

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Pravin Rajakumar,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-4189

Decision No. CR4498

Date: December 31, 2015

DECISION

I sustain the determination of a Medicare contractor, acting on behalf of the Centers for Medicare & Medicaid Services, to revoke the Medicare billing privileges of Petitioner, Pravin Rajakumar, a podiatrist, effective August 7, 2014.

I. Background

CMS offered 17 exhibits, identified as CMS Ex. 1-CMS Ex. 17, in support of its arguments. Petitioner offered six exhibits, identified as P. Ex. 1-P. Ex.6 , in opposition. CMS objected to my receiving three of Petitioner's proposed exhibits, P. Ex. 4-P. Ex. 6, into the record. It objected to P. Ex. 4 and P. Ex. 6 on the grounds that these were documents that Petitioner had not submitted at reconsideration and that Petitioner had not shown good cause for offering them now. It objected to P. Ex. 5, which contains the written direct testimony of Mr. Pyong Yun, on the ground that it is irrelevant.

I receive CMS Ex. 1-CMS Ex. 17 into the record. I also receive P. Ex. 1-P. Ex. 3, and P. Ex. 5. I sustain CMS's objections to my receiving P. Ex. 4 and P. Ex. 6. Petitioner offered these exhibits for the first time at this hearing and has made no

showing of good cause for his failure to submit them at reconsideration. 42 C.F.R. § 498.56(e). I overrule CMS's objection to my receiving Mr. Yun's testimony (P. Ex. 5). I find Mr. Yun's testimony to be relevant. However, and for reasons that I explain below, his testimony does not support an outcome that is favorable to Petitioner.

On October 31, 2014, National Government Services, a Medicare contractor, notified Petitioner that his Medicare billing privileges were being revoked effective August 7, 2014. The basis for the revocation was that Petitioner was "no longer operational" to provide covered Medicare services at several practice locations that he had listed on his application for Medicare participation. 42 C.F.R. § 424.535(a)(5). The revocation notice provided additional information to Petitioner, citing on-site visits that inspectors had made between August 7 and August 14, 2014 to several of Petitioner's purported practice locations and noting that Petitioner did not maintain a practice at any of these addresses. CMS Ex. 4 at 1-2.

Petitioner filed a request for reconsideration on July 1, 2015.¹ CMS Ex. 2. In his request Petitioner acknowledged that he was no longer operational at four of the five practice sites that had been cited in the initial determination to revoke his Medicare billing privileges. He contended that at a fifth location, 136-69 41st Avenue, Flushing, NY, 11355, he was fully operational but that he only worked there on a part-time basis consisting of one or two days a week. These days, he alleged, were Wednesdays and some Fridays. He also contended that he practiced at an additional location not named in the initial determination. *Id.*

On July 31, 2015, the contractor issued a reconsidered determination. CMS Ex. 1. The reconsidered determination affirmed the initial determination, stating that Petitioner "had not provided evidence to show full compliance with the standard" for which he was revoked, without citing the specific regulation which was the basis for the initial or reconsidered determination. *Id.*² Petitioner filed his hearing request to challenge the findings of the reconsidered determination.

¹ The Medicare contractor accepted this request as timely and CMS has not argued that the request was invalid due to untimely filing.

² Inexplicably, the contractor issued a separate document on May 10, 2015, which purports to be an initial determination. CMS Ex. 3. That document states, erroneously, that Petitioner's application for Medicare participation was denied because Petitioner had been excluded or debarred from participating in Medicare. Petitioner has not appealed that determination and it is not at issue before me. I note, however, that CMS is not relying on it as grounds for revoking Petitioner's Medicare billing privileges.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether: Petitioner received adequate notice of the reasons for CMS's reconsidered determination; and CMS is authorized to revoke Petitioner's Medicare billing privileges.

B. Findings of Fact and Conclusions of Law

I note, preliminarily, that CMS styled its submission as a motion for summary judgment. I do not need to decide whether the criteria for summary judgment are met here, i.e., that there are no disputed issues of material fact. That is because CMS offered no witness testimony that would give Petitioner a right to cross-examination and because CMS asserts that the testimony of Petitioner's one witness, Mr. Yun, is irrelevant. I infer from CMS's assertion about Mr. Yun's testimony that it has no desire to cross-examine him. Given that, the parties have effectively submitted their cases in writing. That means that there is no need for an in-person hearing.

As a threshold issue CMS has raised the question of whether Petitioner received adequate notice from the Medicare contractor of the reasons for denying his request for reconsideration. I note that Petitioner has made no assertion that the notice was inadequate.

CMS asserts that the reconsidered determination – although it did not cite the specific regulatory ground for revoking Petitioner's billing privileges – provided him with adequate notice of the reasons for doing so. Alternatively, it argues that I have the authority to set forth the regulatory basis for revoking Petitioner's billing privileges as an element of my authority to conduct a *de novo* hearing.

I need not address CMS's alternate argument. The reconsidered determination plainly informed Petitioner of the basis for the revocation. As I recite above, the determination explicitly told Petitioner that he was not in compliance with the standard for which his billing privileges were revoked. CMS Ex. 1. That statement incorporated by reference the grounds stated in the initial determination, which not only cited the regulatory criterion for revocation – 42 C.F.R. § 424.535(a)(5) – but which recited in detail the findings of the inspectors who visited the various sites that Petitioner had listed as his practice locations in his Medicare enrollment application.

As to the merits of this case the evidence establishes that, as of August 7, 2014, Petitioner was no longer operational at the sites that he had listed as his practice locations. Therefore, the contractor and CMS were authorized to revoke Petitioner's Medicare billing privileges.

An "operational" practice location is one in which 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 . . . to furnish these items or services.

42 C.F.R. § 424.502. The sites that Petitioner listed as his practice locations were not operational within this regulation's plain meaning because none of them were "open to the public for the purpose of providing health care related services." The contractor's investigators visited the five locations that Petitioner had alleged as being active practice sites in his application for Medicare participation. Four of them were not offices at which Petitioner was employed. The fifth location revealed no evidence that Petitioner actually maintained a practice there. CMS Ex. 9; CMS Ex. 11-15; CMS Ex. 17.

Petitioner does not dispute any of these findings, with the exception of one location, 136-69 41st Avenue., Flushing, NY, 11355 (the fifth location visited by the inspectors). The inspectors visited this location on August 14, 2014, and found it to be closed. They found no indication of a podiatrist's office at that location. The facility's awning stated that the business at that location was a pharmacy, but the interior was an out of business shoe store. CMS Ex. 2; CMS Ex. 15.

Petitioner argues that he maintained an office suite at the back of the building and that he had an active practice at that location. However, he concedes that there was no sign on the exterior of the facility showing that he practiced there. He contends that there was a sign on the outside of his office with the days and hours of operation of that office. Petitioner's brief at 2. Petitioner also contends that this site was a part-time location at which he worked only on Wednesdays and on certain Fridays. CMS Ex. 2 at 4.

Petitioner offered no evidence in his request for reconsideration that supports any of his contentions that he actually maintained a practice at 136-69 41st Avenue, Flushing. He provided no proof that he rented space there, that he actually worked there, or that he posted signage that accurately stated his hours of operation in a way that would inform the general public of when he would be open for business. I cannot accept his representations as being true in the absence of some evidence to support them. Simply asserting a fact does not establish it to be so absent proof.

As I discuss above, Petitioner had the opportunity to present evidence in his reconsideration request that showed that he actually maintained a practice location. His failure to do so there disqualifies him from now attempting to raise that issue.

However, even if I accepted Petitioner's representations, they are inadequate to establish that he was "operational" at 136-69 41st Avenue, Flushing, within the meaning of 42 C.F.R. § 424.502. By his own admission there was no sign on the exterior of the site that showed that he worked at that location and nothing that would indicate to a member of the public that he maintained a practice there. Having his name and hours of operation on his office door in the interior of a building, where there was nothing on the building's exterior that would indicate the presence of a podiatrist's office is simply not enough to inform the public of Petitioner's practice location. I note also that Petitioner does not deny that there was nothing in the hallway of the building that would inform the public that he maintained a practice at that location. Petitioner also does not deny that the signage on the building's exterior was for a pharmacy that no longer existed. To say the least that sign and the closed pharmacy, without any additional information provided by Petitioner, would be misleading to the general public.

Petitioner argues also that he was rendering services at an additional location – one not visited by the inspectors – at the time of the August inspection of his other purported practice locations. Petitioner's brief at 3. He contends that he had an active practice at 136-39 37th Avenue, Flushing, where he rented space from Mr. Yun. However, Petitioner did not offer evidence in his reconsideration request to prove that assertion. His documentary support – P. Ex. 4 and P. Ex. 6 – consists of evidence that he did not offer at reconsideration and which I have excluded for that reason. Petitioner has offered no explanation for why he did not offer these exhibits at reconsideration. He certainly was aware of their potential relevance because in his reconsideration request he asserted that he maintained an additional practice location at 136-39 37th Avenue, Flushing. But, that assertion notwithstanding, he offered no corroborating evidence.

I have considered Mr. Yun's testimony. P. Ex. 5. At most, it proves that Petitioner leased space at 136-39 37th Avenue, Flushing. It does not prove that he maintained an actual practice there. I do not find that this evidence is sufficient to prove that Petitioner maintained an operational practice at 136-39 37th Avenue, Flushing.

Moreover, even if I were to accept Petitioner's representations as true I would not find that he had informed CMS that he maintained an operational practice as of August 7, 2014. Petitioner did not submit evidence of his practice at 136-39 37th Avenue, Flushing, until August 21, 2014, weeks after the inspections of his other

