Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Douglas Bradley, M.D.
(PTANs: 514170QH2, 514170, and 514170AM3),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1922

Decision No. CR3670

Date: February 26, 2015

DECISION

Novitas Solutions, Inc. (Novitas), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare billing privileges of Petitioner, Douglas Bradley, M.D., based on Petitioner's exclusion from the Medicaid program by the New York State Office of the Medicaid Inspector General (NYOMIG). Petitioner requested a hearing to dispute the revocation. For the reasons stated below, I affirm CMS's revocation of Petitioner's Medicare billing privileges.

I. Background and Procedural History

Petitioner is a physician licensed to practice medicine in the states of Pennsylvania (license number MD-039252-E), New Jersey (license number 25MA04990400), and New York (license number 00154380). CMS Ex. 2 at 3; CMS Ex. 6 at 1, 6; CMS Ex. 9 at 1, 6. In October 2010, the New Jersey Attorney General filed a complaint with the New Jersey State Board of Medical Examiners alleging six counts of professional misconduct. On December 27, 2011, the New Jersey State Board of Medical Examiners and Petitioner signed a Final Consent Order and Settlement Agreement to resolve the disciplinary action against Petitioner. CMS Ex. 9 at 6-12; P. Ex 4 at 12-18. Although

Petitioner did not admit or deny the charges against him, he agreed to the imposition of 17 sanctions/conditions on his practice, including among others, the following: Petitioner's medical license in New Jersey was suspended for three years, but this was stayed and Petitioner actually served three years of probation; and Petitioner had to pay penalties and costs totaling $48,455. CMS Ex. 9 at 7-11; P. Ex. 4 at 13-17.

Following resolution of Petitioner's disciplinary matter in New Jersey, the Pennsylvania State Board of Medicine instituted a disciplinary proceeding against Petitioner. In May 2012, Petitioner signed a Consent Agreement and Order in which he agreed that he had been disciplined by a proper licensing authority in another state (i.e., New Jersey), would pay a $5,000 penalty, and would not apply for renewal of his medical license in Pennsylvania until Petitioner's medical license in New Jersey was restored to unrestricted, non-probationary status. CMS Ex. 9 at 1-5. On July 24, 2012, the Pennsylvania State Board of Medicine approved the Consent Agreement. CMS Ex. 9 at 13.

On November 29, 2012, the New York State Board of Professional Medical Conduct issued a Statement of Charges against Petitioner based on his discipline in New Jersey. The Statement of Charges included two specifications: 1) Petitioner violated New York Education Law § 6530(9)(b) because he was found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary body of another state and, had that conduct occurred in New York, it would have constituted professional misconduct under the laws of New York State; and 2) Petitioner violated New York Education Law § 6530(9)(d) because he was disciplined by a duly authorized professional disciplinary body of another state where the conduct resulting in discipline, had it occurred in New York, would have constituted a violation of the laws of New York State. CMS Ex. 6 at 10-11. In April 2013, Petitioner signed a Consent Agreement in which he agreed that:

> I do not contest the two (2) Specifications [in the Statement of Charges] in that some of the conduct resulting in the New Jersey disciplinary action would constitute misconduct under the laws of New York State, and agree to the following sanction:
>
> Censure and Reprimand;
>
> Respondent shall pay a $2,000 fine . . . .

CMS Ex. 6 at 6. On May 11, 2013, the New York State Board of Professional Medical Conduct approved the Consent Agreement. CMS Ex. 6 at 5.

On July 26, 2013, NYOMIG issued a letter informing Petitioner that he was being excluded from the New York Medicaid program under 18 New York Comp. Codes R. & Regs. (NYCRR) § 515.7(e) due to professional misconduct based on Petitioner's violation of New York Education Law § 6530. The letter indicated that the exclusion would be effective five days from the date of the letter. The letter stated that the exclusion meant that Petitioner could neither bill Medicaid for services he provided nor provide services related to care that would be billed to Medicaid. The letter notifies Petitioner of his appeal rights and where to file an appeal. Petitioner did not appeal the exclusion. CMS Ex. 6 at 12-13; CMS Ex. 11 at 1.

New Jersey excluded Petitioner from its Medicaid program based on NYOMIG's exclusion. P. Ex. 14 at 3.

In an April 8, 2014 initial determination, Novitas revoked Petitioner's Medicare billing privileges. Novitas based this action on 42 C.F.R. §§ 424.535(a)(2) (exclusion from Medicare, Medicaid, and any other federal health care program) and 424.535(a)(12) (termination or revocation of Medicaid billing privileges by a state Medicaid agency). Factually, Novitas asserted that NYOMIG excluded Petitioner from the Medicaid program and that the Department of Health and Human Services' Inspector General excluded Petitioner from Medicare, Medicaid, or any other federal health care program.[1] CMS Exhibit (Ex. 1).

Petitioner timely requested reconsideration of the revocation determination, arguing that Petitioner had never been enrolled in the New York Medicaid program and thus could not be excluded or terminated from the program. Petitioner also disputed that Novitas was authorized, in place of CMS, to revoke Petitioner's billing privileges and that, in any event, the revocation was an abuse of discretion. CMS Ex. 3.

In an August 28, 2014 reconsidered determination, a Novitas hearing officer upheld the initial determination based on the NYOMIG exclusion.[2] The hearing officer also stated that Novitas revoked Petitioner's billing privileges at CMS's direction. CMS Ex. 5.

Petitioner timely requested a hearing. On September 30, 2014, I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of prehearing exchanges. However, because Petitioner's hearing request did not specify why he had appealed, CMS moved for a more definitely statement. I granted this motion, provided Petitioner with time to file a perfected hearing request, and

[1] It is unclear whether this federal exclusion was ever imposed because there is no evidence in the record that proves it occurred.

[2] The Novitas hearing officer appears to have abandoned the allegation in the April 8, 2014 initial determination that Petitioner was subject to a federal exclusion.

modified the prehearing submission schedule. Petitioner timely filed a revised hearing request in which he disputed the same issues as stated in his reconsideration request.

In accordance with the Order, as modified, CMS filed its prehearing exchange, which included a brief (CMS Brief) in support of summary judgment,[3] ten exhibits (CMS Exs. 1-10), and written direct testimony for two witnesses (CMS Ex. 6 at 1-3; CMS Ex. 7). Petitioner also filed a prehearing exchange consisting of a brief (P. Br.) in opposition to summary judgment, 18 exhibits (P. Exs. 1-18), and written direct testimony of Petitioner (P. Ex. 2). Because Petitioner's brief raised many issues not stated in the hearing request, I ordered CMS to respond to any issues in Petitioner's brief that it had not addressed in its brief. I also provided Petitioner with an opportunity to file a response to CMS. CMS submitted a reply brief (CMS Reply Br.) along with two additional exhibits (CMS Exs. 11-12), one of which was written direct testimony for another witness (CMS Ex. 11). Petitioner filed a reply brief (P. Reply Br.)

II. Evidentiary Ruling and Decision on the Record

Petitioner objected to the admission of CMS Ex. 12, which is a blank Form CMS-855I enrollment application. P. Reply Br. at 14-15. CMS submitted this form to support the new basis it identified (i.e., 42 C.F.R. § 424.535(a)(9)) in its brief for revoking Petitioner's Medicare billing privileges. CMS Reply Br. at 15 n.7. As discussed in footnote 2 of this decision, I cannot consider a basis for revocation that does not appear in the reconsidered determination. Therefore, I exclude CMS Ex. 12 from the record.

In the absence of any other objection to the proposed exhibits, I admit CMS Exs. 1-11 and P. Exs. 1-18 into the record.

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested to cross-examine a witness. Order ¶¶ 8-10; *Pacific Regency Arvin*, DAB No. 1823, at 8 (2002). CMS submitted written direct testimony for two witnesses and

[3] CMS asserts a new basis for revocation in its brief based on an alleged violation of 42 C.F.R. § 424.535(a)(9). CMS urges me to consider this new basis in this proceeding because Novitas overlooked it when issuing its revocation determination and because it would conserve resources to adjudicate it now. P. Br. at 4-5, 13-14. Petitioner objects to this. P. Br. at 20. While the Departmental Appeals Board previously permitted CMS to provide new reasons for a revocation in its brief submitted to an ALJ (*Fady Fayad*, DAB No. 2266, at 10-11 (2008), *aff'd Fayad v. Sebelius*, 803 F.Supp. 2d 699 (E.D. Mich. 2011), the Departmental Appeals Board now restricts administrative law judge review to the basis or bases for revocation CMS asserts in its reconsidered determination. *See e.g.*, *Neb Group of Arizona LLC*, DAB No. 2573, at 7 (2014). As a result, I must uphold Petitioner's objection to the inclusion of this new basis to support revocation in this case.

Petitioner submitted his own written testimony. However, neither party requested to cross-examine a witness. Therefore, I issue a decision based on the written record. Order ¶ 11; *Marcus Singel, D.P.M.*, DAB No. 2609, at 5-6 (2014).

III. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. §§ 424.535(a)(2) and/or 424.535(a)(12).

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[4]

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.

1. Effective July 31, 2013, the NYOMIG excluded Petitioner from participation in the New York State Medicaid program and Petitioner did not appeal the exclusion.

On July 26, 2013, the NYOMIG issued a letter informing Petitioner that he was being excluded from the New York Medicaid program under 18 NYCRR § 515.7(e) due to a violation of New York Education Law § 6530 for conduct that the New York State Board of Professional Medical Conduct described as professional misconduct or unprofessional conduct. CMS Ex. 6 at 12-13. The exclusion became effective on July 31, 2013, which is five days after the date on the letter. CMS Ex. 6 at 2, 12; CMS Ex. 11 at 1. The letter stated that Petitioner could neither bill the New York Medicaid program for services he provided nor provide services related to care that would be billed to Medicaid. The exclusion letter notified Petitioner of his right to file an appeal within 30 days. CMS Ex. 6 at 12-13. Petitioner did not appeal the exclusion. CMS Ex. 11 at 1.

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

2. CMS did not have a legitimate basis to revoke Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(2) because NYOMIG excluded Petitioner in accordance with New York State regulations and not with exclusion provisions in the Social Security Act (Act).

CMS revoked Petitioner's Medicare billing privileges based in part on the conclusion that Petitioner's exclusion from the New York Medicaid program could serve as a predicate for revocation under 42 C.F.R. § 424.535(a)(2). The relevant portion of that regulation states that CMS may revoke a supplier who is:

> [e]xcluded from the Medicare, Medicaid, and any other Federal health care program, as defined in §1001.2 of this chapter, in accordance with section 1128, 1128A, 1156, 1842, 1862, 1867 or 1892 of the Act.

42 C.F.R. § 424.535(a)(2)(i).

Petitioner argues that NYOMIG's exclusion cannot be an exclusion on which a revocation under section 424.535(a)(2)(i) is based because the exclusion must be imposed in accordance with one of the listed sections of the Act, and that each of those provisions only authorizes the Secretary of Health and Human Services (Secretary) to impose the exclusion. Therefore, NYOMIG could not impose an exclusion under one of the sections of the Act listed in section 424.535(a)(2)(i). Petitioner further argues that the NYOMIG exclusion was not imposed "in accordance with" the Act provisions listed in section 424.535(a)(2)(i), but rather in accordance with New York State regulations. P. Br. at 8; P. Reply Br. at 6-7. CMS responded to this argument by arguing that section 424.535(a)(2)(i) includes Medicaid exclusions, which includes NYOMIG's exclusion. CMS Reply Br. 12-13.

Petitioner's argument that a state Medicaid agency cannot impose an exclusion under the authority of the Act is incorrect. Congress expressly authorized states to exclude individuals and entities from participation in their Medicaid programs based on any of the grounds for exclusion indicated in sections 1128, 1128A, and 1866(b)(2) of the Act. 42 U.S.C. § 1396a(p)(1); 42 C.F.R. § 1002.2(a). Indeed, each "State agency must have administrative procedures in place to exclude an individual or entity for any reason for which the Secretary could exclude such individual or entity under [sections 1128 and 1128A of the Act]." 42 C.F.R. § 1002.210. Therefore, the primary question to resolve is whether NYOMIG imposed its exclusion on Petitioner in accordance with section 1128, 1128A, or 1866(b)(2) of the Act.

The NYOMIG letter specifies that it is excluding Petitioner under the authority in 18 NYCRR § 515.7(e). That provision states:

> Upon receiving notice that a person has been found to have violated a State or Federal statute or regulation pursuant to a final decision or determination of an agency having the power to conduct the proceeding and after an adjudicatory proceeding has been conducted, in which no appeal is pending, or after resolution of the proceeding by stipulation or agreement, and where the violation resulting in the final decision or determination would constitute an act described as professional misconduct or unprofessional conduct by the rules or regulations of the State Commissioner of Education or the State Board of Regents, or an unacceptable practice under this Part, or a violation of article 33 of the Public Health Law, the department may immediately sanction the person and any affiliate.

CMS Ex. 8. A review of sections 1128, 1128A, and 1866(b)(2) of the Act reveals that there is no provision to exclude in those sections that has all of the same elements as stated in 18 NYCRR § 515.7(e). Further, there is nothing in the NYOMIG exclusion letter expressly citing to the Act for authority to exclude. CMS Ex. 6 at 12-13.

The Act recognizes that states have their own authority to exclude individuals from the Medicaid program. 42 U.S.C. § 1396a(p)(1); *see also* 42 C.F.R. § 1002.2(a) ("Nothing contained in this part should be construed to limit a State's own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law."); *Cf. James O. Boothe*, DAB No. 2530, at 5 (2013) (distinguishing federal and state exclusions and indicating exclusions under 18 NYCRR § 515.7 are based on a state law that authorizes NYOMIG "to regulate Petitioner's participation in New York State's Medicaid program."). Because NYOMIG excluded Petitioner based on New York State regulations, I conclude that CMS's revocation of Medicare billing privileges cannot be affirmed based on section 424.535(a)(2)(i).

3. CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12) because NYOMIG excluded Petitioner from the Medicaid program, the exclusion has the same effect as a termination of Medicaid billing privileges, and Petitioner has no appeal of the exclusion pending.

Based on NYOMIG's exclusion (CMS Ex. 6 at 12-13), CMS also revoked Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12). CMS Exs. 1, 5. That regulation states that CMS may revoke billing privileges if:

> (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 discussed below, I conclude that CMS properly revoked Petitioner's Medicare billing privileges under section 424.535(a)(12).

a. NYOMIG is a state Medicaid agency.

Petitioner was excluded by the NYOMIG. As testified to by two NYOMIG employees:

> [NYOMIG] is an independent entity created within the New York State Department of Health to improve and preserve the integrity of the Medicaid program by conducting and coordinating fraud, waste, and abuse control activities for services funded by Medicaid. In carrying out its mission, [NYOMIG] conducts and supervises all prevention, detection, audit, and investigation efforts and coordinates these activities with the New York Department of Health, among other state agencies and offices.

CMS Ex. 6 at 1; CMS Ex. 11 at 1. The statute establishing the NYOMIG is consistent with this testimony. *See* New York Public Health Law §§ 31-33. Petitioner has not disputed that the NYOMIG is a state Medicaid agency. Therefore, I conclude that NYOMIG is a state Medicaid agency.

b. For purposes of 42 C.F.R. § 424.535(a)(12), Petitioner's exclusion from the New York Medicaid program is equivalent to the termination of Medicaid billing privileges.

Petitioner disputes that his exclusion from the New York Medicaid program is the same as a termination of Medicaid billing privileges. Petitioner asserts that a plain language reading of section 424.535(a)(12) means that CMS may only revoke Medicare billing privileges when the supplier's Medicaid billing privileges have been terminated or revoked, and not when a supplier has been excluded. P. Reply Br. at 7-8. Because I believe that the Secretary meant for the terms "terminated" and "revoked" in section 424.535(a)(12) to be descriptive of an action that a state Medicaid agency may take that could result in revocation of Medicare billing privileges, I disagree with Petitioner's argument.

The Secretary added section 424.535(a)(12) as a basis for revocation of Medicare billing privileges so that it could "work[] in tandem" with the requirement in the Affordable Care Act (ACA) § 6401 that each state must terminate the Medicaid billing privileges of a provider who has been terminated from the Medicare program or another state's

Medicaid program. 76 Fed. Reg. 5,861, 5,946 (Feb. 2, 2011). The reason that the Secretary thought that coordination between Medicare and state Medicaid programs was important was because "providers and suppliers whose enrollment has been terminated by a State Medicaid program may pose an increased risk to the Medicare program." *Id*. Significantly, even though section 424.535(a)(12) as originally proposed and ultimately promulgated only mentions terminations and revocations of Medicaid billing privileges in the regulatory text, the preambles to the proposed rule and final rule consider terminations, revocations, and suspensions of billing privileges to be actions that permit CMS to revoke Medicare billing privileges. *Id*.; 75 Fed. Reg. 58,203, 58,229, 58,242 (Sept. 23, 2010). The inclusion of suspensions to the actions that a state Medicaid agency can take that could result in revocation of Medicare billing privileges indicates that the specific name of the action taken is not dispositive under section 424.535(a)(12). Rather, it is more important to look to the action taken by the state Medicaid agency and determine if it is essentially the same in effect as a termination or revocation. This flexible approach is necessary because the states may use various terms in their statutes and regulations to indicate that an individual has been prohibited from billing a state's Medicaid program. Based on this approach, I believe that New York Medicaid exclusions have essentially the same effect as a termination of Medicaid billing privileges.

As an initial matter, I note that the Act does not treat Medicaid terminations and exclusions as entirely separate. In the statute authorizing states to exclude individuals from the Medicaid program based on sections 1128, 1128A, and 1866(b)(2) of the Act, Congress defined the word "exclude" to encompass "the refusal to enter into or renew a [Medicaid] participation agreement or the **termination** of such agreement." 42 U.S.C. § 1396a(p)(3) (emphasis added).

Under New York State's regulations, which authorize both terminations and exclusions (*see* 18 NYCRR §§ 504.7, 515.3(a)(1)), terminations and exclusions are clearly interrelated. See *Koch v. Sheehan*, 998 N.E.2d 804, 806-806 (N.Y. 2013) (stating the following when reviewing an exclusion under 18 NYCRR § 515.7(e): "thus, [NY]OMIG's decision **to terminate** petitioner physician's participation in the Medicaid program falls squarely within the agency's explicit powers.") (emphasis added). The primary basis for imposing a termination for misconduct under New York State's regulations appears to be when a Medicaid provider has engaged in an "unacceptable practice" as set forth in the exclusion regulations, and if a provider is terminated under that provision, the provider has the same appeal rights as an excluded provider. 18 NYCRR §§ 504.7(b), 515.2; *see also Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 582 (2d Cir. 1989). Most significantly, terminations and exclusions in New York State have effectively the same fundamental result: the provider cannot bill the

Medicaid program for services provided.[5] *Compare* 18 NYCRR §§ 504.1(b)(1), (d)(16) *with* 18 NYCRR § 515.5.

Although section 424.535(a)(12) does not list all of the possible terms that state Medicaid agencies might use when prohibiting a provider from billing the Medicaid program, I cannot accept Petitioner's narrow interpretation of that section. To do so would unnecessarily restrict CMS's efforts to protect the Medicare program from individuals "who may pose an increased risk to the Medicare program." The NYOMIG exclusion bars Petitioner from billing the New York Medicaid program for services. CMS Ex. 6 at 12. This is the same as terminating Medicaid billing privileges. Therefore, I conclude that Petitioner's exclusion from the New York Medicaid program is a termination for the purposes of section 424.535(a)(12).

Petitioner would dispute this conclusion because he also argues that he was never enrolled in the New York Medicaid program and that the use of the terms "terminated" and "revoked" in section 424.535(a)(12) mean that Medicaid billing privileges must have been first conferred and then removed. P. Br. at 9; P. Reply Br. at 8-9. In support of this argument, Petitioner testified that he was never enrolled in the New York State Medicaid program. CMS Ex. 2. Further, Petitioner submitted a letter in which CMS counsel states that "there is no enrollment application for [Petitioner's] enrollment in the New York Medicaid program." CMS Exs. 3, 10.

CMS asserts that Petitioner was enrolled in the New York Medicaid program and provided testimony from a NYOMIG employee who stated that a review of eMedNY (New York's Medicaid provider computer system) shows that Petitioner was enrolled "to provide services as part of Hudson Health Plan, a managed care provider for the New York Medicaid program . . . ." CMS Ex. 6 at 2-3. The NYOMIG employee also provided screen shots from that system. CMS Ex. 6 at 15-17.

Although Petitioner argues that the screen shots from the eMedNY are unclear to someone who does not understand that system, I accept the testimony of the NYOMIG employee as to their meaning. The NYOMIG did not need to show that Petitioner was enrolled in the New York State Medicaid program to exclude him, so the NYOMIG employee would have no motivation to falsely interpret the records in the eMedNY system. CMS Ex. 6 at 2. Further, Petitioner did not cross-examine this witness.

In addition, I find it significant that Petitioner's testimony, which is focused entirely on denying that he was enrolled in the New York Medicaid program, does not deny (or even

[5] The interrelatedness of terminations and exclusions is further evidenced by the New York State regulation that requires exclusion from the Medicaid program when an individual is "excluded or terminated from participation in the Federal Medicare program." 18 NYCRR § 515.8(a)(1).

mention) an association with Hudson Health Plan in response to the NYOMIG's testimony. Further, I do not accept as conclusive the ambiguous statement by CMS counsel that there is no enrollment application for Petitioner in the New York Medicaid program. P. Ex. 3. This statement was made in response to Petitioner's counsel's request for that document from CMS counsel, not from the NYOMIG. P. Ex. 10. I do not know if CMS counsel is able to categorically state that an enrollment application for Petitioner does not exist.

To the extent that such a finding is necessary to uphold Petitioner's revocation under section 424.535(a)(12), I find that the record establishes by a preponderance of the evidence that Petitioner was enrolled in the New York Medicaid program prior to being excluded from it.

c. Petitioner does not have an appeal of his NYOMIG exclusion pending.

The July 26, 2013 letter informing Petitioner that NYOMIG was excluding him from the New York Medicaid program stated that the exclusion was imposed based on 18 NYCRR § 515.7(e) and that he had the right to an appeal under 18 NYCRR § 515.7(g). CMS Ex. 6 at 12. The letter provides detailed information as to the potential bases for appeal, the time limit to file an appeal (30 days), and the address where to send the appeal. CMS Ex. 6 at 12-13.

An NYOMIG attorney testified that: Petitioner did not file an appeal of the exclusion under 18 NYCRR § 515.7(g); Petitioner did not appeal to a state court within 4 months of the exclusion letter; NYOMIG's decision to exclude Petitioner is final; and Petitioner "has no further appeal rights to try to challenge his exclusion from the New York Medicaid program." CMS Ex. 11 at 1. The testimony concerning Petitioner's failure to appeal is partially corroborated by Petitioner's testimony: "I did not in July of 2013 – and continue to not – perceive the July 16, 2013 letter from the [NYOMIG] purporting to exclude me from the New York Medicaid Program as an adverse legal action." P. Ex. 2. This testimony, taken in conjunction with the fact that Petitioner did not assert he appealed the exclusion, is essentially a concession that Petitioner did not file an appeal to the exclusion within the 30-day period provided under New York regulations.

However, Petitioner asserts that he currently has an appeal pending related to his request for the NYOMIG to remove his name from their exclusion list and that this appeal is sufficient to show that he has not exhausted "all applicable appeal rights" as required under section 424.535(a)(12)(ii). Petitioner asserts that a request for removal of his name from the exclusion list is distinct from a request for reinstatement based on NYOMIG's website. P. Br. at 16-18; Reply Br. at 11-12; P. Exs. 14, 15.

Petitioner sent a letter in August 2014 requesting removal from the New York Medicaid exclusion list, which NYOMIG denied. P. Exs. 4, 5. This was approximately a year after an appeal of his exclusion was due. Although it is true that Petitioner has an appeal pending related to the denial of the request to remove his name from the exclusion list (P. Exs. 6, 7), under New York State regulations, this appeal technically relates to the denial of a request for reinstatement and not to the original exclusion. CMS Ex. 11 at 1. The decision denying Petitioner's request to remove his name from the exclusion list expressly states that NYOMIG applied the regulations related to the denial of an enrollment application (18 NYCRR § 504.5) as required by the regulation governing reinstatement requests (18 NYCRR § 515.10(b)).[6] P. Ex. 5.

An attorney with NYOMIG testified to the following regarding the nature of Petitioner's appeal:

> Even if [Petitioner] were ultimately successful in getting reinstated to the New York Medicaid program as a result of his pending appeal for reinstatement under [18 NYCRR § 515.10(b)], that decision would not "overturn" his current exclusion from the New York State Medicaid program. . . . Thus, even if [Petitioner] were to achieve reinstatement in the New York Medicaid program, the exclusion would nevertheless be in effect from July 31, 2013 until the date of any reinstatement.

CMS Ex. 11 at 2.

Based on the foregoing, I conclude that Petitioner did not appeal his exclusion from the New York Medicaid program and that Petitioner's current appeal with NYOMIG is not an appeal related to the decision to exclude him from the New York Medicaid program. As a result, Petitioner's exclusion may serve as the basis for a revocation under section 424.535(a)(12).

4. I reject Petitioner's various other arguments.

Petitioner's raises various arguments related to NYOMIG's exclusion decision and CMS's revocation determination.

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[6] The regulation at 18 NYCRR § 515.10(b) states that a "request for reinstatement or for removal of any condition or limitation on participation in the program is made as an application for enrollment under Part 504 of this Title and must be denominated as a request for reinstatement to distinguish it from an original application."

Petitioner argues that 42 C.F.R. § 424.535(a) only authorizes CMS and not a contractor to make the discretionary decision to revoke Petitioner's Medicare billing privileges on behalf of CMS. Further. Petitioner argues that even if the contractor has been granted such authority, this grant is impermissible. P. Reply Br. at 4-5. I reject this argument because the regulations governing provider revocation matters expressly authorizes CMS contractors to revoke Medicare billing privileges (42 C.F.R. §§ 800(b), 803) and this authorization has been upheld by a federal court. *Fayad v. Sebelius*, 803 F.Supp. 2d. 699, 704-706 (E.D. Mich. 2011). Further, the preamble to the final rule indicates that CMS "directly or through its contractor" could revoke billing privileges under section 424.535(a)(12). 76 Fed. Reg. 5,861, 5,946 (Feb. 2 2011). Finally, even if a contractor cannot make the discretionary decision to revoke billing privileges, in this case, Novitas revoked Petitioner's billing privileges at CMS's direction. CMS Ex. 5 at 2.

Petitioner argues that an administrative law judge, who is holding a de novo hearing, may review the discretionary act of CMS to revoke Petitioner's billing privileges. P. Reply Br. at 5-6. However, it has been long settled that CMS has discretion to revoke a supplier's billing privileges and that discretionary decision is not reviewable. *Latantia 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."). Rather, "[t]he ALJ's review of CMS's revocation . . . is thus limited to whether CMS had established a legal basis for its actions." *Id*.

Petitioner asserts that I should not uphold CMS's revocation in this case because NYOMIG's exclusion decision did not comply with New York State regulations, that NYOMIG did not have sufficient evidence to exclude Petitioner, and that the regulations governing Petitioner's exclusion are deficient because the appeal rights do not provide for a hearing. P. Br. at 11-16, 18-20; P. Reply Br. at 9-12. CMS argues, citing *Ravindra Patel, M.D.*, DAB CR2171 (2010), that Petitioner's arguments are impermissible collateral attacks on NYOMIG's exclusion decision and that I do not have authority to consider them, especially since the exclusion decision is final. CMS Reply Br. at 2-4. I agree with CMS. A revocation under section 424.535(a)(12) is derivative to the action of a state Medicaid agency. The terms of that regulation do not authorize me to review the merits or procedures involved in the exclusion decision. If Petitioner wanted to challenge the exclusion, Petitioner ought to have followed the appeal procedures in New York State's regulations and, if necessary, sought judicial relief. However, this is not the forum for an appeal of the exclusion decision.

Petitioner argues that the reenrollment bar imposed by CMS is arbitrary and capricious. P. Br at 22-25. However, I do not have jurisdiction to consider this issue. *See Ravindra Patel, M.D.*, DAB CR2171, at 7 n.5 (2010); *Emmanuel Brown M.D. and Simeon K. Obeng, M.D.*, DAB CR2145, at 10 (2010).

III. Conclusion

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

/s/
Scott Anderson
Administrative Law Judge