

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Pacific Labs, LLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-4176

ALJ Ruling No. 2016-4

Date: December 7, 2015

DISMISSAL

On November 10, 2015, the Centers for Medicare & Medicaid Services (CMS) filed a Motion to Dismiss. On November 19, 2015, Petitioner, Pacific Labs, LLC, filed a response. On December 1, 2015, CMS filed a reply to Petitioner's response to its motion to dismiss (CMS Reply).

By way of background, on September 16, 2015, Petitioner submitted a request for hearing following its receipt of a July 20, 2015 reconsidered determination of Novitas Solutions (Novitas), a Medicare contractor, which determined that Petitioner's Medicare billing privileges would be revoked, effective March 25, 2015. The reconsidered determination followed an initial determination, dated January 12, 2015, and a revised initial determination, dated February 23, 2015. The reasons for revocation listed in the reconsidered determination are that Petitioner violated 42 C.F.R. § 424.535(a)(1) and (a)(10).

CMS filed its pre-hearing exchange on November 5, 2015, at which time it requested that I uphold Petitioner's revocation based on a violation of 42 C.F.R.

§ 424.535(a)(10). While CMS reported in its November 5, 2015 prehearing brief that it had already filed a motion to dismiss and that Novitas had sent Petitioner a letter revising the February 23, 2015 revised initial determination on November 5, 2015, these statements are unsupported by the record. The record before me shows that the aforementioned letter from Novitas was not issued until November 9, 2015, which is four days after CMS filed its prehearing exchange (see Att. 1 to CMS Reply), and the motion to dismiss was not filed until November 10, 2015. The November 9, 2015 letter informed Petitioner that its billing privileges were being revoked based on violations of 42 C.F.R. §§ 424.535(a)(8)(ii) and (a)(10).

While I take notice of CMS's reference in its brief to a letter that was apparently not yet in existence, I must nonetheless consider the effect of this letter which also serves as the basis for CMS's motion to dismiss. Pursuant to 42 C.F.R.

§ 498.70(b), I am authorized to dismiss a request for hearing where the affected party "does not . . . have a right to a hearing." CMS contends that Petitioner no longer has a right to a hearing because the unfavorable reconsidered determination that gave rise to Petitioner's appeal rights has been mooted by the reopened and revised initial determination from Novitas on November 9, 2015. CMS points out that, as it did in this case, it may elect to reopen and revise its initial determination within one year of the date of the initial determination pursuant to 42 C.F.R.

§ 498.30. CMS, in its reply to Petitioner's response to its motion to dismiss, contends that the November 9, 2015 letter "specifically replaces and supersedes the determination letter dated February 23, 2015." CMS Reply at 1. CMS further explains that "there has not been a reconsideration decision issued by CMS, and the [administrative law judge] therefore does not have authority to review the appeal." 42 C.F.R. 498.5(l)(1)-(2); 498.22. CMS Reply at 2.

Petitioner raises concerns about substantive issues contained in the November 9, 2015 letter that revised the basis for revocation of its billing privileges, and CMS appears to agree in part with Petitioner's concerns.¹ However, Petitioner has conceded that the letter is a "second revised initial determination."² P. Response at 1. Petitioner has advanced several substantive disagreements with the revised

¹ Petitioner disputes the effective date of revocation assigned in the November 9, 2015 letter, and CMS appears to be in agreement with this point.

² The November 9, 2015 letter indicates that it is a "revised letter from previous mailing on February 23, 2015, to show corrected revocation reasons." Att. 1 to CMS Reply. While it does not indicate that it is an initial determination or that it "supersedes" the February 23, 2015 determination, the letter contains the reasons for the revocation and addresses the effect of the determination, and also provides Petitioner notice of its right to reconsideration, in compliance with 42 C.F.R. § 498.22.

