

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gerald L. Cooke, M.D.,
(PTANs: IL5640001, F400341891),
(NPI: 1386768588)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-830

Decision No. CR4960

Date: October 30, 2017

DECISION

I sustain the determination of a Medicare contractor, as affirmed upon reconsideration, to revoke the Medicare enrollment and billing privileges of Petitioner, Gerald L. Cooke, M.D.

I. Background

The Centers for Medicare & Medicaid Services (CMS) moved for summary judgment. It filed a brief and supporting exhibits that are identified as CMS Ex. 1-CMS Ex. 13. Petitioner opposed the motion, filing a brief and supporting exhibits that are identified as P. Ex. 1-P. Ex. 7.

It is unnecessary that I decide whether the criteria for summary judgment are met here. CMS did not offer the testimony of a witness. Petitioner offered his own testimony in affidavit form (P. Ex. 2) but CMS has not requested to cross-examine Petitioner.

Consequently, the record of this case is complete and I may decide it based on the parties' written submissions and without regard to summary judgment criteria. I receive CMS Ex. 1-CMS Ex. 13 and P. Ex. 1-P. Ex. 7, including Petitioner's affidavit.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue is whether a basis exists for CMS to revoke Petitioner's Medicare enrollment and billing privileges.

B. Findings of Fact and Conclusions of Law

CMS asserts two grounds for revoking Petitioner's Medicare enrollment and billing privileges. First, it contends that 42 C.F.R. § 424.535(a)(1) authorizes revocation because Petitioner was not in compliance with Medicare enrollment requirements. Specifically, according to CMS, during the period from July 1 to July 21, 2016, Petitioner did not satisfy the Medicare enrollment requirement that he comply with state licensure requirements because his Illinois license to practice medicine was suspended during that period. 42 C.F.R. § 424.516(a)(2).

Second, CMS asserts that 42 C.F.R. § 424.535(a)(9) authorizes revocation because Petitioner failed to comply with mandatory reporting requirements. CMS contends that Petitioner failed to notify the contractor of an adverse legal action, his license suspension, within 30 days as is required by 42 C.F.R. § 424.516(d)(1)(ii).

The evidence supports CMS's contentions. The Illinois Department of Financial and Professional Regulation (IDFPR) suspended Petitioner's license to practice medicine in Illinois because Petitioner had failed to pay his Illinois state income taxes. CMS Ex. 1. That suspension endured for a period of 21 days, from July 1 to July 21, 2016. *Id.* The suspension constituted a failure by Petitioner to meet professional licensing standards in Illinois and provided grounds for the contractor and CMS to revoke Petitioner's Medicare enrollment and his billing privileges. 42 C.F.R. §§ 424.516(a)(2), 424.535(a)(1); *Abram A. Ismail, M.D.*, DAB No. 2429 (2011). The fact that Petitioner's license suspension was temporary does not deprive the contractor and CMS of authority to revoke his Medicare participation and his billing privileges. *Ismail*, DAB No. 2429 at 10.

The evidence establishes also that Petitioner failed to notify the contractor of his license suspension within 30 days as is required by regulation. This failure provides the contractor and CMS with additional authority to revoke his Medicare participation and billing privileges. 42 C.F.R. § 424.516(d)(1)(ii). The evidence establishes that Petitioner filed an application with the contractor for revalidation of his Medicare billing privileges on July 29, 2016. CMS Ex. 3. He answered "no" to the application's question whether

any final adverse action had ever been imposed against him under his current or former name or as a business entity. The contractor rejected that application and Petitioner re-filed on September 16, 2016. CMS Ex. 6. It was only then, well past 30 days from the date of the suspension, that Petitioner acknowledged that his license to practice medicine in Illinois had been suspended. CMS Ex. 6 at 14.

Petitioner makes several arguments challenging the contractor's determination. I find these to be without merit. First, Petitioner characterizes the determination to revoke his Medicare participation and billing privileges as "incredibly outrageous, arbitrary and capricious," asserting that the revocation had nothing to do with the services that Petitioner rendered. Petitioner's Pre-hearing Brief and Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment (Petitioner's brief) at 1-2. I agree with Petitioner that the revocation determination does not relate to the quality of services that Petitioner provided. However, the regulations do not contain any requirement that a supplier must be found to have rendered substandard care as a criterion for revocation. Here, the plain language of the regulations supports the contractor's determination.

Second, Petitioner makes an equitable argument. Petitioner essentially asserts that his failure to comply with Medicare regulations was not his fault and that he shouldn't be penalized for that failure. Whatever the truth of Petitioner's assertions they are of no avail. CMS may not be barred from imposing a remedy on equitable grounds. *Heckler v. Community Services of Crawford County, Inc.*, 467 U.S. 51 (1984).

Moreover, the record does not support Petitioner's contentions that he was treated unfairly. He contends that he is blameless for not notifying the contractor of his license suspension because IDFPR sent the notice of that action to the wrong address, an address that Petitioner had used but was no longer using. Petitioner's brief at 3. However, Petitioner concedes that he knew about the suspension no later than July 5, 2016. *Id.* He thus had plenty of time to meet the 30-day deadline to notify the contractor of his suspension.

Petitioner contends also that he was unaware that his July 29, 2016 application for renewal would be treated as an application for renewal of his personal participation in Medicare. Petitioner's brief at 7. According to Petitioner, he "reasonably believed . . . [his] July 29, 2016 CMS Form 855 filing was intended to relate solely to . . . [a corporate entity] and not to . . . [Petitioner] personally." *Id.* This assertion is not credible. On its face, the application was for renewal of Petitioner's personal participation in Medicare. The form that Petitioner filed on July 29 explicitly stated that it was for renewal of participation of "Gerald M. Cooke, M.D." CMS Ex. 3. There is nothing on this form to suggest that Petitioner submitted it on behalf of a corporation.

Moreover, Petitioner was bound to comply with Medicare reporting requirements whether or not he believed that his July 29 application was made on his personal behalf or on behalf of a corporation. Whatever Petitioner may have believed about the application's purpose, he was not excused from informing the contractor about his license suspension.

Petitioner also asserts that he did not reply to a request from the contractor for information concerning the status of his license to practice medicine because he never received the contractor's e-mail containing that request. Petitioner's brief at 7. The undisputed facts are that on August 8, 2016 the contractor sent an e-mail to three individuals that Petitioner listed on his July 29 application as contact persons. CMS Ex. 4. In that e-mail the contractor requested information from Petitioner concerning his license suspension. Petitioner did not respond to that request.

Whether Petitioner received or failed to receive the August 8 e-mail is irrelevant. He failed to notify the contractor of the license suspension within 30 days, which is a sufficient ground for the contractor to revoke Petitioner's Medicare participation and billing privileges. Furthermore, the contractor made the request after the 30-day mandatory notification period had expired. Petitioner would not have cured his failure to timely notify the contractor even if he had replied immediately to the e-mail.

However, the facts do not support Petitioner's contention that he should be held blameless for his failure to reply to the e-mail. The contractor sent the e-mail to the three individuals whom Petitioner had listed as contact persons. Petitioner may not credibly hide behind the failure of the contractor to e-mail him personally given that the contractor had e-mailed the three individuals whom Petitioner had listed as the appropriate individuals to receive communications from the contractor.

Petitioner argues also that the contractor and CMS abused their discretion in determining to revoke Petitioner's Medicare participation and billing privileges for a period of three years. Petitioner's brief at 11. I have no authority to consider this argument. The determination to revoke falls within the discretionary authority conferred on CMS and its contractors by 42 C.F.R. § 424.535(c)(1) and is not reviewable. *Vijendra Dave, M.D.*, DAB No. 2672 at 9-10 (2016).

_____/s/_____
Steven T. Kessel
Administrative Law Judge