Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Nicklya Harris-Ray,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-890

Decision No. CR4819

Date: March 28, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare enrollment and billing privileges of Nicklya Harris-Ray, D.P.M. (Dr. Harris-Ray or Petitioner) because Petitioner's practice location on file with CMS was not operational under 42 C.F.R. § 424.535(a)(5). Dr. Harris-Ray requested a hearing before an administrative law judge (ALJ) to dispute the revocation. Because Petitioner did not provide CMS with the locations where she rendered services to Medicare beneficiaries and instead provided an address to a United Parcel Service (UPS) store where she receives mail, I affirm CMS's determination to revoke Dr. Harris-Ray's Medicare billing privileges because her practice location on file with CMS was not operational.

I. Background

Dr. Harris-Ray is a podiatrist. CMS Exhibit (Ex.) 7 at 7. She was enrolled in the Medicare program as a supplier in 2006. CMS Ex. 7 at 3; 42 U.S.C. § 1395x(d), (r) (for Medicare program purposes, podiatrists are physicians, and physicians are enrolled in the program as suppliers).

In a May 3, 2016 initial determination, a CMS administrative contractor revoked Dr. Harris-Ray's Medicare enrollment and billing privileges. CMS Ex. 2. The effective date for the revocation was January 7, 2016. The reason for revocation was the following:[1]

> 42 CFR §424.535(a)(5) On Site Review
>
> **You are no longer operational to furnish Medicare covered items or services. A site visit conducted on January 7, 2016 at 857 Brownswitch Rd. 136, Slidell, LA 70458-5335 confirmed that you are non-operational.**

CMS Ex. 2 (emphasis in original). The initial determination barred Petitioner from reenrollment in the Medicare program for two years. CMS Ex. 2 at 2.

On May 16, 2016, Dr. Harris-Ray requested that the CMS administrative contractor reconsider the revocation. Petitioner stated the following:

> I am a nursing home podiatrist only. I only treat patients in a nursing home/residence setting. This has always been indicated in my records.
>
> The 857 Brownswitch location that was visited during the site visit is a base of operation only. I receive mail only at this location, and am able to mail and fax correspondences from there. No patients are seen at this location at all. All patients are treated at nursing home facilities.

CMS Ex. 3 at 20. Petitioner also submitted amended portions of the CMS-855I enrollment application to show the six nursing home locations where she treats Medicare beneficiaries. CMS Ex. 3 at 7-12. Further, Petitioner stated the following on the application: "I only render services at nursing homes/residences." CMS Ex. 3 at 13.

On July 18, 2016, a hearing officer with the CMS administrative contractor issued an unfavorable reconsidered determination that stated:

> Nicklya Harris-Ray, DPM did not report to Medicare the actual practice locations where services are render [sic] to Medicare beneficiaries on the CMS-855I Physicians and Non-

[1] The initial determination also stated that Petitioner violated 42 C.F.R. § 424.535(a)(9); however, CMS concedes that this is no longer a basis for revocation. CMS Brief at 3 n.1.

> Physician Practitioners Medicare Enrollment Application per the requirements for enrolling in the Medicare program under 42 CFR §424.510. The CMS-855I enrollment application indicates in Section 4C-Practice locations that all locations disclosed on claims forms should be identified as practice locations; complete this section for each of your practice locations where you render services to Medicare beneficiaries; furnish the name and address if you render services in a hospital and/or **health care facility**; and complete this section with names, telephone numbers and addresses if you render services in a retirement or assisted living community. Each practice location must be a specific street address as recorded by the United States Postal Service. Do not report P.O. Box.
>
> DECISION:
>
> Nicklya Harris-Ray, DPM does not dispute the practice location of 857 Brownswitch Rd, 136, Slidell, LA, 70458-5335 on the PECOS file is non-operational. Therefore, the reconsideration is denied and the revocation is upheld.

CMS Ex. 1 at 2 (emphasis added).

On September 13, 2016, Petitioner requested a hearing. In the hearing request, Petitioner asserted that the address she provided as her practice location was her base of operations that provided administrative support to her "mobile clinic practice, which remains fully operational and facilitates the treatment and care of nursing home residents in their residences." Hearing Request at 2.

On September 29, 2016, I issued an Acknowledgment and Pre-hearing Order (Order). In response to the Order, CMS filed a motion for summary judgment and a pre-hearing brief (CMS Br.), and nine proposed exhibits (CMS Exs. 1-9). Petitioner filed a brief (P. Br.) and one proposed exhibit (P. Ex. 1.)

II. Rulings and Decision on the Record

Petitioner did not object to any of CMS's proposed exhibits. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e). Therefore, I admit CMS Exs. 1-9 into the record.

CMS objects to P. Ex. 1 because Petitioner did not provide good cause for submitting this exhibit for the first time at the ALJ level of appeal.

I sustain CMS's objection. The initial determination provided Petitioner with notice that she needed to submit all evidence with her reconsideration request.

> You may submit additional information with the reconsideration that you believe may have a bearing on the decision. However, if you have additional information that you would like a hearing officer to consider during the reconsideration or, if necessary, an administrative law judge to consider during a hearing, you must submit that information with your request for reconsideration. This is your only opportunity to submit information during the administrative appeals process; you will not have another opportunity to do so unless an administrative law judge specifically allows you to do so under 42 CFR §489.56(e) [sic].

CMS Ex. 2 at 1. I also informed Petitioner at the outset of this proceeding that she needed to provide good cause for any new evidence that she submitted to me. Order ¶ 6. When Petitioner submitted P. Ex. 1, she did not provide good cause for submitting it to me. Therefore, I exclude P. Ex. 1 from the record. 42 C.F.R. § 498.56(e).

Petitioner moves that I strike CMS's pre-hearing brief because CRDP § 13(c) requires the parties to file their entire pre-hearing exchange "at one time." The basis for the motion is that CMS electronically filed its brief several hours after it electronically filed the rest of its pre-hearing exchange. Petitioner also reasons that if I strike CMS's pre-hearing brief, then I should enter summary judgment in her favor. CMS opposes Petitioner's motion, arguing that CMS filed all documents on the same day and that Petitioner was not prejudiced by CMS's actions. I agree with CMS. I believe that electronically filing all documents on the same day is sufficient to comply with CRDP § 13(c). Therefore, I deny Petitioner's motion to strike CMS's pre-hearing brief.

The Order stated that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶ 10; CRDP § 16(b). Both CMS and Petitioner indicated in their pre-hearing exchanges that they do not intend to call any witnesses. Therefore, I decide this case based on the written record. Order ¶¶ 10-11; CRDP § 19(b), (d). Because I can decide this case on the written record, I deny CMS's and Petitioner's motions for summary judgment.

III. Issue

Whether CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges.

IV. Jurisdiction

I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

V. Findings of Fact, Conclusions of Law, and Analysis

My numbered findings of fact and conclusions of law are set forth below in italics and bold.

The Secretary of Health and Human Services (Secretary) has the authority to create regulations that establish enrollment standards for providers and suppliers. 42 U.S.C. § 1395cc(j). The Secretary promulgated regulations that require prospective providers and suppliers to file an enrollment application with CMS and meet certain requirements in order to receive Medicare billing privileges. 42 C.F.R. §§ 424.500, 424.505, 424.510, 424.530. Further, enrolled providers and suppliers must periodically revalidate their enrollment information with CMS and must report to CMS changes in information provided on their enrollment application. 42 C.F.R. §§ 424.515, 424.516. In its discretion, CMS may conduct a site visit to determine whether a provider or supplier meets Medicare enrollment requirements. 42 C.F.R. § 424.517. Finally, the Secretary's regulations provide that if an enrolled provider or supplier is not in compliance with enrollment requirements or other rules related to providers and suppliers, then CMS may revoke that provider's or supplier's Medicare billing privileges. 42 C.F.R. § 424.535.

1. ***Petitioner enrolled in the Medicare program as a podiatrist and informed CMS that her practice location was at 857 Brownswitch Road, #136, Slidell, Louisiana; however, Petitioner actually rendered all services to Medicare beneficiaries at six nursing homes, and a site inspection of the address Petitioner provided to CMS as her practice location was a UPS store.***

As indicated above, Dr. Harris-Ray is a podiatrist who enrolled in the Medicare program as a supplier in 2006. CMS Ex. 7 at 3, 7. In 2008, Dr. Harris-Ray's practice location on file with CMS was 105 Medical Center Drive, Suite 302, Slidell, Louisiana. CMS Ex. 7 at 5. In 2012, Dr. Harris-Ray submitted a CMS-855I enrollment application in which she added a new practice location at 857 Brownswitch Road, #136, Slidell, Louisiana, and indicated that this practice location was a "Group practice office/clinic." CMS Ex. 6 at 8. Dr. Harris-Ray stated the following on the application as a unique circumstance concerning her practice location: "nursing home services." CMS Ex. 6 at 11. The CMS administrative contractor reviewed the CMS-855I enrollment application and sent an email acknowledging receipt of the application. The email also requested that Dr. Harris-Ray resubmit portions of the application. CMS Ex. 7 at 1. In compliance with the email, Petitioner submitted amendments to the CMS-855I in which she indicated that she was deleting the 105 Medical Center Drive, Suite 302, Slidell, Louisiana practice location

address and was changing the practice location address to 857 Brownswitch Road, #136, Slidell, Louisiana. CMS Ex. 8 at 3-4. On March 15, 2012, the CMS administrative contractor approved Dr. Harris-Ray's change of address. CMS Ex. 9 at 1.

On January 7, 2016, an inspector with a CMS administrative contractor attempted a site visit at Dr. Harris-Ray's practice location address on file with CMS: 857 Brownswitch Road, #136, Slidell, Louisiana. The inspector noted that "[t]his address is The UPS Store. The address is a P.O. Box." The inspector took photographs of the UPS Store and a mail box labeled with the number 136, which was inside of the store. CMS Ex. 5.

Petitioner admits that she does not render podiatric services at the 857 Brownswitch address, but rather at six nursing homes. CMS Ex. 3 at 7-13, 20.

2. CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5) because the address that Petitioner identified as her practice location was not operational.

CMS may revoke a supplier if, upon an on-site review, CMS determines that the provider o6 supplier is no longer operational to furnish Medicare-covered items or services. 42 C.F.R. § 424.535(a)(5)(i). The term "operational" means:

> the provider or supplier 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 (definition of *Operational*). In order "[t]o be 'operational' in accordance with the definition in section 424.502, a provider [or supplier], among other things, must have a 'qualified physical practice location' that is 'open to the public for the purpose of providing health care related services." *Viora Home Health, Inc*., DAB No. 2690 at 7 (2016). A provider's or supplier's qualified physical practice location is the provider's or supplier's address that is on file with CMS at the time of a site visit. *Foot Specialists of Northridge*, DAB No. 2773 at 8-10 (2017).

In the present case, it is undisputed that the site inspector attempted to conduct a site visit at the address that Petitioner provided for her practice location. Further, it is undisputed that the address was for a UPS store and, therefore, was not a location that "is open to the public for the purpose of providing health care related services." 42 C.F.R. § 424.502 (definition of *Operational*).

Although Petitioner does not dispute that she indicated that a UPS store was her practice location, she argues that she should not be revoked because she provides all services at six nursing homes and that the 857 Brownswitch address is her administrative base of operations. Petitioner asserts that she correctly reasoned that her services were best characterized as ones provided in patients' homes (i.e., house calls). In such a circumstance, the CMS-855I enrollment form permits the supplier to provide a home address in lieu of the addresses of the patients' homes (CMS Ex. 6 at 7, 11). Petitioner points out that she indicated on the enrollment application that she provides "nursing home services." P. Br. at 11-13. Petitioner also argues that she was operational at the 857 Brownswitch address because this was where Petitioner conducted the administrative aspects of her business while providing actual health care services at the patients' homes. P. Br. at 19-21.

I disagree that Petitioner properly considered herself to provide services in the homes of the Medicare beneficiaries whom she treated. Unlike the CMS-855A and CMS-855B enrollment applications, which are used for providers or suppliers that are entities, the CMS-855I enrollment application is one that is used only by individual practitioners. In Section 4, Subsection C, the form instructs, among other things:

> Complete this section for each of your practice locations **where you render services** to Medicare beneficiaries.
>
> . . .
>
> If you render services in a hospital and/or other health care facility, furnish the name and address of that hospital or facility.

CMS Ex. 6 at 7 (emphasis added). Further down in that subsection under the place to provide the practice location addresses, the form asks what type of practice location is listed and one of the options is "Skilled Nursing Facility and/or Nursing Facility." CMS Ex. 6 at 8.

The application is clear that the practice locations that must be disclosed are ones where Petitioner actually renders services to Medicare beneficiaries, and not where administrative functions take place. It is also clear that the names and addresses for each health care facility must be provided. And skilled nursing facilities would easily be categorized as a health care facility. *See* 42 C.F.R. Part 483, Subpart B.

It is true that Petitioner indicated on the enrollment application "nursing home services" in the section to delineate unique circumstances. CMS Ex. 6 at 11. However, this statement is at best ambiguous given that Petitioner indicated on the CMS-855I that Petitioner's practice location was a "Group practice office/clinic." CMS Ex. 6 at 8.

Taken with the fact that Petitioner did not disclose that her practice location address was a UPS store, CMS could have concluded that nursing home residents were being transported to Petitioner's office for services. If Petitioner had wanted CMS to understand that she was providing services at various nursing homes, she needed to provide the address information for each nursing home and then, under the address section, identify it as a nursing home. CMS Ex. 6 at 8.

Petitioner also asserts that the requirement that she provide the actual location where she provides services as her practice location is improper because CMS has engaged in rulemaking with no notice. P. Br. at 16-17. However, duly promulgated regulations support CMS's position. The regulations require providers and suppliers to "submit enrollment information on the applicable enrollment application" that is truthful and complete and submit all documents required by CMS, which may include the "practice location." 42 C.F.R. § 424.510(a)(1), (d)(1), (2). As discussed, the CMS-855I explains, not unreasonably, that a practice location is where the supplier actually provides services to Medicare beneficiaries and then lists options for the type of location where the services are provided, such as a skilled nursing facility. This is consistent with the definition of the term "operational" in the regulations, which requires a supplier's qualified practice location to be open to the public for the purpose of providing health care related services. 42 C.F.R. § 424.502.

Petitioner's decision to indicate that a UPS store was a "Group practice office/clinic" on the CMS-855I was not reasonable. CMS Ex. 6 at 8. Because Petitioner identified a UPS store as her practice location, CMS properly determined that the practice location that CMS had on file for Petitioner was not operational.

Finally, Petitioner asserts that CMS should be estopped from revoking Petitioner because Petitioner allegedly provided CMS with sufficient information to understand that Petitioner was providing all services at nursing homes, and not at the address Petitioner actually gave as her practice location. Petitioner asserts that she relied on CMS's prior approvals of her status as a supplier.

I am without authority to grant equitable relief. It is well-established that: (1) estoppel cannot be the basis to require payment of funds from the federal fisc; (2) estoppel cannot lie against the government, if at all, absent a showing of affirmative misconduct, such as fraud; and (3) I am not authorized to order payment contrary to law based on equitable grounds. *See, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51 (1984); *Oklahoma Heart Hosp.*, DAB No. 2183 at 16 (2008); *Wade Pediatrics*, DAB No. 2153 at 22 n.9 (2008), *aff'd*, 567 F.3d 1202 (10th Cir. 2009); *U.S. Ultrasound*, DAB No. 2303 at 8 (2010). Petitioner has not provided evidence of affirmative misconduct by CMS or its administrative contractor. Therefore, I must reject Petitioner's equitable estoppel argument.

VI. Conclusion

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

/s/
Scott Anderson
Administrative Law Judge