

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

William R. Vivas, D.P.M., P.A. / William R. Vivas, D.P.M.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-586

Decision No. CR2874

Date: July 30, 2013

DECISION

First Coast Services Options, Inc. (First Coast), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), found Petitioner, William R. Vivas, D.P.M., P.A./William R. Vivas, D.P.M., not to be operational and revoked Petitioner's billing privileges as a supplier in the Medicare program. Petitioner appealed. Because the address of Petitioner's office on record with CMS was vacant at the time of two site inspections and Petitioner was not otherwise operational, I affirm the determination to revoke Petitioner's enrollment.

I. Background

Petitioner is a podiatric physician who has practiced in South Florida for over 25 years. During much of his career, Petitioner was enrolled in Medicare and provided podiatric services from an office located at 3051 West Flagler Street, Miami, Florida 33135-1257. Commencing in June 2012, Petitioner's Medicare claims received additional scrutiny, resulting in significant economic difficulty for Petitioner's practice. Petitioner Ex. (P. Ex.) 8, at 1; *see also* CMS Ex. 7, at 5.

In July 2012, Edwin Pratts Ponce, D.P.M., offered to allow Petitioner to practice from Dr. Ponce's office located at 2455 West Flagler Street, Miami, Florida 33135. P. Ex. 1, at 1. Petitioner agreed to relocate his practice, and Petitioner and Dr. Pounce signed a Form CMS-855R (Medicare Enrollment Application Reassignment of Medicare Benefits) on July 27, 2012. CMS Ex. 5, at 7-11; P. Exs. 1, at 1; 8, at 2. First Coast received the Form CMS-885R on August 10, 2012. CMS Ex. 5, at 12. By mid-August 2012, Petitioner closed his office at 3051 West Flagler Street and commenced providing services at the 2455 West Flagler Street location; however, by mid-September 2012, Petitioner stopped providing services from the 2455 West Flagler Street location. P. Ex. 8, at 2; *see also* P. Exs. 1, at 1; 3, at 1, 3, 5, 7; 6, at 2. Without an office from mid-September to December 2012, Petitioner went about "reorganizing [his] business, which included locating and being approved for a new practice location, in order to continue providing quality services and treatments to [Petitioner's] patients." P. Ex. 8, at 2. In December 2012, Petitioner found a "new intended location" for his practice. P. Ex. 8, at 3.

On September 12, 2012, investigators from SafeGuard Services (SGS), LLC, a CMS "Zone Program Integrity Contractor," conducted an unannounced site inspection of Petitioner's 3051 West Flagler Street office. CMS Ex. 1. The investigators obtained entry to the location through an individual who was painting Petitioner's former office space, and documented with photographs that the location was vacant and undergoing repairs. CMS Ex. 1, at 1, 7-11.

On October 10, 2012, First Coast informed SGS that Petitioner filed a Form CMS-855R. On October 15, 2012, a site investigator from First Coast appeared at the 2455 West Flagler Street location and learned from Dr. Ponce that Petitioner was not providing services from the 2455 West Flagler Street location. CMS Ex. 2; P. Ex. 1, at 2. On October 17, 2012, an SGS investigator went to the 2455 West Flagler Street location and confirmed that Petitioner was not practicing at that location. CMS Ex. 3. On October 18, 2012, First Coast issued an initial determination stating that it was denying Petitioner's Form CMS-855R because "[a]n on-site review was conducted on October 15, 2012, and it has been determined that [Petitioner is] not operational."¹ CMS Ex. 5, at 3.

On October 30, 2012, one of the SGS investigators went back to Petitioner's former office located at 3051 West Flagler Street and confirmed that the office space was vacant; a sign was posted on the office exterior indicating that it was for rent. CMS Ex. 4. Based on its investigation, SGS recommended revocation of Petitioner's enrollment. CMS Ex. 7. On November 16, 2012, First Coast issued an initial determination revoking Petitioner's enrollment effective September 12, 2012. First Coast indicated that it

¹ Neither party indicated that Petitioner appealed the October 18, 2012 initial determination. Therefore, the present case does not involve a review of that initial determination. *See* 42 C.F.R. § 498.20(b).

revoked Petitioner based on 42 C.F.R. § 424.535(a) because Petitioner was found not to be operational following site inspections of Petitioner's 3051 West Flagler Street location on September 12, 2012, and October 30, 2012. CMS Ex. 8.

On December 28, 2012, Petitioner, through counsel, requested reconsideration of the revocation. CMS Ex. 9. Petitioner argued that First Coast revoked Petitioner before he could establish a new office following his decision not to continue to practice at Dr. Ponce's office. CMS Ex. 9, at 1-2. Petitioner attached to the reconsideration request Forms CMS-855B and CMS-855I signed on December 17, 2012, which provided Petitioner's new practice location as 330 SW 27th Avenue, Suite 408A, Miami, Florida 33135-2967. CMS Ex. 9, at 16-41.

In its February 26, 2013 reconsidered determination, First Coast upheld its initial determination to revoke Petitioner's enrollment. CMS Ex. 11. First Coast noted that at the time of the site inspections, Petitioner had not filed an application to change his address or deactivate his provider number. CMS Ex. 11, at 1. First Coast also indicated it was aware that Petitioner attempted to reassign his benefits, but further noted that a site inspection showed that Petitioner was not providing services at Dr. Ponce's location. CMS Ex. 11, at 2. Because Petitioner did not properly notify First Coast of the change in his practice location address and did not withdraw his Form CMS-855R, First Coast determined that SGS's site inspections at Petitioner's 3051 West Flagler Street office and Dr. Ponce's 2455 West Flagler Street office were appropriate for determining whether Petitioner was operational. CMS Ex. 11, at 3. First Coast modified the effective date of the revocation to October 31, 2012. CMS Ex. 11, at 2.

Petitioner, through counsel, timely filed a request for a hearing (RFH) with the Departmental Appeals Board, Civil Remedies Division. In response to my March 28, 2013 Acknowledgment and Pre-hearing Order (Order), CMS filed a Motion for Summary Judgment and 12 proposed exhibits (CMS Exs. 1-12). CMS provided signed declarations from Investigator Jackie Martinez. CMS Exs. 1, at 2; 3, at 2; 4, at 2. Petitioner filed a Response in Opposition to CMS's Motion for Summary Judgment (P. Br.) and eight exhibits (P. Exs. 1-8). Petitioner listed the following individuals as witnesses and provided affidavits from each witness: Petitioner; Dr. Ponce; and four of Petitioner's patients. P. Exs. 1; 3; 8.

Because neither CMS nor Petitioner objected to any of the exhibits or witnesses, I admit CMS Exs. 1-12 and P. Exs. 1-8 into the record. Further, because neither party has affirmatively requested to cross-examine any of the opposing parties' witnesses, I will not hold an in-person hearing in this case. Order ¶¶ 8-11; *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). Accordingly, the record is now closed and I decide this case based on the written record.

III. Discussion

In order to participate in the Medicare program as a supplier,² a prospective supplier must complete the applicable Form CMS-855 enrollment application, which requires disclosure of the supplier's address. *See* 42 C.F.R. § 424.510(a). Suppliers who are physicians or nonphysician practitioners must timely notify CMS of changes in their practice location. *Id.* § 424.516(d)(1)(iii). CMS may perform periodic revalidations and on-site reviews to verify the enrollment information submitted to CMS, determine the supplier's compliance with Medicare enrollment requirements, and determine whether the supplier is operational. *Id.* §§ 424.510(d)(8); 424.515(c); 424.517(a). CMS may revoke the enrollment of a nonoperational supplier. *Id.* § 424.535(a)(5).

A. Issue

Whether CMS has a legitimate basis to revoke Petitioner's enrollment as a supplier in the Medicare program based on a determination that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5).

B. Findings of Fact, Conclusions of Law, and Analysis³

1. *When SGS conducted site inspections on September 12, 2012, and October 30, 2012, of Petitioner's office located at 3051 West Flagler Street, Miami, Florida, Petitioner had already closed that office and was not providing services from that location.*

Petitioner stated in his testimony that for many years he provided services as a Medicare supplier from his office located at 3051 West Flagler Street, but that he closed that office in the summer of 2012 to provide services from Dr. Ponce's office. P. Ex. 8; P. Br. at 2. Petitioner does not dispute the SGS investigators' observations and photographs that show that Petitioner's office on 3051 West Flagler Street was vacant during both site inspections on September 12, 2012, and October 30, 2012. CMS Exs. 1, 4. Therefore, I find that Petitioner ceased providing services from his 3051 West Flagler Street before the September 12, 2012 site inspection.

2. *Petitioner did not properly inform First Coast that the address where he provided services changed from 3051 West Flagler Street, Miami, Florida, to 2455 West Flagler Street, Miami, Florida.*

² Podiatrists are "suppliers" for Medicare program purposes. *See* 42 C.F.R. §§ 400.202 (definition of "supplier"); 410.20(b)(3).

³ My findings of fact and conclusions of law are set forth, in italics and bold font.

Petitioner does not dispute that his long-time office was located at 3051 West Flagler Street. P. Ex. 8, at 1. However, in the summer of 2012 when Petitioner decided to work from Dr. Ponce's office at 2455 West Flagler Street, Petitioner only filed a Form CMS-855R. P. Ex. 8, at 2. Although Petitioner asserts that he thought filing the Form CMS-855R was sufficient notice that he was changing his address (P. Ex. 8, at 2), I cannot accept this assertion because the Form CMS-855R Petitioner submitted does not provide Dr. Ponce's office address. CMS Exs. 5, at 7-11; 9, at 12-15; P. Exs. 2; 6, at 11-14. It was Petitioner's obligation to timely notify First Coast of any change in practice location. 42 C.F.R. § 424.516(d). Therefore, I find that at the time of the September 12, 2012 SGS inspection, Petitioner's official address on record with CMS was the 3051 West Flagler Street office.

3. Petitioner did not provide services from any location after the middle of September 2012 through at least November 2012.

Petitioner testified that he stopped providing services at Dr. Ponce's office located at 2455 West Flagler Street by the middle of September 2012. P. Ex. 8, at 2. However, according to Petitioner, he did not immediately begin practicing at another location. Rather, Petitioner testified that he "was reorganizing [his] business, which included locating and being approved for a new practice location," which turned out to be a process that was "quite lengthy." P. Ex. 8, at 2. Petitioner further testified that as late as November 2012, he still had not made "any definitive decisions regarding my practice" and had not yet submitted any CMS-855 forms to First Coast. P. Ex. 8, at 2. Petitioner did not submit Forms CMS-855B and CMS-855I with a new practice location address until December 2012. CMS Ex. 9; P. Ex. 8, at 3.

First Coast and SGS investigators conducted site inspections in October 2012 of Dr. Ponce's 2455 West Flagler Street offices and documented that Petitioner was not practicing from that location. CMS Exs. 2; 3. Both Petitioner's and Dr. Ponce's testimony confirms that Petitioner was not practicing from the 2455 West Flagler location since September 2012. P. Exs. 1, at 2; 8, at 2. Therefore, I find that Petitioner ceased to provide services from any location by the middle of September 2012.

4. CMS has a legitimate basis to revoke Petitioner's enrollment in the Medicare program because Petitioner was not operational pursuant to 42 C.F.R § 424.535(a)(5).

CMS may revoke a currently enrolled supplier's Medicare billing privileges if:

CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services
Upon on-site review, CMS determines that-

* * * *

(ii) 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 the statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii).

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.

Id. § 424.502. CMS has authority to perform off cycle revalidations that may be accompanied by site visits. *Id.* § 424.515(d). The purpose of a site visit is to verify information on file with the contractor and to confirm compliance with Medicare enrollment requirements. *Id.* § 424.517(a).

In the present case, Petitioner was not operational at his long standing practice location of 3051 West Flagler Street by September 12, 2012. Further, by mid-September 2012, Petitioner was not operational at Dr. Ponce’s location of 2455 West Flagler Street. Rather, from the middle of September through at least November 2012, Petitioner was attempting to restart his practice. However, “merely planning or preparing to do business with the public is not equivalent to being actually operational as required.” *A TO Z DME, LLC*, DAB No. 2303, at 5 (2010). This is true even when the supplier “had been operational at an earlier time and might resume operational status at some future date.” *I & S Healthcare Servs., LLC*, DAB No. 2519, at 6 (2013). Because Petitioner was not operational, First Coast, acting on behalf of CMS, had a legitimate basis to revoke Petitioner’s Medicare billing privileges. 42 C.F.R. § 424.535(a)(5).

Revocation of enrollment is a discretionary act of CMS. *See* 42 C.F.R. § 424.535(a). I do not have the authority, however, to review CMS’s discretionary act to revoke a provider or supplier. *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 has 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.* Once CMS establishes a legal basis on which to proceed with a revocation, then the action to revoke is a permissible exercise of discretion. *See id.* at 10. In the present case, such a basis exists and I must affirm the revocation.

IV. Conclusion

Because Petitioner was not "operational" as that term is defined in the regulations, I affirm the revocation of Petitioner's billing privileges in the Medicare program.

/s/

Scott Anderson
Administrative Law Judge