Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

First Houston Health Care, L.L.C.,
(PTAN: 67-9142)
(NPI: 1306159397),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-15-733

Decision No. CR4814

Date: March 23, 2017

DECISION

Petitioner, First Houston Health Care, L.L.C., is a home health agency located in Houston, Texas, that, until recently, was enrolled in the Medicare program. The Centers for Medicare & Medicaid Services (CMS) found that Petitioner was no longer operational at its designated location and revoked its Medicare supplier number. Petitioner challenged that action, and, in a reconsidered determination dated October 16, 2014, the Medicare contractor upheld the revocation. Petitioner appeals.

For the reasons set forth below, I find that Petitioner First Houston was not operational at its designated location, and CMS therefore properly revoked its Medicare enrollment.

Background

Until June 26, 2014, Petitioner was enrolled in the Medicare program as a home health agency. *See* Social Security Act § 1861(o); 42 C.F.R. Part 484. In a letter dated September 11, 2014, the Medicare contractor, Palmetto GBA, notified Petitioner that its

Medicare privileges were revoked and its provider agreement terminated, effective June 26, 2014. According to the letter, the contractor took this action pursuant to 42 C.F.R. § 424.535(a)(5). Based on a June 26, 2014 site visit, the contractor found that the home health agency was no longer operating from its 6300 Hillcroft Street location; it was therefore "no longer operational to furnish Medicare covered items or services" and "was not meeting Medicare enrollment requirements." CMS Ex. 3.

Petitioner sought reconsideration. In a reconsidered determination, dated October 16, 2014, the contractor upheld the revocation, concluding that the home health agency was not operational at the only current address available. CMS Ex. 1. Petitioner now appeals that determination. 42 C.F.R. § 424.545.

The parties filed briefs and cross-motions for summary judgment. (CMS Br.; P.Br.). I found that summary judgment was not appropriate and scheduled a pre-hearing telephone conference, which convened on December 19, 2016. During that conference, I ruled on the admissibility of the parties' proposed exhibits. I have admitted into evidence CMS Exhibits (Exs. 1-5) and Petitioner's (P.) Exs. 1-4, 6, and 9-15. Order Summarizing Prehearing Conference at 3 (December 21, 2016). I declined to admit P. Exs. 5, 7, 8, and 16. *Id*. at 2-3. As I explained in my order:

- P. Ex. 5 is a copy of CMS form 855A, dated April 30, 2014, which Petitioner now maintains it submitted to the CMS contractor well before the June 26 attempted site visit.[1] Petitioner offers this document, for the first time, at this level of review. CMS Ex. 1 at 1 (listing the documentation submitted at the reconsideration level). Under 42 CFR 498.56(e), I may admit new documentary evidence if I find good cause for Petitioner's failing to submit it at the reconsideration level. Accepting Petitioner's representation that the document existed at the time of the reconsideration (which is highly questionable), I find no such good cause. I reject Petitioner's claims that, until it received the reconsideration determination, 1) it did not know that CMS found the home health agency not operational at the Hillcroft Street address; and 2) it reasonably assumed that the CMS contractor timely received the appropriate notification (CMS form 855A) of its new address. The CMS contractor's initial notice letter is explicit: "On June 26, 2014, a site visit was conducted at 6300 Hillcroft St., Suite 310, Houston, TX . . . . It was found that First Houston Health Care LLC is no longer

[1] CMS has designated submission of its 855A as the means by which providers enroll in the Medicare program and report changes in enrollment information. *See Viora Home Health, Inc.*, DAB No. 2690 at 4, n. 4 (2016); Medicare Program Integrity Manual, CMS Pub. 100-08, Ch. 15, § 15.1.2.

operating from this location." CMS Ex. 3 at 1.[2] From this, Petitioner should have known that the contractor considered the Hillcroft Street address to be its practice location.

- P. Ex. 8 is a document titled "Palmetto Update Address Letter" dated May 21, 2013. I declined to admit this document for two reasons: 1) again, Petitioner did not show good cause for failing to submit it at the reconsideration level; and 2) on its face, this letter does not seem to have anything to do with this case. Petitioner was not the party to whom it is addressed; the name of the addressee is obscured. Because the document is irrelevant, I declined to admit it. 42 C.F.R. § 498.60(b)(1).

- For similar reasons, I found that P. Ex. 7 is irrelevant and declined to admit it. The document is titled "DADS Relocation CMS Approval Letter," but the addressee's name and address have been blocked out. The body of the letter refers to a request for relocation dated December 2014, six months *after* the attempted site inspection in this case.

- Finally, P. Ex. 16 is an ALJ decision, *Gibraltar Healthcare Supplies, L.L.C.*, DAB CR3422 (2014), which need not be admitted. The parties are free to cite to any Board, ALJ, or court decision.

With the parties' agreement, I scheduled a hearing for March 8, 2017. In a motion filed February 16, 2017, however, Petitioner waived its right to an in-person hearing and asked that I issue a decision on the record. Petitioner's Motion for Decision on the Record in Lieu of Telephonic Hearing (February 16, 2017); 42 C.F.R. § 498.66(d). CMS did not object. I therefore grant the motion and decide this matter based on the written record.

[2] In my December 2016 order, I suggested that, at the reconsideration level, Petitioner claimed, as a defense, that it timely submitted its form 855A to the CMS contractor. This was in error. At reconsideration, Petitioner provided state licensing forms and argued that, because it notified the state licensing agency that it was moving, the Medicare contractor should have known of its new location. At that point, Petitioner was not claiming that it submitted an updated 855A form. In any event, Petitioner well knew that the Medicare contractor considered the Hillcroft address its practice location, and it has offered no good reason for failing to submit at reconsideration a copy of form 855A to establish that the contractor made a mistake.

Discussion

CMS properly revoked Petitioner's Medicare enrollment because the home health agency was not operational at its registered practice location.[3]

Program requirements: To maintain its Medicare enrollment and billing privileges, providers (which include home health agencies) must be operational and comply with program requirements. *See* 42 C.F.R. §§ 400.202; 424.500; 424.505; 424.510; 424.516; 424.530. To be operational, the provider must, among other requirements, have a "qualified practice location" that is "open to the public for the purpose of providing health care related services." It must be properly staffed, equipped, and stocked (based on the type of provider it is) to furnish those services. 42 C.F.R. § 424.502.

CMS may perform an on-site inspection to determine the provider's compliance with Medicare enrollment requirements. 42 C.F.R. §§ 424.510(d)(8); 424.517(a)(1). If, upon on-site review, CMS determines that the provider is no longer operational to furnish Medicare-covered items and services, it may revoke Medicare billing privileges. 42 C.F.R. § 424.535(a)(5)(i).

In this case, prior to June 2014, Petitioner's practice location was 6300 Hillcroft St., Houston, Texas, which is the address it provided the CMS contractor when it enrolled in the Medicare program. CMS Ex. 5 at 2 (Norman Decl. ¶ 8); CMS Ex. 5 at 5, 23. On June 26, 2014, a field investigator working for the Medicare contractor went to that address to verify that the home health agency was operational. He found that it was not open for business; its name was not listed in the building directory; no signage was posted on the door; the door was locked; and the office appeared to be vacant. CMS Ex. 4.

Petitioner concedes that it was not operational at the 6300 Hillcroft Street address on June 26, 2014. The home health agency moved to 8303 Southwest Freeway on June 1, 2014. P. Ex. 1 at 1 (Shukla Decl. ¶ 5) (indicating that the provider relocated in June 2014); P. Ex. 1 at 29 (indicating, more specifically, that the provider relocated on June 1, 2014).

Home health agency owner and administrator, Sonal Shukla, now claims that, on April 30, 2014, she "sent the required pre-notice change of address documentation to the state's licensing entity, the Texas Department of Aging and Disability Services . . . *and to Palmetto*." P. Ex. 1 at 1 (Shukla Decl. ¶ 4) (emphasis added). She faults the contractor for failing "to receive, account for, or process the provider's 855A change of address documents submitted in April 2014." P. Ex. 1 at 3 (Shukla Decl. ¶ 10); *see also* P. Ex. 1 at 2 (Shukla Decl ¶ 7). Petitioner submits additional declarations, from an employee and

[3] I make this one finding of fact/conclusion of law.

from Owner Shukla's spouse, also declaring that Ms. Shukla prepared and sent CMS form 855A to the Medicare contractor "on the same date" that she submitted change-of-address information to the state licensing agency. P. Ex. 2 (Malhotra Decl. ¶ 5); P. Ex. 3 (G. Shukla Decl. ¶ 5). Each asserts that he or she personally "witnessed and assisted" the owner in submitting the licensing board information, but neither indicates how he or she knew that Owner Shukla sent the 855A form. This lack of foundation makes the declarations less reliable.

I reject Petitioner's new-found assertions as not credible. Petitioner made no such claims at the reconsideration level. In its reconsideration request, dated September 25, 2014, Petitioner asserted that "on or about April 30, 2014," by means of a license application, it informed the state licensing agency that it was relocating. CMS Ex. 2 at 1. With the request for reconsideration, Petitioner submitted an affidavit signed by Owner Shukla and copies of the state licensing application and other documents. It did not mention sending CMS form 855A or any other document to the Medicare contractor. CMS Ex. 2; P. Ex. 1 at 22-23.

Even more enlightening, Owner Shukla's most recent statement is inconsistent with the sworn statement she submitted at reconsideration and to a federal court. *See* P. Ex. 15 at 2 (pointing out the "troubling" fact that, in challenging CMS's actions, Owner Shukla "decided to take a position contrary to her earlier testimony"). She swore, in an affidavit dated September 26, 2014, that her home health agency relocated to 8303 Southwest Freeway on June 1, 2014; that, on April 30, 2014, it notified the state licensing agency of the relocation; and that "*[w]e have now taken steps to update the Centers for Medicare and Medicaid Services*." P. Ex. 1 at 29 (emphasis added). That, as of September 26, 2014, Petitioner had "taken steps" to advise the CMS contractor of its new address is compatible with CMS's assertion that Petitioner finally filed its form 855A on October 1, 2014, using the Provider Enrollment and Ownership System (PECOS), which is an electronic filing system. CMS Ex. 5 at 2 (Norman Decl. ¶ 9); CMS Ex. 5 at 45-57.

In her September 2014 affidavit, Owner Shukla effectively admitted that she had not yet submitted form 855A, and I find that dispositive. But even putting aside Owner Shukla's prior inconsistent statement, Petitioner produced no reliable evidence that she – or anyone else from the home health agency – timely mailed or otherwise conveyed the 855A to the contractor any time before October 1, 2014. Petitioner submits no proof of mailing, dated mailing receipt, tracking document, or other reliable indicia of mailing. *See Viora Home Health, Inc*., DAB No. 2690 at 10-12 (2016) (concluding that a home health agency's qualified practice location remained unchanged where it failed to produce documentary evidence that it submitted change-of-location information to the contractor, and it failed to explain why it did not produce that evidence).

I recognize that a home health agency has 90 days in which to advise its contractor that it has moved. Had Petitioner done so by August 30, the 90th day following its move – giving the investigator an opportunity to inspect timely the new premises – the result here might be different. 42 C.F.R. § 424.516(e)(2); *Adora Healthcare Services, Inc.*, DAB No. 2714 (2016). But compelling evidence establishes that the facility was not operational at its designated practice location on the 91st day. If the contractor's investigator had returned to 6300 Hillcroft on the 91st day, the 100th day, or even the 121st day, he would have found exactly what he found on June 26: the absence of an operational home health agency. The investigator could not have gone to any other address because the contractor did not know of any other address. CMS should not be compelled to expend scarce resources sending an investigator to an empty location simply to verify that it is still empty.

Moreover, CMS has learned that allowing providers and suppliers to participate in the Medicare program without verifying their designated practice locations leads to fraud and abuse. Much mischief could occur if an unscrupulous provider or supplier were essentially allowed a 90-day grace period in which to continue billing the Medicare program after abandoning its practice location.

Conclusion

Because compelling evidence establishes that Petitioner was not operational at its registered practice location, CMS properly revoked its Medicare privileges and terminated its provider agreement.

/s/
Carolyn Cozad Hughes
Administrative Law Judge