**Department of Health and Human Services**
**DEPARTMENTAL APPEALS BOARD**
**Appellate Division**

Proactive Medical , L.L.C.
Docket No. A-10-85
Decision No. 2346
November 22, 2010

# FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) requests review of the June 9, 2010 decision of Administrative Law Judge Carolyn Cozad Hughes in *Proactive Medical, L.L.C.*, DAB CR2150 (2010) (ALJ Decision). The ALJ granted summary judgment in favor of Proactive Medical, L.L.C. (Proactive), reversing CMS's revocation of Proactive's Medicare billing privileges as an Independent Diagnostic Testing Facility (IDTF).

For the reasons stated below, we uphold the ALJ Decision but modify the rationale.

## Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. *Andrew J. Elliott, M.D.*, DAB No. 2334, at 2 (2010); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Everett Rehabilitation and Medical Cente*r, DAB No. 1628, at 3 (1997). If a 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*, 474 U.S. 574, 587 (1986) (quoting Fed. R. Civ. Pro. 56(e)). In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the nonmoving party, drawing all reasonable inferences from the evidence in that party's favor. *Madison Health Care, Inc.*, DAB No. 1927 (2004).

## Legal Background

Requirements for IDTFs are set forth at 42 C.F.R. § 410.33. Section 410.33(a)(1) provides that an IDTF "may be a fixed location, a mobile entity, or an individual nonphysician practitioner." Elsewhere, the regulations speak of a "fixed-base

IDTF" and a "mobile IDTF". 42 C.F.R. § 410.33(15)(g). Neither the regulations nor the Medicare Program Integrity Manual (PIM) define the terms "fixed location," "fixed-base IDTF," "mobile entity," or "mobile IDTF."

Section 410.33(g) sets forth IDTF "certification standards." Section 410.33(g)(15) provides in relevant part:

> With the **exception** of hospital-based and **mobile** IDTFs, a fixed-base IDTF is prohibited from the following:
> (i) **Sharing a practice location** with another Medicare-enrolled individual or organization;
> (ii) **Leasing or subleasing** its operations or its practice location **to** another Medicare-enrolled individual or organization.

(Emphasis added.) Failure to meet a section 410.33(g) standard is a basis for revoking an IDTF's billing privileges. 42 C.F.R. § 410.33(h).

## Factual Background

Prior to May, 2009, Proactive was enrolled in Medicare as a mobile IDTF. On May 4, 2009, CMS's Medicare contractor, Pinnacle, revoked Proactive's IDTF billing privileges based on its conclusion that Proactive was a fixed-base IDTF that was "**sharing** a practice location and **subleasing** space from another Medicare-enrolled organization" in violation of 42 C.F.R. § 410.33(g)(15)(i) and (ii). CMS Ex. 1, at 1 (emphasis in original).

Proactive requested reconsideration of the revocation and, thereafter, appealed Pinnacle's unfavorable reconsidered determination to the ALJ. Proactive argued to Pinnacle and continues to argue that it was in compliance with section 410.33(g)(15). CMS Ex. 5 (Proactive's request for contractor reconsideration). First, Proactive argues that it is a mobile IDTF, not a fixed-base IDTF, and that section 410.33(g)(15) does not apply to mobile IDTFs. Second, it argues that, even if it were a fixed-base IDTF, it did not share its practice location with or lease its practice location to another Medicare-enrolled individual or organization as prohibited by section 410.33(g)(15)(i) and (ii).

The following facts are undisputed. In 2002, the CMS contractor at that time approved Proactive's participation in Medicare as an IDTF. Petitioner (P.) Ex. 5, at 1. In 2003, Proactive filed with the contractor additional information establishing that it was "providing portable unit mobile IDTF vascular diagnostic testing services to multiple practice sites by transporting its mobile equipment to those sites." *Id.* Before the ALJ Proactive alleged that it continued to "provide mobile inpatient and outpatient vascular ultrasound testing via portable units." P.

Motion for Summary Judgment at 3; *see also* P. Memorandum in Opposition (P. Memorandum) before the Board setting forth "undisputed facts."

In the 2003 submission, Proactive identified its base of operations for its mobile services as 5424 Brittany Drive, Suite B, Baton Rouge, Louisiana.[1] P. Ex. 1, at 7. In January 2009, Proactive filed a CMS-855B with Pinnacle reporting that it had relocated to Suite C at that address.[2] CMS Ex. 7, at 1. Proactive leased Suite C from a doctor enrolled in Medicare. CMS Exs. 9, at 77-80; 10, at 2.

Subsequently, Pinnacle conducted a site inspection and found that Proactive "was sharing a waiting area and receptionist area with [the doctor]." CMS Ex. 10, at 2. As to whether Proactive was providing mobile IDTF services, the site inspector stated that she "did not see or inspect a mobile unit during my visit and the CMS 855B application submitted by PM did not indicate . . . that it was a mobile facility." CMS Ex. 10, at 1.

Thereafter, Pinnacle concluded that Proactive was a fixed-base IDTF that leased space from and shared reception and waiting areas with the doctor. It revoked Proactive's billing privileges on the ground that Proactive was violating sections 410.33(g)(15)(i) and (ii). CMS Request for Review (RR) at 6; CMS Ex. 1, at 1 (revocation letter). The hearing officer upheld the revocation on those grounds.

Before the ALJ, both parties moved for summary judgment. The ALJ granted Proactive's motion, and CMS appealed.

## **Analysis**

CMS revoked Proactive's billing privileges on the ground that Proactive was violating 42 C.F.R. § 410.33(g)(15)(i) and (ii). Section 410.33(g)(15) (set out above) excepts mobile IDTFs from the prohibitions on sharing a practice location with another Medicare-enrolled individual or organization and on leasing or subleasing operations or a practice location to another Medicare-enrolled individual or organization.

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[1] A "base of operations" for mobile or portable suppliers is "the location from where personnel are dispatched, where mobile/portable equipment is stored, and when applicable, where vehicles are parked when not in use." CMS Ex. 9, at 20 (CMS-855B Medicare Enrollment Application [for] Clinics/Group Practices and Certain Other Suppliers). The application has a box to check if the address for the base of operations is the same as the IDTF's practice location. The regulations refer to a "home office" for IDTFs, rather than using the term "base of operations." *See* 42 C.F.R. § 410.33(g)(3)(i).

[2] A CMS-855B is a Medicare Enrollment Application for "Clinics/Group Practices and Certain Other Suppliers" including IDTFs. Suppliers use CMS-855Bs to report changes, such as a change in location.

The ALJ concluded that the undisputed facts show that Proactive was a mobile IDTF subject to the exception. Thus, the sole issues before us are (1) whether CMS has shown that there is a genuine dispute of material fact about whether Proactive was a mobile IDTF to which the exception in section 410.33(g)(15) applies, and, if so, (2) whether there is a genuine dispute of fact material to the issue of whether Proactive was in compliance with the provisions at 410.33(g)(15)(i) and (ii).

Below, we first discuss what guidance there is on whether a supplier providing services at a practice location and other sites, using portable equipment, may be enrolled as a mobile IDTF. We then explain why we conclude that the evidence on which CMS relies (even viewed in the light most favorable to CMS) does not show a genuine dispute of fact on this question. Finally, we explain why, even if CMS did show that there is a genuine dispute about whether Proactive was a mobile IDTF, that fact is not material since CMS has not shown any dispute of material fact relevant to whether Proactive was in compliance with section 410.33(g)(15). Since that section was the sole basis for the revocation, Proactive is entitled to judgment in its favor.

**1. CMS has failed to show a genuine dispute of material fact regarding whether Proactive was a mobile IDTF.**

The ALJ found that Proactive was enrolled in the Medicare program as a “mobile IDTF" and therefore was not subject to section 410.33(g)(15); the ALJ expressly rejected CMS's argument that Proactive's failure in 2009 to complete sections of the enrollment application related to the operation of a mobile IDTF created a dispute of material fact about whether it was a mobile IDTF. She implicitly rejected CMS's argument that the site inspector's statement that “I did not see or inspect a mobile unit during my visit” created a dispute of material fact as to whether Proactive was a mobile IDTF. CMS Br. before ALJ at 7, citing CMS Ex. 10, at 1.

Whether Proactive was a mobile or fixed-base IDTF depends on the manner in which it was delivering IDTF services, and there is no dispute of fact about how it delivered such services. Before Pinnacle’s hearing officer, Proactive represented that, as of 2009, it was “provid[ing] its vascular ultrasound services using mobile equipment onsite at 5424 Brittany Drive . . . *and* off site at various locations throughout the Baton Rouge community pursuant to contractual relationships [with other suppliers and providers].” CMS Ex. 5, at 4 (italics in original). CMS has never disputed this representation, and the hearing officer found that Proactive provided IDTF services at 5424 Brittany Drive and "also provided portable unit [IDTF] services in other fixed locations." CMS Ex. 7, at 4; CMS Ex. 5, at 2 (list of entities with which Proactive contracted to provide IDTF services at their sites).

There is, therefore, no factual dispute about how Proactive was delivering services but rather a legal dispute about whether that delivery structure made it, as the ALJ found, a mobile IDTF rather than a fixed-based IDTF. As indicated above, the regulations do not define a fixed-base or a mobile IDTF. Before the hearing officer, the ALJ, and the Board, Proactive relied on the following statement by CMS in the preamble to section 410.33:

> Comment: One commenter requested clarification to differentiate between fixed and mobile IDTFs business models and the differences by which IDTFs using these models provide services.
> Response: A fixed base IDTF performs all of its diagnostic testing at the practice location found on the Medicare enrollment application (CMS-855), whereas a mobile IDTF travels and performs its diagnostic tests at locations other than a single practice location.

P. Memorandum at 9, citing 72 Fed. Reg. 66,287 (Nov. 27, 2007) (emphasis added). Proactive argues that it should be considered a mobile IDTF because it provides IDTF services "at locations other than a single practice location [i.e., 5424 Brittany Drive]." *Id.*

CMS does not address the cited preamble language or Proactive's related arguments. Rather, in deciding that Proactive was a fixed-base IDTF, CMS, Pinnacle, and the hearing officer conflated the term "mobile IDTF" with the terms "mobile unit" and/or "mobile facility" -- terms used in the PIM to mean a large vehicle in which testing is actually performed. CMS fails to recognize that a supplier using portable equipment to provide diagnostic services at multiple locations is a type of mobile IDTF, even if it has no mobile unit/facility.[3] Thus, in arguing that the ALJ erred in granting summary judgment to Proactive, CMS relies on the site inspector's assertion that she "did not see or inspect a mobile unit during my visit" and argues that Proactive was a fixed-location IDTF. CMS RR at 6, citing CMS Ex. 10, at 1. That assertion is not relevant under the applicable law.

In response to CMS's apparent position that Proactive was required to have a mobile unit or facility in order to be a mobile IDTF, Proactive states:

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[3] In arguing that Proactive was a fixed-base IDTF, CMS relies on the undisputed fact that Proactive did not have a mobile unit, a fact we find to be irrelevant. CMS has never argued that the dual nature of Proactive's delivery system (i.e., the fact it was delivering services at other provider/suppliers' practice locations and at its own practice location) makes it a fixed-based IDTF. Such a construction would arguably be contrary to the statement in the regulatory preamble relied on by Proactive here. In any event, there is nothing in the record indicating that CMS has ever given IDTFs notice of such a construction of "fixed-based" and "mobile."

> Within the mobile IDTF category, CMS has . . . recognized "portable unit" IDTFs and "mobile facility or unit" IDTFs. [PIM], Ch. 10 § 12.2.5 [now at Ch. 15.4.2-5] (footnote omitted). Under a "portable unit" mobile IDTF structure, equipment is transported to a fixed location to render services to patients. *Id.* CMS differentiates a "portable unit" mobile IDTF from a "mobile facility or unit" IDTF, which it defines as a mobile home, trailer, or other large vehicle that has been converted, equipped, and licensed to render health care services in the mobile unit or facility. *Id.* [Proactive] operates as a portable unit IDTF, and transports its portable equipment to various locations in vans.
>
> In the [PIM], CMS states in its discussion of portable x-ray suppliers (PXRS) that a mobile IDTF may be ***either*** a portable unit or a mobile facility (emphasis added). *Id.* Specifically, CMS states the following:
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>> A PXRS can be either a mobile facility or portable unit, although it usually is the latter. A mobile IDTF, on the other hand, ***while it too can be either*,** is typically a mobile facility (emphasis added). *Id.*

P. Memorandum at 8-9.

CMS responds by asserting that "the regulation does not contain a supplier designation for a 'portable unit mobile IDTF.' In fact, [CMS argues], the section of the [PIM] relied on by [Proactive] refers to a specific supplier, 'portable x-ray supplier,' . . . a completely different supplier type than a IDTF . . . ." CMS Reply at 1-2.

CMS's response is unpersuasive. Proactive never asserted that the regulations expressly provide for a "portable unit mobile IDTF." Moreover, in the absence of guidance in the regulations about what constitutes a mobile IDTF, Proactive reasonably relies on guidance in the preamble and the PIM. The fact that CMS chose to include guidance about mobile IDTFs in the PXRS section of the PIM does not make that guidance irrelevant. Finally, we note that the CMS-855B supports Proactive's position, explaining to IDTF applicants as follows:

> Mobile facility and/or Portable unit
>
> A "mobile facility" is generally a mobile home, trailer, or other large vehicle that has been converted, equipped, and licensed to render health care services. These vehicles usually travel to local shopping centers or community centers to see and treat patients inside the vehicle.

> A "portable unit" is when the supplier transports medical equipment to a fixed location (e.g., physician's office, nursing home) to render services to the patient.
>
> **The most common types of mobile facilities/portable units are mobile IDTFs**, portable X-ray suppliers, portable mammography, and mobile clinics.

CMS Ex. 9, at 15 (emphasis added).

CMS argues that we should infer from the fact that Proactive's enrollment application submitted in February 2009 did not originally include information in sections 4.E, 4.F. and 4.G. of the form related to mobile suppliers that Proactive was not a mobile IDTF. According to CMS, the ALJ erred in determining that Proactive was required to report only changes on the form. CMS argues that the ALJ failed to consider the form in its entirety and that it is undisputed that Proactive "was required to resubmit and recertify for revalidation its enrollment information." CMS Reply at 1, citing 42 C.F.R. § 424.415.

Contrary to what CMS argues, it is not undisputed that Proactive was required to resubmit its application form in its entirety. Proactive proffered an affidavit from its business manager attesting that she did not complete sections 4.E., 4.F. and 4.G. of the CMS Form 855B of the application she submitted in February 2009 because she "followed the instructions" that state "complete only those sections that are changing" and because Proactive "was instructed by Pinnacle representatives not to complete sections for information that had not changed . . . ." P.Ex.4, ¶¶ 3, 4. CMS does not claim there is a dispute of fact regarding the instructions given by Pinnacle. The affidavit by the site inspector addresses only her on-site visit and does not address any communications she had with Proactive about the application form. CMS Ex. 10. A January 29, 2009 letter from her to Proactive says on page one that "[s]ince this IDTF was enrolled prior to our latest enrollment system PECOS, you must complete the CMS 855B application in its entirety . . . so we can revalidate your enrollment." It also, however, identifies specific "missing data elements," tells Proactive it does not need to submit information regarding changes already submitted, says Pinnacle "will need a new section 15 of the 855B application signed and dated along with the missing data elements," and warns Proactive that "[i]f the missing data elements are not submitted by the requested date, you may be required to complete a new application that would start the entire processing time of your application over." CMS Ex. 9, at 89-90. In response to the January 2009 request, Proactive submitted additional/revised parts of the 855B form on February 3. CMS Ex. 9, at 1. The way Proactive filled out the form confirms that Proactive thought it had to provide only partial, not complete information. For example, CMS Exhibit 9, at 6

shows that Proactive checked as relevant only one of the attachments IDTFs are required to submit as supporting documentation. While Pinnacle later asked for some additional information, it does not appear that Pinnacle informed Proactive that it had misunderstood its instructions by not submitting a complete application form. CMS Ex. 9, at 85-86.

Under these circumstances and given the undisputed facts that Proactive was previously enrolled as a mobile IDTF and was providing services using portable equipment at multiple locations, no rational trier of fact would determine that Pinnacle was not a mobile IDTF based solely on its failure to fill out sections 4.E., 4.F, and 4.G. of the February 2009 application.[4]

Even if CMS's evidence regarding whether Proactive was a mobile IDTF, viewed in the light most favorable to CMS, creates a genuine dispute of fact requiring a hearing, it would still be appropriate to grant summary judgment in favor of Proactive. The exception in section 433.10(g) for mobile IDTFs is relevant only if other evidence would support a finding that Proactive was not in compliance with that section. As we discuss below, the facts on which CMS relies to show that Proactive did not meet the requirements of section 433.10(g) would not enable a rational trier of fact to find for CMS, even under the most favorable, reasonable construction of the proffered evidence.

**2. CMS has failed to show a genuine dispute of material fact relevant to whether Proactive was in compliance with section 410.33(g)(15)(i) or (ii).**

CMS alleges that Proactive was violating section 410.33(g)(15) because it was sharing reception/waiting areas with a Medicare-enrolled individual (a doctor) and leasing space from that doctor. CMS RR at 6; CMS Ex. 1, at 1 (revocation letter). Proactive does not dispute that it shared a reception/waiting areas with the doctor and leased its practice location from the doctor. Instead, as to subsection (i), Proactive argues that the shared reception/waiting areas were not part of its "practice location" as that term is used in subsection (i). Proactive Memorandum

[4] We note that section 4.E. of the form, which is for a "base of operations" address for mobile or portable suppliers, instructs the applicant to simply "Check here and skip to Section 4F if the 'Base of Operations' address is the same as the practice location listed in Section 4A." CMS 3, at 41. If Proactive was not changing the fact that its practice location and base of operations were the same, it would not necessarily know to fill this out if it thought it had to report only changes, even though it was changing its practice location. Moreover, Section 4.F. on the relevant CMS 855B makes it clear that it does not apply unless a supplier has a mobile vehicle in which it is providing services. Finally, CMS Exhibit 3 at page 41, which is the application Proactive submitted in January 2009, does include a completed section 4.G. (Geographic Location for Mobile or Portable Suppliers).

at 10. As to subsection (ii), Proactive argues that it was leasing space from the doctor, not to the doctor as prohibited by subsection (ii). *Id.* at 12.

In support of its position, Proactive relies on statements in the preamble to the final rule adopting section 410.33(g)(15)(i) in which the Secretary provided guidance about what is meant by "sharing a practice location." P. Memorandum at 10-11. Proactive writes:

> The proposed standard in the initial proposed rule provided that an IDTF could not share "space, equipment or staff" with another Medicare-enrolled provider. 72 FR 38122, July 12, 2007. The Preamble to the Final Rule noted numerous comments and questions by commenters regarding the effect of the proposed rule. In response to those comments, CMS made substantial changes to the performance standards of 410.33(g)(15). These included excepting hospital-based and mobile IDTFs from the standard's prohibition. Additionally, the changes removed the prohibition of sharing space or staff. The prohibition on space sharing was replaced with a prohibition on sharing a "practice location." While CMS did not define the term "practice location", it did provide substantial guidance in the Preamble as to the meaning of that term as applied to a fixed-base IDTF.

*Id.* Proactive cites to statements made in the Preamble of the final rule. *Id.* at 11. Such statements include the following:

> *Comment:* One commenter requested that we clarify whether the proposed performance standard found at § 433.10(g)(15) would permit a multi-specialty clinic and an IDTF to be enrolled as a clinic and an IDTF, and for portions of space and staff to be used for both clinic and IDTF activities.
>
> *Response:* While we understand the commenter's concern, we do not believe that it is appropriate to co-locate a multi-specialty clinic in the same practice location as an IDTF. Specifically, while we are not prohibiting the sharing [of] common [] hallways, parking, or common areas, we believe that a multi-specialty clinic cannot occupy or be co-located within the same practice location. For example, a multi-specialty clinic and an IDTF could not enroll or remain enrolled using the same suite number within the same office building.
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> * * *
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> *Comment:* One commenter recommended that we permit an adjoining physician practice or a radiology group that is the owner of an IDTF to share space, equipment, and staff.

> *Response:* While we agree that it is common for IDTFs to share common areas (that is, waiting rooms) with the adjoining physician practice or radiology group that is an owner of the IDTF, we do not believe that it is appropriate for IDTFs to share common practice locations or diagnostic testing equipment.
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> * * *
>
> *Comment:* One commenter agreed that it would be inappropriate to commingle the clinical staff listed on the CMS-855 enrollment application during the times that the IDTF is open; however, the commenter maintains that non-clinical space and staff (such as waiting rooms, receptionists, and schedulers) should be shared with other entities.
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> *Response:* We agree with this comment and have amended the provision to reflect these concerns.
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> * * *
>
> *Comment:* One commenter recommends that the sharing of nonclinical space, equipment and personnel be allowed between an IDTF and an adjacent facility, because it does not offer the same potential for abuse as situations where the clinical operations of the IDTF would be commingled.
>
> *Response:* We have amended the provision found at § 410.33(g)(15) to address these concerns.

72 Fed. Reg. 66,222, at 66,290-92 (Nov. 27, 2007).

In its Reply Brief, CMS acknowledges that waiting and receptionist areas "are arguably 'non-clinical spaces' which the Department has recognized as a permissible sharing of space." CMS Reply Br. at 3. CMS nonetheless continues to argue that Proactive was violating section 410.33(g)(15), but now on the ground that "the sublease reflects that [the doctor and Proactive] also share the practice location," i.e., Suite C. CMS Reply Br. at 3. Specifically, CMS points to language in the sublease stating that the sublessor (the doctor) is "entitled to occupy" the premises in Suite C and to language in the regulatory preamble stating that an "IDTF is not prohibited from entering into a rental agreement for space . . . as long as the IDTF . . . [is] exclusively using the space . . . ." *Id.* at 3, citing 72 Fed. Reg. 66,290. CMS asserts that "pursuant to the terms of the sublease, [Proactive] did not enjoy exclusive use of the practice location." *Id.*

We reject CMS's arguments based on the sublease. Nothing in the terms of the sublease (or any other evidence in the record) supports a reasonable inference that Proactive and the doctor shared Suite C or that, "pursuant to the terms of the sublease, [Proactive] did not enjoy exclusive use" of Suite C. The language to which CMS points merely establishes that the doctor, having the right to occupy Suite C, had the right to sublet that space. The sublease goes on to provide:

> NOW THEREFORE, the parties agree as follows
>
> 1. **Leased Premises.** Subject to the terms and conditions hereof, Sublessor [the doctor] hereby leases to Sublessee [Proactive] and Sublessee hereby leases from Sublessor those certain premises within the Premises as depicted in Attachment A hereto, consisting of the following (the Subleased Premises)
> A. Exclusive use of Suite C consisting of approximately 1,000 square feet.
> B. Non-exclusive use of that part of the Premises to be jointly used by the Sublessee and Sublessor of waiting areas and entry hallway.
> 2. **Use of Subleased Premises.** The Subleased Premises shall be used *exclusively by Sublessee* for the operation of a vascular ultrasound testing laboratory.

CMS Ex. 9, at 77 (italicized emphasis added).

The unambiguous terms of the sublease gave Proactive exclusive use of Suite C. Moreover, while CMS points out that the doctor also provided vascular services (and was Proactive's supervising physician required by section 410.33(b)), CMS does not allege that the doctor was using Suite C in some manner that violated section 410.33(g)(15)(i) or (ii). Thus, we see no legal basis for concluding that sharing a reception/waiting area violates section 410.33(g)(15)(i) and no evidence in the record that would support a reasonable inference that Proactive did not have a contractual right to exclusive use of Suite C.

As to Proactive's argument that subsection (ii) did not apply to it because it leased the premises <u>from</u> the doctor and not <u>to</u> the doctor (as prohibited by section 410.33(g)(15)(ii)), CMS responds that "such a distinction has no bearing in this case." CMS Reply at 3. We disagree. The fact that Proactive was leasing "from" the doctor, rather than "to" the doctor, means that the prohibition against leasing or subleasing "to" another Medicare-enrolled individual or organization simply does not apply.

CMS revoked Proactive's billing privileges solely on the basis of noncompliance with section 410.33(g)(15) and the revocation authority in section 410.33(h).

CMS Exs. 1, at 1; 7, at 2. For the reasons discussed above, we conclude CMS failed to show a dispute of material fact as to whether Proactive was in compliance with section 410.33(g)(15)(i) and (ii). Therefore, Proactive was entitled to summary judgment in its favor before the ALJ. We modify the ALJ's FFCL as follows:

> Proactive is entitled to summary judgment because Proactive had the right to exclusive use of its practice location; because 42 C.F.R. § 410.33(g)(15)(i), as interpreted in the related preamble, permits sharing of reception and waiting areas; and because Proactive leased its practice location from, not to, a Medicare enrolled individual as permitted by section 410.33(g)(15)(ii).

Conclusion

For the reasons discussed above, we uphold the ALJ's reversal of CMS's revocation of Proactive's billing privileges as an IDTF, based on our modified analysis set out above.

/s/
Stephen M. Godek

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member