Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

James T. Murphy, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-4208

Decision No. CR4707

Date: September 20, 2016

DECISION

National Government Services (NGS), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, James T. Murphy, M.D. (Petitioner or Dr. Murphy). NGS relied on two grounds in revoking Dr. Murphy's Medicare billing privileges: 1) the State of California had revoked his license to practice medicine and 2) the State of California had terminated his enrollment in Medi-Cal, California's Medicaid program. Petitioner requested a hearing to contest the revocation. CMS later informed Dr. Murphy that it was relying on the Medi-Cal termination as the sole basis for revoking his Medicare billing privileges. Because Petitioner does not dispute that his participation in Medi-Cal was terminated, I affirm CMS's revocation of Dr. Murphy's Medicare billing privileges.

I. Background and Procedural History

Dr. Murphy is an emergency medicine physician who at various times has been licensed to practice medicine in Alabama, Arizona, California, Connecticut, Indiana, Michigan, Missouri, New York, North Carolina, Texas, Wisconsin, and Wyoming. *See* Petitioner's Brief (P. Br.) at 2. On or about January 9, 2014, the New York State Board for

Professional Medical Conduct (New York Board) charged Dr. Murphy with five specifications of professional misconduct. CMS Exhibit (Ex.) 2 at 16-19. The first specification charged that Dr. Murphy "practic[ed] the profession of medicine with negligence on more than one occasion." CMS Ex. 2 at 18. The other four specifications charged that Dr. Murphy "fail[ed] to maintain a record for each patient which accurately reflect[ed] the evaluation and treatment of the patient." *Id.* On or about January 10, 2014, Dr. Murphy and the New York Board entered into a consent agreement. CMS Ex. 2 at 11-15. In the consent agreement, Dr. Murphy agreed not to contest the charge that he failed to maintain adequate patient records. CMS Ex. 2 at 11. Under the terms of the consent agreement, Dr. Murphy agreed, among other conditions, that he would never reactivate his New York medical license (# 259046) and would never again practice medicine in New York State. CMS Ex. 2 at 12. The New York Board adopted the terms of the consent agreement by order dated January 10, 2014. CMS Ex. 2 at 10.

On or about May 23, 2014, the Medical Board of California (California Board) issued an Accusation against Dr. Murphy's California medical license (#G89033), charging that the conduct that formed the basis for the New York consent order constituted unprofessional conduct under California law. CMS Ex. 2 at 6-9. Dr. Murphy requested a hearing and the California Board scheduled a hearing for January 8, 2015. CMS Ex. 2 at 1-2. Dr. Murphy did not appear for the scheduled hearing and was declared in default. CMS Ex. 2 at 2. On January 27, 2015, the California Board issued a default order revoking Dr. Murphy's California medical license, effective February 26, 2015. CMS Ex. 2 at 4.

In a letter dated April 13, 2015, the California Department of Health Care Services (DHCS) notified Dr. Murphy of the following:

> [Y]ou are prohibited from being able to receive payment from the Medi-Cal program for an indefinite period of time, effective March 16, 2015. Your name will be posted on the "Medi-Cal Suspended and Ineligible Provider List," available on the Internet. During the period of your suspension, no person or entity, including an employer, may submit any claims to the Medi-Cal program for items or services rendered by you.

CMS Ex. 4 at 1. DHCS further stated that it was required to suspend from Medi-Cal any provider of health care services who has a license to provide health care revoked or suspended or has surrendered that license while a disciplinary hearing on that license was pending.[1] *Id.*

[1] Although the California Board revoked Dr. Murphy's medical license, the DHCS letter mistakenly stated that Dr. Murphy had surrendered his license while a disciplinary hearing was pending. CMS Ex. 4 at 1.

In an e-mail dated June 19, 2015, DHCS informed CMS that Dr. Murphy's Medi-Cal privileges were suspended or "terminated," that the reason for termination was "[l]icense loss," and that Dr. Murphy had exhausted all appeal rights. CMS Ex. 5 at 1-2. In an e-mail dated June 25, 2015, CMS directed NGS to revoke Dr. Murphy's Medicare enrollment and billing privileges. CMS Ex. 6.

By letter dated July 2, 2015, NGS issued an initial determination revoking Dr. Murphy's Medicare enrollment and billing privileges, effective February 26, 2015. CMS Ex. 7 at 1. NGS relied on two grounds in support of the revocation:

> **42 CFR §424.535(a)(1) – Not in Compliance with Medicare Requirements**
> James Murphy's license to practice medicine in the State of California was revoked effective February 26, 2015, as a result of disciplinary action rendered by the Medical Board of California.
>
> **42 CFR §424.535(a)(12) – Medicaid Termination**
> By letter dated April 13, 2015, James Murphy was informed that he was terminated from the California Medicaid (Medi-Cal) program. California Medi-Cal confirmed that James Murphy's appeal rights have been exhausted with respect to this termination.

Id. The initial determination further informed Dr. Murphy that he could submit a corrective action plan (CAP) with regard to the alleged violation of 42 C.F.R. § 424.535(a)(1) only, and that he could request reconsideration of either or both grounds. CMS Ex. 7 at 1-2.

Dr. Murphy timely requested reconsideration by letter dated August 15, 2015. CMS Ex. 9. In his reconsideration request, Dr. Murphy argued that the California Board had illegally revoked his medical license and denied him due process. He explained that the conduct charged in the New York disciplinary proceeding occurred at a facility that was understaffed and was implementing a new electronic medical records system that did not function properly. He characterized the disciplinary action of the New York Board as "[d]raconian" and stated that he lacked the time or resources to fight the New York charges. He pointed out that several of the other jurisdictions in which he was licensed had not taken action against his licenses, and that Wisconsin had permitted him to retain his license with the proviso that he complete "remedial education for medical record taking." Dr. Murphy's reconsideration request did not address whether or not his California Medicaid privileges had been terminated. CMS Ex. 9.

In an August 17, 2015 reconsidered determination, an NGS hearing officer upheld the initial determination. CMS Ex. 10. The reconsideration determination stated the following:

> EVALUATION OF SUBMITTED DOCUMENTATION: There was no letter of reconsideration, stating the facts in which [Dr. Murphy] is disagreeing with the decision in which [sic] was made to revoke[.]
>
> DECISION: James T Murphy MD Has not *provided evidence to show full compliance with the standards for which you were revoked. Therefore, we cannot grant you access to the Medicare Trust Fund (by way or issuance) of a Medicare number.*

CMS Ex. 10 at 2 (italics original).

Petitioner timely requested a hearing. The case was initially assigned to Administrative Law Judge Carolyn Cozad Hughes, who issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of prehearing exchanges. Effective August 26, 2016, the case was reassigned to me. In accordance with Judge Hughes' Order, CMS filed its prehearing exchange, consisting of a brief (CMS Br.) in support of summary disposition and ten exhibits (CMS Exs. 1-10). CMS did not submit the written direct testimony of any witness. In its prehearing brief, CMS stated that it was no longer pursuing revocation of Dr. Murphy's Medicare enrollment and billing privileges based on 42 C.F.R. § 424.535(a)(1) and, instead asserted that revocation was authorized based solely on 42 C.F.R. § 424.535(a)(12).[2] CMS Br. at 3 n.1.

Petitioner also filed a prehearing exchange consisting of a brief (P. Br.) responding to CMS's submission and cross-moving for summary disposition. Petitioner also offered 3 exhibits (P. Exs. 1-3). Petitioner did not offer the written direct testimony of any witness. Petitioner requested to cross-examine Kyra Blair, an NGS representative identified by CMS in its brief. *See* P. Br. at 7 n.1; *see also* CMS Br. at 3 n.4.

Neither party objected to the exhibits offered by the opposing party. Therefore, in the absence of objection, I admit CMS Exs. 1-10 and P. Exs. 1-3 into the record. As explained in more detail below, I conclude that it is unnecessary to hold a hearing for the purpose of receiving the testimony of the NGS representative, Ms. Blair, because her testimony would not be relevant to any issue necessary to my decision in this case.

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[2] Because CMS determined not to pursue revocation of Dr. Murphy's Medicare enrollment and billing privileges based on the loss of his California medical license, CMS amended the effective date of revocation of his Medicare billing privileges to August 2, 2015, which was 30 days after Dr. Murphy was notified that his Medicare billing privileges were being revoked. *See* CMS Br. at 3 n.2; *see also* P. Ex. 3.

II. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12).

III. 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).

IV. Findings of Fact, Conclusions of Law, and Analysis[3]

1. Summary disposition is appropriate in this case.

CMS argues that it is entitled to summary judgment in its favor. CMS Br. at 12. The Departmental Appeals Board (Board) has stated the standard for summary judgment:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300 at 3 (2010) (citations omitted).

In the present case, CMS produced evidence to establish that the Medi-Cal program terminated Dr. Murphy's participation and that he had exhausted all appeals. *See* CMS Ex. 5. These are the only two elements required to establish a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(12). Thus, CMS met its initial burden in support of its motion for summary disposition. By contrast, Petitioner has not meaningfully disputed any fact material to my resolution of the case. On the contrary, Petitioner admits that "Medi-Cal terminated Dr. Murphy's participation in the program because of a

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[3] My findings of fact and conclusions of law are set forth in italics and bold font.

default order by the California Medical Board . . . ." P. Br. at 10. As I explain in the following sections, Petitioner's remaining arguments concern matters that are either irrelevant or are beyond my authority to consider. Accordingly, I conclude that summary judgment in favor of CMS is appropriate.

2. Petitioner does not dispute that his Medicaid privileges were terminated or that he had exhausted all possible appeals; therefore, CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12).

Petitioner is a physician and, therefore, 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). CMS may revoke the Medicare billing privileges of a supplier for any of the reasons stated in 42 C.F.R. § 424.535. Pursuant to 42 C.F.R. § 424.535(a)(12), CMS or its contractor is authorized to revoke a supplier's Medicare enrollment and billing privileges under the following circumstances:

> (i) Medicaid billing privileges are terminated or revoked by a State Medicaid Agency.
> (ii) Medicare may not terminate unless and until a provider or supplier has exhausted all applicable appeal rights.

As noted above, the California DHCS notified Dr. Murphy that, because his license to practice medicine in California had been lost, he could no longer be reimbursed for treating Medi-Cal beneficiaries. CMS Ex. 4. DHCS then notified CMS that Dr. Murphy's Medi-Cal privileges had been terminated and that he had exhausted all appeal rights. CMS Ex. 5.

Petitioner admits that DHCS terminated Dr. Murphy's Medi-Cal privileges. P. Br. at 3-4, 10-11. Petitioner does not dispute that DHCS is a State Medicaid Agency or that Medi-Cal is a State Medicaid program within the meaning of the regulations. Nor does Petitioner contend that Dr. Murphy's appeal rights (if any) regarding the Medi-Cal termination were not exhausted. Accordingly, CMS had a legal basis to revoke Dr. Murphy's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(12).

3. Estoppel does not provide a basis to overturn the revocation of Petitioner's Medicare enrollment and billing privileges.

Petitioner argues that CMS should be estopped from enforcing the revocation of Dr. Murphy's Medicare enrollment and billing privileges based on what Petitioner characterizes as misconduct by NGS. P. Br. at 6-8. According to Petitioner, NGS

committed misconduct by issuing its reconsidered determination without having reviewed the substance of Dr. Murphy's reconsideration request.

By arguing that NGS or its employee committed misconduct in reviewing Dr. Murphy's reconsideration request, Petitioner apparently acknowledges that courts and administrative tribunals generally disfavor claims of estoppel against government actors. The Supreme Court has expressed doubt as to whether the government can ever be estopped from enforcing valid regulations based on statements or actions of government employees or their agents. *See Heckler v. Cmty. Health Servs. of Crawford Cnty.*, 467 U.S. 51, 63 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981). However, while expressing doubt that estoppel is ever available against the federal government, the Court left open the possibility that estoppel might lie upon a showing of "affirmative misconduct," such as fraud, by the federal government. *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414, at 421 (1990). However, as I explain below, I need not decide whether NGS's actions constitute "affirmative misconduct" that would support a claim of estoppel.

Petitioner contends that by alleging NGS committed misconduct, he raises an issue of material fact that would prevent my granting CMS's motion for summary disposition. I disagree. This is because, even if NGS did not consider the arguments in Dr. Murphy's reconsideration request, the omission would be harmless error. The error, if any, is harmless because the arguments Dr. Murphy put forward in his reconsideration request have no bearing on any issue necessary to support the revocation determination in this case.

As noted above, in the present proceeding, CMS relies on only a single ground in support of its decision to revoke Dr. Murphy's billing privileges: namely, that revocation is authorized by 42 C.F.R. § 424.535(a)(12) based on the termination of his Medi-Cal privileges. "[I]n reviewing the legality of a revocation under section 424.535(a)(12), an administrative law judge is authorized to decide only whether (1) a supplier's Medicaid billing privileges have been terminated or revoked by a State Medicaid Agency and (2) that action has become unappealable, or otherwise final, under state law." *Douglas Bradley, M.D.*, DAB No. 2663 at 16 (2015). Dr. Murphy's request for reconsideration included no contention that his Medi-Cal privileges were not terminated, or that the termination was not final. CMS Ex. 9. Instead, the sole focus of the reconsideration request was Dr. Murphy's contention that the New York and California Medical Boards acted unfairly in revoking his medical licenses in those States. *Id.*

Petitioner's logic appears to be that, had the California Board not unfairly revoked Dr. Murphy's license based on the unfair action by the New York Board, his Medi-Cal privileges would not have been terminated. However I have no authority to declare the

Medi-Cal termination invalid based on Dr. Murphy's perception of unfairness.[4] A revocation under section 424.535(a)(12) is derivative of the action of a state Medicaid agency. The regulations do not authorize me to review the merits or procedures involved in the state Medicaid agency's decision to terminate a provider or supplier. *See Douglas Bradley, M.D.*, DAB No. 2663 at 16 ("[n]othing in [the appeal] regulations, or in the Medicare statute, even remotely suggests that they were intended [to] provide a forum to collaterally challenge adverse decisions by federal or state courts or non-federal regulatory bodies"). If Dr. Murphy wished to assert that the Medi-Cal termination or the New York or California license revocation proceedings were unfair, he should have taken direct appeals challenging those actions. Having apparently made a strategic decision to abandon his New York and California medical licenses and thus avoid the expense of mounting legal defenses in those states (*see* CMS Ex. 9), Dr. Murphy cannot now collaterally attack the New York and California proceedings in which he lost his medical licenses and which led to the termination of his Medi-Cal privileges.

Therefore, because Dr. Murphy's reconsideration request did not raise any issue material to the grounds on which CMS determined to revoke his Medicare billing privileges, NGS's alleged "misconduct" in failing to review the reconsideration request was, at most, harmless error. For this reason, it is unnecessary to convene a hearing to elicit testimony or cross-examination of the NGS employee identified in CMS's brief. *See* CMS Br. at 3 n.4; *see also* P. Br. at 7 n.1.

4. I do not have authority to review the length of the re-enrollment bar imposed by CMS.

Because Petitioner does not dispute that DHCS terminated Dr. Murphy's Medi-Cal privileges, Petitioner implicitly acknowledges that CMS had a basis to revoke Dr. Murphy's Medicare enrollment and billing privileges. Petitioner nevertheless argues that I should grant summary disposition in Dr. Murphy's favor, reducing the two-year

[4] Though not necessary to my decision, I observe that Petitioner has not demonstrated that the processes through which Dr. Murphy's New York and California licenses were revoked were tainted by any unfairness. In each instance, Dr. Murphy had the opportunity to contest the revocation, but voluntarily waived or abandoned that opportunity. Dr. Murphy chose to enter into the consent agreement pursuant to which the New York Board revoked his license. In so doing, he relinquished his right to appeal the license revocation. In the case of his California license, the California Board offered Dr. Murphy the opportunity to appear at a hearing at which he could have explained the circumstances under which he lost his New York license. But, instead of appearing at the hearing, Dr. Murphy chose not to appear. It was his failure to appear at the California hearing that led the California Board to declare him in default and revoke his California license.

re-enrollment bar imposed by CMS to one year. P. Br. at 11. Petitioner contends that I must reduce the two-year re-enrollment bar because CMS failed to articulate why it imposed a two-year re-enrollment bar instead of a one-year re-enrollment bar. P. Br. at 8-13. Petitioner's arguments are without merit.

Petitioner argues that CMS is bound by precedent in setting the length of a re-enrollment bar. P. Br. at 9-11. In support of this proposition, Petitioner cites the decision of the U.S. Court of Appeals for District of Columbia Circuit in *Friedman v. Sebelius*, 686 F.3d 813 (D.C. Circuit 2012). The case is inapposite because it interprets the authority of the Inspector General of the Department of Health and Human Services to exclude individuals from participation in the Medicare program pursuant to section 1128 of the Social Security Act (Act) (42 U.S.C § 1320a-7). As an appellate panel of the Departmental Appeals Board has stated:

> [R]evocation under section 424.535 and exclusion under section 1128 are distinct remedial tools, each with its own set of prerequisites and consequences for the provider or supplier.

Abdul Razzaque Ahmed, M.D., DAB No. 2261 at 13 (2009), *aff'd sub nom. Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). Thus, the rationale articulated by the court in *Friedman* is inapplicable to the present case because Dr. Murphy has not been excluded from Medicare pursuant to section 1128 of the Act, but rather has had his Medicare enrollment and billing privileges revoked pursuant to 42 C.F.R. § 424.535(a)(12).

Moreover, even if CMS could be bound to precedent under the reasoning articulated in *Friedman*, it is well settled that decisions of Civil Remedies Division administrative law judges have no precedential weight. *See, e.g., John M. Shimko, D.P.M.*, DAB No. 2689 at 5 (2016). Finally, CMS's decision as to the length of a re-enrollment bar is a matter of discretion which I do not have authority to review. *See Vijendra Dave, M.D.*, DAB No. 2672 at 8-12 (2016).

5. Petitioner's other arguments request equitable relief, which I lack authority to grant.

Petitioner points out that the State of Wisconsin, where Dr. Murphy currently practices, did not revoke his medical license, although it was aware of the circumstances surrounding the disciplinary proceedings in New York and California. P. Br. at 4. Petitioner further points to a letter of support from Dr. Murphy's employer, attesting to Dr. Murphy's competence as an emergency physician. P. Br. at 10, citing P. Ex. 2. These assertions seem to imply that I should overturn CMS's exercise of its discretion to revoke Dr. Murphy's Medicare billing privileges because the revocation does not serve a remedial purpose. However, CMS's discretionary act to revoke a provider or supplier is

not subject to review based on equity or mitigating circumstances. *Letantia Bussell, M.D.*, DAB No. 2196 at 13 (2008) ("the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke . . . not to substitute the ALJ's discretion about whether to revoke").

III. Conclusion

For the reasons explained above, I affirm CMS's determination to revoke Petitioner's Medicare billing privileges.

/s/
Leslie A. Weyn
Administrative Law Judge