Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Akram A. Ismail, M.D.
Docket No. A-11-109
Decision No. 2429
December 20, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Akram A. Ismail, M.D. (Dr. Ismail) appeals the June 23, 2011 decision of Administrative Law Judge (ALJ) Keith W. Sickendick upholding the revocation of Dr. Ismail's Medicare billing privileges and granting summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS). *Akram Ismail*, DAB CR2387 (2011) (ALJ Decision). On August 4, 2010, CMS revoked Dr. Ismail's billing privileges based on the New Jersey State Board of Medical Examiners' (NJSBME) suspension of Dr. Ismail's medical license, which, in turn, was based on the Florida Department of Health (FDOH) imposing an emergency suspension of Dr. Ismail's medical license. CMS concluded that NJSBME's suspension of Dr. Ismail's license rendered him noncompliant with the Medicare enrollment requirements, a basis for revocation in 42 C.F.R. § 424.535(a)(1). The ALJ upheld CMS's determination, concluding that as a result of the suspension, Dr. Ismail was no longer "legally authorized to practice" medicine as required by 42 C.F.R. § 410.20(b). ALJ Decision at 7. The ALJ also found that Dr. Ismail's billing privileges were subject to revocation under 42 C.F.R. § 424.535(a)(9) based on his failure to report NJSBME's suspension of his medical license, an "adverse legal action," to CMS or its contractor within 30 days as required by 42 C.F.R. § 424.516(d)(1)(ii). *Id.*

Dr. Ismail challenges the ALJ Decision on two grounds. First, Dr. Ismail argues that his compliance with certain "State licensure" requirements in Florida (such as keeping his "practitioner profile" updated and maintaining his continuing education requirements) necessarily means that he is in overall compliance with the Medicare enrollment requirements. Second, he argues that the suspension of his Florida medical license is not "final" and thus not subject to the reporting requirement. For the reasons set forth below, we conclude that Dr. Ismail's contentions have no merit, and we affirm the ALJ Decision.

Applicable Legal Standards

Title XVIII of the Social Security Act (Act) establishes the Medicare program. Medicare Part B establishes the supplementary medical insurance benefits program for the aged and disabled. Act § 1831 (42 U.S.C. § 1395j).[1] Under this program, eligible health care providers and suppliers can receive payment from Medicare for certain services rendered to Medicare beneficiaries. *See* Act §§ 1832 (42 U.S.C. § 1395k), 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395u(h)(1)). For the purposes of the Medicare program, a "supplier" is "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services under [Title XVIII]." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "physician" is "a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he performs such function or action . . . ." Act § 1861(r)(1) (42 U.S.C. § 1395x(r)(1)).

Section 1866(j) of the Act (42 U.S.C. § 1395cc(j)), added by section 936(a) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, authorizes the Secretary of the Department of Health & Human Services (Secretary) to establish by regulation the enrollment requirements for providers and suppliers seeking approval to participate in the Medicare program. Additionally, the Act authorizes the Secretary to administer the Medicare program, including the enrollment process, through contractors. Act §§ 1842(a) (42 U.S.C. § 1395u(a)), 1874A (42 U.S.C. § 1395kk-1). In this case, the contractor is Highmark Medicare Services (Highmark).

In 2006, the Secretary adopted the regulations in 42 C.F.R. Part 424, subpart P, which establish the enrollment process for providers and suppliers, the requirements to maintain enrollment, and the grounds on which CMS or its contractor may revoke enrollment and billing privileges. *See* 71 Fed. Reg. 20,754, 20,776 (2006). One of those requirements states that in order to maintain an active enrollment status, a provider or supplier must continue to comply with the applicable "Federal and State licensure, certification, and regulatory requirements, as required, based on the type of services or supplies the provider or supplier type will furnish and bill Medicare." Section 424.516(a)(2) (2009).[2] Part 410 lists the types of services for which a provider or supplier may bill Medicare. Relevant to this case is section 410.20, which provides that "physicians' services" must be provided by a practitioner "legally authorized to practice by the State in which he or she performs the functions or actions, and who is acting within the scope of his or her license." Section 410.20(b). Section 424.516 further requires that a provider or supplier

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[1] The current version of the Act, together with the corresponding United States Code sections, is available online at http://www.socialsecurity.gov/OP_Home/ssactlssact.htm.

[2] The 2006 regulations included this requirement at section 424.520(a)(2). 71 Fed. Reg. 20,754, 20,759 (2006). The amendments that moved this requirement to its current location in section 424.516(a)(2) were published in 2008, and became effective on January 1, 2009. 73 Fed. Reg. 69,726, 69,777 (Nov. 18, 2008).

report "[a]ny adverse legal action" to a CMS contractor within 30 days of the "reportable event." Section 424.516(d)(1)(ii).

Section 424.535 outlines the grounds on which CMS or its contractor may revoke the Medicare billing privileges of a provider or supplier. Relevant to this case, section 424.535(a)(1) allows CMS or its contractor to revoke billing privileges if the provider or supplier "is determined not to be in compliance with the enrollment requirements described in this section . . . ." Additionally, section 424.535(a)(9) allows CMS or its contractor to revoke billing privileges if the provider or supplier "did not comply with the reporting requirements specified in § 424.516(d)(1)(ii) and (iii) of this subpart." Revocation results in the termination of the provider's or supplier's agreement with Medicare as well as a ban on re-enrollment for at least one year, but no more than three years. Section 424.535(b)-(c).

Case Background[3]

Dr. Ismail holds a medical license in Florida and New Jersey and has been enrolled in Medicare as a supplier. On December 14, 2009, FDOH entered an Order of Emergency Suspension of License (OES) that suspended Dr. Ismail's medical license in that state. CMS Ex. 8. FDOH based its suspension on its determination that Dr. Ismail posed an "immediate and serious danger to the health, safety or welfare to the public," and that he had failed to comply with the terms of a prior agreement with FDOH's treatment program for impaired practitioners. *Id.* at 9-10. FDOH imposed the suspension for the duration of its disciplinary proceedings. *Id.* at 10. Dr. Ismail challenged the emergency suspension of his license in his request for a formal administrative hearing before FDOH. P. Ex. 3.

Subsequently, on May 4, 2010, NJSBME entered a Final Order of Discipline that suspended Dr. Ismail's license in that state. CMS Ex. 10. NJSBME based its suspension on the OES previously entered by FDOH. *Id.* at 2. NJSMBE's suspension expressly prohibits Dr. Ismail from practicing medicine in New Jersey until he demonstrates that he is able to practice medicine in Florida. *Id.* NJSBME notified Highmark about its suspension of Dr. Ismail's medical license. CMS Ex. 1. Dr. Ismail did not report the suspension of either license to Highmark or CMS.

In a letter dated August 4, 2010, Highmark notified Dr. Ismail that it was revoking his Medicare billing privileges retroactive to May 4, 2010, and was imposing a one-year enrollment bar. *Id.* at 1-2. Highmark based its revocation on NJSBME's suspension, specifically finding that because of this suspension Dr. Ismail was no longer able to

[3] The facts included in this general background, all undisputed, are drawn from the record before the ALJ and the ALJ Decision; they are not new or substituted findings. We present them here to provide a general framework for understanding our decision.

practice medicine and, therefore, not in compliance with the Medicare enrollment requirements. *Id.* at 1. Highmark also found that Dr. Ismail had failed to report the suspension of his license, as required by regulation. *Id.* Dr. Ismail requested reconsideration of Highmark's decision. CMS Ex. 6.

On December 29, 2010, Highmark issued its reconsideration decision. CMS Ex. 7. The hearing officer found that NJSBME's suspension of Dr. Ismail's medical license rendered him "non-compliant with enrollment requirements." *Id.* at 3. The hearing officer stated that "Medicare may revoke a provider or supplier's billing privileges if the provider [or] supplier [is] found to be noncompliant with the enrollment requirements of its supplier type." *Id.* The hearing officer concluded that Highmark's initial revocation decision on August 4, 2010 was proper under section 424.535(a)(1) based on Dr. Ismail's noncompliance with the enrollment requirements. *Id.* at 3-4.[4] Dr. Ismail appealed the reconsideration decision to the ALJ.

In the proceeding before the ALJ, CMS moved for summary judgment on the ground that there was no genuine dispute of material fact and CMS was entitled to judgment as a matter of law. CMS Mot. for Summ. J. at 8-9. In response, Dr. Ismail conceded that there was no material fact in dispute, but opposed summary judgment so as to allow more time for "further interpreting and applying the regulations to this case." P. Reply Br. (in Docket No. C-11-326), at 11. The ALJ ruled that summary judgment was appropriate and determined that CMS was entitled to judgment as a matter of law. ALJ Decision at 5. Specifically, the ALJ found that Dr. Ismail was no longer "legally authorized to practice medicine" under section 410.20(b) while his New Jersey medical license remained suspended. *Id.* at 7. The ALJ concluded that CMS properly revoked Dr. Ismail's billing privileges under section 424.535(a)(1) because not being "legally authorized to practice medicine" as required by section 410.20(b) rendered him noncompliant with the Medicare enrollment requirements. *Id.* The ALJ further concluded that NJSBME's suspension of Dr. Ismail's medical license was an "adverse legal action," as that phrase is used in section 424.516(d)(1)(ii). The ALJ determined that Dr. Ismail's failure to report the suspension to Highmark gave CMS an additional ground for revocation under section 424.535(a)(9). *Id.* Dr. Ismail timely appealed the ALJ Decision to the Board.

[4] The hearing officer also concluded that the reporting requirement in section 424.516(d)(1)(ii) did not apply in this case because Dr. Ismail's New Jersey license had been deactivated since 1994. The ALJ properly noted that the hearing officer "did not provide any analysis or citation of authority for that conclusion." ALJ Decision at 8, n.5. Neither party has cited any legal authority that would support the hearing officer's conclusion on this issue. As discussed below, we conclude that the reporting requirement was triggered by both the Florida and New Jersey license suspensions.

Standard of Review

Whether summary judgment is appropriate is a legal issue we review *de novo*. *Dumas Nursing and Rehabilitation, L.P.*, DAB No. 2347, at 5 (2010) (citing *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918, at 7 (2004)). The party moving for summary judgment must meet the initial burden of demonstrating that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)). If the moving party meets its initial burden, the non-moving party may overcome a motion for summary judgment by pointing out "specific facts showing there is a genuine issue for trial." *Id.* at 324. Our standard of review on a disputed conclusion of law is whether the ALJ's decision is erroneous. *See Departmental Appeals Board, Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs* at http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html.

Analysis

Consistent with his arguments before the ALJ, Dr. Ismail does not contend that there is any genuine dispute of material fact in this case. Rather, Dr. Ismail raises two legal issues for the Board's consideration: first, whether the ALJ erred in upholding the revocation under section 424.535(a)(1) based on Dr. Ismail's inability to practice medicine legally in New Jersey as a result of NJSBME's suspension of his medical license, and second, whether the ALJ erred in upholding the revocation under section 424.535(a)(9) based on Dr. Ismail's failure to report NJSBME's suspension of his license to Highmark. For the reasons set forth below, we conclude that the ALJ Decision is free of legal error, and that CMS is entitled to judgment as a matter of law. Therefore, we uphold the ALJ Decision.

1. CMS had authority to revoke Dr. Ismail's Medicare enrollment and billing privileges based on NJSBME's suspension of Dr. Ismail's medical license.[5]

Section 424.535(a)(1) permits CMS or its contractor to revoke a supplier's enrollment and billing privileges if the supplier fails to comply with the "enrollment requirements described in this section." These "enrollment requirements" include the requirements in section 424.516 and other requirements in subpart P. *See* 71 Fed. Reg. at 20,761 (preamble to final regulations adopting section 424.535, stating that "a provider or supplier's enrollment and billing privileges may be revoked if, at any time, it is determined to be out of compliance with the Medicare enrollment requirements outlined

[5] We refer to the NJSBME suspension as the basis for the revocation because that is the suspension communicated to and relied on by Highmark. However, our discussion relates with no material difference to the Florida suspension as well, and that suspension also provides a ground for revocation of Dr. Ismail's billing privileges.

in subpart P . . ."). In relevant part, section 424.516 requires that a supplier comply with "Federal and State licensure, certification, and regulatory requirements, as required, based on the type of services or supplies the . . . supplier type will furnish and bill Medicare." Section 424.516(a)(2).

In determining that revocation was authorized under section 424.535(a)(1), the ALJ focused his analysis on whether Dr. Ismail was authorized to provide Medicare services under section 410.20(b), which states that Medicare pays for services furnished by a professional, including a "doctor of medicine," "who is legally authorized to practice medicine by the State in which he or she performs the functions or actions . . . ." The ALJ noted that Dr. Ismail "does not dispute that he could not legally provide physicians' services in New Jersey during the suspension of [his] license to practice medicine." ALJ Decision at 7. Accordingly, the ALJ concluded that Dr. Ismail "could not legally practice medicine in New Jersey after his license was suspended and he no longer met the enrollment requirement . . . of [section] 410.20(b)." *Id.* The ALJ further concluded that this was a sufficient basis for revoking Dr. Ismail's billing privileges under section 424.535(a)(1) for failure to comply with the Medicare enrollment requirements. *Id.*

We conclude that the ALJ properly relied on section 410.20(b) to find Dr. Ismail noncompliant with the Medicare "enrollment requirements" within the meaning of the revocation authority in section 424.535(a)(1). Section 424.516(a)(2) mandates compliance with "Federal . . . regulatory requirements . . . based on the type of services or supplies the provider or supplier type will furnish and bill Medicare." A doctor of medicine who provides services to Medicare beneficiaries and is enrolled in Medicare as a "supplier" would be reimbursed for providing "physicians' services." *See* section 410.20(a) (listing services included in "physicians' services"); section 400.202 (definition of "services"). In order to be covered under the Medicare program, "physicians' services" must be furnished by a practitioner who is "legally authorized to practice medicine by the State in which he or she performs the functions or actions . . . ." Section 410.20(b). Thus, a doctor of medicine who seeks reimbursement for "physicians' services" would not meet the federal regulatory requirements "based on the type of services or supplies the . . . supplier type will furnish and bill Medicare" if he or she was not "legally authorized to practice medicine." Accordingly, the federal regulatory requirements in section 424.516(a)(2) applicable to doctors of medicine necessarily include by reference the provisions in section 410.20(b).

The Board's recent decision in *Briarwood Community Mental Health Center*, DAB No. 2414 (2011), although not specifically addressing section 410.20(b), also generally supports reference to the Medicare participation requirements specific to the provider or supplier type when determining whether the Medicare enrollment requirements of section 424.516 are met. As relevant here, the Board wrote:

> [S]ections 424.516(a)(1) and 424.516(a)(2) indicate that a condition for Medicare enrollment is CMS's verification that the applicant is *compliant with the Medicare statute and regulations*, including federal certification and regulatory requirements "*based on the type of services or supplies the provider or supplier type will furnish and bill Medicare*" (emphasis added). These requirements plainly indicate that an entity seeking enrollment as a particular type of Medicare provider must satisfy the legal conditions which render the provider eligible *to furnish covered items or services to the program's beneficiaries, and to receive Medicare payment for those covered items and services.*

DAB No. 2414, at 9 (last emphasis added and footnote omitted).

We next consider whether Dr. Ismail is "legally authorized to practice medicine" while his medical licenses remain suspended. We find, consistent with the ALJ Decision, that as a result of the suspensions of Dr. Ismail's medical licenses in both Florida and New Jersey, he is unable to practice medicine legally in those states. NJSBME has expressly prohibited Dr. Ismail from practicing medicine in New Jersey until Dr. Ismail "appear[s] before the Board or a Committee thereof and demonstrate[s] that he is fit to practice medicine in New Jersey, and that he holds an active, unrestricted license to practice medicine and surgery in Florida." CMS Ex. 10, at 2. The OES imposed an emergency suspension of Dr. Ismail's license in Florida, an effect of which is that the "Licensee may not practice in Florida while license is suspended under emergency order." P. Ex. 2, at 2. Thus, both the New Jersey and the Florida licensing authorities prohibit Dr. Ismail from practicing medicine while their suspensions remain in effect. Moreover, as the ALJ noted, it is a criminal offense in both New Jersey and Florida to practice medicine with a suspended license. *See* ALJ Decision at 6. In Florida, practicing medicine "without an active license" is a third-degree felony, punishable by up to five years' incarceration. Fl. Stat. Ann. §§ 456.065(2)(d)(1), 775.082(3)(d) (2011). To practice "without an active license" includes "practicing on a *suspended*, revoked, or void license." *Id.* § 456.065(2)(d) (emphasis added). In New Jersey, practicing medicine while one's license has been "knowingly suspended" is also a third-degree felony, punishable by up to five years' incarceration. N.J. Stat. Ann. §§ 2C:21-20, 2C:43-6(a)(3) (2011). Because practicing on a suspended license would constitute a criminal offense in both Florida and New Jersey, we conclude that it was and is illegal for Dr. Ismail to practice medicine in either state while his license remains suspended.

Although he does not dispute that he cannot practice medicine while his license remains suspended, Dr. Ismail argues that the revocation regulations apply only to permanent suspensions. He notes that the federal regulations "make absolutely no mention of the terms 'permanent license suspension' or 'temporary license suspension,' nor do any of those regulations distinguish between those types of suspensions." Ismail Br. at 5. Thus, he argues that the regulations should be interpreted to mean that only "permanent license suspensions" may render a medical doctor not "legally authorized to practice medicine."

Id. The ALJ rejected the same argument below, concluding that "[i]f the impact of a suspension, whether temporary or permanent, is that a physician is no longer legally authorized to practice medicine, the physician is no longer in compliance with participation requirements and revocation is authorized." ALJ Decision at 8. Dr. Ismail does not point to any error in the ALJ's conclusion, nor do we find any error. CMS may determine a supplier is out of compliance with the Medicare enrollment requirements at any time. *See* 71 Fed. Reg. at 20,761("[A] provider or supplier's enrollment and billing privileges may be revoked if, *at any time*, it is determined to be out of compliance with the Medicare enrollment requirements outlined in subpart P . . . ." (emphasis added)). Thus, the ALJ correctly looked at the immediate effect of Dr. Ismail's suspension rather than the possibility that the suspension may be lifted at some point. Moreover, we note that a "suspension" is defined as "the *temporary* deprivation of a person's powers or privileges, [especially] of office or profession." Black's Law Dictionary 1487 (8th ed. 2004) (emphasis added). Under this definition, a suspension is inherently "temporary," which undercuts the distinction Dr. Ismail attempts to make.

During oral argument before the Board, counsel for Dr. Ismail requested that we stay this action until the resolution of the disciplinary proceedings before FDOH. Tr. of Oral Argument at 7, December 1, 2011. Staying the proceedings, however, would serve no purpose because it was the suspensions already in place that prompted the legally authorized revocation of Dr. Ismail's Medicare billing privileges. Even if FDOH were to reinstate Dr. Ismail's authorization to practice medicine at the conclusion of its disciplinary proceedings, Dr. Ismail is, as discussed above, unauthorized to practice medicine legally while the suspension is in effect. Dr. Ismail's inability to practice medicine for any length of time due to the disciplinary actions imposed against him triggered his noncompliance with the Medicare enrollment requirements and authorized revocation of his billing privileges.

Dr. Ismail further argues that he has met all of the necessary ongoing education and other requirements to keep his Florida medical license "active."[6] Ismail Br. at 4; Ismail Reply Br. at 3-4. Dr. Ismail appears to view his "active" license status in Florida as showing that he remains compliant with the Medicare enrollment requirements. The ALJ rejected a similar argument, concluding that since Dr. Ismail did not dispute that he may not legally practice medicine in either New Jersey or Florida while his license is suspended, "he does not meet current enrollment requirements, even though he may meet state licensure requirements." ALJ Decision at 8. Again, Dr. Ismail does not point to any error in the ALJ's conclusion. Moreover, Dr. Ismail's argument reads the requirements of section 424.516(a)(2) in isolation and without due regard to other relevant statutory and regulatory provisions. Accepting Dr. Ismail's narrow reading of section 424.516(a)(2) would allow for the legally untenable conclusion that Dr. Ismail meets the

[6] For the purposes of summary judgment, the ALJ accepted as true Dr. Ismail's assertion that his Florida license was still active in this regard. ALJ Decision at 5, n.2.

"State licensure" requirements necessary to be enrolled in the Medicare program, even though he cannot bill Medicare for "physicians' services" provided in the state because he is not "legally authorized to practice medicine" there. The "State licensure" requirement in section 424.516(a)(2) must be read in a manner consistent with the regulatory and statutory provisions requiring that a physician be "legally authorized to practice" medicine by the state in which he performs the actions. Act § 1861(r); 42 C.F.R. § 410.20(b). The requirement that physicians participating in and submitting claims to Medicare be legally authorized to practice medicine is not met simply by having an "active" medical license when the authority to practice medicine is nonetheless denied by the state.

Dr. Ismail also does not cite any authority under either New Jersey or Florida law indicating that merely meeting the requirements necessary to keep a license "active" permits a doctor of medicine with a suspended license to "practice medicine." Indeed, Dr. Ismail has conceded that he is unable to practice medicine in Florida while the OES remains effective. Ismail Reply Br. at 3. Moreover, the Florida Administrative Code provides that "[r]enewal of a suspended license during the period of suspension shall not affect the suspension of the license and the suspension shall continue until all requirements for reinstatement have been met." Fl. Admin. Code § 64B8-8.0011(10). This provision recognizes that a physician may keep his or her license "active" while suspended without changing the effect of the suspension – the lack of authority to practice medicine.

Based on the foregoing, we conclude that because Dr. Ismail is not "legally authorized to practice medicine" in the states in which he has his medical licenses, he is not in compliance with the Medicare enrollment requirements as required by section 424.516(a)(2). Accordingly, the ALJ did not err in upholding CMS's revocation of Dr. Ismail's enrollment and billing privileges pursuant to section 424.535(a)(1).

2. CMS had authority to revoke Dr. Ismail's enrollment and billing privileges based on his failure to report the suspension of his New Jersey medical license to Highmark within 30 days.

Under section 424.535(a)(9), CMS or its contractor may revoke a supplier's enrollment and billing privileges if the supplier fails to comply with the "reporting requirements specified in § 424.516(d)(1)(ii) and (iii) of this subpart." These reporting requirements mandate, in relevant part, that a supplier report to the appropriate CMS contractor "[a]ny adverse legal action" within 30 days. Section 424.516(d)(1)(ii). The ALJ concluded that revocation of Dr. Ismail's billing privileges was authorized by section 424.535(a)(9) since Dr. Ismail "does not dispute that he failed to report the adverse legal action of [NJSBME]." ALJ Decision at 8.

Dr. Ismail argued before the ALJ, and reiterates on appeal, that the suspension of his medical license was not an "adverse legal action" subject to reporting because it was not "final." Ismail Br. at 6-7. As support, Dr. Ismail points to the phrase "final adverse action," which is defined in section 424.502 to include "[s]uspension or revocation of a license to provide health care by any state licensing authority."[7] In Dr. Ismail's view, use of the word "final" in section 424.502 means that all challenges to a suspension must be exhausted before it is considered a "final adverse action." Ismail Reply Br. at 6. Dr. Ismail argues that the phrase "[a]ny adverse legal action" in section 424.516(d)(1)(ii) similarly should be read to require the reporting of only "final" license suspensions. *Id.* at 6-7. According to Dr. Ismail, a license suspension that remains subject to appeal by the licensee is not "final" and need not be reported under section 424.516(d)(1)(ii). Ismail Br. at 7.

In interpreting the phrase "[a]ny adverse legal action," the ALJ applied the "ordinary or usual meaning of the individual words," finding that the phrase refers to "some legal action or action pursuant to or under color of law that is hostile to or contrary to the interest, concern, or position of one against whom the action was taken." ALJ Decision at 7 (citing Black's Law Dictionary 31, 58, 912 (8th ed. 2004)). The ALJ also found that the wording of section 424.516(d)(1)(ii) is broad and encompasses all adverse legal actions, not just those that are "final" as argued by Dr. Ismail. *Id.* at 9. The ALJ further stated with respect to that argument: "If the drafters of 42 C.F.R. § 424.516(d)(1)(ii) intended for only 'final adverse action' to be reportable, they would have used that phrase given the fact they specifically defined that phrase in 42 C.F.R. § 424.502." *Id.* The ALJ concluded that NJSBME's suspension of Dr. Ismail's medical license was subject to the reporting requirement in section 424.516(d)(1)(ii) because it was a "legal action" by the state licensing board that was "adverse to the interests of Dr. Ismail." *Id.*

We agree with the ALJ that the phrase "[a]ny adverse legal action" in section 424.516(d)(1)(ii) should be read according to its plain language to require the reporting of a license suspension even if an appeal of the suspension is pending. The Secretary added the reporting requirement in that section as an "incentive for [individual practitioners] to report a change that may adversely affect their ability to continue to receive Medicare payments." 73 Fed. Reg. at 69,777. The definition of "final adverse action" contained in section 424.502 was promulgated in the same rulemaking that established the reporting

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[7] The definition of "final adverse action" reads in full:

Final adverse action means one or more of the following actions:

(1) A Medicare-imposed revocation of any Medicare billing privileges;
(2) Suspension or revocation of a license to provide health care by any State licensing authority;
(3) Revocation or suspension by an accreditation organization;
(4) A conviction of a Federal or State felony offense (as defined in § 424.535(a)(3)(i)) within the last 10 years preceding enrollment, revalidation, or re-enrollment; or
(5) An exclusion or debarment from participation in a Federal or State health care program.

requirement. *See id.* at 69,778, 69,939. If the Secretary had intended the definition in section 424.502 to limit the scope of section 424.516(d)(1)(ii), she would not have used different language. The phrase "[a]ny adverse legal action," as it is used in the provider/supplier enrollment regulations, is on its face broader than "final adverse action," and includes, but is not limited to, a final adverse action. In this case, we agree with the ALJ that the suspensions of Dr. Ismail's medical licenses constituted "legal actions" that were adverse to his interests.

Our interpretation is consistent with the plain reading of the phrase "[a]ny adverse legal action" and is also appropriate in view of the goal of the section, which, as the Board stated in *Gulf South Medical & Surgical Institute*, DAB No. 2400, at 8 (2011), is "to provide CMS with information about adverse legal actions that CMS had determined are relevant to evaluating whether a supplier should continue to participate in Medicare." Allowing a doctor of medicine with a suspended medical license to participate in Medicare pending an appeal of the suspension without having to notify a CMS contractor of the suspension would prevent CMS from effectively evaluating whether the supplier should continue to participate in Medicare, and would undercut the regulatory goal of reducing improper payments to unqualified practitioners. *See* 71 Fed. Reg. at 20,754.

Even if the definition in section 424.502 limited the phrase "[a]ny adverse legal action" in section 424.516(d)(1)(ii) as Dr. Ismail suggests, NJSBME's suspension of Dr. Ismail's license would nevertheless have to be reported. Section 424.502 specifically provides that "[s]uspension or revocation of a license to provide health care by any state license authority" is a "final adverse action." Moreover, the Secretary has expressly stated that license suspensions are "final" for the purposes of the Medicare enrollment regulations irrespective of any ongoing appeal rights. *See* 73 Fed. Reg. at 69,777 ("[W]e believe that a final adverse action has occurred when the sanction is imposed and not when a supplier has exhausted all of the appeal rights associated with the action itself."). Therefore, notwithstanding any pending appeal, the suspension of Dr. Ismail's license would already be considered "final" for the purposes of the reporting requirements.

In summary, we conclude that the ALJ did not err in concluding that CMS was authorized to revoke Dr. Ismail's billing privileges pursuant to section 424.535(a)(9).

Conclusion

For the foregoing reasons, we uphold the ALJ Decision.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member