This means that each enrolling IDTF can only have one practice location on its CMS-855B enrollment application; thus, if an IDTF is adding a practice location to its existing enrollment, it must submit a new, complete CMS-855B application for that location and have that location undergo a separate site visit. *Also, each of the IDTF's mobile units must enroll separately. Consequently, if a fixed IDTF site also contains a mobile unit, the mobile unit must enroll separately from the fixed location.*

DMS Imaging, Inc., at 2-3, quoting MPIM, Ch. 10, Section 4.19.1.C. (emphasis added); CMS Ex. 3, at 6.

I find the quoted section of the MPIM informative in further clarifying any doubts as to the meaning of 42 C.F.R. § 410.33(g)(16). It is clear that the plain meaning of 42 C.F.R. § 410.33(g)(16) requires that an IDTF enroll a mobile unit separately in the Medicare program. Petitioner was thus required to submit a separate Medicare application for its mobile MRI unit, but failed to do so, in violation of Medicare enrollment requirements.

Petitioner also argues that it is exempt from having to separately enroll its mobile MRI unit because the unit was leased to it. In support of this argument, Petitioner cites Section 4.19.1(E) of the March 13, 2009 MPIM, Transmittal 286, which provides:

> For purposes of the provisions in 42 C.F.R.§ 410.33, a "mobile IDTF" does not include entities that lease or contract with a Medicare enrolled provider or supplier to provide: a) diagnostic testing equipment; b) non-physician personnel described in 42 C.F.R. § 410.33(c); or c) diagnostic testing equipment and non-physician personnel described in 42 C.F.R. § 410.33(c). This is because the provider/supplier is responsible for providing the appropriate level of physician supervision for the diagnostic testing.

March 13, 2009 MPIM, Transmittal 286, 4.19.1(E). According to Petitioner, a company called Jacksonville Diagnostic Imaging, Inc., leased the mobile MRI unit to Petitioner. P. Brief at 12; CMS Ex. 1, at 71-84. Petitioner states that, as the equipment lessor,

Jacksonville Diagnostic Imaging, Inc. is not a Medicare-enrolled supplier and is not required to enroll as an IDTF. P. Brief at 12. Petitioner asserts further that because it is using the mobile MRI unit through a leasing arrangement, the above-quoted MPIM language means that it was exempt from the requirement to separately enroll its mobile unit.

Petitioner's argument is without merit. Petitioner is correct that Jacksonville Diagnostic Imaging, Inc., as the lessor, would not be considered a "mobile IDTF" and would not have to enroll in the Medicare program as an IDTF. However, the fact that Petitioner is leasing the mobile MRI unit does not create any special exception to the requirement set forth in 42 C.F.R. § 410.33(g)(16) that a mobile MRI unit be enrolled separately by the supplier. There is nothing in the language of 42 C.F.R. § 410.33(g)(16) that indicates that a leasing arrangement exempts an IDTF from the requirement that a mobile unit must be enrolled separately.

Petitioner also urges me to consider what it sees as the practical benefits of enrolling only the IDTF facility with Medicare, and not the mobile unit. Petitioner claims, for instance, that a Medicare beneficiary may be confused when he or she receives an explanation of benefits listing two different provider names and sites of service, and this confusion would be alleviated if only the IDTF was enrolled. P. Brief at 8-9. I find these contentions to be irrelevant and immaterial. Petitioner simply has not pointed to anything in the regulations or prior Board decisions in support of its position that separate enrollment for its mobile MRI unit was not required.

As part of its case, Petitioner has submitted P. Exs. 4 and 5, claiming they are evidence showing that it was allowed to add other mobile MRI units in the past, instead of having to enroll them separately. P. Ex. 4 is a March 26, 2010 letter from Cigna to an IDTF affiliated with Petitioner (Cape Fear Diagnostic Imaging LLC), acknowledging receipt of an information change request and showing that a mobile MRI unit was added. P. Ex. 5 is a February 16, 2010 letter from Palmetto GBA to another IDTF affiliated with Petitioner (MedQuest), which, according to Petitioner, indicates that a mobile MRI was approved at the facility. CMS objects to P. Exs. 4 and 5 on the grounds that Petitioner has not shown good cause for submitting these exhibits for the first time at the ALJ level. 42 C.F.R. § 498.56(e). CMS argues that Petitioner had the opportunity to submit this evidence with its request for reconsideration but failed to do so. CMS argues that the proffered exhibits are not relevant and should be excluded.

I find that P. Exs. 4 and 5 address different situations involving different IDTF facilities. The facts and circumstances surrounding those situations do not play any role in my consideration of the issue in this case. Moreover, both exhibits are dated after the decision on reconsideration in this case, which was issued on January 26, 2010. Thus, although I have admitted them to this record for purposes of discussion, I find both P. Exs. 4 and 5 to be irrelevant. Contrary to what Petitioner argues, the exhibits do <u>not</u> create an issue of material fact.

V. Conclusion

For the reasons set out above, CMS's Motion for Summary Disposition must be, and it is, GRANTED.

/s/
Richard J. Smith
Administrative Law Judge