Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bruce S. Goldenberg, M.D.,
(PTAN: 578316),
(NPI: 15381674)

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-55

Decision No. CR4838

Date: April 28, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Petitioner, Bruce S. Goldenberg, M.D., because Petitioner was not operational at the practice location on record with CMS. Specifically, the practice location on record with CMS was a mailbox at a United States Post Office. For the reasons stated herein, I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

I. Background

Petitioner is a thoracic and cardiac surgeon. Petitioner Exhibit (P. Ex.) 10 at 3. On August 3, 2012, Novitas Solutions (Novitas or "the contractor"), a Medicare administrative contractor, sent Petitioner a revalidation request pursuant to 42 C.F.R. § 424.515(d). CMS Ex. 1. Petitioner timely complied with the request and submitted a Medicare enrollment application in which he reported a change of address for his practice location. CMS Ex. 2 at 5, 16. Petitioner reported that his new practice location was 30 Chatham Rd., # 377, in Short Hills, New Jersey, and that he no longer practiced at his

former practice location of 350 Boulevard in Passaic, New Jersey. CMS Ex. 2 at 5, 16. Novitas sent a letter dated August 30, 2012, to Petitioner confirming that it had processed the revalidation application. CMS Ex. 3. In that letter, Novitas informed Petitioner that its enrollment information on file included the practice location in Short Hills. CMS Ex. 3 at 1.

On December 28, 2015, a site visit contractor visited Petitioner's reported address in Short Hills, at which time the site visit contractor documented that the location was a United States Post Office ("post office"), and not a medical office. CMS Ex. 4. On April 22, 2016, Novitas sent Petitioner an initial determination informing him that his Medicare enrollment and billing privileges were being revoked retroactive to December 28, 2015, the date of the failed site visit, and that he was barred from re-enrollment in Medicare for a period of two years. CMS Ex. 5. The letter stated the following, in pertinent part:

> 42 [C.F.R. §]424.535(a)(5) On Site Review
>
> **You are no longer operational to furnish Medicare covered items or services. An on-site review conducted on December 28, 2015 at 30 Chatham Road, #377, Short Hills, NJ 07078-0377 confirmed that you are non-operational.**
>
> 42 [C.F.R. §]424.535(a)(9) - Failure to Report
>
> **You are no longer operational to furnish Medicare covered items or services. An on-site review conducted on December 28, 2015 at 30 Chatham Road, #377, Short Hills, NJ 07078-0377 confirmed that you are non-operational. You did not notify the Centers for Medicare & Medicaid Services of this change of practice location as required under 42 C.F.R. [§]424.516.**

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

In a letter dated April 28, 2016, Petitioner requested reconsideration of the April 22, 2016 revocation determination. CMS Ex. 6 at 1. Petitioner explained that his "office apparently did not properly complete the appropriate documentation regarding locations for correspondence, patients, and reimbursement." CMS Ex. 6 at 1. Petitioner "apologize[d] for our error," and explained he provides services to patients at 1500 Pleasant Valley Way, Suite 302, in West Orange, New Jersey. CMS Ex. 6 at 1. Petitioner enclosed a "corrected" Form CMS-855I in which he reported that he had been practicing at the location in West Orange since April 1, 2015. CMS Ex. 6 at 2-11.

On July 5, 2016, Novitas issued an unfavorable reconsidered determination. CMS Ex. 7. The reconsidered determination stated the following:

> Revocation Reason: 42 [C.F.R. §]424.535(a)(5) – On-Site Review
>
> Specifically on April 22, 2016, Novitas Solutions revoked your billing privileges effective December 28, 2015 due to the site visit at 30 Chatham Road, #377, Short Hills, NJ 07078-0377. The site visit results on December 28, 2015 confirmed that you are non-operational.
>
> Revocation Reason: 42 [C.F.R. §]424.535(a)(9) – Failure to Report
>
> Specifically on April 22, 2016, Novitas Solutions revoked your billing privileges effective December 28, 2015 since Bruce Goldenberg, MD did not notify CMS of this change of practice location as required under 42 [C.F.R. §]424.516.

CMS Ex. 7 at 1. The reconsidered determination explained that Petitioner "does not dispute the practice location of 30 Chatham Road, #377, Short Hills, NJ 07078-0377 on the [Provider Enrollment, Chain, and Ownership System] file is non-operational since this address is the mailing/correspondence address." CMS Ex. 7 at 2. The letter further explained, with language similar to a statement by Petitioner in his request for reconsideration, that Petitioner's office "didn't properly complete the appropriate documentation regarding locations for correspondence, patients, and reimbursement." CMS Ex. 7 at 2. Novitas determined that Petitioner "has not provided evidence to show full compliance with the standards for which [he was] revoked." CMS Ex. 7 at 2.

Petitioner, through counsel, submitted a request for an administrative law judge (ALJ) hearing on August 17, 2016 that my office received on October 19, 2016. On November 3, 2016, I issued an Acknowledgment and Pre-Hearing Order (Order), at which time I directed the parties to each file a pre-hearing exchange consisting of a brief and supporting documents by specified deadlines.[1] 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.

[1] In my Order, I discussed that Petitioner had misdirected his August 17, 2016 request for hearing to the Office of Medicare Hearing and Appeals (OMHA), and that OMHA had forwarded the request for hearing to the Departmental Appeals Board on October 18, 2016. I explained that good cause had been shown for the late filing of the request for hearing. 42 C.F.R. §§ 498.40(a)(2), (c), 498.70(c). I gave the parties an opportunity to file objections to the Order, and neither party filed any objections.

In response to my November 3, 2016 Order, CMS filed a brief and eight exhibits (CMS Exs. 1-8). Petitioner filed a brief and 10 exhibits (P. Exs. 1-10).[2] As neither party has objected to any exhibits, I admit the exhibits into the record.[3] Pursuant to my Order, Petitioner has also submitted his own written direct testimony (P. Ex. 10). Order, § 8. Because CMS has not requested the opportunity to cross-examine this witness, I consider the record to be closed and the matter ready for a decision on the merits.[4] Order, §§ 9, 10.

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 and did not timely report a change in practice location.

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).

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[2] Petitioner's brief identifies the Inspector General (IG), rather than CMS, as the respondent in this matter. In addition, Petitioner requests that I "consider all mitigating factors and affirmative defenses." Such factors are applicable to cases in which the Inspector General is a party. *See* 42 C.F.R. pt. 1005. The instant decision involves an enrollment matter in which CMS, and not the IG, is a party; I will not address any matters that may be pending involving the IG as a party, as such matters, if any, are not properly before me. *See* Request for Hearing; CMS Ex. 7.

[3] Petitioner did not submit P. Exs. 1 through 4 prior to requesting an ALJ hearing. Petitioner alleges there is good cause for the late submission. P. Br. at 12-13. As CMS has not objected to the submission of these exhibits, I accept Petitioner's assertion of good cause. 42 C.F.R. § 498.56(e)(2)(ii) (requiring exclusion of any new documentary evidence at the administrative law judge level of appeal if no good is shown for why that evidence was not previously offered).

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

IV. Findings of Fact, Conclusions of Law, and Analysis[5]

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 non-operational, 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 an 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."

1. On December 28, 2015, a site visit contractor was unable to conduct a site visit of Petitioner's Short Hills practice location, which was the practice location on file with Novitas at that time, because the location is a post office and not a medical office.

On or about August 23, 2012, Petitioner submitted an enrollment application in response to the Medicare administrative contractor's request that it revalidate its enrollment. At that time, Petitioner reported that he was changing his Medicare information and checked a block corresponding to an update of "Practice Location Information, Payment Address and Medical Record Storage Information." CMS Ex. 2 at 2-3. Shortly thereafter, and in conjunction with his revalidation application, Petitioner "delete[d]" a former practice location in Passaic, NJ, which he also described as a "private office." CMS Ex. 2 at 16. Petitioner provided a handwritten notation reporting that his new practice location was a "private office," and stated that the practice location was at the address in Short Hills starting on August 3, 2012. CMS Ex. 2 at 5. In a letter dated August 30, 2012, Novitas informed Petitioner that it had processed his enrollment application for purposes of revalidation. CMS Ex. 3 at 1. In summarizing Petitioner's Medicare enrollment information, Novitas informed Petitioner that its "Medicare enrollment record" listed that his practice location was in Short Hills. CMS Ex. 3 at 1.

[5] My numbered findings of fact and conclusions of law appear in bold and italics.

On December 28, 2015, a Novitas contractor attempted a "site verification survey" at the reported practice location address in Short Hills. CMS Ex. 4. The Novitas contractor reported that "[t]he given address of 30 Chatham Rd. Short Hills, NJ is the United States Post Office for Short Hills, NJ." CMS Ex. 4 at 1. The Novitas contractor further reported that he "spoke to a postal worker that stated #377 is a PO Box and ther[e] are no other tenants at this facility." CMS Ex. 4 at 1.

In seeking reconsideration of the determination revoking its enrollment, Petitioner admitted that his office "did not properly complete the appropriate documentation regarding locations for correspondence, patients, and reimbursement" and explained that he sees patients at the location in West Orange. CMS Ex. 6 at 1. Petitioner also submitted, for the first time, a Form CMS-855I enrollment application informing Novitas of the West Orange address that was his practice location, effective April 1, 2015. CMS Ex. 6 at 7.

Petitioner admits that he practiced at a location other than the location listed on the enrollment record at the time of the site verification survey. CMS Ex. 6 at 1; P. Br. at 6 (admitting the listing of the Short Hills address as his practice location was an "unintentional clerical oversight"); P. Br. at 4 (stating that "[t]he sole purpose for Petitioner to utilize the Short Hills address was to retrieve his mail in a more efficient and timely manner.").

There is no dispute that the Short Hills address Petitioner provided is a post office, and not a medical office where he provided services to Medicare beneficiaries.

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

While Petitioner concedes that the Short Hills location is a post office, he nonetheless contends that he was operational to see patients and his enrollment should not have been revoked. P. Br. at 4-5.

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 provided services to patients at the West Orange address that he first reported in April 2016 (*see* CMS Ex. 6 at 7), the address Petitioner provided as his physical practice location when he revalidated his Medicare enrollment in August 2012 was a post office in Short Hills. CMS Ex. 2 at 5. Even if Petitioner had any misunderstanding regarding the location he had reported as a practice location, Novitas had informed him, in August 2012, that his "enrollment record" showed that his "practice location" was at the location of the Short Hills post office, and not another location where he has asserted he actually provided services to patients. CMS Ex. 3 at 1.

The regulatory definition of the term "operational" refers to the "qualified physical practice location" of a supplier, 42 C.F.R. § 424.502. When Petitioner was asked to revalidate in August 2012, Petitioner provided a new physical practice location and deleted another practice location, and reported that his new practice location was a "private office" in Short Hills. CMS Exs. 1; 2 at 5, 16. Petitioner signed the application and certified that its contents were "true, correct, and complete." CMS Ex. 2 at 17. CMS, in its performance of an on-site inspection "to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements," discovered that Petitioner did not have an operational practice at the location in Short Hills that he claimed was a private office and his practice location. CMS Ex. 2 at 5; 42 C.F.R. § 424.517(a). In assessing that Petitioner was not operational at a practice location in Short Hills, CMS attempted to inspect the "qualified physical practice location" that Petitioner provided and was on file with CMS at the time of the attempted site visit. 42 C.F.R. § 424.517(a).

Because the physical practice location on file with CMS was a post office, and not a private office, CMS had a legal basis to revoke Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)(ii). Simply stated, Petitioner was not operational at the post office in Short Hills.

Petitioner raises several unpersuasive arguments. First, Petitioner argues that he intended for the listing of the Short Hills address to be nothing more than a mailing address, and

"that he did not appreciate that he had to change his address with Medicare since he understood that the Short Hills [a]ddress he utilized was a valid address based on his communications with Medicare." P. Br. at 5-6. While Petitioner has provided reasons for why he believed it was appropriate to provide a post office address as a practice location, such reasons do not establish that he was operational at that address as contemplated by section 424.517(a).[6]

Petitioner contends that 42 C.F.R. § 424.535(a) is permissive, and revocation is not mandatory. Petitioner is correct; however, my review is not premised on whether CMS's action was required, but rather, whether CMS or its contractor has a "legal basis" for its action. *Letantia Bussell, M.D.*, DAB No. 2196 at 10 (2008); *see Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2008), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2nd 167 (D. Mass. 2010) (stating if CMS establishes that the regulatory elements necessary for revocation are satisfied, an ALJ may not substitute his or her "discretion for that of CMS in determining whether revocation is appropriate under the circumstances"). Therefore, I need only review whether CMS was authorized to revoke Petitioner's Medicare enrollment, rather than whether it was required to revoke Petitioner's Medicare enrollment. 42 C.F.R. § 424.535(a) (stating "CMS *may* revoke a currently enrolled provider or supplier's Medicare billing privileges . . . .") (emphasis added).

Petitioner also contends, with little supporting explanation, that the contractor "did not follow proper procedure for address verification," and that "CMS should have requested 'clarifying information' pursuant to Section 15.5.4(A) of the [Medicare Program Integrity Manual]." P. Br. at 8. First, the Medicare Program Integrity Manual (MPIM) provisions are sub-regulatory policies and are intended as guidance or instructions for CMS contractors. *Viora Home Health, Inc.*, DAB No. 2690 at 8 (2016); *see Gloria D. Johnson, NP*, DAB No. CR4803 at 8-9 (2017) (discussing CMS's position that "[e]ven if the ALJ had jurisdiction over these issues, which it does not, the internal policy guidance set forth in the [MPIM] is not binding and does not form a legal obligation on the part of [the contractor] or CMS."). MPIM provisions have no force of law, and Petitioner has not shown that he has recourse on appeal for the contractor's failure to adhere to an MPIM provision, alone, if such an error or omission even occurred. *See Care Pro Home Health, Inc.*, DAB No. 2723 at 7-8 (2016). Next, Section 15.5.4(A) of the MPIM, even if it creates procedures for contractors, does not obviate the fact that Petitioner was non-operational at the same location that he listed as a practice location in his enrollment application. Further, Petitioner does not explain, in any detail, how the contractor failed to follow Section 15.5.4(A). *See Care Pro Home Health*, DAB No. 2723 at 8 (discussing

[6] Section 2 of the Form CMS-855I enrollment application directs the applicant to provide a "correspondence address." *See* CMS Ex. 8 at 6. If Petitioner wished to receive his mail at the Short Hills post office, he could simply have listed the Short Hills address as a correspondence address without the need to inaccurately provide practice location information in Section 4 of the application.

that Section 15.5.4(A) "is intended to cover the situation in which a contractor is unable to confirm the **physical existence** of a practice location, as distinct from being unable to verify, through on-site review, that a provider meets all the requirements for being 'operational' at some location.") (emphasis in original). Petitioner does not explain why it would have been necessary for Novitas to obtain clarifying information in such an instance where the site visit contractor was readily able to confirm the existence of the practice-location address on file with CMS as of December 28, 2015. Unfortunately for Petitioner, the practice location that the Novitas site visit contractor confirmed was a post office, rather than a medical office.

Petitioner recounts that he "called Medicare for assistance in filling out the forms," and without explicitly stating so, insinuates that his listing of the Short Hills address as his practice location was somehow based on guidance he received from the contractor. In no uncertain terms, Petitioner stated in his application that his practice location was a private office at what is actually a post office. Even assuming Petitioner, at the conclusion of the telephone conversation with Novitas, thought it was appropriate to list a post office as a practice location and to further indicate that the location is a "private office," such an erroneous belief should have been rectified when he completed the Form CMS-855I and reported that a post office is the location where he "render[s] services to Medicare beneficiaries." P. Br. at 9; CMS Exs. 2 at 5; 8 at 6 (blank Form CMS-855I providing instructions for completing Section 4, Practice Location Information).

Petitioner also contends that the two-year length of the re-enrollment bar is excessive. The Board has explained that "CMS's determination regarding the duration of the re-enrollment bar is not reviewable." *Vijendra Dave, M.D.*, DAB No. 2672 at 11 (2016). The Board further discussed that "the only CMS actions subject to appeal under Part 498 are the types of initial determinations specified in section 498.3(b)." *Id.* The Board also explained that "[t]he determinations specified in section 498.3(b) do not, under any reasonable interpretation of the regulation's text, include CMS decisions regarding the severity of the basis for revocation or the duration of a revoked supplier's re-enrollment bar." *Id.* The Board noted that a review of the rulemaking history showed that CMS did not intend to "permit administrative appeals of the length of a re-enrollment bar." *Id.* Petitioner offers no authority supporting that an ALJ has the authority to review the length of a re-enrollment bar. I have no authority to review this issue on appeal, and therefore, I do not disturb the length of the two-year reenrollment bar.

To the extent that Petitioner is requesting equitable relief, I am unable to grant equitable relief. *See* P. Ex. 10 at 3 (written direct testimony of Petitioner stating that a two-year revocation "would significantly impact the patient population . . . "); P. Br. at 11 (argument that equitable considerations weigh in Petitioner's favor); *see also US Ultrasound*, DAB No. 2302 at 8 (2010) ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements"). While I cannot grant Petitioner equitable relief,

that does not mean that I do not recognize the significant impact of Petitioner's Medicare enrollment revocation on his practice. However, because Petitioner listed a practice location on his enrollment application at which he was not operational, CMS had a legal basis to revoke his enrollment.

3. Petitioner failed to notify CMS or its administrative contractor of a change of practice location within 30 days of the location change.[7]

The regulations at 42 C.F.R. § 424.516(d)(1)(iii) require that physicians report, within 30 days, a change in practice location to their Medicare contractor. Failure to timely report a change in practice location subjects a physician to revocation of his or her Medicare billing privileges. 42 C.F.R. § 424.535(a)(9). Petitioner does not contend that he informed Novitas of his practice location change within 30 days of April 1, 2015, the date he reported that he began practicing at the West Orange location. CMS Ex. 6 at 7. Rather, the evidence shows that Petitioner did not report his new practice location in West Orange for another year, until April 2016, when he submitted a new Medicare enrollment application. CMS Ex. 6 at 7.

Petitioner cannot escape responsibility for his failure to report his change in practice location within 30 days of his practice's relocation, and Petitioner is responsible for knowing the rules pertaining to Medicare suppliers. Therefore, I conclude that Petitioner failed to timely notify Novitas of the change in practice location within 30 days as required, and that this failure serves as a legitimate basis to revoke his Medicare billing privileges. 42 C.F.R. § 424.516(d)(1)(iii).

V. Conclusion

I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges, along with the two-year bar to re-enrollment.

/s/
Leslie C. Rogall
Administrative Law Judge

[7] I recognize that the fact that Petitioner was non-operational, alone, is a sufficient basis for CMS to have revoked his Medicare enrollment and billing privileges. I will nonetheless briefly address Petitioner's failure to timely report the location change for his practice.