

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Wendell Foo, M.D.
(NPI: 1164457511;
PTAN: H0000BDNKQ),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-378

Decision No. CR5003

Date: January 8, 2018

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Wendell Foo, M.D. (herein Petitioner or Dr. Foo) because Petitioner was not operational at a practice location on record with CMS. Specifically, the location on record with CMS was a mailbox unit at a The UPS Store® location (herein “UPS Store”). For the reasons stated herein, I affirm CMS’s revocation of Petitioner’s Medicare enrollment and billing privileges.

I. Background

Petitioner is an anesthesiologist. Petitioner Exhibit (P. Ex.) at 20. Petitioner does not maintain his own office that is open to the public, but rather, provides anesthesiology services at several locations. CMS Exhibit (Ex.) 4 at 2. Petitioner submitted a Medicare enrollment application in February 2010, at which time he reported that his physical practice location was 4348 Waiālae Avenue, 5-311, Honolulu, Hawaii (herein “Waiālae Avenue address”). CMS Ex. 11. In a letter dated March 4, 2010, Palmetto GBA, a

Medicare administrative contractor, informed Petitioner of the following, in pertinent part:

We have received your enrollment application requesting revalidation. We have reviewed and revalidated the information contained within and determined that changes have occurred:

The changes noted below have been made:

Your physical address has been changed to 4348 Waialae Ave 5-311, Honolulu, HI, 96816-5767.

CMS Ex. 10 at 1. Petitioner submitted an enrollment application to revalidate his enrollment in May 2014. CMS Ex. 9. In that application, Petitioner maintained the same practice location at the Waialae Avenue address. CMS Ex. 9 at 1.

A Medicare site visit contractor conducted a visit to the 4348 Waialae Avenue address on March 5, 2015, at which time the contractor documented that the location was a UPS Store. CMS Ex. 7 at 1-2. A subsequent contractor visit to the same location on May 8, 2015, confirmed that the location was a “one story building that has a UPS store, Restaurant, and juice bar” and that “[t]here is no Dr [sic] office at this location.” CMS Ex. 6 at 1.

On June 24, 2015, Noridian Healthcare Solutions (Noridian), a Medicare administrative contractor, sent Petitioner an initial determination informing him that his Medicare enrollment and billing privileges were being revoked retroactive to March 5, 2015, and that he was barred from reenrollment for a period of two years. CMS Ex. 5 at 1-2. The letter stated the following, in pertinent part:

42 [C.F.R. §]424.535(a)(5) On-site Review/Other Reliable Evidence that Requirements Not Met

An Onsite visit was conducted on March 5, 2015 and on May 11, [2015] at the address listed above and this is not a practice location.

CMS Ex. 5 at 1 (emphasis in original).

In a letter dated July 3, 2015, Petitioner requested reconsideration of the June 24, 2015 revocation determination. CMS Ex. 4. Petitioner explained that he performs anesthesiology services wherever the surgeon requests his services and thus “those facilities are [his] practice locations.” CMS Ex. 4 at 1 (emphasis omitted). Petitioner stated that he had three current practice locations at the Hawaii Eye Center, Surgicare of Hawaii, and the Hawaii Endoscopy Center, and that two of these facilities had been listed

in Section 4 of his “most recent Medicare Enrollment Record.” CMS Ex. 4 at 2. Petitioner also explained that he would “always specifically state [the] practice location for the given anesthesia procedure” in “Box 32” of the Form CMS-1500 he submitted for reimbursement by Medicare, and he faulted the site inspector for not seeking “clarification” of his address. CMS Ex. 4 at 1 (emphasis omitted). Petitioner further acknowledged that he had been asked to report his practice locations by submitting an updated Form CMS-855I application, but he stated “it is not required for the appeal” and that he had provided his practice location information in his July 3, 2015 letter. CMS Ex. 4 at 2.

Mr. D. Wahl, on behalf of Petitioner, submitted follow-up email correspondence on July 15, 2015, at which time he complained that the on-site visits to the UPS Store were performed “without the on-site representative cross-referencing against Section 4 (Practice Locations – Medical Records Storage location).” CMS Ex. at 3 at 1 (emphasis in original). Shortly thereafter, on or about July 18, 2015, Petitioner submitted an updated application through the Provider Enrollment, Chain, and Ownership System (PECOS) listing the Hawaii Eye Center, Surgicare of Hawaii, and the Hawaii Endoscopy Center as practice locations. P. Ex. 17 at 1-3 (Petitioner’s copy of a July 18, 2015 “report of [his] current Medicare application in PECOS”).

On August 27, 2015, Noridian issued an unfavorable reconsidered determination. CMS Ex. 1. The reconsidered determination stated the following:

Revocation, Denial, or Effective date reason: 42 [C.F.R. §] 424.535(a)(5)

On-site Review/Other Reliable Evidence that Requirements Not Met

An On-Site visit was conducted on March 5, 2015 and on May 11, 2015 at the address listed above and this is not a practice location.

CMS Ex. 1 at 1 (emphasis in original). The reconsidered determination explained that Petitioner “had not provided evidence to show full compliance with the standards for which [he was] revoked.” CMS Ex. 1 at 1 (emphasis omitted).

Petitioner submitted a request for an administrative law judge (ALJ) hearing on October 23, 2015, which was assigned docket number C-16-50. On October 28, 2015, I issued an Acknowledgement and Pre-Hearing Order (Order), at which time I directed the parties to each file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Order, § 4. I further 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 October 28, 2015 Order, CMS filed a brief and 15 exhibits (CMS Exs. 1-15). Petitioner, through counsel, filed a brief (P. Pre-Hearing Br.) and five exhibits (P. Exs. 16-20). Each party submitted written direct testimony for one witness (CMS Ex. 13, P. Ex. 19).

As neither party requested an opportunity to cross-examine the other's witness, I considered the record closed after the parties filed their respective pre-hearing exchanges. I admitted the parties' exhibits into the record and issued a decision, on the merits, based on the parties' written submissions. *Wendell Foo, M.D.*, DAB CR4580 (2016).

Petitioner appealed my decision to the Departmental Appeals Board (DAB), which issued a decision remanding the case to me with instructions. *Wendell Foo, M.D.*, DAB No. 2769 (2017). The remanded case has been assigned docket number C-17-378.¹

Following remand, I issued an Order dated March 1, 2017, in which I directed the parties to submit additional evidence and written arguments, along with written notice of any request for an opportunity to cross-examine any witness. I also gave the parties an opportunity to reply to each other's arguments.

Petitioner thereafter filed a brief (P. Br.) and three exhibits (P. Exs. 21-23), and CMS filed a brief and six exhibits (CMS Exs. 16-21). On May 26, 2017, CMS filed a motion to file out of time along with a substitute version of CMS Ex. 17, which is the signed declaration of a witness, L. Hoffman.² Thereafter, Petitioner filed a reply brief (P. Reply), objections to portions of the written direct testimony that CMS submitted as CMS Exs. 16 and 17 (P. Objections), and a request for an opportunity to cross-examine CMS's two witnesses. CMS filed a reply brief and responses to Petitioner's objections;

¹ The documents filed in the previously-docketed case appear in the electronic record for case number C-16-50, while the documents filed in the remanded case appear in the electronic record for case number C-17-378.

² A day earlier, on May 25, 2017, Petitioner, through counsel, contacted me directly via an email message (even though I had not provided my email address to the parties) to object to CMS Ex. 17 and to pre-emptively object to the filing of a substitute version of CMS Ex. 17. Docket entry 12 (email upload); *see, e.g.*, Civil Remedies Division Procedures, Section 4 ("Direct communication with the ALJ is prohibited unless all parties are present," and "[a]n ALJ may impose sanctions against a party for engaging in *ex parte* communication . . ."). On May 26, 2017, I issued an Order informing Petitioner that it must cease direct communications with me and that the appropriate way to request relief is by submitting "an appropriate filing through DAB E-File"

CMS did not request an opportunity to cross-examine either of Petitioner's two witnesses. Following a pre-hearing conference, I issued an order on August 10, 2017, in which I, *inter alia*, informed the parties that I had provisionally admitted all exhibits.

On August 23, 2017, I held a hearing by telephone for the purpose of enabling Petitioner to cross-examine CMS's witnesses. A transcript of the proceedings (Tr.) was made available to the parties following the hearing, at which time I directed, *inter alia*, a post-hearing briefing schedule. CMS timely filed a post-hearing brief (CMS Post-Hrg Br.) and a notice that it would not be filing a post-hearing reply. Petitioner timely filed a post-hearing brief (P. Post-Hrg Br.) and reply brief (P. Post-Hrg Reply).

In the absence of objections by CMS, I admit P. Exs. 16-23. Despite Petitioner's objections to CMS Exs. 8, 10, 11, 13, 16, and to a withdrawn and substituted version of CMS Ex. 17, I admit CMS Exs. 1-21.

On May 22, 2017, CMS submitted CMS Ex. 17, a supplemental declaration of C. Finneman.³ On May 26, CMS submitted "corrected" CMS Ex. 17, a declaration of L. Hoffman, along with a motion for leave to file the corrected version of CMS Ex. 17 out of time. I strike CMS Ex. 17, as filed on May 22, 2017, and admit CMS Ex. 17, as filed on May 26, 2017.⁴ I overrule Petitioner's objection to CMS's submission of CMS Ex. 17 because Petitioner has not demonstrated he is prejudiced by a four-day delay in the submission of CMS Ex. 17, and further, he had an opportunity to cross-examine the declarant who signed CMS Ex. 17.

Petitioner objects "to the introduction of evidence related to the June 24, 2014 phone call" placed by a Noridian employee, L. Hoffman, to the telephone number listed in Petitioner's 2014 revalidation application. P. Objections at 2-3, 5; *see* CMS Ex. 17 at 6 (testimony of Ms. Hoffman that she made the telephone call and authored the record of the call, a "Provider Enrollment Call Log" (herein "call log"), which is found at CMS Ex. 8);⁵ *see* Tr. at 18-71 (cross-examination of Ms. Hoffman). Petitioner argues that the call log is inadmissible because it is illegible, unreliable, and a product of hearsay. I am

³ This submission was duplicative of CMS Ex. 16, which was also a declaration of Ms. Finneman.

⁴ I construe CMS's May 26, 2017 motion for leave out of time to encompass a request to withdraw the version of CMS Ex. 17 filed on May 22, 2017.

⁵ Ms. Hoffman incorrectly referenced this document as CMS Ex. 9 in her written direct testimony. CMS Ex. 17 at 5. On cross-examination, Ms. Hoffman referenced CMS Ex. 8 when discussing the information she recorded in the call log. Tr. at 48.

authorized to consider *any* evidence that is relevant and material, even hearsay evidence, that would be inadmissible under the Federal Rules of Evidence. 42 C.F.R. § 498.61 (“Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to court procedure.”); 42 C.F.R. § 498.60(b)(3) (“The ALJ inquires fully into all of the matters at issue, and receives in evidence the testimony of witnesses and any documents that are relevant and material.”). Petitioner has cross-examined Ms. Hoffman, the author of CMS Ex. 8, and therefore, his argument that CMS Ex. 8 is inadmissible hearsay is not persuasive. Further, CMS Ex. 8 is sufficiently legible for the purpose it was submitted. *See* Tr. at 50 (my observation during the hearing that the electronic copy of the document contained in DAB E-File was more legible than a printed copy of the same document). Additionally, Petitioner argues that Noridian introduced evidence related to the call log for the first time on reconsideration and therefore did not comply with the Chapter 15, § 15.25.2.2.D of the Medicare Program Integrity Manual (MPIM). Section 15.25.2.2.D instructs that a contractor should not “introduc[e] new denial or revocation reasons or chang[e] a denial or revocation reason listed in the initial determination during the reconsideration process.” Petitioner has not shown that Noridian presented a new *reason* for revocation when it issued the reconsidered determination, nor has it demonstrated that CMS was prevented from submitting that evidence or that I am precluded from admitting the same evidence. In both the initial and reconsidered determinations, the *reason* cited by Noridian for Petitioner’s failure to comply with 42 C.F.R. § 424.535(a)(5) was that it was not operational at the practice location of record. CMS Exs. 1, 5. Finally, CMS argues that the June 2014 telephone call is “not determinative of the basis for revocation” (CMS Post-Hrg Br. at 2), and Petitioner similarly argues that the call log has “limited relevance.” P. Post-Hrg Reply at 4. I agree with the parties that CMS Ex. 8, while it has been admitted into evidence, is minimally relevant and is not determinative of whether Petitioner’s enrollment revocation was appropriate; in fact, I do not rely on CMS Ex. 8 in determining that CMS appropriately revoked Petitioner’s Medicare enrollment and billing privileges.

Finally, Petitioner broadly objects to and requests exclusion of “any and all proffered evidence concerning a 2010 revalidation application.” P. Br. at 2; *see* CMS Exs. 10, 11. Evidence falling into this category includes the revalidation application (CMS Ex. 11) and the letter informing him that Noridian had revalidated his enrollment based on the application (CMS Ex. 10), and certain portions of CMS’s witness declarations (CMS Exs. 13, 16, and 17) addressing the 2010 application. The DAB has already determined that the admission of this evidence was not erroneous, and that “evidence related to the 2010 revalidation is as relevant to the question of how CMS came to have Waiālae Ave. as Petitioner’s practice location of record as the evidence related to the 2014 revalidation

is.”⁶ *Wendell Foo, M.D.*, DAB No. 2769 at 11 (2017). Therefore, I overrule Petitioner’s blanket objection to the admissibility of evidence related to his 2010 revalidation application.

Based on the foregoing, I admit CMS Exs. 1-21 into the record.

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).

IV. Findings of Fact, Conclusions of Law, and Analysis⁷

As a physician, 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, individuals 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 nonoperational, 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).

⁶ CMS Ex. 10 is the February 2010 application, and CMS Ex. 11 is the letter approving enrollment based on the application and confirming the practice location listed in the application. CMS Exs. 13, 16 and 17 are the written direct testimony of Noridian employees.

⁷ My numbered findings of fact and conclusions of law appear in bold and italics.

On-site review is addressed in 42 C.F.R. § 424.535(a)(5). Pursuant to subsection 424.535(a)(5)(i), a supplier is non-operational if CMS determines upon on-site review that it is “[n]o longer operational to furnish Medicare-covered items or services.”

1. On March 5 and May 8, 2015, Petitioner’s Medicare enrollment record listed a practice location of 4348 Waialae Ave., Unit 5-311, Honolulu, Hawaii, 96816-5767, and no other practice location address.

On or about February 4, 2010, Petitioner submitted an electronic Form CMS-855I through PECOS in which he provided a “physical location” of the Waialae Avenue address, which he identified as a “[p]ractice [l]ocation,” and indicated that his practice was an “other health facility” and a “[p]rivate [p]ractice.” CMS Ex. 11 at 3. Petitioner likewise reported his correspondence address was the same address. CMS Ex. 11 at 2.

In a letter dated March 4, 2010, the Medicare administrative contractor, Palmetto GBA, informed Petitioner that it received his enrollment application and “reviewed and validated the information contained within and determined the changes have occurred.” CMS Ex. 10 at 1. Palmetto GBA informed Petitioner that his “physical address has been changed to reflect 4348 Waialae Ave[.] 5-311 Honolulu, HI. 96816-5767.” CMS Ex. 10 at 1.

On May 14, 2014, Petitioner submitted another application to revalidate his Medicare enrollment.⁸ CMS Ex. 9; P. Exs. 19 at 5; 21 at 3; *see* 42 C.F.R. § 424.515 (discussing requirements for revalidation of Medicare enrollment information). In the Application Record Data (ARD) Report of the revalidation application, the field for “Practice Location(s)/Base(s) of Operations” lists, “No Current Records Exist for Practice Location(s)/Base(s) of Operations.” CMS Ex. 9 at 1.

CMS has submitted sworn and written direct testimony of C. Finneman, a project analyst for Noridian. CMS Ex. 13; *see also* CMS Ex. 16. Ms. Finneman stated that “[t]he document marked as CMS Exhibit 9 is a copy of the Application Record Data Report which details the information submitted on May 14, 2014 to revalidate the enrollment of Dr. Foo via the online PECOS system.” CMS Ex. 13 at 4. Ms. Finneman reported that “[a]s normal operation, the ARD report shows that statement [i.e., that “No Current Records Exist”] on all sections of a revalidation enrollment application in which the provider is not changing/updating information.” CMS Ex. 13 at 4-5. Ms. Finneman added that “[i]f the provider wanted to make any changes to information currently

⁸ Neither party has alleged or submitted evidence that Petitioner submitted any applications between the February 2010 and May 2014 applications.

contained in PECOS during the revalidation process, they would need to edit that section and add the new information.” CMS Ex. 13 at 5. Ms. Finneman also explained that in Petitioner’s previous enrollment application, dated February 4, 2010, “[u]nder ‘Practice Location’ he listed the ‘Physical Location’ as 4348 Waialae Ave. 5-311, Honolulu, Hawaii 96816-5767.” CMS Ex. 13 at 3-4. Thus, based on Ms. Finneman’s explanation of the ARD report in PECOS, Petitioner did not enter a physical practice location address in PECOS in May 2014 because he did not change the physical location that was already of record; this is evidenced by the message “no current records exist” that appears on the report. CMS Exs. 9 at 1; 13 at 4-5; *see* CMS Ex. 15 (“screen shot” of Section 4 of PECOS showing that a supplier can use the “Add” button to add “new Practice Location Information.”).

Contrary to the ARD report and Ms. Finneman’s testimony, both Petitioner and his witness, Mr. Wahl, testify that Petitioner, in the May 2014 application, listed three physical practice locations at which Petitioner routinely provides services and that he did not list the Waialae Avenue address as a practice location in that application. P. Exs. 19 at 6; 21 at 4. Both Mr. Wahl and Petitioner further testify that they “have never indicated to anyone that 4348 Waialae Avenue is a medical office or practice location.” P. Exs. 19 at 9; 21 at 5. Relying on this testimony, Petitioner argues that when he completed his enrollment applications, he listed the Waialae Avenue address as a correspondence address because he does not maintain a private office. P. Br. at 13; P. Post-Hrg Br. at 3-4. He further argues that he did not list the UPS Store as a practice location, but rather, he listed each of the individual locations where he practices anesthesiology. P. Pre-Hearing Br. at 15; P. Post-Hrg Br. at 3-4.

While CMS has presented witness testimony that has been subject to cross-examination, along with supporting evidence, as discussed above, demonstrating that the practice location of record at the time of the March and May 2015 site visits was the Waialae Avenue address and no other location, the sole evidence Petitioner offers is his testimony, along with the testimony of Mr. Wahl. Despite the fact that Petitioner claims he submitted updated enrollment information, he has been unable to present his own copy of such important documentation.⁹ I find CMS’s documentary evidence, along with the testimony of its witnesses, to be credible and probative. Petitioner’s testimony is inconsistent with the evidence of record and is otherwise unsupported by any other evidence of record. Therefore, Petitioner has not supported his claim that he updated his

⁹ While Petitioner could not produce a copy of this application, he has produced a copy of a later application. *See* P. Ex. 17; *see also* P. Exs. 19 at 6; 21 at 4.

practice location to an address or addresses other than the Waialae Avenue address prior to the May 2015 site visit.¹⁰

Petitioner did not report any physical practice locations, other than the Waialae Avenue address, on his revalidation applications. CMS Exs. 9, 11. While Petitioner reported the addresses for the Hawaii Eye Center and the Hawaii Endoscopy Center as records storage locations in his February 2010 application and did not revise that information in his May 2014 application, he did not report that these records storage locations were physical practice locations in his applications. CMS Exs. 9 at 1; 11 at 3-4; *see also* CMS Ex. 13 at 4-5.

For the foregoing reasons, I find that Petitioner listed only the Waialae Avenue address as a practice location on his February 2010 application and did not change that information in his May 2014 revalidation application. Neither party has presented probative evidence of any intervening applications or attempts by Petitioner to update his practice location information between May 14, 2014, and the first site visit on March 5, 2015, or between the first site visit and the second site visit on May 8, 2015. Therefore, the Waialae Avenue address was the practice location of record on March 5, 2015, the effective date of Petitioner's revocation.

2. The PECOS records and related testimony about PECOS recordkeeping submitted by CMS are reliable and credible.

Petitioner argues that the "PECOS record is unreliable" and that "there is no reliable evidence in the record related to his 2014 revalidation application identifying the UPS Store location as a practice address." P. Br. at 3 (bold and underline font in heading omitted). In its decision, the DAB discussed that the evidence of record did not explain how PECOS retains data, and that this warranted examination upon remand. *Foo*, DAB No. 2769 at 12-13. In summary, CMS has established that PECOS records are reliable.

Ms. Finneman, who is "personally acquainted" with enrollment records maintenance in PECOS, testified that "[o]nce an approved Medicare enrollment application[]has been submitted via PECOS an enrollment record is generated using the approved application

¹⁰ For the same reasons, I also reject Petitioner's use of this testimony to argue that PECOS is unreliable because "the print out of the 2014 PECOS information . . . is not reflective of the information [Petitioner] submitted with his 2014 enrollment application." P. Br. at 3. Petitioner has submitted no probative evidence to refute that the PECOS information in CMS Ex. 9 contains information that he provided in his May 2014 application.

data.” CMS Ex. 13 at 3, 4. In other words, a Medicare “enrollment record includes approved application data.” CMS Ex. 13 at 3. Such information includes “data such as the provider type, practice address, billing information,” and more. CMS Ex. 13 at 3. When questioned at the hearing, Ms. Finneman explained that a supplier filling out an electronic revalidation application in PECOS would “see the information that is of record” in PECOS and would have the option to either “update or [not] update that information on their record.” Tr. at 102; *see also* Tr. at 117. However, Ms. Finneman noted that while “the supplier may see whatever information they input into each section” of the application, that application “information is not automatically added to the final enrollment record until after it has been verified by the applicable [Medicare administrative contractor].” CMS Ex. 16 at 3. In some cases, information is not added to an approved enrollment record. Tr. at 88-89. For instance, in the case of a supplier whose billing privileges have been revoked, “[n]o data would be entered in [the revoked supplier’s] official PECOS enrollment record after” the date of revocation; thus, even if a revoked supplier submitted updated information, that information would not be incorporated into the enrollment record. CMS Ex. 16 at 4.¹¹ Ms. Finneman explained that this would occur even if the revoked supplier submitted a new enrollment application, because MPIM § 15.8.1.A instructs “contractors [to] return applications submitted by a . . . supplier prior to the expiration of a re-enrollment bar.” CMS Ex. 16 at 4. In fact, “[a]s long as PECOS documents that a particular enrollment record is still in the re-enrollment bar period . . . no updates to the official PECOS record would be maintained or stored by PECOS. Any attempts to update information would result in showing ‘No Data Provided.’” CMS Ex. 16 at 5.

Ms. Finneman testified that Petitioner’s copy of a July 2015 application (P. Ex. 17) is an example of a completed application that the contractor returned and did not accept for purposes of updating an enrollment record. Tr. at 102-104. Petitioner’s Medicare billing privileges were revoked effective March 5, 2015, and a two-year re-enrollment bar went into effect on July 24, 2015. CMS Ex. 5. Therefore, because Petitioner submitted the July 2015 application during the period a re-enrollment bar was in effect, the information he inputted was not stored in PECOS based on the fact that it had been “returned” pursuant to MPIM § 15.8.1.A. Tr. at 103-104; *see also* CMS Ex. 16 at 3-5. In support of Ms. Finneman’s testimony, the evidence shows that Noridian returned the application to Petitioner and Mr. Wahl by email, explaining it was doing so because a “revocation is in place.” CMS Exs. 19 at 1; 20 at 1 (emphasis omitted).

With regard to the PECOS records submitted by CMS, Ms. Finneman confirmed that the February 2010 application data (CMS Ex. 11) “show[s] the information [Petitioner]

¹¹ Ms. L. Hoffmann, a provider enrollment representative for Noridian, corroborates Ms. Finneman’s testimony on this point. CMS Ex. 17 at 3-4; Tr. at 39.

provided to CMS in February 2010 at the time he revalidated his enrollment as a Medicare supplier.” CMS Ex. 13 at 3; *see* CMS Ex. 11. She also confirmed that the May 2014 ARD report (CMS Ex. 9) “details the information submitted on May 14, 2014 to revalidate the enrollment of [Petitioner] via the online PECOS system.” CMS Ex. 13 at 4. According to Ms. Finneman, the ARD report shows a message that “no current records exist” for “all sections of a revalidation enrollment application in which the provider is not changing/updating information.” CMS Ex. 13 at 4-5; *see also* Tr. at 87-88, 101. To make changes to a particular section of the application, Petitioner would have “need[ed] to edit that section and add the new information.” CMS Ex. 13 at 5; *see also* Tr. at 101. When cross-examined at the hearing, Ms. Finneman confirmed that the May 2014 ARD report “says no current record exists for practice location,” and she explained that this occurred “[b]ecause [Petitioner] made no updates to that section when he submitted [his May 2014 application].” Tr. at 99; *see also* Tr. at 113.

Petitioner’s attempts to cast doubt on Ms. Finneman’s testimony and the reliability of the PECOS records are not persuasive and do not diminish Ms. Finneman’s testimony or the reliability of the PECOS records. For example, Petitioner argues that overlap in the February 2010 and May 2014 PECOS records undermines Ms. Finneman’s explanation that the “No Current Records Exist” message appears in all sections of a revalidation application where the supplier makes no changes. Petitioner points out that both records contain his demographic information and apparently identical contact information, but do not indicate that “No Current Records Exist” with respect to his demographic and contact information. He contends that because neither his demographic information nor the contact information changed, each section should indicate “No Current Records Exist.” P. Post-Hrg Br. at 5-6; *see also Foo*, DAB No. 2769 at 13 (discussing the similarities in the contact information provided in the February 2010 and May 2014 PECOS records). I observe there are subtle differences in the contact information reported in the two applications.¹² Based on those differences, it is clear that Petitioner *did* make changes to the contact information field in his May 2014 application, which explains why that field does not contain a “No Current Records Exist” message. Second, the “demographic” information Petitioner references is static information that would not be expected to change (i.e., Social Security Number, date of birth, place of birth) with each successive enrollment application.¹³ Therefore, the lack of a “No Current Records Exist” message in

¹² For example, the February 2010 application lists “4348 WAIALAE AVE 5-311,” whereas the May 2014 application lists “4348 Waialae Ave *Unit* 5-311.” CMS Exs. 9 at 2 (emphasis added); 11 at 4.

¹³ This would explain why the February 2010 PECOS report and the May 2014 ARD report do not contain the same “Web Tracking ID” or “PAC ID.” CMS Exs. 9 at 1; 11 at 2.

the demographic information and contact information fields gives no reason to doubt Ms. Finneman's testimony concerning the presence of that message in many other fields in the May 2014 ARD report.

Petitioner also unpersuasively argues that purported discrepancies in the format and information contained in the May 2014 ARD report and the returned July 2015 application discredit Ms. Finneman's explanation of the "No Current Records Exist" entry in the May 2014 ARD report.¹⁴ Petitioner discusses that information he provided in his July 2015 application is not included in the May 2014 ARD report. P. Pre-Hearing Br. at 16. Ms. Finneman persuasively explained that the July 2015 application contains more detailed information because Petitioner inputted all of that information into the application. Tr. at 104. Ms. Finneman further explained that because Noridian rejected this application and returned it to Petitioner without updating his PECOS record, Petitioner's enrollment record was not updated based on this information. Tr. at 103-104. Any differences between the May 2014 ARD report submitted by CMS (CMS Ex. 9) and the July 2015 application submitted by Petitioner (P. Ex. 17) are due to the fact that they are dissimilar documents; one is a *report* based on an approved application, and the other is Petitioner's copy of his *application*.

Finally, Petitioner argues that the practice of not retaining data from rejected applications "is further evidence of the lack of reliability of PECOS records." P. Br. at 10. Petitioner alleges that, as a result, "information submitted by providers or suppliers apparently can be disregarded and not automatically added to their enrollment records." P. Reply at 10. Noridian determined that the July 2015 application should be rejected and returned pursuant to MPIM § 15.8.1.A (because it had been submitted while a re-enrollment bar was in effect), and it notified both Petitioner and Mr. Wahl of such; pursuant to section 15.8.1.A of the MPIM, Noridian did not update Petitioner's enrollment record after it received the July 2015 application. Petitioner's allegation that Noridian's processing of the July 2015 application evidences unreliability by PECOS is without merit.

¹⁴ Likewise, Petitioner alleges that there are purported discrepancies between the format and information contained in February 2010 ARD report and the January 2016 PECOS record. P. Br. at 5. Petitioner is comparing dissimilar documents; one document, furnished by CMS, is a February 2010 ARD report for a then-current Medicare enrollment; the other document is a Petitioner-accessed summary of his revoked Medicare enrollment record. *Compare* CMS Ex. 13 *with* P. Ex. 18. As Ms. Finneman explained, "an enrollment record is generated using . . . approved application data." CMS Ex. 13 at 3.

The DAB expressed concern that section 4 (practice location information) of Petitioner's January 2016 enrollment record (P. Ex. 18) "showed the 'no data provided' message," and further discussed that it "would expect to see a similar message in the January 2016 PECOS records for the category for 'medical record storage facility records,'" yet "neither the July 2015 screenshot, nor the January 2016 PECOS records, shows such a message, and the field for the medical storage facilities remains populated with ASC addresses." *Foo*, DAB No. 2769 at 12-13. The January 2016 PECOS record is an enrollment record, which Ms. Finneman explained would be "generated using . . . approved application data." CMS Ex. 13 at 3. Therefore, the January 2016 PECOS record would report the approved data from Petitioner's enrollment applications, to include all approved medical storage facility addresses dating back to the 2010 application. *Compare* CMS Ex. 11 at 3-4 *with* P. Ex. 18 at 3. The absence of any practice location information in Section 4 of the January 2016 enrollment record is to be expected; as of January 2016, Petitioner's enrollment had already been revoked because the practice location previously of record had been determined to be a UPS Store; therefore, the enrollment record correctly reported that there was "No Data Provided" for a practice location as of January 2016. P. Ex. 18 at 1.

Ms. Finneman's testimony with respect to how PECOS maintains records is probative and credible, and it is consistent with the evidence of record. *See* CMS Exs. 9, 11; P. Exs. 17, 18. PECOS correctly shows that Petitioner did not report a practice location other than the UPS Store location at any time prior to the March 5 and May 8, 2015 site visits.

3. A site visit contractor was unable to conduct a site visit of Petitioner's practice location on file (i.e., the Waiialae Avenue address) on March 5 and May 8, 2015, because a UPS Store, and not a medical office, is at that location.

On March 5, 2015, a Noridian contractor visited the Waiialae Avenue address, the address Petitioner reported as his practice location, to attempt a "site verification survey." CMS Ex. 7. The contractor determined that the location was a UPS Store. CMS Ex. 7 at 1. At the time of the attempted site verification, the contractor "made calls to the Dr's office," but there was no answer. CMS Ex. 7 at 1. The same contractor re-visited the location on May 8, 2015, and again determined that Petitioner did not have an office at that location. CMS Ex. 6.

Petitioner does not dispute that the Waiialae Avenue address is a UPS Store; he described it as such in his reconsideration request, and both he and Mr. Wahl concede that the Waiialae Avenue address is the location of a UPS Store in their testimony. CMS Ex. 4 at 1; P. Exs. 19 at 9; 21 at 2.

Based on this undisputed evidence, I find that Petitioner's practice location on file (the Waialae Avenue address) is a UPS store, and not a medical office. Therefore, the site visit contractor was unable to conduct a site visit of Petitioner's physical practice location on March 5 and May 8, 2015.

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

As previously discussed, Petitioner concedes that the Waialae Avenue address is a UPS Store, not a practice location, but he argues that he was nonetheless operational to see Medicare beneficiaries.

A supplier is "operational" when the supplier:

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:

Upon on-site review or other reliable evidence, CMS determines that the provider or supplier is . . . :

(i) No longer operational to furnish Medicare-covered items of services.

42 C.F.R. § 424.535(a)(5)(i).

While Petitioner asserts that he provided services at the Hawaii Eye Center, Surgicare of Hawaii, and Hawaii Endoscopy Center, the address he provided as his physical practice location was that of a UPS Store. The regulatory definition of the term "operational" refers to the "qualified physical practice location" of a supplier, 42 C.F.R. § 424.502. The enrollment and revalidation applications request the address of the supplier's physical practice location. CMS Ex. 11 at 3; *see* CMS Ex. 14. Additionally, a supplier must be able to provide documentation of its "practice location" with its enrollment application. 42 C.F.R. § 424.510(d)(2)(ii). CMS may perform on-site inspections to verify that the enrollment information submitted by a supplier is accurate and to

determine compliance with Medicare requirements. 42 C.F.R. § 424.517(a). This means that CMS will inspect the “qualified physical practice location” that has been provided by the supplier and is currently on file with CMS. *See, e.g., CompRehab Wellness Group, Inc.*, DAB No. 2406 at 7-8 (2011).

Because the physical practice location on file with CMS was a UPS Store, and not a private office or medical facility, CMS had a legal basis to revoke Petitioner’s enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)(ii). *See Care Pro Home Health, Inc.*, 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). Because the physical practice location on file with CMS was that of the UPS Store, and because it is not disputed that Petitioner was not operational at the UPS Store location on the dates of the attempted site visits, CMS had a legal basis to revoke Petitioner’s enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)(i).

5. Petitioner has not demonstrated that CMS or its contractor lacked the authority to revoke his Medicare enrollment and billing privileges.

Petitioner alleges that “Noridian appears to have taken an overly simplistic, result oriented approach to evaluating Dr. Foo’s 2014 enrollment application” and “this is not how the Medicare enrollment process is supposed to work.” P. Pre-Hearing Br. at 23-24. In fact, Petitioner states that “upon on-site inspection of the 4348 Waiialae Avenue location and ‘discovering’ that it was a UPS store, rather than simply concluding that Dr. Foo was not operational, Noridian should have made an effort to determine whether Dr. Foo was providing services at other locations.” P. Pre-Hearing Br. at 21. Petitioner adds that “[h]ad Noridian made that effort, they would have determined that Dr. Foo was indeed fully operational as a Medicare supplier.” P. Pre-Hearing Br. at 21. Petitioner reiterates this argument in his post-remand briefing. P. Br. at 13-15; P. Reply at 11-14; P. Post-Hrg Reply at 5-7.

Petitioner essentially contends that the administrative burden of demonstrating that a physician practice is operational should be placed on the Medicare contractor. P. Pre-Hearing Br. at 21. As a preliminary matter, I point out that CMS’s determination to revoke a provider or supplier’s enrollment is discretionary, and my review is limited to deciding whether the CMS contractor had a “legal basis” for its action. *Letantia Bussell, M.D.*, DAB No. 2196 at 10 (2008); *see Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2008) (stating if CMS establishes that the regulatory elements necessary for revocation are satisfied, an administrative law judge may not substitute his or her “discretion for that of CMS in determining whether revocation is appropriate under all the circumstances”), *aff’d, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010).

While I am required to decide whether CMS had a legal basis for its revocation of Petitioner's enrollment, I am not required to assess whether CMS could have made additional efforts to identify Petitioner's practice location, and Petitioner has not cited any authority showing CMS had such an *obligation*.¹⁵ Likewise, it is unreasonable to expect that, in the event of a failed site verification inspection, CMS and its contractors will proactively search for physical locations that are not listed on an enrollment application.¹⁶ As Petitioner points out, a purpose of the Medicare site visit verification process is "to reduce fraud and keep 'bad' providers and supplier[s] out of the program." P. Pre-Hearing Br. at 24. To that end, CMS and its contractors place the burden on a physician to correctly provide his or her practice location or locations when completing an application for enrollment or revalidation purposes. The Form CMS-855I clearly instructs a physician to list his or her practice location, and if the physician has more than one practice location, section 4C of the form instructs that "[a]ll locations disclosed on claims forms should be identified in this section as practice locations." CMS Ex. 14 at 16 (copy of Form CMS-855I). Physicians are further instructed to "[c]omplete this section for each of [their] practice locations where [they] render services to Medicare beneficiaries," and "[i]f [they] render services in a hospital and/or other health care facility," they are instructed to "furnish the name and address of the hospital or facility." CMS Ex. 14 at 16. The enrollment application unambiguously informs physicians that they must identify all practice locations. CMS Ex. 14 at 16. Finally, physicians are even afforded an opportunity, in Section 4H, to "[e]xplain any unique circumstances concerning [their] practice locations." CMS Ex. 14 at 20.

Petitioner further argues that "the most reliable evidence relating to [his] practice location are the many hundreds of claims submitted to Medicare over the years, directly to Noridian, with his practice location . . . clearly listed on . . . CMS 1500 claim forms."

¹⁵ Petitioner argues that "Noridian did not appropriately follow" procedures listed in chapter 15 of the MPIM. P. Pre-Hearing Br. at 22; *see also* P. Br. at 13-15; P. Reply at 11-14; P. Post-Hrg Reply at 5-7. Petitioner cites to various provisions, but none require the contractor to further investigate possible physical practice locations. Further, subsection 15.5.4.3.C (Practice Location Information) of the MPIM states that "the contractor shall verify that the address is a physical address" and specifies that "[p]ost office boxes and drop boxes are not acceptable."

¹⁶ I take notice that there are well more than a half million physicians enrolled as suppliers in the Medicare program, and these physicians are also subject to periodic site verification visits. *See* U.S. Dep't of Health & Human Servs., *2016 CMS Statistics*, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Statistics-Reference-Booklet/Downloads/2016_CMS_Stats.pdf (last visited December 15, 2017).

P. Reply at 3; *see also* CMS Ex. 4 at 1; P. Ex. 16 (a redacted Form CMS-1500 (Health Insurance Claim Form) that includes Block 32 (“Service Facility Location Information”). This argument is without merit. Section 4C of the Form CMS-855I states that “[a]ll locations disclosed on claims forms should be identified in this section as practice locations.” CMS Ex. 14 at 16. Moreover, Form CMS-1500, which is aptly titled “Health Insurance Claim Form,” is used for the submission of a “claim for payment from federal funds,” and it does not indicate, on its face or in its accompanying instructions, that it should be used for the purpose of updating enrollment information. *See* Form CMS-1500. The form does not contain any field to allow a supplier to report that he or she is updating enrollment information. Thus, there is no reason for CMS or its contractors to refer to this form to seek information about a supplier’s practice location.¹⁷ Suppliers may submit hundreds, or even thousands, of these claims forms each year, and it would be absurd to expect that each claim reimbursement form should be reviewed for a potential update to *enrollment* information, when a Form CMS-855 exists for that very purpose. *See* P. Reply at 3 (Petitioner’s assertion that he has submitted “many hundreds of claims . . . to Medicare over the years”). Moreover, the representative Form CMS-1500 that Petitioner submitted *includes* the Waiialae Avenue address in Section 33 (“Billing provider info & [phone number]”). P. Ex. 16.

Petitioner argues that “[n]either Noridian nor CMS should be permitted in the context of the 2014 revalidation application to revoke [based] on information that was consistent with its record and raised no issues following the 2010 revalidation process.” P. Br. at 10. In a similar vein, Petitioner notes that other physicians list the Waiialae Avenue address as a primary practice address. P. Br. 12-13. Neither of these arguments calls into question the appropriateness of Petitioner’s revocation. The fact that a site visit contractor did not attempt to visit Petitioner’s practice address of record until March 2015 does not establish “affirmative misconduct” required to even consider estopping CMS from revoking Petitioner’s billing privileges. *US Ultrasound*, DAB No. 2302 at 8 (2010). Similarly, Petitioner provides no authority to support that because other suppliers have apparently used the same UPS Store address as a practice location, that CMS is not authorized to revoke his enrollment. *See* Tr. at 81 (testimony that Noridian ordered the site visit because the Inspector General notified Noridian that the UPS Store was being used as a practice location by Petitioner and others). To the extent either of these points

¹⁷ Indeed, Ms. Finneman testified at the hearing that “[m]ost of the analysts or representatives on the enrollment team do not have access to the claims system nor are they required under CMS enrollment regulations to look up claims. If the provider is verifying and attesting that this is their practice location, they are to do it via their applications and their PECOS record. It’s irrelevant what’s on the claim form.” Tr. at 97-98.

attempt to invoke equitable concerns, I recognize that I do not have equitable jurisdiction. *US Ultrasound*, DAB No. 2302 at 8.

Finally, Petitioner argues that CMS's revocation of his billing privileges is somehow inconsistent with the "intent" of the Medicare enrollment regulations. P. Pre-Hearing Br. 24-25; P. Reply 14-15. Petitioner has not cited any authority that evidences the "intent" of any regulations, and therefore, I need not address this unsupported argument.

V. Conclusion

I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

/s/
Leslie C. Rogall
Administrative Law Judge