

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Thomas E. Dunaway, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-1757

Decision No. CR3986

Date: June 26, 2015

DECISION

Noridian Healthcare Solutions (Noridian), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare billing privileges of Petitioner, Thomas E. Dunaway, M.D., based on Petitioner's termination from the Medicaid program by the Ohio Department of Job and Family Services (Ohio State Medicaid agency). Petitioner requested a hearing. For the reasons stated below, I grant CMS's Motion for Summary Judgment that CMS's revocation of Petitioner's Medicare billing privileges was authorized.

I. Background and Procedural History

Petitioner is a physician who was licensed to practice medicine in the state of Ohio. On April 9, 2010, the Ohio State Medicaid agency terminated Petitioner's Medicaid provider agreement because his license was inactive. CMS Ex. 1. Petitioner claims his license was revoked "for failure to submit to an inpatient evaluation for alcohol abuse." CMS Ex. 5 at 14. Petitioner exhausted his appeal rights regarding this termination from the

Ohio Medicaid program. CMS Ex. 2 at 1. Petitioner moved to Wyoming and Wyoming granted him a restricted medical license. CMS Ex. 4 at 4. Petitioner was granted an unrestricted license when he completed Wyoming's Professional Assistance Program. CMS Ex. 3.

In July 2013, Petitioner submitted a CMS Form 855B to enroll a new clinic, Lander Women's Care, LLC. CMS Ex. 5. In its application the clinic disclosed the revocation of Petitioner's Ohio license as a final adverse legal action which the clinic stated was resolved when Wyoming granted Petitioner an unrestricted license in 2012. CMS Ex. 5. Noridian granted billing privileges to the clinic effective July 26, 2013. CMS Ex. 7.

In a letter dated August 18, 2014, Noridian revoked Petitioner's Medicare billing privileges effective September 17, 2014, pursuant to 42 C.F.R. § 424.535(a)(12). CMS Ex. 2. On October 3, 2014, Petitioner requested reconsideration. Noridian issued its reconsideration decision on January 29, 2015, and upheld its revocation. CMS Ex. 4. Noridian also advised Petitioner that he was subject to a two-year enrollment bar. *Id.*

Petitioner requested a hearing on March 9, 2015. CMS moved for Summary Judgment on May 14, 2015, and filed eight exhibits (CMS Exs. 1-8). Petitioner responded on June 18, 2015, and filed two exhibits (P. Exs. 1-2).

II. Issue

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

III. Findings of Fact, Conclusions of Law, and Analysis¹

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. On April 9, 2010, the Ohio State Medicaid agency terminated Petitioner's Medicaid participation and Petitioner has exhausted his appeal rights.***

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

On April 9, 2010, the Ohio State Medicaid agency terminated Petitioner's Medicaid provider agreement and notified Petitioner that he could request administrative review of the termination. CMS Ex. 1. Petitioner's Medicaid termination became effective on March 10, 2010. Ohio Medicaid confirmed that Petitioner's appeal rights have been exhausted with respect to the termination. CMS Ex. 2.

2. CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12) because the Ohio State Medicaid agency terminated Petitioner from the Medicaid program and Petitioner has no appeal of the termination pending.

Based on the Ohio State Medicaid agency's termination, CMS revoked Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(12). CMS Ex. 2. 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.

Petitioner has not disputed that the Ohio State Medicaid agency is a state Medicaid agency. Petitioner does not dispute that the Ohio State Medicaid agency terminated his Medicaid participation. Petitioner does not dispute that he does not have an appeal of the Ohio Medicaid termination pending.

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 or supplier 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.*

In his request for reconsideration Petitioner states that at the time his Ohio medical license was terminated he was in the process of moving to Wyoming, and he had already applied for a Wyoming medical license. Petitioner states that he does not intend to practice medicine in Ohio and does not wish to renew his Ohio medical license. CMS Ex. 3. In his hearing request, Petitioner disputes only one fact: that his decision to

