Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kenneth H. Weisiger, M.D.,
(NPI: 1376504670; PTAN: C305318)
(NPI: 1780611079; PTAN: C305308),

Petitioner,

v.

Centers for Medicare & Medicaid Services,

Respondent.

Docket No. C-14-1805

Decision No. CR3728

Date: March 26, 2015

DECISION

Novitas Solutions (Novitas), an administrative contractor acting for the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Dr. Kenneth Weisiger, M.D. and Kenneth H. Weisiger M.D. PC because neither Petitioner nor Kenneth H. Weisiger M.D. PC reported an adverse legal action and both did not meet Medicare enrollment requirements. I find that Novitas Solutions had a legal basis to revoke the Medicare enrollment and billing privileges of Dr. Kenneth Weisiger, M.D. and Kenneth H. Weisiger M.D. PC because neither Petitioner nor his practice group reported the adverse legal action that the Colorado Medical Board took against Petitioner in a timely manner. I do not have authority to review the re-enrollment bar that Novitas imposed on Petitioner and his practice group due to the revocations.

I. Background

On November 20, 2013, Petitioner entered into an Interim Cessation of Practice Agreement (Interim Agreement) with the Colorado Medical Board (CMB) in which he surrendered his medical license while the CMB fully investigated certain allegations against him. CMS Exhibit (Ex.) 4. As part of the Interim Agreement, both parties agreed that "reasonable grounds [existed] to believe that the public health, safety, or welfare imperatively require[d] emergency action" against Petitioner. CMS Ex. 4, at 1. Specifically, Petitioner's "care of seven critical care patients showed a pattern of substandard care demonstrating that [Petitioner] delayed the initiation of critical care or otherwise was too slow to respond to patient conditions that required urgent action." CMS Ex. 4, at 1. Under the agreement, Petitioner was barred from "perform[ing] any act requiring a license issued by the [CMB]. . . ." CMS Ex. 4, at 2.

Petitioner entered into a Stipulation and Final Agency Order (Final Order) with the CMB on April 2, 2014. CMS Ex. 5. As part of the Final Order, Petitioner agreed to permanent restrictions on his medical license. The Final Order barred Petitioner from practicing critical or intensive care medicine in a critical or intensive care unit. It also prohibited Petitioner from providing "consultation, management or treatment of critical care or intensive care patients." CMS Ex. 5, at 3.

In a letter dated May 12, 2014, Novitas informed Petitioner that it was revoking his Medicare enrollment and the Medicare enrollment of his practice group, Kenneth H. Weisiger MD PC. Novitas also imposed a three year re-enrollment bar on Petitioner and his practice group. CMS Ex. 8. Petitioner requested a reconsidered determination on May 20, 2014. CMS Ex. 3. Petitioner subsequently submitted additional information to the hearing officer assigned to issue a reconsidered determination and specified that his request applied to "both he and his group." CMS Ex. 7, at 2.

Novitas issued a reconsidered determination on June 24, 2014. CMS Ex. 1. The reconsidered determination found that CMS had two bases to revoke the Medicare enrollments of Petitioner and his practice group: Petitioner and his practice group did not comply with Medicare requirements, which authorized CMS to revoke their Medicare enrollments under 42 C.F.R. § 424.535(a)(1), and Petitioner and his practice group failed to report adverse legal actions, which authorized CMS to revoke their Medicare enrollments under 42 C.F.R. § 424.535(a)(9). The reconsidered determination upheld the three-year re-enrollment bar. CMS Ex. 1, at 1-2. Petitioner requested review of the reconsidered determination before an Administrative Law Judge (ALJ) and challenged both bases the reconsidered determination identified, as well as the re-enrollment bar. [1]

[1] Because I find that both Petitioner and his practice group failed to report an adverse legal action, which authorized CMS to revoke their Medicare enrollments under section

Request for Hearing at 1. Petitioner specifically requested review of both his and his practice group's revocations. Request for Hearing at 5.

The matter was assigned to me for hearing and decision, and I issued an Acknowledgment and Prehearing Order (Prehearing Order) that established a briefing schedule requiring the parties to submit all their arguments including any motions for summary judgment. CMS timely filed its prehearing exchange including a motion for summary judgment, supporting brief (CMS Br.), and CMS Exs. 1-8. Petitioner, in turn, timely filed his prehearing exchange including a brief in opposition to the motion for summary judgment (P. Br.) and Petitioner's Exhibits (P. Exs.) 1-4.

Neither party objected to the opposing party's exhibits, therefore I admit CMS Exs. 1-8 and P. Exs. 1-4. Petitioner submitted affidavits from two proposed witnesses as P. Exs. 1 and 2. CMS did not request to cross-examine either witness and did not propose any of its own witness testimony. I informed the parties that I would only conduct a hearing if either party submitted affidavits of direct testimony from a witness and the opposing party wished to cross-examine that witness. Prehearing Order ¶10. Further, Petitioner affirmatively waived his right to a hearing. P. Br. at 1 ("Petitioner provides complete evidence supporting his position in written form as part of this submission. Petitioner does not specifically request a hearing . . . ."). Because CMS did not seek to cross-examine Petitioner's witnesses, and Petitioner waived his right to hearing, I will decide this matter on the written record. Prehearing Order ¶11; *Marcus Singel, D.P.M.*, DAB No. 2609, at 5-6 (2014).

II. Analysis

A. Issues

1. Whether CMS had a legal basis to revoke the Medicare enrollments of Petitioner and his practice group for not reporting an adverse legal action; and, if so,

2. Whether I have the authority to consider the three year re-enrollment bars CMS imposed on Petitioner and his practice group.

B. Applicable Law

A provider or supplier must be enrolled in the Medicare program and have a billing number in order to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary. 42 C.F.R. § 424.505. "Suppliers" include physicians, other

---

424.535(a)(9), I do not decide the issue of whether section 424.535(a)(1) provided an additional revocation basis.

practitioners, and "entities (other than providers of services) that furnish[] items or services . . . ."[2] 42 U.S.C. § 1395x(d).

CMS may revoke a supplier's Medicare enrollment for any of the reasons found at 42 C.F.R. § 424.535(a). Among those reasons, CMS may do so where the supplier fails to comply "with the reporting requirements specified in [42 C.F.R.] § 424.516(d)(1)(ii)." 42 C.F.R. § 424.535(a)(9). In order to remain enrolled in the Medicare program, section 424.516(d)(1)(ii) requires physicians and physician organizations to report "[a]ny adverse legal action" to their Medicare contractors within 30 days. Where CMS revokes a supplier's Medicare enrollment based on a license suspension, the revocation is effective from the date of the suspension. 42 C.F.R. § 424.535(g).

C. Findings of Fact and Conclusions of Law

1. *The November 20, 2013 Interim Agreement constituted an "adverse legal action" that Petitioner had an obligation to report within 30 days*.

Suppliers, including physicians and physician organizations, must report "any adverse legal action" to their designated Medicare contractor within 30 days. 42 C.F.R. § 424.516(d)(1)(ii). The Interim Agreement forbade Petitioner from "perform[ing] any act requiring a license issued by the [CMB] while [the] Interim Agreement" was in effect. CMS Ex. 4, at 2. The Interim Agreement was a temporary deprivation of Dr. Weisiger's privileges to practice medicine. As such, the Interim Agreement imposed a suspension of Petitioner's license, an adverse legal action. *See Akram A. Ismail, M.D.*, DAB No. 2429, at 8 (2011) ("[W]e note that a 'suspension' is defined as 'the *temporary* deprivation of a person's powers or privileges, [especially] of office or profession." citing Black's Law Dictionary 1487 (8th ed. 2004)). License suspensions, even if they are not finalized, are still "adverse legal actions" within the meaning of section 424.516(d)(1)(ii). *Ismail,* DAB No. 2429 at 10-11.[3]

---

[2] "Providers" include hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, and hospice programs. 42 U.S.C. § 1395x(u); 42 C.F.R. § 400.202.

[3] Even if I were to find that the Interim Agreement did not impose a "suspension" of Petitioner's license, I would still deem its prohibition on Petitioner's practice of medicine an "adverse legal action" because it was adverse to Petitioner's interest to continue to practice medicine in Colorado and was an official action by the state licensing authority, the CMB, that bore "legal consequences" as a "valid board order." In either event, Petitioner had an obligation to report it to Novitas.

Petitioner argues that the Interim Agreement is not an "action" under Colorado law by its very terms. P. Br. at 7-8. However, I do not find the Colorado law definition of "action" supersedes the federal regulations in this instance. *C.f. Laurie Laurel, PT*, DAB No. 2524, at 4 (2013) (rejecting supplier's argument that the state law definition of "convicted" controls in a revocation action under 42 C.F.R. § 424.535(a)(3)); *Singing River Rehab. & Nursing Ctr.*, DAB No. 2232, at 9-10 (2009) (rejecting nursing facility's argument that a state law definition of "abuse" limited regulatory language requiring the reporting of alleged abuse). Even if I were to consider the Colorado provision in question, Petitioner's attempt to parse the terms of the Interim Agreement is not persuasive. An "order" of the CMB is an "action" under Colorado law, C.R.S. 24-4-102(1), and the "Interim Agreement and all its terms constitute a valid board order . . . ." CMS Ex. 4, at 2.

2. CMS had the authority to revoke Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(9) because Petitioner failed to report an adverse legal action the CMB took against him within 30 days.

CMS may revoke a supplier's Medicare enrollment where the supplier fails to comply with the reporting requirements specified at 42 C.F.R. § 424.516(d)(1)(ii). 42 C.F.R. § 424.535(a)(9). Section 424.516(d)(1)(ii) requires physicians to report certain "reportable events" to their Medicare contractors. It further defines a "reportable event" to include "[a]ny adverse legal action" and requires physicians to report adverse legal actions "within 30 days." Therefore, section 424.516(d)(1)(ii) required Dr. Weisiger to report his license suspension to his Medicare contractor, Novitas. It is undisputed that Dr. Weisiger did not do so. P. Br. at 10 ("[T]he November 20, 2013 Interim Agreement was not an adverse action requiring reporting."). Therefore, CMS had the authority to revoke Dr. Weisiger's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(9).

Petitioner argues that he "timely cured" his failure to report the adverse legal action when he sent a May 20, 2014 letter to Novitas that "included a corrective action plan." P. Br. at 8-9. Novitas's May 12, 2014 initial determination and revocation notice gave Petitioner the opportunity to submit a corrective action plan "within 30 calendar days after the postmark" of the initial determination. CMS Ex. 8, at 2. Petitioner submitted his letter, including his corrective action plan, eight days thereafter. CMS Ex. 3. The corrective action that Petitioner proposed was his statement that he was "formally notifying [Novitas] pursuant to 42 C.F.R. 516(d)(1)(ii) that [he] was disciplined by the CMB, the terms of which are outlined" in an attachment. CMS Ex. 3, at 2. Petitioner did not specifically report the Interim Agreement but instead referred to the April 2, 2014 Final Order. He also apologized for missing "the May 1, 2014 deadline," because he "had no idea . . . [reporting discipline by the CMB] was required." CMS Ex. 3, at 2. Had Petitioner intended to report the Interim Agreement, the deadline for doing so would have

been 30 days from November 20, 2013, or December 20, 2013. Therefore, Petitioner did not, in fact, report the Interim Agreement and the license suspension it imposed on him.

Even if Petitioner had reported the Interim Agreement's license suspension as part of a corrective action plan, Petitioner's corrective action would not automatically relieve CMS of the authority to revoke his Medicare enrollment. Petitioner misunderstands the relationship between submitting a corrective action plan and requesting reconsideration from a Medicare contractor. As the Board explained in *DMS Imaging, Inc.*:

> After the initial notice of revocation, the supplier has two tracks to seek to avoid revocation and may elect to pursue either or both concurrently. The supplier, within 60 days, may request "reconsideration" of whether the basis for revocation is erroneous or, within 30 days, it may submit a CAP to demonstrate that it has corrected that basis. If the contractor accepts the CAP, it notifies the supplier, and any reconsideration request is withdrawn. If the contractor denies the CAP, the reconsideration process may proceed to a hearing before a hearing officer, who reviews "the Medicare contractor's reason for imposing a . . . revocation at the time it issued the action . . . ." An unfavorable hearing officer decision is appealable to an ALJ, who reviews the basis for the revocation. No provision is made for an appeal of the contractor's decision not to reinstate based on the CAP.

DAB No. 2313, at 7-8 (2010) (citations and footnote omitted).

In the present case, Petitioner submitted a proposed corrective action plan, and Novitas rejected that plan and proceeded with the reconsideration process. The result was that Novitas issued a reconsidered determination. *See* CMS Ex. 1. The fact that Petitioner submitted a corrective action plan does not preclude CMS from revoking his Medicare enrollment, and I have no authority to question Novitas's decision to reject the proposed corrective action plan. *Conchita Jackson, M.D.*, DAB No. 2495, at 6 (2013); *DMS Imaging, Inc.*, DAB No. 2313, at 6 (2010).

Petitioner additionally argues that, throughout the revocation process, various Novitas employees provided him with inaccurate information. For instance, Petitioner alleges that he "spoke with [a] Novitas Solutions Provider Management Supervisor . . . and was told that he could correct timely notification of his adverse action through submission of a letter to Novitas." P. Br. at 4. Petitioner further alleges that a "Novitas Solutions representative informed [him] that the revocation of his billing privileges was a result of claims submitted under his name from November 20, 2013[,] to April 2, 2014." P. Br. at 6. Additionally, Petitioner asserts that "multiple" unnamed Novitas representatives "indicated . . . that the revocation did not impact the other providers in his group." P. Br. at 4.

Petitioner's assertions amount to an argument that CMS should be equitably estopped from revoking his billing privileges based on the misinformation he received. CMS did not rebut any of Petitioner's claims, and I accept that Novitas representatives may have misinformed him, or, at a minimum, that serious miscommunication took place between Novitas representatives and Petitioner. Petitioner, however, does not allege that either Novitas or its representatives engaged in affirmative misconduct. It is clear that:

> [T]he government cannot be estopped absent, at a minimum, a showing that the traditional requirements for estoppel are present (i.e., a factual misrepresentation by the government, reasonable reliance on the misrepresentation by the party seeking estoppel, and harm or detriment to that party as a result of the reliance) and that the government's employees or agents engaged in 'affirmative misconduct.'

Citadel Cmty. Dev. Corp., DAB No. 2596, at 7 (2014) (quoting *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 31 (2011)); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Pac. Islander Council of Leaders*, DAB No. 2091, at 12 (2007). Because Petitioner has not alleged that Novitas engaged in affirmative misconduct, any misinformation that Novitas or its representatives provided to him cannot prevent CMS from exercising its authority to revoke his Medicare enrollment.

Lastly, Petitioner argues that even if CMS had the authority to revoke his Medicare enrollment, the effective date of the revocation should not be November 20, 2013. Petitioner argues that because his license was not suspended, the effective date should be 30 days from the date CMS provided notice of its intent to revoke his enrollment. P. Br. at 12. I have determined, however, that the CMB action constituted a suspension of Petitioner's medical license. Therefore, I uphold the effective date of the revocation as the date of his license suspension, or November 20, 2013. *See* 42 C.F.R. § 424.535(g).

3. CMS had the authority to revoke Dr. Kenneth H. Weisiger MD PC's Medicare enrollment because the practice group failed to report the CMB's adverse legal action against Dr. Weisiger within 30 days.

CMS revoked Dr. Kenneth H. Weisiger M.D. PC's Medicare enrollment because it failed to report an adverse legal action against Dr. Weisiger within 30 days. Novitas specifically identified the Interim Agreement as the adverse legal action in question. CMS Ex. 1, at 2. The initial determination and the reconsidered determination both informed Dr. Weisiger that CMS was revoking his practice group's Medicare enrollment.

CMS had the authority to revoke Dr. Kenneth H. Weisiger MD PC's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(9). Both physicians and physician organizations have an obligation to report an adverse legal action. 42 C.F.R. § 424.516(d)(1)(ii). A "physician . . . organization" is "any physician . . . entity that

enrolls in the Medicare program as a sole proprietorship or organizational entity." 42 C.F.R. § 502. Dr. Weisiger acknowledges that he is the "sole owner" of his practice group. Request for Hearing at 5. He does not argue that the group is not a "physician organization" within the meaning of 42 C.F.R. §§ 424.516 and 424.502.

The Board has held that section 424.516(d)(1)(ii) requires physician organizations to report adverse legal actions against their physician owners. *Gulf South Med. & Surgical Inst., and Kenner Dermatology Clinic, Inc.*, DAB No. 2400, at 7 (2011). In *Gulf South Medical*, the Board considered two physician organizations' obligations to report their physician owner's medical license revocation. The Board reasoned that requiring physician organizations to report adverse legal actions against their physician owners is consistent with the manner in which other owners are treated under section 424.535. *Id.* at 8. Further, such a requirement advances the purpose of section 424.516(d)(1)(ii), which is to "provide CMS with information about adverse legal actions that CMS has determined are relevant to evaluating whether a supplier should continue to participate in Medicare." *Id.*

Dr. Weisiger did not report his license suspension because he did not believe he was required to report it, either on his own behalf or on behalf of the practice group. While his belief may have been earnest, Medicare suppliers, operating as program participants, have a duty to remain familiar with Medicare requirements. *See, e.g., Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63-64 (1984); *John Hartman, D.O.*, DAB No. 2564, at 3 (2014); *Gulf South Medical*, DAB No. 2400, at 9; *Waterfront Terrace, Inc.*, DAB No. 2320 (2010). Therefore, because Dr. Kenneth H. Weisiger MD PC did not report its sole owner's license suspension, CMS had the authority to revoke the practice group's Medicare enrollment.

Petitioner argues that Kenneth H. Weisiger MD PC did not receive fair and effective notice that CMS was revoking its Medicare enrollment in addition to Dr. Weisiger's individual enrollment. P. Br. at 11-12. In support, Petitioner argues that "[t]he entire revocation notice dated May 12, 2014[,] refers to revocation of billing privileges related to licensure actions affecting Petitioner as an individual." P. Br. at 11. Further, Petitioner points out that "[t]he body of the letter does not refer to Petitioner's professional corporation" and that "[i]t was not until June 10, 2014[,] that Petitioner learned . . . that his professional corporation's billing privileges were also impacted . . . ." P. Br. at 11. Petitioner submitted a letter dated June 11, 2014, which confirms that he did not understand that CMS intended to revoke both his and his practice group's Medicare enrollments. In that letter, Petitioner clarified that his "request for reconsideration relates to both he and his group." CMS Ex. 7, at 2.

CMS responds that the May 12, 2014 initial determination did adequately inform Dr. Weisiger that CMS intended to revoke his practice group's Medicare enrollment. CMS argues that Novitas addressed the initial determination "to both Petitioner and his group"

and that "the notice specifies that it pertains to Petitioner's individual NPI/PTAN and his group NPI/PTAN." CMS Br. at 9.

I find Novitas addressed the initial determination to both Petitioner and his practice group. Novitas specifically drew Petitioner's attention to his practice group's National Provider Identifier (NPI) and Provider Transaction Access Number (PTAN), and identified those numbers as belonging to the practice group. CMS Ex. 8, at 1. It would have made little sense for Novitas to reference the practice group's NPI and PTAN if they were not relevant to the revocation. Novitas could have been clearer by describing the NPI's and PTAN's as something other than "Reference #['s]." Considering the initial determination in its entirety, however, I find that it provided sufficient notice to Dr. Weisiger that CMS intended to revoke his practice group's Medicare enrollment. Therefore, CMS both provided adequate notice to Dr. Weisiger and had a legal basis to revoke his practice group's Medicare enrollment.

4. I lack the authority to consider Petitioner's challenge to the duration of the re-enrollment bar that CMS imposed on him and his practice group.

Petitioner argues the three-year re-enrollment bars that CMS imposed on him and his practice group are disproportionate to their actions and unauthorized by Medicare guidelines. P. Br. at 12-13. My review authority in this matter is limited to certain enumerated initial determinations listed at 42 C.F.R. § 498.3(b). CMS's selection of a re-enrollment bar is not a determination subject to ALJ review because it is not a reviewable initial determination under 42 C.F.R. § 498.3(b)(17). *See David Tolliver, D.O.*, DAB CR2281, at 10 (2010). Therefore, I cannot adjust the re-enrollment bar that CMS has imposed on Petitioner and his practice group.

III. Conclusion

I find CMS and its contractor had a legal basis for revoking the Medicare enrollment of Petitioner and Petitioner's group practice because they did not properly report an adverse legal action relating to a suspension of Petitioner's license to practice medicine. I uphold the three-year re-enrollment bar, which is effective November 20, 2013.

/s/
Joseph Grow
Administrative Law Judge