

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Igor Persidsky, M.D./House Calls Medical Corporation
(NPIs: 1437188299; 1598787574),

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2629

Decision No. CR4309

Date: October 13, 2015

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, Noridian Healthcare Solutions, Inc., revoked the Medicare billing privileges of Petitioners, Igor Persidsky, M.D. and his professional corporation, House Calls Medical Corporation (HCMC), based on the denial of HCMC's application for enrollment in California's Medicaid program and Dr. Persidsky's termination from the same. Petitioners requested a hearing to dispute the revocations of their Medicare enrollments and billing privileges. For the reasons stated below, I affirm CMS's revocation of Dr. Persidsky's Medicare billing privileges and reverse the revocation of HCMC's Medicare billing privileges.

I. Background and Procedural History

Dr. Persidsky is a physician licensed to practice medicine in California. CMS Exhibit (Ex.) 3 at 1. After approximately 12 years as a physician participating in Medicare and the California Medicaid program, Medi-Cal, Dr. Persidsky decided to enroll HCMC in the Medicare and Medi-Cal programs. Dr. Persidsky submitted an enrollment application to CMS on behalf of HCMC, and CMS approved the application. Dr. Persidsky's

difficulties began when he submitted an application to enroll HCMC in Medi-Cal. The California Department of Health Care Services (state agency) conducted a site-visit to HCMC's billing address and determined that HCMC did not have an appropriate place of business and that Dr. Persidsky, on behalf of HCMC, had failed to disclose all individuals with an ownership interest in HCMC. CMS Ex. 3 at 2. As a result, on September 5, 2013, the state agency denied HCMC's Medi-Cal enrollment application and deactivated Dr. Persidsky's provider number. CMS Ex. 1 at 1, 3. The state agency warned Petitioners that "[o]nce the appeal period is closed or you have exhausted all appeal rights under State law . . . should this denial and deactivation be upheld, then [the state agency] will be required to report the termination of your participation in the Medi-Cal Program . . . [and] other government healthcare programs in which you participate may also take action to terminate you." CMS Ex. 1 at 4.

Petitioners appealed the state agency's decision in a September 27, 2013 letter. Dr. Persidsky stated that he believed he had corrected the identified problems or deficiencies. CMS Ex. 3 at 24. At some point thereafter, an administrative law judge (ALJ) in the state agency's Office of Administrative Hearings and Appeals denied Petitioners' appeals, fully exhausting Petitioners' appeal rights at the state level. CMS Ex. 3 at 4.

In a December 23, 2014 initial determination, CMS revoked Petitioners' Medicare enrollments and billing privileges pursuant to 42 C.F.R. § 424.535(a)(12) (termination or revocation of Medicaid billing privileges by a state Medicaid agency). CMS stated that it revoked Petitioners' billing privileges because:

[b]y letter dated September 5th, 2013, Igor Persidsky [sic] was informed that he was terminated from the California Medicaid program. California Medicaid confirmed that Igor Persidsky's appeal rights have been exhausted with respect to his termination.

CMS Ex. 2 at 1.

Petitioners requested reconsideration on February 17, 2015. CMS Ex. 3. Petitioners explained that Dr. Persidsky submitted the incorrect enrollment form to Medi-Cal and compounded his mistake by misunderstanding certain principles of corporate ownership, which began the series of events that led the state agency to deny HCMC's Medi-Cal enrollment application and terminate Dr. Persidsky's Medi-Cal provider number. They argued that CMS should exercise its discretion and choose not to terminate Petitioners' Medicare billing privileges. Petitioners maintained that each of the factors the Secretary of Health and Human Services (Secretary) identified as important in determining whether a supplier should be removed from the Medicare program weighed against revoking Petitioners' privileges. CMS Ex. 3 at 5-9.

CMS issued a March 6, 2015 reconsidered determination upholding the revocations. CMS Ex. 4. The hearing officer recited the identical factual basis for revocation found in the initial determination. The sole explanation the hearing officer proffered for the decision was that “Igor Peridsky [sic] MD had not provided evidence to show full compliance with the standards for which you were revoked.” CMS Ex. 4 at 1.

Petitioners timely requested a hearing before an ALJ. On June 2, 2015, I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of prehearing exchanges. In accordance with the Order, CMS filed its prehearing exchange, which included a brief (CMS Br.) in support of summary judgment and four exhibits (CMS Exs. 1-4). Petitioners filed a prehearing exchange consisting of a brief (P. Br.) in opposition to summary judgment. Petitioners did not object to CMS’s exhibits; therefore, I admit CMS Exs. 1-4 into the record.

II. Decision on 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; Civil Remedies Division Procedures §§ 16(b), 19(b). Neither party submitted written direct testimony, and there are no witnesses to cross-examine. Therefore, I issue a decision based on the written record. Order ¶ 11; Civil Remedies Division Procedures § 19(d).

III. Issue

Whether CMS had a legitimate basis for revoking Petitioners’ Medicare billing privileges under 42 C.F.R. § 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 Analysis¹

Dr. Persidsky is a physician and HCMC is an entity that furnishes health care services. Therefore, both are suppliers for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (*compare* definition of *Supplier* and *Provider*), 410.20(b)(1). CMS may revoke the Medicare billing privileges of a supplier for any of

¹ My findings of fact and conclusions of law are set forth in italics and bold font.

the reasons stated in 42 C.F.R. § 424.535. Relevant to this case, CMS may revoke a supplier's Medicare 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.

42 C.F.R. § 424.535(a)(12).

- 1. On September 5, 2013, the state agency denied HCMC enrollment in Medi-Cal and deactivated the Medi-Cal provider number for Dr. Persidsky.***

On January 17, 2013, a representative of the state agency conducted an onsite inspection of HCMC in conjunction with its Medi-Cal enrollment application. In a letter dated September 5, 2013, the California state agency notified Dr. Persidsky that it was denying HCMC's enrollment in Medi-Cal as a result of the onsite inspection and identified two bases for the denial. First, the state agency stated that HCMC "failed to disclose all individuals with ownership and control interest . . . [because] you failed to disclose that [an individual other than Dr. Persidsky] owns 49% of shares in the business." CMS Ex. 1 at 1. Second, the state agency stated that HCMC "failed to meet established place of business requirements" CMS Ex. 1 at 2. Therefore, the state agency denied HCMC's enrollment in Medi-Cal and imposed a three-year bar on its reapplication. CMS Ex. 1 at 3. Further, due to that denial, the state agency deactivated Dr. Persidsky's Medi-Cal provider number. CMS Ex. 1 at 3.

- 2. CMS had a legitimate basis for revoking Dr. Persidsky's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12) because the state agency deactivated Dr. Persidsky's Medicaid provider number, the deactivation has the same effect as a termination of Medicaid billing privileges, and Dr. Persidsky has no appeal of the deactivation pending.***

Based on the state agency's deactivation (CMS Ex. 1 at 3), CMS revoked Dr. Persidsky's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12). CMS Exs. 2, 4. As discussed below, I conclude that CMS properly revoked Dr. Persidsky's Medicare billing privileges under section 424.535(a)(12).

a. The Department of Health Care Services administers Medi-Cal, the California Medicaid program.

The state agency deactivated Dr. Persidsky's Medi-Cal provider number. CMS Ex. 1. Medi-Cal is California's Medicaid program. *See Jesusa N. Romero, M.D.*, DAB CR380, at 1 n.1 (1995). The state agency, the Department of Health Care Services, administers the Medi-Cal program. *See Cal. Welf. & Inst. Code* § 14000.03; *Marvin Lieblein, Inc. v. Shewry*, 137 Cal.App.4th 700, 707, 40 Cal. Rptr.3d 547, 549 (2006) ("California participates in Medicaid through the Medi-Cal program, administered by the Department [of Health Services]."). Medi-Cal benefits are benefits that California provides to individuals who are eligible for Medicaid under Title XIX of the Act, which established the Medicaid program. Cal. Welf. & Inst. Code § 14005.60. Petitioner has not disputed that Medi-Cal is California's state Medicaid program. CMS Ex. 3 at 2 ("The California Department of Health Care Services ("DHCS"), [is] the State Agency which administers the Medi-Cal program). Therefore, I conclude that the state agency that deactivated Dr. Persidsky's Medi-Cal provider number is a state Medicaid agency within the meaning of 42 C.F.R. § 424.535(a)(12).

b. For purposes of 42 C.F.R. § 424.535(a)(12), Dr. Persidsky's deactivation from the California Medicaid program is a termination of his Medicaid billing privileges.

The state agency deactivated Dr. Persidsky's provider number as a result of its denial of HCMC's Medi-Cal enrollment application. CMS Ex. 1 at 3. Petitioner has variously described the action that the state agency took against him as a "termination" of his Medicaid privileges. P. Br. at 2; CMS Ex. 3 at 4, 7, 9. Petitioner does not contest that he was terminated from Medi-Cal. As previously discussed, California regulations define "deactivate" to mean that "the provider's number . . . shall no longer be used to bill the Medi-Cal Program on or after the effective date of the deactivation." Cal. Code Regs. tit. 22, § 51000.6.1 (2008).

Because I believe that the Secretary meant for the terms "terminated" and "revoked" in section 424.535(a)(12) to describe an action that a state Medicaid agency may take that could result in revocation of Medicare billing privileges, I find that CMS was authorized to revoke Dr. Persidsky's Medicare billing privileges.

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 and final rules 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 in the list of 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 the state Medicaid agency takes and determine if it is essentially the same in effect as a termination or revocation. The states may use various terms in their statutes and regulations to indicate that an individual has been prohibited from continuing to bill a state’s Medicaid program, so a flexible approach is required to effectuate the Secretary’s stated purpose: to remove the risk to the Medicare program that individuals who have been terminated by a state’s Medicaid program may pose. Based on this approach, I believe that California Medicaid deactivations have essentially the same effect as a termination of Medicaid billing privileges for purposes of section 424.535(a)(12) because, under California law, a deactivation is a suspension.

When the state agency notified Dr. Persidsky that it was deactivating his provider number, it cited Cal. Welf. & Inst. Code § 14043.28(b)(1) as the basis for its action. Section 14043.28(b)(1) states that when an application is denied as it was here, “all business addresses of the applicant or provider shall be deactivated and the applicant or provider shall be *removed from enrollment in the Medi-Cal program by operation of law.*” (emphasis added). It was on this basis that the state agency deactivated Dr. Persidsky’s Medi-Cal provider number and, in so doing, “removed [him] from enrollment in the Medi-Cal program.” Significantly, California regulations define the term “suspend” to include:

a deactivation, and means health care services, goods, supplies, or merchandise provided, directly or indirectly, to a Medi-Cal beneficiary shall not be reimbursed under the Medi-Cal program until the provider is reinstated by the Department.

Cal. Code Regs. tit. 22, § 51000.25.1. Thus, the state agency’s action is a suspension, which has the same effect as terminating his Medicaid billing privileges.

Further, the state agency characterized its action as “the termination of [Dr. Persidsky’s] participation in the Medi-Cal Program” and warned Dr. Persidsky that “other government healthcare programs in which [he] participate[s] may also take action to terminate [him].” CMS Ex. 1 at 4.

Therefore, I conclude that Dr. Persidsky's deactivation from the California Medicaid program is a termination for purposes of section 424.535(a)(12).

c. Dr. Persidsky does not have an appeal of his Medi-Cal termination pending.

The September 5, 2013 letter informing Dr. Persidsky that the state agency was deactivating him from the California Medicaid program stated that he had the right to an appeal under Cal. Welf. & Inst. Code § 14043.65. The letter provided detailed information about where to send an appeal and what information to include with an appeal. CMS Ex. 1 at 3-4.

Petitioners concede that they appealed the denial and deactivation to an ALJ at the state agency's Office of Administrative Hearings and Appeals and that ALJ denied the appeal. CMS Ex. 3 at 4. Dr. Persidsky does not assert that an appeal is presently pending with the state agency. P. Br. at 2. Therefore, I conclude that Dr. Persidsky does not have an appeal of his deactivation pending, and the deactivation may serve as a basis for a revocation under section 424.535(a)(12).

Based on the evidence of record CMS had a legitimate basis to revoke Dr. Persidsky's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12).

3. CMS did not have a legitimate basis to revoke HCMC's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12) because the state agency denied HCMC enrollment in Medi-Cal, rather than terminated its enrollment.

CMS revoked HCMC's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12) because *Dr. Persidsky* was "terminated from the California Medicaid Program" and because "California Medicaid confirmed that Igor Persidsky's [sic] appeal rights have been exhausted with respect to this termination." CMS Ex. 2 at 1. That regulation requires as one of its elements that the supplier's "Medicaid billing privileges are terminated or revoked by a State Medicaid Agency." 42 C.F.R. § 424.535(a)(12)(i).

Neither the initial determination nor the reconsidered determination identified the basis upon which CMS believed HCMC's Medicaid billing privileges had been terminated. Both referred to Dr. Persidsky's Medicaid termination, rather than HCMC's termination. Indeed, neither mentioned HCMC whatsoever in explaining the basis for CMS's actions. Both relied on the action the state agency took against Dr. Persidsky. CMS Exs. 2, 4. Before me, CMS has not offered any explanation for why it believes HCMC's Medicaid privileges were terminated. Instead, CMS concedes that the state agency "denied HCMC's application to enroll as a provider in the Medi-Cal program" CMS Br. at 2. CMS distinguishes the action that the state agency took against HCMC from the

action it took against Dr. Persidsky: “at the same time [the state agency] revoked Dr. Persidsky’s personal enrollment as a Medi-Cal provider.” CMS Br. at 2.

The state agency did not terminate HCMC’s Medi-Cal enrollment because HCMC had not yet enrolled in Medi-Cal. The September 5, 2013 notice letter begins by stating that the state agency “reviewed the Medi-Cal Physician Application/agreement *requesting enrollment . . .*” CMS Ex. 1 at 1 (emphasis added). In requesting reconsideration of CMS’s initial determination, Petitioners explained that “[s]ince the year 2000, Dr. Persidsky, as an individual has been . . . an approved preferred provider for . . . ‘Medi-Cal,’” and in January 2012, “decided to enroll his professional medical corporation [HCMC] in Medicare and Medi-Cal.” CMS Ex. 3 at 2. It was only following the submission of the HCMC provider enrollment application that the state agency conducted the onsite inspection that led it to deny HCMC’s enrollment in Medi-Cal. CMS Ex. 3 at 2. All the evidence before me suggests that HCMC was never enrolled in the Medi-Cal program, and, therefore, could not be terminated from it.

As noted above, the term “terminated” in section 424.535(a)(12) could encompass differently named actions that states may take that serve to remove an enrolled health care provider or supplier from participating in a state health care program, whether the state uses the specific term “terminate” or a similar term, such as suspend. Here, however, without evidence that HCMC previously was enrolled in Medi-Cal, it cannot reasonably be said that denial of an enrollment application has essentially the same effect as termination of a provider’s enrollment.

Whereas the state agency denied HCMC’s enrollment, it “deactivat[ed] [Dr. Persidsky’s] provider number (1437188299) . . .” CMS Ex. 3 at 1. Under California regulations, “deactivate” means “the provider’s number, including all business addresses used by the provider to provide health care services, goods, supplies, or merchandise directly or indirectly to Medi-Cal beneficiaries shall *no longer* be used to bill the Medi-Cal Program . . .” Cal. Code Regs. tit. 22, § 51000.6.1 (2008) (emphasis added). In order for a provider to “no longer” be permitted to bill Medi-Cal, it must have been permitted to do so in the first place. HCMC was not permitted to bill Medi-Cal; indeed, seeking permission for it to bill Medi-Cal was the entire purpose of Dr. Persidsky’s efforts. CMS Ex. 3 at 2 (“Dr. Persidsky decided to enroll his professional medical corporation [HCMC] in Medicare and Medi-Cal so that payment remittances would be tied to the [HCMC] tax identification number rather than his own individual social security number.”).

Because CMS revoked HCMC’s Medicare billing privileges based on a provision that applies only to terminations and HCMC was not terminated, CMS did not have a legitimate basis to revoke HCMC’s Medicare billing privileges.

4. I reject Dr. Persidsky's various other arguments.

The bulk of the arguments that Dr. Persidsky raises before me constitute challenges to the state agency's denial and deactivation decisions and CMS's exercise of discretion in making its revocation determination. Dr. Persidsky challenges the factual basis upon which the state agency denied HCMC's Medi-Cal enrollment application and deactivated his Medi-Cal enrollment. He argues that he always had an established place of business and was at all times the sole owner of HCMC. Further, he asserts that the state agency never should have terminated him at all, notwithstanding its decision to deny HCMC's Medi-Cal enrollment. P. Br. at 2-4. Dr. Persidsky's arguments amount to collateral attacks on the state agency's administrative decisions. His revocation under section 424.535(a)(12) is derivative of the state agency's action. The terms of that regulation do not permit me to review the merits of the state agency's decision. See *Ravindra Patel, M.D.*, DAB CR2171, at 6 (2010). Though he misidentifies the source, Dr. Persidsky correctly observes that the Secretary has the discretion to terminate the Medicare billing privileges of an individual who has been terminated by a state Medicaid program. He argues that the Secretary's decision, by way of CMS, to exercise that discretion does not serve the best interests of his patients or other Medicare beneficiaries. P. Br. at 4-5. However, I am not authorized to review whether CMS exercised its discretion wisely, merely whether CMS acted permissibly based on the law and facts in a case. *Latantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (“[T]he 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.*

Finally, Dr. Persidsky argues that the reenrollment bar CMS imposed is unfair for all of the reasons he previously raised. He asks that I shorten the bar, at a minimum. P. Br at 5. However, I do not have jurisdiction to consider this issue. See *Patel*, DAB CR2171, at 7 n.5; *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 Dr. Persidsky's Medicare billing privileges and reverse CMS's determination to revoke HCMS's Medicare billing privileges.

/s/
Scott Anderson
Administrative Law Judge