

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Integrated Homecare Services Chicago Corporation,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1058

Decision No. CR3070

Date: January 10, 2014

DECISION

Palmetto GBA National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), determined that Petitioner, Integrated Homecare Services Chicago Corporation (Supplier No. 5126960002), was not operational and revoked Petitioner's Medicare billing privileges as a supplier. Petitioner appealed. Because the undisputed facts establish that Petitioner was not operational at the practice location on file with CMS, I grant CMS's motion for summary judgment and affirm NSC's determination.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, orthotics, prosthetics, and supplies (DMEPOS). Petitioner has been in business for 25 years and has multiple offices in Illinois. The office located at 2225 West Jefferson Street, Joliet, Illinois, was enrolled as a Medicare supplier for three years. In 2012, Petitioner decided to move its Joliet office from 2225 West Jefferson Street to 195 Springfield Avenue, Joliet, Illinois, which is a distance of

less than a third of a mile. Petitioner anticipated moving to the 195 Springfield Avenue site in early January 2013. Petitioner Exhibit (P. Ex.) 1 at 1-2, 4.

On or about December 21, 2012, Petitioner submitted a Form CMS-855S in which Petitioner informed NSC that effective January 1, 2013, Petitioner's new address in Joliet, Illinois, would be at 195 Springfield Avenue. CMS Ex. 1, at 1, 9, 26; P. Ex. 2. Petitioner did not actually move until either March 28 or 29, 2013, due to delays in constructing Petitioner's new office. CMS Ex. 4; P. Ex. 1, at 2-3. Petitioner did not inform NSC of this delay.

On February 20, 2013, an inspector from NSC attempted to perform a site visit of Petitioner's 195 Springfield Avenue office. On that date, the inspector observed that Petitioner's office was still under construction. After speaking with occupants on the second floor of the building, the inspector learned that Petitioner was to move in to the first floor in the near future. CMS Ex. 2.

In a March 25, 2013 initial determination, NSC informed Petitioner that it was revoking Petitioner's Medicare billing privileges, citing 42 C.F.R. §§ 424.57(c)(7) (failure to maintain facility on an appropriate site), 424.57(22) (failure to be accredited),¹ and 424.535(a)(5)(ii) (failure to be operational). The revocation was retroactively effective to February 20, 2013. CMS Ex. 3.

Petitioner filed a timely request for reconsideration explaining that Petitioner's move to the 195 Springfield Avenue site did not occur until March 29, 2013, due to construction delays. CMS Ex. 4. In a May 23, 2013 reconsidered determination, an NSC hearing officer upheld the initial determination stating:

The fact remains that the site inspector was unable to complete a site investigation for Integrated Homecare Services Chicago Corporation because the facility location on record with the NSC was not operational at the time of the site visit attempt, and the site inspector was unable to verify compliance with the supplier standards.

CMS Ex. 6, at 3.

Petitioner timely filed a request for hearing (RFH) before an administrative law judge. In response to my July 31, 2013 Acknowledgment and Pre-hearing Order (Order), CMS filed a Motion for Summary Judgment and Pre-hearing Brief (CMS Br.) and six proposed exhibits (CMS Exs. 1-6). Petitioner filed a response to the motion and a brief (P. Br.), three exhibits (P. Exs. 1-3), and a witness list. CMS filed a timely objection to the testimony of some of Petitioner's witnesses.

¹ This reason for revocation is not mentioned in the reconsidered determination.

II. Rulings

Petitioner proposed to call as witnesses Petitioner's president and accounting manager, NSC's site inspector, and "[v]arious staff members" from two congressional offices. Petitioner provided written direct testimony for its president and accounting manager. P. Exs. 1; 2. Petitioner did not provide written direct testimony for the congressional staff members. CMS filed a timely objection to the testimony from congressional staff members. I sustain the objection because Petitioner failed to provide written direct testimony for the congressional staff members. Order at ¶ 8.

Neither party objected to any of the marked exhibits. CMS did not affirmatively request to cross-examine the witnesses for which Petitioner submitted written direct testimony (i.e., P. Exs. 1-2). Order at ¶ 9-10. Therefore, I admit CMS Exs. 1-6 and P. Exs. 1-3 into the record.

In its brief, CMS raised a new issue in this case. CMS sought to amend the basis for revocation to include an allegation that Petitioner failed to comply with 42 C.F.R. § 424.57(c)(8). CMS Br. at 4, 7, 10. CMS cited *Asbury Ctr. at Johnson City*, DAB No. 1815 (2002) and *Columbus Nursing and Rehab. Ctr.*, DAB No. 2398 (2011),² for the proposition that CMS could provide notice to suppliers of a new basis for revocation as long as CMS gives adequate notice in its motion for summary judgment. CMS Br. at 4. Based on the plain reading of the regulations, I deny CMS's request that I consider a new basis for revocation in this case.

Provider and supplier enrollment appeals are governed by 42 C.F.R. pt. 498. 42 C.F.R. §§ 405.800(a)(2), 405.800(b)(1)(ii), 424.545(a), 498.1(g), 498.3(c)(17), 498.5(1), 498.40(a)(1). Although proceedings under 42 C.F.R. pt. 498 generally allow the parties to request that an administrative law judge adjudicate "new issues that impinge on the rights of the affected party" even if "CMS . . . has not made an initial or reconsidered determination on them," provider and supplier enrollment cases are expressly excepted from this rule. 42 C.F.R. § 498.56(a)(1)-(2). This limitation on new issues is consistent with the special rule prohibiting providers and suppliers from submitting new evidence to administrative law judges in enrollment cases unless there is good cause. 42 C.F.R. §§ 405.803(e), 498.56(e). As indicated above, CMS relied on two cases as its authority to add Petitioner's alleged failure to comply with 42 C.F.R. § 424.57(c)(8) as a new basis for revocation in this case. However, neither of the cited cases were provider or supplier enrollment cases, and as indicated above, only provider or supplier

² Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

enrollment cases were excepted from the provision allowing new issues to be raised before an administrative law judge.³

Because all of the issues that impinge the rights of an affected party in a provider or supplier enrollment case must have been decided in an initial or reconsidered determination, remand to CMS for a new determination appears to be the proper course of action when CMS wants to add a basis for revocation in a provider or supplier enrollment case. *See* 42 C.F.R. §§ 498.56(d), 498.78. However, because I am affirming NSC’s determination to revoke Petitioner’s Medicare billing privileges, there is no need to remand this case for a new determination.

III. Issues

1. Whether this case should be decided by summary judgment.
2. Whether CMS has a legitimate basis to revoke Petitioner’s enrollment as a DMEPOS supplier in the Medicare program based on a determination that Petitioner was not operational (42 C.F.R. § 424.535(a)(5)) and that it failed to comply with Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)).

IV. Discussion

1. Summary judgment is appropriate in this case because there are no material issues in dispute.

A provider or supplier may request reconsideration of the initial determination to revoke his or her billing privileges. 42 C.F.R. §§ 498.5(1)(1), 498.22(a). If a supplier is dissatisfied with the reconsidered determination, the supplier may request a hearing before an administrative law judge. 42 C.F.R. § 498.5(1)(2). When appropriate, administrative law judges may decide a case arising under 42 C.F.R. pt. 498 by summary judgment. *See* Civil Remedies Division Procedures § 7; *see also Livingston Care Ctr. v. U.S. Dep’t of Health & Human Servs.*, 388 F.3d 168, 172 (6th Cir. 2004) (citing *Crestview Parke Care Ctr. v. Thomson*, 373 F.3d 743 (6th Cir. 2004). “Summary judgment is appropriate if there are no genuine disputes of fact material to the result.” *Dinesh Patel, M.D.*, DAB No. 2551, at 5 (2013) (citations omitted). To determine whether there are genuine issues of material fact for an in-person hearing, the administrative law judge must

³ There are two cases (*Fady Fayad, M.D.*, DAB No. 2266 at 9-11; *Green Hills Enterprises, LLC*, DAB No. 2199, at 8-9 (2008)) that indicate that CMS may bring new issues at the hearing level in provider/supplier enrollment cases. However, these cases did not cite or discuss the regulatory exception to new issues in provider/supplier enrollment hearings in 42 C.F.R. § 498.56(a)(2).

view the evidence in the light most favorable to the non-moving party. *See id.* (citation omitted).

There is no genuine dispute of material facts in this case. The decision as to whether the revocation should be affirmed in this case is a matter of law and appropriate for summary judgment. For purposes of summary judgment, I draw all reasonable inferences in favor of Petitioner.

CMS has presented evidence showing that Petitioner's office at 195 Springfield Avenue was under construction when a site visit occurred on February 20, 2013. Further, Petitioner admitted that it provided notice to NSC in December 2012 that it was relocating to 195 Springfield Avenue in January 2013, but that due to construction delays, Petitioner was not able to move into the office at 195 Springfield until the end of March 2013. RFH at 1; P. Br. at 3-4. I accept as true for purposes of summary judgment that Petitioner's president signed the Form CMS-855S because he thought it would only inform NSC of a change in "billing services." P. Ex. 1. Further, I accept as true that Petitioner's accounting manager did not understand that she could inform NSC of a change in Petitioner's address as late as 30 days after Petitioner moved to the 195 Springfield site. P. Ex. 2. I also accept as true that Petitioner did not move to the 195 Springfield Avenue site by January 1, 2013, due to construction delays. Finally, I accept as true that Petitioner continued to maintain its offices at 2225 West Jefferson Street until the end of March 2013, and that NSC's site inspector did not attempt to inspect those offices on February 20, 2013, or at any time before NSC issued the initial determination revoking Petitioner's billing privileges.

2. Petitioner filed a Form CMS-855S informing NSC that it was changing its address to 195 Springfield Avenue effective January 1, 2013, but that Petitioner did not finally move to that address until March 28 or 29, 2013.

It is undisputed that in December 2012, Petitioner filed with NSC a Form CMS-855S indicating that it was relocating in January 2013, to 195 Springfield Avenue,⁴ and that Petitioner did not actually relocate to that address until the end of March 2013. CMS Exs. 1; 4; P. Exs. 1-2. Further, Petitioner does not assert that it informed NSC prior to February 20, 2013, that it was still operating from the 2225 West Jefferson Street address until construction could be completed at the 195 Springfield Avenue address.

⁴ Petitioner's RFH states that the effective date of the new registered business address was January 31, 2013, but the Form CMS-855S indicates an effective date of January 1, 2013. RFH at 1; CMS Ex. 1, at 9; CMS Ex. 6, at 3.

- 3. During the February 20, 2013 site visit of Petitioner's address on record with NSC (195 Springfield Avenue), the site inspector observed that Petitioner's office was still under construction and not occupied.**

It is undisputed that an NSC site inspector went to 195 Springfield Avenue on February 20, 2013, and observed that Petitioner's office was still being constructed and not open for business. CMS Ex. 2. Petitioner admits that at the time of the site visit, the 195 Springfield Avenue site was still under construction. See CMS Ex. 4; RFH at 1; P. Ex. 1, at 2-3; P. Ex. 2, at 2.

- 4. CMS had 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).⁵**

In order to participate in the Medicare program as a supplier, 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). Once enrolled, a DMEPOS supplier must report within 30 days any changes in its enrollment information. See 42 C.F.R. §§ 424.57(c)(2), 424.516(c). CMS may perform periodic revalidations and site visits to verify the enrollment information submitted to CMS, determine the supplier's compliance with Medicare enrollment requirements, and determine whether the supplier is operational. 42 C.F.R. §§ 424.510(d)(8), 424.515(c), 424.517(a).

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-

* * * *

⁵ Petitioner presented evidence that suggests it may have maintained a "physical facility on an appropriate site," see 42 C.F.R. § 424.57(c)(7), at the 2225 West Jefferson Street address, although this was no longer the address in NSC's file at the time of the on-site inspection. However, whether Petitioner may have technically complied with section 424.57(c)(7) is not dispositive here because section 424.535(a)(5) authorizes CMS to revoke its billing privileges regardless of any compliance with specific subsections of 424.57(c). It should be noted that the term "operational" does not appear in section 424.57(c)(7) and, therefore, is not directly applicable to that section. Therefore, I uphold Petitioner's revocation due to a violation of section 424.535(a)(5).

(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 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.

42 C.F.R. § 424.502.

In the present matter, CMS provided undisputed evidence that Petitioner was not operational on February 20, 2013, at its business address on file with NSC (i.e., 195 Springfield Avenue). Therefore, I conclude that CMS had a legal basis to revoke Petitioner’s billing privileges under 42 C.F.R. § 424.535(a)(5).

Petitioner’s primary legal argument in opposition to the conclusion above is that Petitioner was in fact fully operational on February 20, 2013, at its 2225 West Jefferson Street address. Petitioner faults NSC’s site inspector for not attempting to contact or locate Petitioner at the 2225 West Jefferson Street address. Further, Petitioner distinguishes the present case from other cases cited by CMS in its brief by emphasizing that, far from failing to inform NSC of the change in its address, Petitioner’s revocation has arisen because Petitioner was attempting to prospectively comply with the notice requirement for an address change and simply made a mistake as to timing of the notice.

Petitioner’s argument that it was operational at an address different than the one on file with NSC is unavailing as to a violation under 42 C.F.R. § 424.535(a)(5). As indicated above, the regulatory definition of the term “operational” refers to the “qualified physical practice location” of a supplier. 42 C.F.R. § 424.502. Significantly, a supplier must indicate on an enrollment application the supplier’s “practice location.” 42 C.F.R. § 424.510(d)(2)(ii). A DMEPOS supplier must provide CMS with notice to any changes to the information on its enrollment application. 42 C.F.R. § 424.57(c)(2). 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., JIB Enterprises, LLC, d/b/a Drug Plus Pharmacy*, DAB CR3010, at 9 (2013); *Erik Nelson d/b/a Kalamazoo Long Term Care Pharmacy*, DAB CR2894, at 5 (2013).

Petitioner also asserts that its accounting manager submitted the Form CMS-855S indicating a change of address on her own initiative and that the president signed the Form CMS-855S believing it was for another purpose. P. Exs. 1, at 2; 2, at 1-2. However, NSC was correct to rely on the notice of the change in location for Petitioner because the president's signature on the Form CMS-855S indicated that he read the contents of the form and certified that information as true and accurate. CMS Ex. 1, at 26.

A cursory review of the completed Form CMS-855S unambiguously shows that Petitioner was informing NSC of a change of address, effective January 1, 2013. CMS Ex. 1, at 9. While Petitioner's president testified that the accounting manager is at fault for prematurely informing NSC of the change in address, Petitioner's president shares blame in this because he should not have certified the accuracy of the information in the Form CMS-855S without reviewing it. Further, even if the error in submitting the Form CMS-855S could be completely attributable to the accounting manager, Petitioner cannot avoid responsibility for violating the regulations by blaming an employee. *Cf. Louis J. Gaefke, DPM*, DAB No. 2554 at 5-6 (2013) (holding a supplier responsible for improper claims filed by others on his behalf).

Finally, based on the testimony of Petitioner's president, Petitioner "had intended on moving into the new space in early January, 2013." P. Ex. 1 at 2. Therefore, the accounting manager appears to have filed the Form CMS-855S based on this original schedule. When Petitioner learned that construction issues would delay the move, Petitioner should have informed NSC that it was remaining at its current address at 2225 West Jefferson Street. However, Petitioner did not.

Revocation of billing privileges based on a violation of 42 C.F.R. § 424.535(a)(5) is a discretionary act of CMS or its contractors. 42 C.F.R. § 424.535(a) (introductory text). I do not have the authority to review CMS's discretionary act to revoke a provider or supplier. *Letantia Bussell*, 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.* (emphasis in original). 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.

