

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

AR Testing Corp.,
(PTAN: A300001784),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-15-54

Decision No. CR3741

Date: March 30, 2015

DECISION

Petitioner, AR Testing Corp., is an independent diagnostic testing facility (IDTF) located in Deer Park, New York, that, until recently, was enrolled in the Medicare program. The Centers for Medicare & Medicaid Services (CMS) found that Petitioner is no longer operational and revoked its Medicare supplier number. Petitioner challenged the revocation, and, in a reconsidered determination dated August 8, 2014, the Medicare contractor upheld the revocation. Petitioner appeals and CMS have moved for summary judgment.

For the reasons set forth below, I find that this case presents no genuine dispute of material fact and that CMS is entitled to judgment as a matter of law. I agree that Petitioner did not meet the requirements for an IDTF and was not operational. I therefore grant CMS's motion for summary judgment.

Background

Until February 12, 2014, Petitioner was enrolled in the Medicare program as an IDTF. See 42 C.F.R. § 410.33. In a letter dated March 19, 2014, the Medicare contractor, National Government Services, notified Petitioner that its Medicare privileges were revoked and its provider agreement terminated, effective February 12, 2014. According to the letter, the contractor took this action pursuant to 42 C.F.R. § 424.535(a)(5) because, based on a February 12, 2014 site visit, the business was no longer operational. The letter also claims that the supplier failed to report its change in practice location within 30 days, as required by 42 C.F.R. § 424.535(a)(9).¹ CMS Ex. 2.

Petitioner sought reconsideration. In a reconsidered determination, dated August 8, 2014, the contractor upheld the revocation, concluding that the IDTF was no longer operational and had failed to report, within 30 days, any change of location.² CMS Ex. 5. Petitioner now appeals that determination pursuant to 42 C.F.R. § 424.545.

CMS moved for summary judgment. With its memorandum in support (CMS Br.), it submits 5 exhibits (CMS Exs. 1-5). Petitioner submits it brief (P. Br.) and 12 exhibits (P. Exs. 1-12).

Discussion

CMS is entitled to summary judgment because undisputed evidence establishes that the Petitioner was not operational at its registered practice location, and CMS therefore properly revoked its Medicare enrollment.³

Summary Judgment. To grant summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party and find that the case presents no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 2-3 (2009); *Illinois Knights Templar Home*, DAB No. 2274, at 3-4 (2009), and cases cited therein.

¹ Apparently in error, the letter refers to 42 C.F.R. § 424.516(d)(ii), which governs the obligation of a physician, nonphysician practitioner, and their organizations to report any adverse legal action. The reporting obligations for IDTFs are set forth at 42 C.F.R. § 410.33(g)(2).

² The reconsidered determination also cited the wrong reporting regulation, citing 42 C.F.R. § 424.516(d)(ii) rather than 42 C.F.R. § 410.33(g)(2).

³ I make this one finding of fact/conclusion of law.

Program requirements. Medicare will pay for diagnostic procedures performed by an IDTF. An IDTF may be a fixed location, a mobile entity, or an individual nonphysician practitioner. 42 C.F.R. § 410.33(a)(1). Petitioner here is a mobile IDTF. An IDTF, including a mobile IDTF, must maintain a physical facility on an appropriate site and must permit CMS, including its agents or contractors, to conduct unannounced, on-site inspections to confirm its compliance with IDTF standards. It must be accessible during regular business hours to CMS and beneficiaries and maintain a visible sign posting its normal business hours. 42 C.F.R. §§ 410.33(g)(3), (14). If the IDTF does not meet these (and other) standards, CMS will revoke its billing privileges. 42 C.F.R. §§ 410.33(h), 424.535(a)(5).

CMS may also revoke the IDTF's Medicare enrollment if it finds that the facility is no longer operational to furnish Medicare-covered items or services. 42 C.F.R. § 424.535(a)(5). A supplier is "operational" if it 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 to furnish those items or services. 42 C.F.R. § 424.502.

On February 12, 2014, Petitioner's practice location was 1640 Deer Park Avenue, Deer Park, New York. P. Ex. 12 at 1 (Sokol Decl. ¶ 2).⁴ On that day, Anthony V. Campo, an inspector for the Medicare contractor, went to the 1640 Deer Park address to inspect the facility, arriving at 9:35 a.m. CMS Ex. 1 at 2 (Campo Decl. ¶¶ 1, 2). According to Inspector Campo, he was unable to find a sign identifying the facility and, in fact, was not able to locate the facility at all, even after checking every office in the building. After questioning someone from another office, he obtained the name and telephone number for Scott Sokol, owner of AR Testing. CMS Ex. 1 at 2-3 (Campo Decl. ¶ 3). Later that day, Inspector Campo and Owner Sokol spoke by telephone. CMS Ex. 1 at 3 (Campo Decl. ¶ 6); P. Ex. 12 at 2 (Sokol Decl. ¶ 5-7).

Petitioner concedes that no one was in the facility at 9:35 a.m. on February 12, 2014. According to Owner Sokol, he stopped by 1640 Deer Park Avenue at 7:30 that morning to pick up equipment, but left to go to a medical office in Queens, New York. P. Ex. 12 at 2 (Sokol Decl. ¶ 4-5); Hearing Request at 4 ¶ 19 (conceding "no person was available to see walk-in patients at the time that the unannounced site visit occurred"). Petitioner argues that the business was nevertheless "accessible" during regular business hours because he and his technicians could be contacted by telephone, and the applicable telephone numbers were posted on the facility's sign. P. Ex. 12 at 11 (Sokol Decl. ¶ 44).

⁴ Although the facility was planning a move on March 31, 2014, according to Owner Sokol, the Deer Park location was its practice location at the time Inspector Campo visited. P. Ex. 12 at 5, 6 (Sokol Decl. ¶¶ 22, 26).

Without citation to any authority, Petitioner maintains that a mobile IDTF need not have its location attended and accessible to the general public. P. Br. at 8.

Petitioner's position is not compatible with the regulations. An IDTF must be accessible to CMS and beneficiaries during regular business hours. 42 C.F.R. § 410.33(g)(14). It is not operational if it is not open to the public and properly staffed. 42 C.F.R. § 424.502. Posting a telephone number does not satisfy the requirements that a supplier be open and accessible. *See Complete Home Care*, DAB No. 2525, at 5-6 (2013). Moreover, CMS must be able to conduct *unannounced* on-site inspections (42 C.F.R. § 410.33(g)(14)), which it could not do if required to call facility staff in order to arrange access. *See* 76 Fed. Reg. 5862, 5869 (Feb. 2, 2011) (explaining that unannounced site visits to IDTFs are important to protect against fraud and to ensure that the enrolled supplier remains viable).

CMS also complains that no visible sign was posted, as required by 42 C.F.R. § 410.33(g)(14)(ii). In its request for hearing, Petitioner conceded that "at the time of the visit," construction workers "had very recently taken down AR Testing's sign, and it had not yet been replaced." Hearing Request at 4 ¶ 17. Now, however, Petitioner is less definitive. Without declaring outright that a visible sign was posted, it maintains that "AR Testing had signage on site." P. Br. at 8. It submits undated photographs showing what appear to be temporary signs. One sign, on an exterior door, has the facility name on it. A second sign, next to the door, says that the office hours are Monday through Friday, 9 a.m. to 5 p.m. and "By Appointment."⁵ P. Ex. 11 at 1, 2, 3, 8. Owner Sokol alludes to the signage, without specifically saying that any sign was posted on February 12: "As indicated on AR Testing's signage, AR Testing was available by appointment and could be contacted during regular business hours. Copies of photographs showing a fair and accurate likeness of AR Testing's entrance . . . are annexed as Exhibit 11." P. Ex. 12 at 11 (Sokol Decl. ¶ 44).

Because I must draw all reasonable inferences in the light most favorable to the nonmoving party, I accept, for summary judgment purposes, that the signs submitted as P. Ex. 11 have been posted consistently at the facility's entrance, including on February 12, but I find this not material. The undisputed evidence establishes that the facility was not accessible for inspection during regular business hours and was not operational. These undisputed findings are sufficient to justify revoking its Medicare supplier number. *See Centro Radiologico Rolon, Inc.*, DAB No. 2579, at 7 (2014) (Each violation independently constitutes a basis upon which to sustain revocation).

⁵ I note that the investigator's photograph, taken on February 12, shows a significant amount of snow on the ground, the shrubbery, and the building's roof. CMS Ex. 1 at 8. The snow seems to be missing from Petitioner's photographs. P. Ex. 11 at 1, 2, 3.

Conclusion

Because the undisputed evidence establishes that Petitioner did not meet the requirements for an IDTF and was not operational, CMS properly revoked its Medicare supplier number. I therefore grant CMS's motion for summary judgment.

 /s/
Carolyn Cozad Hughes
Administrative Law Judge