

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Zongli Chang, M.D./Metro Home Visiting Physicians PLLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-1577

Decision No. CR4540

Date: March 3, 2016

**DECISION**

Petitioner, Zongli Chang, M.D. and his medical practice, Metro Home Visiting Physicians PLLC, appeal a December 19, 2014 reconsideration decision. After a review of the full written record, I reverse the determination of the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner’s Medicare enrollment and billing privileges. CMS did not show that Petitioner was noncompliant with Medicare enrollment requirements due to a physician practice location of record that was allegedly not operational.

**I. Case Background and Procedural History**

Petitioner participated in the Medicare program as a “supplier” of services.<sup>1</sup> By letter dated October 24, 2014, Wisconsin Physicians Service (WPS), a Medicare contractor, notified Petitioner that it was revoking Petitioner’s Medicare enrollment and billing privileges effective September 10, 2014, pursuant to 42 C.F.R. § 424.535(a)(5). CMS

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<sup>1</sup> A “supplier” is defined as “a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services under [Title XVIII of the Social Security Act].” 42 U.S.C. § 1395x(d); *see also* 42 C.F.R. § 400.202.

Exhibit (Ex.) 4. The letter stated the contractor conducted two site visits at Petitioner's practice location of record on September 10, 2014 and October 15, 2014, the location did not have signage, there was no activity noted at the practice location, and the premises were vacant and locked. *Id.* at 1. The letter also explained that Petitioner would not be eligible to reapply for enrollment in Medicare for two years from September 10, 2014. *Id.* at 2.

Petitioner requested reconsideration of the initial determination on November 10, 2014, and included five exhibits with his request. CMS Ex. 5. On December 19, 2014, a WPS hearing officer determined that Petitioner's enrollment in the Medicare program was properly revoked. CMS Ex. 6. The reconsidered determination provided Petitioner with appeal rights for review by an Administrative Law Judge. *Id.*

Petitioner then filed a hearing request with the Civil Remedies Division of the Departmental Appeals Board by letter dated February 9, 2015. The case was assigned to me. I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) on March 20, 2015, which required a complete pre-hearing briefing of all issues with supporting evidence, including any motions for summary judgment. In response, CMS filed a motion for summary judgment with a supporting brief (CMS Br.) along with six proposed exhibits (CMS Exs. 1-6). Petitioner filed an opposition to CMS's motion for summary judgment with a supporting brief (P. Br.) and 21 proposed exhibits (P. Exs. 1-21). Petitioner also objected to CMS Exs. 1-3. On June 12, 2015, CMS filed objections to P. Ex. 1 and P. Ex. 2 at 5-11 (CMS Response).

Petitioner submitted affidavits of direct testimony from 23 proposed witnesses, including Dr. Chang, as P. Ex. 2 at 1-4 and P. Exs. 3-21. CMS did not request to cross-examine the witnesses and did not propose any of its own witness testimony. I informed the parties that I would only conduct a hearing if either party submitted affidavits of relevant direct testimony from a witness, and the opposing party wished to cross-examine that witness. Pre-Hearing Order ¶ 10. Because CMS did not seek to cross-examine Petitioner's witnesses, an in-person hearing is not necessary, and I will decide this matter on the full merits of the written record. *Id.* at ¶ 11; *see Marcus Singel, D.P.M.*, DAB No. 2609, at 5-6 (2014).

## **II. Evidentiary Ruling**

Petitioner objected to CMS Exs. 1-3. CMS Ex. 1 is a document titled "ZPIC Recommendation for Revocation," on Cahaba Safeguard Administrators letterhead and dated October 15, 2014, the date of the last site visit to Petitioner's practice location and before WPS's October 24, 2014 initial determination to revoke Petitioner's enrollment and billing privileges. The document identifies the ZPIC (Zone Program Integrity Contractor) contact person and is not signed. The document is a narrative summary of the observations of the four ZPIC investigators from the September 10, 2014 and October

15, 2014 site visits and includes the basis for the ZPIC investigators' recommendation for revocation of Petitioner's Medicare enrollment and billing privileges. Petitioner objects to this exhibit on the grounds that the document is not witness testimony that complies with my Pre-Hearing Order and CMS did not list the ZPIC contact as a witness. P. Br. at 7. Petitioner claims that if I admit the exhibit he would be denied the opportunity to cross-examine its author. P. Br. at 7-8. I overrule Petitioner's objections because the fact that the October 15, 2014 report is unsigned would only potentially affect the weight I may give the document and not its ultimate admissibility. CMS Exhibit 1 was not proffered as sworn written direct testimony and is not subject to cross-examination. Petitioner had the ability to request a subpoena of any related witness pursuant to 42 C.F.R. § 498.58, but he did not do so. Regardless, the primary material facts in the report are not at issue here because Petitioner does not challenge that no one was present at the time of the visits or the absence of exterior signage with Petitioner's name and posted business hours.

Petitioner also objected to the photos contained in CMS Exs. 2 and 3 based on lack of authenticity, lack of foundation, and because the photos are more prejudicial to Petitioner than probative. P. Br. at 7-8. Nonetheless, Petitioner does not specifically dispute that the photos are of Petitioner's practice location at Five Mile Road. I overrule the objections because the photos are relevant to my review and were available to the hearing officer for review prior to the issuance of the December 19, 2014 reconsidered determination. Further, I do not find their inclusion prejudices Petitioner's case. I therefore admit CMS Exs. 1-6 into the record.

CMS objects to P. Ex. 1 and all the photos contained in P. Ex. 2 at 5-11 because they are irrelevant, new evidence that Petitioner did not submit at the reconsideration level, and Petitioner has not stated good cause for why I should admit them now. CMS Response at 1; *see* 42 C.F.R. § 498.56(e). Petitioner's Exhibit 1 contains a copy of an email dated December 23, 2014, from Dr. Chang to a WPS employee, and 13 photos attached to the email. Petitioner claims the photos at Petitioner's Exhibit 1 at 2-4, which are of the Five Mile Run Road practice location at issue, were primarily taken on November 4, 2014, after he moved out of the location. P. Ex. 1 at 1. Petitioner's Exhibit 2 at 5-11 includes photos of the Five Mile Run Road location after Petitioner vacated the premises and also photos of Petitioner's new practice location at Farmington Road. The revocation in this case was premised on the Five Mile Road address and not on whether Petitioner maintained a new practice location at Farmington Road. Therefore I do not find this evidence relevant, so I will sustain CMS's objections. Accordingly, I admit P. Ex. 2 at 1-4 and P. Exs. 3-21 into the record.

### III. Discussion

#### A. Issue

Whether CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner, a physician supplier who primarily conducted house visits, was allegedly not operational during two site visits.

#### B. Findings of Fact and Conclusions of Law

- 1. It is undisputed that Petitioner's practice location was not open to the investigators on September 10 and October 15, 2014, when they attempted to complete site visits.*

Investigators from Cahaba Safeguard Administrators, LLC, a ZPIC, attempted to conduct a site visit of Petitioner's practice location at 32854 Five Mile Road, Livonia, Michigan, to verify Petitioner's compliance with Medicare enrollment requirements on September 10, 2014, and again on October 15, 2014. CMS Ex. 1. At 10:00 a.m. on September 10, 2014, two investigators found the practice location locked and reported that it appeared to be vacant. *Id.* at 2. They reported that they were unable to see any furniture through the glass door. *Id.* They also did not see a sign indicating that Petitioner had an office at the location, and they noted that Petitioner had not posted business hours. *Id.* They took photos of the exterior of the building. CMS Ex. 2 at 1-4. The two investigators returned to Petitioner's practice location at noon the same day and were still unable able to complete the site visit. CMS Ex. 1 at 2. They then took photos of the rear of the building. CMS Ex. 2 at 5. They looked through the back glass door and reported only seeing boxes and a rug with no one inside. *Id.*

On October 15, 2014 at 12:18 p.m., a different pair of ZPIC investigators attempted to conduct a site visit at the same practice location. CMS Ex. 1 at 2. They reported there was no exterior signage with Petitioner's name, there were no lights on inside the location, and they did not see any furniture or activity in the building. *Id.* They reported that both the front and the back doors were locked. *Id.* They saw some cleaning supplies when they looked through the window in the back of the building. *Id.* They took photos of the interior of the building through both the front and back glass doors and photos of the outside of the building. CMS Ex. 3 at 1-7.

The ZPIC investigators determined that based on the unsuccessful site visits, Petitioner was not operational and recommended that CMS revoke Petitioner's Medicare enrollment and billing privileges effective the date of the first site visit. CMS Ex. 1.

**2. *The CMS contractor revoked Petitioner’s Medicare enrollment and billing privileges on the basis that Petitioner’s physician practice location was not operational.***

A supplier in the Medicare program “must be operational to furnish Medicare covered items or services before being granted Medicare billing privileges.” 42 C.F.R. § 424.510(d)(6). CMS is authorized to revoke a supplier’s Medicare billing privileges when the provider is determined not to be in compliance with Medicare enrollment requirements. 42 C.F.R. § 424.535(a). Federal regulations provide for revocation of a provider or supplier’s Medicare billing privileges for a variety of reasons including:

(5) *On-site review.* CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements under statute or regulation to supervise treatment of, or to provide Medicare covered items or services for, Medicare patients. . . .

42 C.F.R. § 424.535(a)(5).

Furthermore, 42 C.F.R. § 424.517 provides that:

(a) CMS reserves the right, when deemed necessary, to perform on-site review of a provider or supplier to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements. Site visits for enrollment purposes do not affect those site visits performed for establishing compliance with conditions of participation. Based upon the results of CMS’s on-site review, the provider may be subject to denial or revocation of Medicare billing privileges as specified in § 424.530 or § 424.535 of this part.

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(2) *Medicare Part B providers.* CMS determines, upon review, that the supplier meets any of the following conditions:

- (i) Is unable to furnish Medicare-covered items or services.
- (ii) Has failed to satisfy any or all of the Medicare enrollment requirements.

After reviewing and evaluating the information Petitioner submitted, the WPS hearing officer issued a reconsidered determination on December 19, 2014, that upheld the revocation based on 42 C.F.R. § 424.525(a)(5). CMS Ex. 6. The hearing officer wrote:

According to our records during the on-site review of the practice location of 32854 Five Mile Rd Livonia, MI 48154 the investigator did not find signage for Metro Home Visiting Physicians PLLC. In the back of the building the only sign found was for DMC University Laboratories. The inside of the building appeared to be vacant with only a few counters and there were some empty boxes near the back door. According to the reconsideration request there is no signs showing the business hours because appointments are scheduled over the phone, however, once the appointment is made there is no way for a patient to know this is where Dr. Chang's office is.

CMS Ex. 6 at 1.

The only basis cited for revocation under 42 C.F.R. § 424.535(a)(5) was that Petitioner was not operational to furnish Medicare covered items or services. CMS Exs. 4 at 1; 6 at 1. There is no allegation, finding, or conclusion that Petitioner failed to satisfy any other Medicare enrollment requirement or failed to furnish Medicare covered items or services as Medicare required. CMS Exs. 4, 6.

***3. CMS did not have a legitimate basis to revoke Petitioner's enrollment and billing privileges because CMS did not show Petitioner, as a physician practice specializing in house call visits, was not operational.***

The regulations define "operational" as follows:

*Operational* means the provider or supplier has a qualified physical practice location, is opened 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 times being rendered***), to furnish these items.

42 C.F.R. § 424.502 (emphasis added).

CMS categorizes its screening of existing suppliers into levels based on the risk for fraud. Medicare Program Integrity Manual (MPIM), CMS Pub. 100-08, ch. 15, § 15.19.2.1, *Screening Categories, Background*. Physicians and their practices are categorized as "limited," the lowest level of risk and screening. *Id.* The CMS enrollment process

allows physicians the ability to explain if they will use an address for administrative purposes. *See, e.g., Alexander Eugene Istomin*, DAB No. 2484, at 5 (2012); Form CMS-855I (07/11), *Medicare Enrollment Application for Physicians and Non-Physician Practitioners* at 19 (“Explain unique circumstances concerning your practice locations or the method by which you render health care services (e.g. you only render services in patients’ homes [house calls only]).”), available at [www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/cms855i.pdf](http://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/cms855i.pdf).

Here, Petitioner admitted that the Five Mile Road practice location, although not vacant, was locked on both those days because he was working at another facility with non-Medicare patients. CMS Ex. 5 at 1, 2; P. Ex. 2 ¶ 11. However, Petitioner— a physician practice that is in a limited risk category for fraud and screening— explained at the reconsideration level<sup>2</sup> (CMS Ex. 5 at 1-2), and persuasively to me now, that the nature of Petitioner’s business was primarily making house calls. Petitioner’s practice name actually reflects this, “Metro Home Visiting Physicians.”

Petitioner specifically acknowledged the practice location was locked “most of the time,” and there was no signage with his name or hours of operation posted as his main service was house calls to Medicare patients with disabilities. CMS Ex. 5. He noted that he only held meetings or treated patients at the office by appointment only, and these appointments and meetings were all scheduled in advance by phone. *Id.* He explained that on both site visit days – September 10 and October 15, 2014 – he was not in the office because he was seeing non-Medicare patients at another facility. *Id.* He further explained that he was conducting business by phone when the site visits occurred. He submitted phone records as documentary evidence in support of this. *Id.* at 4-7. According to Petitioner, the Five Mile Run practice location was not vacant, and he occupied the space during the two site visits. *Id.* at 2. He provided two rent checks as proof. *Id.* at 7-8. According to Petitioner, the office rooms were furnished and were not vacant until he moved from the location around October 31, 2014, to another practice location. *Id.* at 2. He presented a letter he sent his landlord terminating the lease effective the end of October 2014. *Id.* at 9. He claims that there was a desk at the practice location that was visible through the front door. *Id.*

Petitioner also now provides the credible written direct testimony of 21 witnesses, all unchallenged by CMS, attesting that Dr. Chang provided health care related services at the Five Mile Road practice location prior to and after the site visits. P. Exs. 4-21. The witnesses testified that Petitioner rented office space at the Five Mile Road location, Petitioner occupied the practice location for several years prior to the site visits, the office

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<sup>2</sup> No Medicare enrollment application of Petitioner was part of the record, so I was not able to ascertain how Petitioner explained the nature of his medical practice in the application, but he undisputedly presented those explanations at the reconsideration level. CMS Ex. 5 at 1-2.

location was furnished and not vacant, and the witnesses provided dates before and after the two site visits where they met with Dr. Chang at the Five Mile Road practice location. P. Exs. 4-21.

The definition of “operational” requires a physical location to be open to the public, properly staffed, equipped, and stocked to deliver *the type of services the physician is licensed and enrolled to provide*. I am aware of no program requirements that a *physician’s* practice location be open to the public at specific times or have signs identifying the location of the practice or the hours the location is open to the public. The regulations and policies also do not specify requirements that must be satisfied for a physician to be found prepared to submit valid Medicare claims, other than the requirements for licensure, Medicare enrollment, and the ability to deliver covered items or services to a qualified Medicare beneficiary. *See* 42 C.F.R. §§ 410.20, 410.26; MPIM, ch. 15, § 15.4.4.11. I am aware of no evidence suggesting any issue with Petitioner’s license or enrollment status. Further, Petitioner has presented persuasive argument supported by credible evidence of his ability during the period of the two site visits to provide covered services to Medicare beneficiaries considering the nature of his medical practice that specialized in making house calls.

#### **IV. Conclusion**

For the reasons outlined above, I find CMS did not have a legitimate basis to revoke Petitioner’s Medicare enrollment and billing privileges on the grounds that Petitioner was not operational, and I reverse its revocation determination and its imposition of a two-year reenrollment bar upon Petitioner.

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/s/  
Joseph Grow  
Administrative Law Judge