

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Fullerton Chest & Critical Care, Inc.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-131

Decision No. CR4887

Date: July 10, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare enrollment and billing privileges of Fullerton Chest and Critical Care, Inc. (Petitioner), which is a group practice solely owned and operated by Farhan Khabaz, M.D. (Dr. Khabaz), because Petitioner's practice location on file with CMS was not operational under 42 C.F.R. § 424.535(a)(5). Petitioner requested a hearing before an administrative law judge (ALJ) to dispute the revocation. Because Petitioner did not provide CMS with the locations where Dr. Khabaz rendered services to Medicare beneficiaries and instead provided an address to a United Parcel Service (UPS) store where Petitioner receives mail, I affirm CMS's determination to revoke Petitioner's Medicare billing privileges because Petitioner's practice location on file with CMS was not operational.

I. Background

Petitioner is a group practice owned by Dr. Khabaz, which has been enrolled as a supplier in the Medicare program since 2007. The address that Petitioner provided to CMS as its practice location was 1038 E. Bastanchury Rd, Ste 206, Fullerton, CA 92835-2786. Petitioner Exhibit (P. Ex.) B at 1 at 1.

In a May 26, 2016 initial determination, a CMS administrative contractor revoked Petitioner's Medicare enrollment and billing privileges. The CMS administrative

contractor established a retroactive revocation effective date of February 24, 2016, and barred Petitioner from reenrollment in the Medicare program for two years. The reasons for the revocation were the following:

42 CFR §424.535(a)(5) - On Site Review/Other Reliable Evidence that Requirements Not Met

You are no longer operational to furnish Medicare covered items or services. A site visit conducted on February 24, 2016 at 1038 E. Bastanchury Rd. Ste. 206, Fullerton, CA 92835-2786 confirmed that you are non-operational.

42 CFR §424.535(a)(9) – Failure to Report Changes

You are no longer operational to furnish Medicare covered items or services. A site visit conducted on February 24, 2016 at 1038 E. Bastanchury Rd. Ste. 206, Fullerton, CA 92835-2786 confirmed that you are non-operational. You did not notify the Centers for Medicare & Medicaid Services of this change of practice location as required under 42 CFR §424.516.

CMS Ex. 3.

On June 7, 2016, Petitioner submitted a Corrective Action Plan; however, on June 24, 2017, the CMS administrative contractor informed Petitioner that it was not eligible to file such a plan, but could seek reconsideration of the revocation determination. CMS Ex. 4; P. Ex. L.

On June 30, 2016, Petitioner requested that the CMS administrative contractor reconsider the revocation. Relevant to this case, Petitioner stated the following:

Fullerton Chest has been an enrolled Medicare provider since 2007. In 2014 a revalidation of information was requested, submitted and approved [in] March 2015. In May 2016, we received a letter stating billing privileges have been suspended effective 2/2016, due to failure to notify Medicare of changes. The revalidation that was submitted showed 1038 E. Bastanchury Road Suite 206 as a practice location and a correspondence address. This was an error of the receptionist. . . . Dr. Farhan Khabaz, d/b/a Fullerton Chest Critical Care Inc. is a hospital based provider who has always only received correspondence at this location. He furnishes

care to Medicare patients at the hospitals of St. Jude and Kindred Brea and Santa Ana. . . . Please accept this letter as a request for forgiveness and to allow me to correct the information and the provider [to] continue to render services to Medicare patients. . . . I was unaware of this misinformation on my application and as you can see [through] my billing, all places of location have been hospitals and facilities only.

CMS Ex. 5 at 1.

On September 27, 2016, a hearing officer with the CMS administrative contractor issued an unfavorable determination that stated:

The provider revalidated his enrollment information with the 855I application received December 22, 2014. Under section 4C practice location the address listed is 1038 E Bastanchury Rd. Ste., 206 Fullerton CA 92835-2786. This address is listed with an effective date of October 15, 2007 and is listed as a group practice office/clinic. **The instructions included for this section is to list each location you or your organization sees patients and to copy and complete this section[] if patients are seen in more than one practice location.**

The on-site performed confirmed that the address given is not a valid practice location therefore making the provider non-operational to perform Medicare services at that location. There are no submitted applications notifying Medicare of a change in practice location.

The revocation will be upheld and the provider may attempt to enroll into the Medicare program at the end of the enrollment bar period.

DECISION: Farhan Khabaz MD had not provided evidence to show full compliance with the standards for which you were revoked. Therefore, Noridian Healthcare Solutions is not granting you access to the Medicare Trust Fund (by way or issuance) of a Medicare number.

CMS Ex. 6 at 1-2 (emphasis added).

On November 23, 2016, Petitioner requested a hearing. In the hearing request, Petitioner asserted that the address located at 1038 Bastanchury Road, #206, Fullerton, California 92385-2786 (“the Bastanchury address”), is a mailing address. CMS Ex. 1 at 9.

Petitioner also stated that the CMS administrative contractor responsible for Petitioner’s Medicare enrollment in 2007 and updating Petitioner’s enrollment information in 2012 had “provided confirmation of acceptance of the use of this address[,]” and did not alert Petitioner “of any problem with using the Bastanchury address.” CMS Ex. 1 at 9-10.

Further, Petitioner asserted that the “Bastanchury address was listed as a practice location due to a misunderstanding by [Petitioner] and its staff regarding what was to be listed as the practice address[.]” CMS Ex. 1 at 10. Finally, Petitioner asserted that the errors were “ministerial/clerical errors, rather than intentional errors.” CMS Ex. 1 at 14.

On December 15, 2016, I issued an Acknowledgement and Pre-hearing Order (Order). In response to the Order, CMS filed a motion for summary judgment and a pre-hearing brief (CMS Br.), and six proposed exhibits (CMS Exs. 1-6). Petitioner filed an opposition to CMS’s motion for summary judgment and a pre-hearing brief (P. Br.), and sixteen proposed exhibits (P. Exs. A-P).

II. Decision on the Record

Petitioner did not object to any of CMS’s proposed exhibits and CMS did not object to any of Petitioner’s proposed exhibits. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e). Therefore, I admit CMS Exs. 1-6 and P. Exs. A-P into the record.

The Order stated that if a party wanted to present a witness, it needed to submit the written direct testimony for that witness with its proposed exhibits. Order ¶ 8. The Order also stated that if the opposing party wanted to cross-examine a witness, it must affirmatively request an opportunity to do so. Order ¶ 9. Finally, the Order stated that in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶ 10; CRDP § 16(b). Because neither CMS nor Petitioner submitted written direct testimony for any witness, there is no reason for me to hold an in-person hearing in this case. Therefore, I decide this case based on the written record. Order ¶¶ 10-11; CRDP § 19(b), (d). Because I can decide this case on the written record, I deny CMS’s motion for summary judgment.

III. Issue

Whether CMS had a legal basis to revoke Petitioner’s enrollment and billing privileges.

IV. Jurisdiction

I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

V. Findings of Fact, Conclusions of Law, and Analysis

My numbered findings of fact and conclusions of law are set forth below in italics and bold.

The Secretary of Health and Human Services (Secretary) has the authority to create regulations that establish enrollment standards for providers and suppliers. 42 U.S.C. § 1395cc(j). The Secretary promulgated regulations that require prospective providers and suppliers to file an enrollment application with CMS and meet certain requirements in order to receive Medicare billing privileges. 42 C.F.R. §§ 424.500, 424.505, 424.510, 424.530. Further, enrolled providers and suppliers must periodically revalidate their enrollment information with CMS and must report to CMS changes in information provided on their enrollment application. 42 C.F.R. §§ 424.515, 424.516. In its discretion, CMS may conduct a site visit to determine whether a provider or supplier meets Medicare enrollment requirements. 42 C.F.R. § 424.517. Finally, the Secretary's regulations provide that if an enrolled provider or supplier is not in compliance with enrollment requirements or other rules related to providers and suppliers, then CMS may revoke that provider's or supplier's Medicare billing privileges. 42 C.F.R. § 424.535.

1. ***Petitioner enrolled in the Medicare program as a physician and informed CMS that his practice location was at 1038 Bastanchury Road, #206, Fullerton, California 92385-2786; however, Petitioner actually rendered services to Medicare beneficiaries at various locations, and a site inspection of the address Petitioner provided to CMS as his practice location, revealed that the location was a UPS store.***

The material facts in this case are undisputed. As indicated above, Petitioner is a physician practice group, which enrolled in the Medicare program as a supplier in 2007. P. Br. at 3; P. Ex. B. at 1. On or about October 2007, Petitioner began using an address at 1038 Bastanchury Road, #206, Fullerton, California 92385-2786 ("the Bastanchury address") as a mailing address. P. Br. at 4. Petitioner's staff listed the Bastanchury address as a practice location even though Petitioner does not see patients at this location. P. Br. at 4.

On December 1, 2014, Petitioner submitted a CMS-855I enrollment application to revalidate its Medicare enrollment. *See* CMS Ex. 1 at 24-52. At the time of revalidation, Petitioner's practice location on file with CMS was the Bastanchury address. CMS Ex. 1 at 41; *see also* CMS Ex. 5 at 1. On January 14, 2015, the CMS administrative contractor reviewed the CMS-855I enrollment application and sent an email to Ms. Lobna Anaim, a credentialing specialist and agent of Dr. Khabaz and Fullerton Chest & Critical Care, Inc., acknowledging receipt of the application. CMS Ex. 1 at 10-11, 64 -65. The email also requested that Petitioner revise and resubmit portions of the application namely, Section 2 (Identifying Information), Section 4 (Practice Location Information), Section

15 (Certification Statement), and supporting documents (Copy of DEA Certification). CMS Ex. 1 at 65. On January 27, 2015, Petitioner resubmitted some of the requested information namely Section 2, in which Petitioner indicated the Bastanchury address, as a correspondence address, and Section 15. CMS Ex. 1 at 68-69. The CMS administrative contractor made additional requested revisions regarding supporting documents for the CMS-855I. CMS Ex. 1 at 71, 74-75. On March 2, 2015, the CMS administrative contractor approved Petitioner's revalidated Medicare enrollment application. CMS Ex. 1 at 86-87. The notification letter informed Petitioner of the requirement to submit updates and changes to Petitioner's "enrollment information in accordance with specified timeframes pursuant to 42 CFR § 424.516." CMS Ex. 1 at 87. The notification letter stated that reportable changes included a change in practice location. CMS Ex. 1 at 87.

On February 24, 2016, at approximately 12:30 p.m., an inspector with the CMS administrative contractor attempted an on-site inspection of Petitioner's practice location on file with CMS: 1038 Bastanchury Road, #206, Fullerton, California 92385-2786. The site inspector found the practice location to be a UPS Store and, on the site verification form, noted that the facility was a "Commercial Mailbox." CMS Ex. 2. The inspector took photographs of the UPS store. CMS Ex. 2 at 2.

Petitioner admits that the "Bastanchury address is a mailing address only and is not truly a practice location." P. Br. at 7. Petitioner admits that Dr. Khabaz and Fullerton Chest & Critical Care, Inc. provide medical care at various locations including Kindred Hospital in Brea, California, which is located at 875 N. Brea Boulevard, Brea, California 92821-2606. P. Br. at 3.

Therefore, I find that Petitioner's practice location on record with CMS was a correspondence address for Petitioner, but was not a location at which Petitioner provided services.

2. CMS had a legitimate reason to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5)(i) because the address that Petitioner identified as his practice location was not operational.

CMS had a legal basis to revoke Petitioner's enrollment and billing privileges, in accordance with 42 C.F.R. § 424.535(a)(5), because (1) the Bastanchury address was the practice location on file with the CMS administrative contractor on the date of the on-site visit, and (2) Petitioner was not operational at the Bastanchury address on the date of the on-site visit. CMS may revoke a supplier if, upon an on-site review, CMS determines that the provider or supplier is no longer operational to furnish Medicare-covered items or services. 42 C.F.R. § 424.535(a)(5)(i). The term "operational" means:

the provider or 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 (*definition of Operational*). In order “[t]o be ‘operational’ in accordance with the definition in section 424.502, a provider [or supplier], among other things, must have a ‘qualified physical practice location’ that is ‘open to the public for the purpose of providing health care related services.’” *Viora Home Health, Inc.*, DAB No. 2690 at 7 (2016). A provider’s or supplier’s qualified physical practice location is the provider’s or supplier’s address that is on file with CMS at the time of a site visit. *Foot Specialists of Northridge*, DAB No. 2773 at 8-10 (2017).

In the present case, it is undisputed that the site inspector attempted to conduct a site visit at the address that Petitioner provided for Dr. Khabaz’s practice location, the Bastanchury address. Further, it is undisputed that the address was for a UPS store, and therefore, was not a location that “is open to the public for the purpose of providing health care related services.” 42 C.F.R. § 424.502 (definition of Operational).

Although Petitioner does not dispute that Dr. Khabaz or his staff indicated a UPS store as his practice location, Petitioner makes three main arguments against the revocation of Petitioner’s Medicare billing privileges.¹ Petitioner argues that it was deprived of its right to correct the practice location by submitting a CAP, as provided in 42 C.F.R. § 424.525(a)(i). *See* P. Br. at 9-11. Further, Petitioner argues that the Bastanchury address was submitted as a practice location in error and that it made at least two attempts to correct the error as soon as it became aware of the error. P. Br. at 11. Finally, Petitioner makes a “good cause” argument that there was no intent to defraud or deceive Medicare, it was an honest mistake, and that Petitioner has lost income since February 2016 and will continue to lose income as a consequence of the revocation. P. Br. at 13.

I conclude that the CMS-855I enrollment application is clear that the practice locations that must be disclosed are ones where Petitioner actually renders services to Medicare

¹ It appears that Petitioner relied on CMS’s prior approvals of Petitioner’s status as a supplier. Although Petitioner asserts that a previous CMS administrative contractor, Palmetto GBA, did not notify it “of any problem with using the Bastanchury address[,]” *see* CMS Ex. 1 at 10, my decision is limited to the facts regarding Petitioner’s December 1, 2014, CMS-855I enrollment application to revalidate its Medicare enrollment with the new CMS administrative contractor, Noridian. Moreover, the CMS-855I enrollment application is very clear about the information that suppliers must provide to comply with Medicare enrollment requirements.

beneficiaries, and not where administrative functions take place. It is also clear that the names and addresses for each health care facility must be provided. The regulations require providers and suppliers to “submit enrollment information on the applicable enrollment application” that is truthful and complete and submit all documents required by CMS, which may include the “practice location.” 42 C.F.R. § 424.510(a)(1), (d)(1), (2). As discussed, the CMS-855I explains that a practice location is where the supplier actually provides services to Medicare beneficiaries and then lists options for the type of location where the services are provided, such as a hospital. This is consistent with the definition of the term “operational” in the regulations, which requires a supplier’s qualified practice location to be open to the public for the purpose of providing health care related services. 42 C.F.R. § 424.502.

Petitioner’s decision to indicate that a UPS store was a “Group practice office/clinic” on the CMS-855I was not reasonable. CMS Ex. 1 at 41. The CMS administrative contractor provided Petitioner with ample opportunity to correct this alleged error, during the Medicare enrollment revalidation process, when the contractor sent an e-mail to Ms. Anaim, requesting revisions to sections of the application, including Section 4 (Practice Location Information). *See* CMS Ex. 1 at 10-11, 64 -65. Because Petitioner identified a UPS store as Dr. Khabaz’s practice location, CMS properly determined that the practice location that CMS had on file for Petitioner was not operational.

In regard to the denial of the CAP, CMS correctly notes, under 42 C.F.R. § 405.809(a)(1), a provider or supplier may only file a CAP if it is revoked for failing to meet enrollment requirements. *See* CMS Br. at 4 n.1; 42 C.F.R. § 424.535(a)(1). Here, Petitioner was revoked for failing to be operational under 42 C.F.R. § 424.535(a)(5). Accordingly, Petitioner was not permitted to file a CAP, and, in any event, there is no ALJ review for a denial of a CAP. *See* 42 C.F.R. § 405.809(b)(2).

Further, CMS’s decision to revoke Petitioner’s Medicare billing privileges does not, as Petitioner argues, subvert the intent and purpose of the law, *see* P. Br. at 11-12, because the facts show that CMS had a legal basis for the revocation because Petitioner was not operational in accordance with 42 C.F.R. § 424.502.

With respect to Petitioner’s good cause or equitable arguments, “CMS’s determination to revoke a provider or supplier’s enrollment is discretionary,” and I am limited to determining whether CMS had legal basis for its action. *See Wendell M. Foo*, DAB CR4580 at 8 (2016). The burden is on the supplier to demonstrate that it is operational. *See id.* at 8-9. The facts show that CMS had a legal basis to revoke Petitioner’s enrollment and billing privileges in accordance with 42 C.F.R. § 424.535(a)(5). The facts show that Petitioner never complied with the requirement to have a practice location on file with Medicare. Petitioner or Petitioner’s agent should have been more diligent in completing the enrollment application. The CMS-855I enrollment application unambiguously informs suppliers to identify all practice locations and even provides

suppliers an opportunity, in Section 4H, to explain unique circumstances concerning their practice locations or methods of rendering healthcare services. *See* CMS Ex. at 44; *see also Wendell M. Foo*, DAB CR4580 at 9 (noting that “[t]he enrollment application unambiguously informs physicians that it is necessary to identify all practice locations.”)

Petitioner asserts that a previous CMS administrative contractor told it to use its contact address as its practice location address and that Petitioner simply complied with those instructions. However, I am without authority to grant equitable relief. It is well-established that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. *See, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hosp.*, DAB No. 2183 at 16 (2008); *Wade Pediatrics*, DAB No. 2153 at 22 n.9 (2008), *aff’d*, 567 F.3d 1202 (10th Cir. 2009); *U.S. Ultrasound*, DAB No. 2303 at 8 (2010). Petitioner has not provided evidence of affirmative misconduct by CMS or its administrative contractor. Therefore, I must reject Petitioner’s equitable estoppel argument.

3. *I need not decide whether Petitioner violated 42 C.F.R. § 424.535(a)(9).*

As indicated above, the initial determination also stated that Petitioner violated 42 C.F.R. § 424.535(a)(9). However, because I have concluded that Petitioner violated 42 C.F.R. § 424.535(a)(5), I do not need to decide whether Petitioner violated 42 C.F.R. § 424.535(a)(9). A violation of 42 C.F.R. § 424.535(a)(5) is sufficient to uphold the revocation and the retroactive effective date of the revocation.

VI. Conclusion

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

/s/
Scott Anderson
Administrative Law Judge