

## **DAB Clarifies Definition of Mobile Independent Diagnostic Testing Facility and Rules on Leasing and Sharing of Practice Locations with Medicare Enrolled Physicians**

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The Department of Health and Human Services Departmental Appeals Board, Appellate Division (“DAB”), issued a final decision on November 22, 2010, that clarifies the meaning of a “mobile independent diagnostic testing facility (“IDTF”),” and interprets IDTF requirements relating to the leasing of space as well as “sharing a practice location” with another Medicare-enrolled individual or organization.<sup>1</sup> CMS regulations for IDTFs have resulted in confusion concerning whether certain delivery structures result in an IDTF being “mobile” or “fixed-based.” For the first time, the DAB has explicitly stated that two types of mobile IDTFs exist: (i) those which are “portable units” and (ii) those which are a “mobile facility or unit.”<sup>2</sup> These two types of mobile IDTFs differ in that a “portable unit” mobile IDTF involves the transportation of equipment to different fixed locations for diagnostic testing, while a “mobile facility or unit” refers to a converted, equipped, and licensed mobile home, trailer, or other large vehicle which travels to a location for the treatment of patients inside the vehicle.

The DAB further clarified the CMS regulations which imposed “certification standards” on IDTFs, particularly those set forth in 42 C.F.R. § 410.33(15)(g) which prohibit a fixed-base IDTFs from sharing a “practice location” with another Medicare-enrolled individual or organization. While CMS did not define the term “practice location” in the regulations, CMS did provide some guidance as to the meaning of this term in the Preamble to the Final Rule.<sup>3</sup> The DAB decision provides that an IDTF may share space with another Medicare-enrolled individual or organization, but draws a clear line between the sharing of clinical space and non-

clinical space.<sup>4</sup> Specifically, the sharing of common hallways, waiting rooms, and reception areas is permissible.<sup>5</sup> However, IDTFs remain prohibited from sharing clinical space, such as the same suite in an office building, or diagnostic testing equipment with another Medicare-enrolled individual or organization.

CMS' IDTF "certification standards" also prohibit a fixed-base IDTF from leasing space to another Medicare-enrolled individual or organization, but there is no restriction on a fixed-base IDTF wishing to lease or sublease space from another Medicare-enrolled individual or organization.<sup>6</sup> The DAB decision solidified this point, stating that when an IDTF leases "from" a doctor, "the prohibition against leasing or subleasing "to" another Medicare-enrolled individual or organization simply does not apply."<sup>7</sup>

Proactive Medical, L.L.C. ("Proactive") enrolled in Medicare as a mobile IDTF. Proactive's business model involved providing mobile inpatient and outpatient vascular diagnostic testing by providing services onsite and by transporting its mobile equipment to various other fixed locations in vans. Proactive's base of operations for its mobile services was located in an office building suite. When Proactive moved from one suite to another within the office building, Proactive filed a revised CMS 855B, the Medicare enrollment form for IDTFs, with Pinnacle Business Services (the "Carrier"), CMS' Medicare Carrier, to provide notification for the change of address. This filing prompted the Carrier to conduct a site survey of Proactive's location. Proactive leased this suite from a Medicare-enrolled doctor. Proactive and the Medicare-enrolled doctor shared a waiting area and a receptionist area, but were otherwise located in separate suites.

After the survey, Pinnacle Business Services (the “Carrier”), CMS’ Medicare Carrier, concluded that Proactive was a fixed-base IDTF and was sharing a practice location and subleasing space from another Medicare-enrolled organization in violation of 42 C.F.R. § 410.33(g)(15)(i) and (ii). As a result, the Carrier revoked Proactive’s billing privileges. Proactive’s request for reconsideration of the revocation was denied and Proactive appealed to the Administrative Law Judge (“ALJ”). The ALJ issued an opinion in favor of Proactive, and CMS, on behalf of the Carrier, appealed to the DAB.

Proactive argued that it was in compliance with the relevant IDTF requirements. It argued that it was a mobile IDTF, not a fixed-base IDTF, and that the prohibitions on sharing a practice location and leasing space to another Medicare-enrolled individual or organization contained in 42 C.F.R. §410.33(g)(15)(i) and (ii) do not apply to mobile IDTFs. Proactive further asserted that even if it was a fixed-base IDTF, it neither shared a practice location nor leased its practice location to another Medicare-enrolled individual or organization.

Conversely, the Carrier argued that Proactive was a fixed-base IDTF because Proactive failed to complete certain sections of the Medicare enrollment application relating to the operations of a mobile IDTF and because the site inspector neither saw nor inspected a mobile unit during the inspection. The Carrier also used the term “mobile IDTF” synonymously with the terms “mobile unit” and “mobile facility,” referring to the mobile IDTF business model involving the treatment of patients within a large vehicle that travels to different locations. The Carrier asserted that an IDTF was required to have a mobile unit or facility in order to be considered a mobile IDTF since the IDTF regulations do not contain a supplier designation for a “portable unit mobile IDTF.”

After concluding Proactive was a fixed-base IDTF, the Carrier concluded that Proactive shared a practice location with a Medicare-enrolled physician since the original lease granted the Medicare-enrolled physician the right to occupy the premises. Since Proactive subleased the premises from the physician, the Carrier argued that Proactive did not have exclusive use of the premises in accordance with the regulations.<sup>8</sup> The Carrier also asserted that the distinction between an IDTF leasing to or from a Medicare-enrolled individual or organization had no bearing in the case.

The DAB disagreed with the arguments put forth by CMS on behalf of its Carrier and found that Proactive was a mobile IDTF. As a result, the DAB affirmed the ALJ's decision reversing the revocation of Proactive's billing privileges and granted summary judgment in favor of Proactive. This opinion may provide guidance to providers and suppliers in structuring leasing arrangements which comply with these regulations.

*Proactive Medical, L.L.C. v. Centers for Medicare and Medicaid Services*; DAB CR2150, Board Decision No. 2346, November 22, 2010.

1. 42 C.F.R. §410.33(g)(15).
2. Proactive Medical, L.L.C., DAB2346 at 6-7 (Nov. 22, 2010).
3. 72 Fed. Reg. 38122 (July 12, 2007); *See also* 72 Fed. Reg. 66222, 66290-92 (Nov. 27, 2007).
4. Proactive Medical, L.L.C., DAB2346 at 9-11 (Nov. 22, 2010).
5. *Id.* at 11.
6. 42 C.F.R. §410.33(g)(15)(ii).
7. Proactive Medical, L.L.C., DAB2346 at 11 (Nov. 22, 2010).
8. 72 Fed. Reg. 66290 (Nov. 27, 2007).

