

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Wendell Foo, M.D.  
(NPI: 1164457511;  
PTAN: H0000BDNKQ),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-50

Decision No. CR4580

Date: April 8, 2016

**DECISION**

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Wendell Foo, M.D. (herein Petitioner or Dr. Foo) because Petitioner was not operational at a practice location on record with CMS. Specifically, the location on record with CMS was a mailbox unit at a United Parcel Service (UPS) Store. For the reasons stated herein, I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

**I. Background**

Petitioner is an anesthesiologist. Petitioner Exhibit (P. Ex.) at 20. Petitioner currently serves as the Chief of Anesthesiology at an eye surgery center and as an assistant clinical professor at a medical school. P. Ex. 20 at 2. Petitioner does not maintain his own office that is open to the public, but rather, provides anesthesiology services at several locations, including the eye surgery center referenced above.<sup>1</sup> CMS Exhibit (Ex.) 4 at 2. Petitioner

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<sup>1</sup> Petitioner, who retired at the rank of Colonel from the United States Army Reserve, is also affiliated with Tripler Army Medical Center. P. Ex. 20 at 1-2.

was enrolled as a Medicare supplier of anesthesiology services (CMS Ex. 10), and submitted a revalidation application in May 2014. CMS Ex. 9 at 1-2. Petitioner reported in his enrollment applications that his physical practice location was 4348 Waialae Avenue, 5-311, in Honolulu, Hawaii. CMS Exs. 11 at 3, 10 at 1, 9 at 1.

A Medicare site visit contractor conducted a visit to Petitioner's reported address, 4348 Waialae Avenue, on March 5, 2015, at which time the contractor documented that the location was a UPS Store. CMS Ex. 7 at 1-2. A subsequent contractor visit on May 8, 2015, confirmed that the location was a "one story building that has a UPS store, Restaurant, and juice bar" and that "[t]here is no Dr [sic] office at this location." CMS Ex. 6 at 1.

On June 24, 2015, Noridian Healthcare Solutions (Noridian), a Medicare administrative contractor, sent Petitioner an initial determination informing him that his Medicare enrollment and billing privileges were being revoked retroactive to March 5, 2015, and that he was barred from reenrollment for a period of two years. CMS Ex. 5 at 1-2. The letter stated the following, in pertinent part:

**42 CFR 424.535(a)(5) On-site review/Other Reliable Evidence that Requirements Not Met**

An Onsite visit was conducted on March 5, 2015 and on May 11, [2015] at the address listed above and this is not a practice location.

CMS Ex. 5 at 1 (emphasis in original).

In a letter dated July 3, 2015, Petitioner requested reconsideration of the June 24, 2015 revocation determination. CMS Ex. 4. Petitioner explained that he performs anesthesiology services wherever the surgeon requests his services and thus "those facilities are [his] practice locations." CMS Ex. 4 at 1 (emphasis omitted). Petitioner stated that he had three current practice locations at the Hawaii Eye Center, Surgicare of Hawaii, and the Hawaii Endoscopy Center, and that two of these facilities had been listed in Section 4 of his most recent enrollment application.<sup>2</sup> CMS Ex. 4 at 2. Petitioner

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<sup>2</sup> Section 4C of the enrollment application pertains to the physical practice location and states that "[i]f you or your organization sees patients in more than one practice location, copy and complete this Section 4C for each location." CMS Ex. 14 at 17. Petitioner had listed his UPS Store location under Section 4C. CMS Exs. 9 at 1, 11 at 3-4. A different subsection of the application, Section 4G, requires applicants to list the location(s) where patients' medical records are stored. CMS Ex. 14 at 20. Petitioner, in Section 4G, listed the addresses of several facilities housing his patients' records, and two of the listed

indicated that he performed services at each facility at least two days per week, and he provided the address and telephone number for each location. CMS Ex. 4 at 2. Petitioner also acknowledged that he had been asked to report his practice locations by submitting an updated Form CMS-855I application, but he stated “it is not required for the appeal” and that he had provided his practice location information in his July 3, 2015 letter. CMS Ex. 4 at 2. D.W.<sup>3</sup>, on behalf of Petitioner, submitted follow-up email correspondence on July 15, 2015 at which time he contended that the on-site visits to the UPS Store were performed “without the on-site representative cross-referencing against Section 4 (Practice Locations – Medical Records Storage location).” CMS Ex. at 3 at 1 (emphasis in original). Shortly thereafter, on or about July 18, 2015, Petitioner submitted an updated application through the Provider Enrollment, Chain, and Ownership System (PECOS) listing the Hawaii Eye Center, Surgicare of Hawaii, and the Hawaii Endoscopy Center as practice locations. P. Ex. 17 at 1-3.

On August 27, 2015, Noridian issued an unfavorable reconsidered determination. CMS Ex. 1. The reconsidered determination stated the following:

Revocation, Denial, or Effective date reason: 42 [C.F.R. §] 424.535(a)(5)  
**On-site Review/Other Reliable Evidence that Requirements Not Met An On-Site visit was conducted on March 5, 2015 and on May 11, 2015 at the address listed above and this is not a practice location.**

CMS Ex. 1 at 1 (emphasis in original). The reconsidered decision explained that Petitioner “had not provided evidence to show full compliance with the standards for which [he was] revoked.” CMS Ex. 1 at 1 (emphasis omitted).

Petitioner submitted a request for hearing on October 23, 2015. On October 28, 2015, I issued an Acknowledgement and Pre-Hearing Order (Order), at which time I directed the parties to each file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Order ¶ 4. I also explained that the parties should submit written direct testimony for any witnesses in lieu of in-person direct testimony. Order ¶ 8. In the Order, I explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Order ¶¶ 9, 10.

In response to my October 28, 2015 Order, CMS filed a brief and 15 exhibits (CMS Exs. 1-15). Petitioner, through counsel, filed a brief and five exhibits (P. Ex. 16-20). As

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addresses correspond to the Hawaii Eye Center and the Hawaii Endoscopy Center. CMS Exs. 11 at 3-4, 9 at 1; *see* CMS Ex. 4 at 2.

<sup>3</sup> To protect the privacy of the witnesses, I refer to them by their initials.

neither party has objected to any exhibits, I admit the parties' briefs and exhibits into the record.

CMS submitted the written direct testimony of C.F. (CMS Ex. 13), and Petitioner submitted the written direct testimony of D.W. (P. Ex. 19). Neither party has requested the opportunity to cross-examine either witness, and I consider the record to be closed and the matter ready for a decision on the merits.<sup>4</sup>

## **II. Issue**

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

## **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<sup>5</sup>**

As a physician, Petitioner 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 nonoperational, 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 subsection 424.535(a)(5)(ii), a supplier is non-operational if CMS determines upon on-site review that it is "no longer operational to furnish Medicare covered items or services" or that it is "not meeting Medicare enrollment requirements."

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<sup>4</sup> As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS's motion for summary disposition.

<sup>5</sup> My numbered findings of fact and conclusions of law appear in bold and italics.

***1. A CMS inspector was unable to conduct a site visit of Petitioner's practice location on file (4348 Waialae Ave, 5-311, in Honolulu, Hawaii, 96816-5767) on March 5, 2015 and May 8, 2015, because there is a UPS Store, rather than a medical office, at that physical location.***

On or about February 4, 2010, Petitioner submitted an electronic Form CMS-855I through PECOS in which he provided a "physical location" of 4348 Waialae Avenue 5-311, Honolulu, HI, 96816-5765 and indicated that his practice was an "other health facility" and a "[p]rivate [p]ractice." CMS Ex. 11 at 3. Petitioner likewise reported his correspondence address was the same address. CMS Ex. 11 at 2.

In a letter dated March 4, 2010, the Medicare administrative contractor, Palmetto GBA, informed Petitioner that it received his enrollment application and "reviewed and validated the information contained within and determined the changes have occurred." CMS Ex. 10 at 1. Palmetto GBA informed Petitioner that "[y]our physical address has been changed to reflect 4348 Waialae Ave[.] 5-311 Honolulu, HI. 96816-5767." CMS Ex. 10 at 1.

On May 14, 2014, Petitioner submitted another application for purposes of revalidating his enrollment. CMS Ex. 9; P. Ex. 19 at 8-10; *see* 42 C.F.R. § 424.515 (discussing requirements for revalidation of Medicare enrollment information). The following month, on June 24, 2014, Noridian contacted the telephone number listed on the application, (808) 373-4007, and "verified that the phone number listed in Section 4 of the application reaches the address" and that "it is the primary phone number used for patients to set up appointments or ask questions." CMS Ex. 8.

A "site verification survey" was attempted on March 5, 2015, at which time a Noridian contractor visited the address reported as the practice location. CMS Ex. 7. The contractor determined that the location was a UPS Store. CMS Ex. 7 at 1. At the time of the attempted site verification, the contractor "made calls to the Dr's office" and there was no answer. CMS Ex. 7 at 1. The same contractor re-visited the location on May 8, 2015, and again determined that Petitioner did not have an office at that location. CMS Ex. 6.

Following Noridian's June 24, 2015 initial determination, Petitioner informed CMS in his reconsideration request that the UPS Store was not his practice location but that he provided anesthesiology services at several locations in Hawaii.<sup>6</sup> CMS Ex. 4 at 2.

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<sup>6</sup> In written direct testimony dated November 17, 2015, D.W., Petitioner's son, who has "long helped Dr. Foo with the administrative aspects of his medical practice," explained that "[t]he nature of Dr. Foo's specialty anesthesiology practice means that Dr. Foo's practice locations are always the facilities in which he is needed . . . by the surgeon." P.

Petitioner explained that he would list the specific “practice location” where he provided anesthesiology services whenever he submitted a claim form (Form CMS-1500) to be reimbursed for services from Medicare. CMS Ex. 4 at 1; *see* P. Ex. 16 (a redacted Form CMS-1500 (Health Insurance Claim Form) that includes Block 32 (“Service Facility Location Information”)).

Petitioner argues that when he completed his enrollment applications, the UPS Store location was listed as a correspondence address because he does not maintain a private office. P. Br. at 13. He further argues that he did not list the UPS Store as a practice location, but rather, he listed the individual locations where he practices anesthesiology. P. Br. at 15.

CMS has submitted sworn and written direct testimony of C.F., a project analyst for Noridian. CMS Ex. 13. C.F. stated that “[t]he document marked as CMS Exhibit 9 is a copy of the Application Record Data Report which details the information submitted on May 14, 2014 to revalidate the enrollment of Dr. Foo via the online PECOS system.” CMS Ex. 13 at 4. C.F. reported that “[a]s normal operation” the Application Record Data Report shows the statement “no current records exist for practice location(s)/Base(s) of Operations” for all sections of the application “in which the provider is not changing/updating information.” CMS Ex. 13 at 4. C.F. added that “[i]f the provider wanted to make any changes to information currently contained in PECOS during the revalidation process, they would need to edit that section and add the new information.” CMS Ex. 13 at 5. C.F. also explained that in Petitioner’s previous enrollment application, dated May 4, 2010, “[u]nder “Practice Location” he listed a ‘Physical Location’ of 4348 Waiālae Ave. 5-311, Honolulu, Hawaii 96816-5767.” CMS Ex. 13 at 3-4. Thus, based on C.F.’s explanation of the Application Record Data Report in PECOS, Petitioner did not enter a physical practice location address in PECOS in May 2014 because he did not change the physical location that was already of record; this is evidenced by the message “no current records exist” that appears on the report. CMS Exs. 9 at 1, 13 at 4-5; *see* CMS Ex. 15 (“screen shot” of PECOS showing that a supplier can use the “Add” button to add a “new Practice Location Information” in Section 4).

Although Petitioner asserts that he listed other addresses as his practice locations on his revalidation application, he did not report any physical practice locations, other than the mailbox unit at the UPS Store, on the application. P. Br. at 15; CMS Ex. 11 at 3; *see* CMS Ex. 9. While Petitioner reported the addresses for the Hawaii Eye Center and the

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Ex. 19 at 2. D.W. reported that he “personally typed in the Hawaii Eye Center, Surgicare of Hawaii, and Hawaii Endoscopy Center’s addresses as physical location addresses” when he completed the May 2014 revalidation application, and he “[d]id not recall having identified 4348 Waiālae Avenue as a practice location of Dr. Foo’s.” P. Ex. 19 at 6. D.W. reported that “Dr. Foo’s office does not have a copy of the PECOS re-enrollment application.” P. Ex. 19 at 6.

Hawaii Endoscopy Center as records storage locations in his May 2010 application and did not revise that information in his May 2014 application, he did not report that those addresses were physical practice locations in his applications. CMS Exs. 11 at 3-4, 9 at 1; *see also* CMS Ex. 13 at 4-5.

For the foregoing reasons, Petitioner identified the UPS Store mailbox location as his physical practice location on his 2010 revalidation application and did not provide the address for any of the surgical centers where he practiced as his physical practice location in its place.

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

Petitioner admits that the 4348 Waiialae Avenue location is a UPS Store and not a practice location, but argues that he was nonetheless operational to see patients.

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, CMS determines that-

(i) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii).

While Petitioner asserts that he saw patients at the Hawaii Eye Center, Surgicare of Hawaii, and Hawaii Endoscopy Center, the address he provided as his physical practice

location was that of the UPS Store. The regulatory definition of the term “operational” refers to the “qualified physical practice location” of a supplier. 42 C.F.R. § 424.502. The enrollment and revalidation applications request the address of the supplier’s physical practice location. CMS Ex. 11 at 3; *see* CMS Ex. 14. 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). This means that CMS will inspect the “qualified physical practice location” that has been provided by the supplier and is currently on file with CMS. *See, e.g., CompRehab Wellness Group, Inc.*, DAB No. 2406 (2011).

Because the physical practice location on file with CMS was that of the UPS Store, and because it is not disputed that Petitioner was not operational at the UPS Store location on the dates of the attempted site visits, CMS had a legal basis to revoke Petitioner’s enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5)(ii).

***3. Petitioner has not demonstrated that CMS or its contractor lacked the authority to revoke its Medicare enrollment and billing privileges.***

Petitioner alleges that “Noridian appears to have taken an overly simplistic, result oriented approach to evaluating Dr. Foo’s 2014 enrollment application” and “this is not how the Medicare enrollment process is supposed to work.” P. Br. at 23-24. In fact, Petitioner states “upon on-site inspection of the 4348 Waialae Avenue location and ‘discovering’ that it was a UPS store, rather than simply concluding that Dr. Foo was not operational, *Noridian should have made an effort to determine whether Dr. Foo was providing services at other locations.*” P. Br. at 21 (emphasis added). Petitioner adds that “[h]ad Noridian made that effort, they would have determined that Dr. Foo was indeed fully operational as a Medicare supplier.” P. Br. at 21.

Petitioner essentially contends that the administrative burden of demonstrating that a physician practice is operational should be placed on the Medicare contractor. P. Br. at 21. I first note that CMS’s determination to revoke a provider or supplier’s enrollment is discretionary, and my review is limited to deciding whether the CMS contractor had a “legal basis” for its action. *Letantia Bussell, M.D.*, DAB No. 2196 at 10 (2008); *see Razaque Ahmed, M.D.*, DAB No. 2261 at 19 (2008), *aff’d*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010) (stating if CMS establishes that the regulatory elements necessary for revocation are satisfied, an administrative law judge may not substitute his or her “discretion for that of CMS in determining whether revocation is appropriate under the circumstances”). While I am required to decide whether CMS had a legal basis for its revocation of Petitioner’s enrollment, I am not required to assess whether CMS could have made additional efforts to identify Petitioner’s practice location and Petitioner has



not cited any authority showing CMS had such an *obligation*.<sup>7</sup> Likewise, 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.<sup>8</sup> As Petitioner points out, a purpose of the Medicare site visit verification process is “to reduce fraud and keep ‘bad’ providers and suppliers out of the program.” P. Br. at 24. CMS and its contractors, to that end, place the burden on a physician to correctly provide his or her practice location or locations when completing an application for enrollment or revalidation purposes. The Form CMS-855I clearly instructs a physician to list his or her practice location, and if the physician has more than one practice location, CMS instructs that “all locations disclosed on claims forms should be identified in this section as practice locations.” CMS Ex. 14 at 16 (copy of Form CMS-855I). Physicians are further directed to “[c]omplete this section for each of your practice locations where you render services to Medicare beneficiaries,” and that “[i]f you render services in a hospital and/or other health care facility, furnish the name and address of the hospital or facility.” CMS Ex. 14 at 16. The enrollment application unambiguously informs physicians that it is necessary to identify all practice locations. CMS Ex. 14 at 16. Finally, physicians are even afforded an opportunity, in Section 4H, to “[e]xplain any unique circumstances concerning [their] practice locations.” CMS Ex. 14 at 20.

Petitioner also contends that “CMS resorts to introducing evidence from 2010 that purportedly corroborates the agency’s contention that Dr. Foo identified the 4348 Waialae Avenue address as a practice location in his Medicare enrollment profile.” P. Br. at 18. Petitioner argues that this enrollment application “was not considered during reconsideration” and is contrary to *Advance Group LLC*, DAB CR4126 (2015). First, the *Advance Group* decision is a non-precedential decision by a single administrative law judge and has no binding effect on the instant case. Furthermore, in *Advance Group* the reconsidered determination was based on two site visits that had been conducted in May 2014, and CMS had acknowledged the reconsidered decision was issued without

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<sup>7</sup> Petitioner argues that “Noridian did not appropriately follow” procedures listed in chapter 15 of the Medicare Program Integrity Manual (MPIM). P. Br. at 22. Petitioner cites to various provisions, but none mandate the contractor to further investigate possible physical practice locations. Further, subsection 15.5.4.3.C (Practice Location Information) of the MPIM states that “the contractor shall verify that the address is a physical address” and specifies that “[p]ost office boxes and drop boxes are not acceptable.”

<sup>8</sup> I take notice that there are more than a half million physicians enrolled as suppliers in the Medicare program and these physicians are also subject to periodic site verification visits. See 2013 CMS Statistics ([https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Statistics-Reference-Booklet/Downloads/CMS\\_Stats\\_2013\\_final.pdf](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 March 30, 2016.)

knowledge of an earlier April 10, 2014 site visit and related evidence. *Advance Group*, DAB CR4126 at 6. Therefore, the administrative law judge, citing to *Neb Group of Arizona LLC*, DAB No. 2573 at 7 (2014), explained that he would not consider the April 2014 site visit and related evidence in determining whether CMS had a basis to revoke Petitioner's Medicare enrollment and billing privileges, since the April 2014 site visit had not been considered at the time of the reconsidered decision. *Id.*

The *Advance Group* decision relied upon by Petitioner is not instructive in this case. Here, in May 2014, Petitioner submitted an application to revalidate his Medicare enrollment. The regulation pertaining to revalidation, 42 C.F.R. § 424.515, clearly states that “[t]o maintain Medicare billing privileges, a provider or supplier (other than a DMEPOS supplier) must resubmit and recertify the accuracy of its enrollment information every 5 years.” Based on this requirement, the contractor would look to the information the supplier previously provided to verify the accuracy of the information on file if the supplier did not provide new information at the time of revalidation. As explained by C.F., if Petitioner did not update pertinent information that was included in his previous enrollment application, the responses contained in the previous May 2010 application would remain in effect. CMS Ex. 13 at 4-5.

## **V. Conclusion**

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

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/s/  
Leslie C. Rogall  
Administrative Law Judge