Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert Miles, Jr., D.P.M.
(NPI: 1316924988)
(PTAN: 5W855),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-26

Decision No. CR4674

Date: August 5, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Robert Miles, Jr., D.P.M. (Petitioner or Dr. Miles) because Dr. Miles did not have an operational medical practice at the location on record with CMS. Specifically, the location on record with CMS was a mailbox unit at a United Parcel Service (UPS) Store. Dr. Miles does not contend that he actively provided podiatry services from this location. Thus, CMS properly concluded that Dr. Miles was not operational at that location. I therefore affirm CMS's revocation of Dr. Miles' Medicare enrollment and billing privileges.

I. Background

Dr. Miles is a podiatrist. He does not maintain an office that is open to the public, but rather provides podiatry services at several nursing homes in the New Orleans area. *See, e.g.*, Petitioner's Brief (P. Br.) at 2. Dr. Miles was enrolled as a Medicare supplier of podiatry services, and submitted a revalidation application, using Form CMS-855I, which

he signed on August 8, 2010. CMS Exhibit (Ex.) 5 at 13-45. At section 4C of the revalidation enrollment form,[1] Dr. Miles reported that his physical practice location was 857 Brownswitch Rd. 290, Slidell, Louisiana 70458-5335. CMS Ex. 5 at 28. On or about October 22, 2010, Dr. Miles re-submitted responses to sections 3, 4C, and 15 of the CMS-855I.[2] CMS Ex. 5 at 1-10. In the resubmission, Dr. Miles again certified that his medical practice location was at 857 Brownswitch Rd. #290, Slidell, Louisiana 70458.[3] CMS Ex. 5 at 6.

A CMS contractor visited Petitioner's reported address, 857 Brownswitch Rd. #290, Slidell, Louisiana, on May 8, 2015, to conduct an on-site review. The site visit contractor documented that a UPS Store occupied the street address and that #290 represented a mailbox unit inside the UPS Store. CMS Ex. 2.

By letter dated May 28, 2015, Novitas Solutions (Novitas), a Medicare administrative contractor, informed Dr. Miles of its initial determination to revoke his Medicare billing privileges retroactive to May 8, 2015, and to impose a two-year reenrollment bar. CMS Ex. 1. The letter stated the following, in pertinent part:

> 42 CFR §424.535(a)(5) – On-Site Review – Requirements Not Met
>
> **Upon an on-site review on May 08, 2015 at 2:56 p.m., we determined you are no longer operational at 857 Brownswitch Road, #290, Slidell, LA, 70485-5335 [sic] to furnish Medicare covered items or services. The address for this facility was a business that has P.O. Boxes. The facility is not located at this address.**

CMS Ex. 1 at 1 (emphasis original).

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[1] Section 4C of the enrollment application requests practice location information.

[2] The record does not reveal the reason for the additional submission dated October 22, 2010.

[3] Dr. Miles originally left out a "#" before "290" in the address he provided in his re-validation application. CMS Ex. 5 at 28. In his October 22, 2010 submission, Dr. Miles included it. CMS Ex. 5 at 4, 6. The site visit contractor's report noted that the address was "857 Brownswitch Rd., #290," however, and took a picture that clarifies that "290" was Dr. Miles' mailbox number at the UPS Store. CMS Ex. 2 at 1, 3.

In a letter dated July 14, 2015, Petitioner requested reconsideration of the May 28, 2015 revocation determination. CMS Ex. 3. Petitioner explained that he performs podiatry services only in nursing homes and not in an office setting. *Id*. Petitioner stated that he "mistakenly understood that he could utilize a secure mailing service as his podiatry practice location in order to ensure receipt of all business-related communications, particularly in light of the nature of his travelling practice." CMS Ex. 3 at 1. With his reconsideration request, Petitioner submitted a "revised and corrected" Form CMS-855I. CMS Ex. 3 at 2; *see also* P. Ex. 1 at 8-27.

On August 21, 2015, Novitas issued an unfavorable reconsidered determination. CMS Ex. 4. The reconsidered determination stated the following:

> [Dr. Miles] does not dispute the practice location of 857 Brownswitch Rd, #290, Slidell, LA, 70458-5335 on the PECOS [Provider Enrollment Chain, and Ownership System] file is a post office box. Therefore, the reconsideration is denied and the revocation is upheld.
>
> [Dr. Miles] has not provided evidence to show full compliance with the standards for which [he was] revoked.

CMS Ex. 4 at 2.

Petitioner submitted a hearing request on October 2, 2015. The case was assigned to Administrative Law Judge Carolyn Cozad Hughes. Effective July 15, 2016, the case was reassigned to me. Judge Hughes issued an Acknowledgement and Pre-Hearing Order (Order) dated October 27, 2015, which directed each party to file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Order ¶ 4. The Order also explained that the parties should submit written direct testimony for any witnesses in lieu of in-person direct testimony. Order ¶ 8. Finally, the Order explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Order ¶¶ 9, 10.

In response to the October 27, 2015 Order, CMS filed a brief (CMS Br.), exhibits (CMS Exs. 1-5), and a response to Petitioner's brief (CMS Resp.). Petitioner, through counsel, filed a brief (P. Br.) and one exhibit (P. Ex. 1). Petitioner objected to CMS Ex. 3 on the grounds that it did not include the complete corrected Form CMS-855I, which Petitioner submitted with his reconsideration request. I conclude that Petitioner's objection does

not provide a basis to exclude CMS Ex. 3. However, I accept Petitioner's representation that he submitted a corrected Form CMS-855I with the reconsideration request, dated July 14, 2015, and that the contents of the corrected form are reproduced in P. Ex. 1. I admit the parties' briefs and exhibits into the record.[4]

CMS represented that it did not intend to present any witness testimony; accordingly, it did not submit the written direct testimony of any witness. The parties cross-moved for summary judgment. Counsel for Petitioner stated that, in the event I do not grant summary judgment in Dr. Miles' favor, Dr. Miles wishes to testify at an in-person hearing. P. Br. at 9. However, Petitioner did not submit, in the form of an affidavit or declaration, the complete written direct testimony of Dr. Miles as required by Judge Hughes' Order. *See* Order ¶ 8. Nor did CMS request the opportunity to cross-examine Dr. Miles. Judge Hughes' Order made clear that "[a]n in-person hearing . . . will be necessary **only if a party files admissible, written direct testimony, and the opposing party asks to cross-examine**." Order ¶ 10 (emphasis added). Therefore, because the conditions for an in-person hearing specified in Judge Hughes' Order are not met, I consider the record to be closed and the matter ready for a decision on the merits.

As an in-person hearing to cross-examine witnesses is not necessary, I decide this case based on the written record, and I need not rule on the parties' cross-motions for summary judgment. Moreover, as I explain more fully in finding # 3, below, even if Dr. Miles were to appear before me and verify under oath all the factual assertions in Petitioner's request for reconsideration and brief, there is nevertheless no basis to conclude that CMS exceeded its authority in revoking Dr. Miles' Medicare enrollment and billing privileges.

II. Issue

Whether CMS has a legal basis to revoke Dr. Miles' Medicare enrollment and billing privileges because Dr. Miles was not operational at the practice location on file with CMS.

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[4] In addition to the exhibits offered pursuant to Judge Hughes' Order, Dr. Miles' wife submitted an unsolicited letter to Judge Hughes, which this office received on July 11, 2016. I direct that this letter be entered into the electronic file in this case. I do not treat it as an exhibit, however, for two reasons: first, the letter was not submitted in the form or time frame directed by Judge Hughes' Order; second, the letter does not include any evidence or argument that is relevant to the issue in this case.

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 Analysis[5]

As a podiatrist, Dr. Miles 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 non-operational, 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).

On-site review is addressed in 42 C.F.R. § 424.535(a)(5). Pursuant to subsections 424.535(a)(5)(i) and (ii) CMS may revoke a supplier's Medicare enrollment and billing privileges if CMS determines upon on-site review that the supplier is "[n]o longer operational to furnish Medicare-covered items or services" or that it "fails to satisfy any Medicare enrollment requirement."

1. A CMS contractor attempted to conduct a site visit of Dr. Miles' practice location on May 8, 2015, at the address on file with CMS (857 Brownswitch Rd. #290, Slidell, Louisiana, 70458-5335); however, a UPS Store, and not Dr. Miles' medical office, occupied that location.

On or about August 8, 2010, Dr. Miles completed a revalidation enrollment application using Form CMS-855I. CMS Ex. 5 at 13-45. At section 4C of the revalidation enrollment form, Dr. Miles reported that his practice location was 857 Brownswitch Rd. 290, Slidell, Louisiana 70458-5335. CMS Ex. 5 at 28. Dr. Miles checked a box on the form identifying this location as a "[p]rivate practice office setting." *Id.* In response to the prompt "Date you saw your first Medicare patient at this practice location," Dr. Miles entered "09/30/2002." *Id.* Dr. Miles also listed the 857 Brownswitch Road address as his correspondence address (section 2B) and the address to which remittance notices and

[5] My numbered findings of fact and conclusions of law appear in bold and italics.

special payments should be sent (section 4E). CMS Ex. 5 at 18, 30. On or about October 22, 2010, Dr. Miles re-submitted responses to sections 3, 4C, and 15 of the Form CMS-855I. CMS Ex. 5 at 1-10. In the resubmission, Dr. Miles again certified that his medical practice location was at 857 Brownswitch Rd. #290, Slidell, Louisiana 70458. CMS Ex. 5 at 6.

A CMS contractor visited Petitioner's reported address, 857 Brownswitch Rd. #290, Slidell, Louisiana, on May 8, 2015, to conduct an on-site review. CMS Ex. 2. The site visit contractor documented that the location was a UPS Store and not a medical office. *Id.* Dr. Miles admits that the Brownswitch Road address is "indeed a post office address only, as the May 2015 on-site review determined." CMS Ex. 4 at 2; *see also* P. Br. at 4.

2. CMS had a legal basis to revoke Dr. Miles' Medicare enrollment and billing privileges because Dr. Miles was not operational under 42 C.F.R. § 424.535(a)(5) at the practice location on file with CMS.

Petitioner admits that the 857 Brownswitch Road location is a UPS Store and not a practice location, but argues that he was nonetheless "fully operational" to see patients at various nursing homes. P. Br. at 2.

A supplier is "operational" when 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 (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 or services.

42 C.F.R. § 424.535(a)(5)(i).

The regulatory definition of the term "operational" refers to the "qualified physical practice location" of a supplier. 42 C.F.R. § 424.502. The Medicare enrollment and revalidation applications request the address of the supplier's practice location. *See, e.g.*, CMS Ex. 5 at 6, 28. 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). CMS has explained, "[T]he primary purpose of an unannounced and unscheduled site visit is to ensure that a provider or supplier is operational *at the practice location found on the Medicare enrollment application*." 76 Fed. Reg. 5862, 5870 (February 2, 2011) (emphasis added).

In summary, to determine whether CMS had a legal basis to revoke Dr. Miles' Medicare enrollment and billing privileges, I must answer two questions: 1) What was the practice location address on file with the Medicare contractor on the date of the on-site visit? 2) Was Dr. Miles operational at that address on the date of the on-site visit? *See Care Pro Home Health, Inc.*, DAB No. 2723 at 15 (2016). Here, CMS provided undisputed evidence that Dr. Miles was not operational at the 857 Brownswitch Road address, which was the only practice address Dr. Miles had on file with the Medicare contractor at the time of the May 8, 2015 attempted site visit.

In his reconsideration request, Dr. Miles explained that he does not maintain an office location because he only treats patients who reside in nursing homes. Dr. Miles contends that his practice was at all times "operational" at the nursing home locations. CMS Ex. 3 at 1. With the reconsideration request, dated July 14, 2015, Dr. Miles submitted a "revised and corrected" Form CMS-855I, on which he listed as practice locations the names and addresses of seven nursing homes at which he treats patients. P. Ex. 1 at 17-23. The fact that Dr. Miles submitted the nursing home addresses to the CMS contractor in July 2015 does not negate the conclusion that he was not "operational" at the Brownswitch Road address on file as of May 8, 2015, because a UPS Store is located at that address.

Therefore, I conclude that CMS had a legal basis to revoke Dr. Miles' enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5)(i).

3. Neither Dr. Miles' factual representations nor his legal arguments provide a basis to reverse the revocation.

Although Petitioner did not submit Dr. Miles' testimony in the form of an affidavit or declaration, for purposes of this decision I accept that Dr. Miles would testify to the

following facts asserted in Petitioner's brief. Dr. Miles never represented to the public (i.e. Medicare beneficiaries) that the UPS Store was his practice address.[6] P. Br. at 2. Dr. Miles entered the UPS Store address on his revalidation application based on advice from a Novitas employee. P. Br. at 3. Dr. Miles has been a Medicare supplier in good standing since 1998, and has never previously been the subject of any adverse action by Medicare or the Office of Inspector General. P. Br. at 2. Dr. Miles has devoted his practice to treating underserved populations, such as nursing home residents and homeless veterans. *Id.* Dr. Miles has submitted his Medicare claims with the appropriate place of service codes, indicating that his services were provided in nursing facilities. P. Br. at 2-3. Petitioner argues that, because Dr. Miles' Medicare claims had proper place of service codes, "Medicare has been expressly aware of Dr. Miles' mobile practice for over fifteen years." P. Br. at 3. Petitioner argues that CMS should have afforded Dr. Miles the opportunity to cure his noncompliance before revoking his Medicare enrollment and billing privileges. P. Br. at 7. Petitioner further argues that revoking Dr. Miles' enrollment and billing privileges and barring him from reenrollment for two years is an unduly "harsh and arbitrary" penalty for a "minor technical error." P. Br. at 3. Petitioner requests, as an alternative remedy, that I reduce the re-enrollment bar imposed by CMS from two years to one year. P. Br. at 8. None of these assertions or arguments is a basis to reverse the revocation of Dr. Miles' Medicare enrollment and billing privileges.

Petitioner's brief raises for the first time the suggestion that a Novitas employee informed Dr. Miles that he was permitted to report the UPS Store address as his practice location when filling out the Form CMS- 855I. The brief provides no details regarding the alleged contact between Dr. Miles and the Novitas employee, nor has Petitioner offered any documentary evidence of such a contact. However, even assuming Dr. Miles received incorrect information from a Novitas employee, this would not be a basis to set aside the revocation. The contention that Dr. Miles relied on incorrect information from a government contractor appears to raise a claim of equitable estoppel. Whether the government can ever be estopped from enforcing valid regulations based on the misrepresentations of government employees or their agents is highly questionable. *See Heckler v. Cmty. Health Servs. of Crawford Cnty.*, 467 U.S. 51, 63 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981). In any event, on the present facts, I would find that Dr. Miles could not reasonably rely on the alleged advice, because, as discussed below, the instructions on the Form CMS-855I explicitly prohibit reporting a post office box as a practice location. *See, e.g.*, CMS Ex. 5 at 27.

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[6] Of course, as discussed above, it is undisputed that Dr. Miles represented to CMS and its contractor that his practice location was at 857 Brownswitch Rd. #290, Slidell, Louisiana.

In a further appeal to equity, Dr. Miles suggests, based on his reputation in and contributions to his community, that revocation of his Medicare enrollment and billing privileges is unjust and fails to serve a public purpose. However, CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances. *Letantia Bussell, M.D.*, DAB No. 2196 at 13 (2008). Rather, "the right to review of CMS's determination by an [administrative law judge] serves to determine whether CMS had the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the [administrative law judge's] discretion about whether to revoke." *Id*. (citation omitted) (emphasis in original). Once CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review. *See id*. at 10; *see also Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2nd 167 (D. Mass. 2010) (if CMS establishes the regulatory elements necessary for revocation, 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").

By pointing out that his claims have at all times been submitted with proper place of service codes, Petitioner appears to argue that, if CMS or its contractor had pursued additional avenues of inquiry, such inquiry may have revealed the true nature and location of Dr. Miles' practice. While I am required to decide whether CMS had a legal basis to revoke Dr. Miles' enrollment, I am not required to assess whether CMS could have made additional efforts to identify his practice location, and Petitioner has not cited any authority showing CMS had such an obligation. *See Wendell Foo, M.D.*, DAB CR4580 at 8-9 (2016). Moreover, 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. *Id*. at 9. According to CMS statistics for calendar year 2012, there were up to one million physicians providing care to Medicare fee-for-service beneficiaries. *See* U.S. Dept. of Health and Human Services, *2013 CMS Statistics*, at 24, Table II.8, *available at https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Statistics-Reference-Booklet/Downloads/CMS_Stats_2013_final.pdf* (last visited July 28, 2016). I take notice that many, if not most, of these physicians are enrolled as suppliers in the Medicare program and these physicians are also subject to periodic site verification visits. Given the scope and scale of the data collection required to enroll these physician/suppliers, CMS and its contractors reasonably place the burden on the supplier to accurately report the practice location or locations when completing an application for enrollment or revalidation purposes.

To this end, the instructions for completing section 4C of the Form CMS-855I provide as follows:

- Complete this section for each of your practice locations where you render services to Medicare beneficiaries. . . . **If you render services in a hospital and/or other health care facility, furnish the name of that hospital or facility**.
- Each practice location must be a specific street address as recorded by the United States Postal Service. **Do not report a P.O. Box**.
- If you only render services in patients' homes (house calls), you may supply your home address in this section if you do not have an office. In Section 4H, explain that this address is for administrative purposes only and that all services are rendered in patients' homes.
- **If you render services in a retirement or assisted living community, complete this section with the names, telephone numbers and addresses of those communities.**

See, e.g., CMS Ex. 5 at 27 (emphasis added). The instructions further state, "[i]f you or your organization sees patients in more than one practice location, copy and complete this Section 4C for each location." *See id.* at 28. Finally, the form even provides an opportunity, in section 4H, for suppliers to "[e]xplain any unique circumstances concerning [their] practice locations." CMS Ex. 5 at 31. These instructions are not overly "technical" or difficult to understand.

Petitioner argues that CMS or its contractor should have afforded Dr. Miles the opportunity to cure his failure to accurately report his practice location pursuant to 42 C.F.R. § 424.535(a)(1). P. Br. at 7. Petitioner's argument on this point fails for two reasons. First, effective February 3, 2015, CMS deleted from the regulation the language affording providers and suppliers a broad right to submit a corrective action plan (CAP) before CMS would implement a revocation. *See* 79 Fed. Reg. 72,500, 72,532 (December 5, 2014). Second, even under the prior regulatory language, a CAP was not available for revocations imposed pursuant to 42 C.F.R. § 424.535(a)(5).

Petitioner relies on the following language, which formerly appeared in 42 C.F.R. § 424.535(a)(1):

> All providers and suppliers are granted an opportunity to correct the deficient compliance requirement before a final determination to revoke billing privileges, except for those imposed under paragraphs (a)(2), (a)(3), and (a)(5) of this section.

In the Federal Register notice implementing the February 3, 2015 final rule, CMS explained that it was deleting the above-quoted sentence for several reasons, including its view—

> that providers and suppliers generally should not be exonerated from failing to fully comply with Medicare enrollment requirements

> simply by furnishing a CAP, for it is the duty of providers and suppliers to always maintain such compliance.

79 Fed. Reg. at 72,523. The site visit contractor conducted the on-site visit of Dr. Miles' purported practice location on May 8, 2015, and Novitas issued the initial determination revoking Dr. Miles' Medicare enrollment and billing privileges on May 28, 2015. Thus, both actions occurred after the regulatory language had been changed.

Moreover, as Petitioner acknowledges, even under the prior regulatory language, no right to submit a CAP attached to revocations imposed pursuant to 42 C.F.R. § 424.535(a)(5). *See* P. Br. at 7. Nor does Petitioner dispute that CMS revoked Dr. Miles' enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5). *Id.* Petitioner argues, however, that CMS should instead have proceeded against Dr. Miles under 42 C.F.R. § 424.535(a)(4), based on his certification of misleading or false information on his enrollment application. P. Br. at 7. Had CMS done so, Petitioner argues, he would have been entitled to offer a CAP before CMS could proceed to revoke his enrollment and billing privileges. *Id.* This argument, too, is unavailing. It is within CMS's discretion to select the regulation on which it will base a revocation action. As noted above, my authority is limited to determining whether CMS has established a legal and factual basis for the revocation it has imposed. Even if CMS could have established noncompliance based on a different regulation, I do not have authority to substitute my judgment for that of CMS and direct revocation on a basis other than what CMS has imposed.

Finally, in regard to Dr. Miles' assertion that CMS's reenrollment bar is too lengthy, I do not have the authority to consider this issue. *See Vijendra Dave, M.D.*, DAB No. 2672 at 8-11 (2016).

V. Conclusion

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

/s/
Leslie A. Weyn
Administrative Law Judge