

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Joshua Hutchins, M.D. and Mobile Medical Consultants PLLC
(PTANs: AA8833B212, B212),
(NPIs: 1871710152, 1376854406)

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-336

Decision No. CR4928

Date: August 24, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Joshua Hutchins, M.D. (Petitioner or Dr. Hutchins) and Mobile Medical Consultants PLLC (Mobile Medical) pursuant to 42 C.F.R. §§ 424.535(a)(1) and (a)(9) because the State Board of Medical Examiners for South Carolina (State Board) suspended Dr. Hutchins' license to practice medicine and because Dr. Hutchins failed to report the suspension to CMS within 30 days. Dr. Hutchins acknowledges that neither he nor Mobile Medical reported his license suspension to CMS within 30 days as was required. Accordingly, CMS had a legal basis to revoke Dr. Hutchins' and Mobile Medical's Medicare enrollment and billing privileges.

I. Background

Dr. Hutchins is a medical doctor who was licensed to practice medicine in the State of South Carolina beginning in September of 2007. CMS Exhibit (Ex.) 1 at 3. Sometime prior to 2014, Dr. Hutchins became addicted to pain medications. *See Request for*

Hearing (RFH) at 2. From January 2014 until May 2015, Dr. Hutchins wrote prescriptions for pain medications in his wife's name, but in fact used the medications himself. *Id.*; *see also* CMS Ex. 1 at 4. Dr. Hutchins was charged with obtaining controlled substances by fraud. He entered a recovering professionals program and a pre-trial diversion program, and the charges were eventually expunged. However, in 2016 Dr. Hutchins was charged with unlawful distribution of controlled substances, based on his failure to renew his controlled substances registration. In May of 2016, the State Board temporarily suspended Dr. Hutchins' license to practice medicine. CMS Ex. 3 at 1, 4. Following a hearing before the State Board, the Board issued a final order, dated September 1, 2016. CMS Ex. 1 at 5. In that order, the State Board stayed the suspension of Dr. Hutchins' license and permitted him to resume his medical practice subject to certain conditions. *Id.*

CMS records reflect that Dr. Hutchins was the sole owner of Mobile Medical Consultants, PLLC.¹ CMS Ex. 3 at 1; *see also* Petitioner's Brief (P. Br.) at 1. Petitioner concedes that neither Mobile Medical nor Dr. Hutchins notified the Medicare contractor that Dr. Hutchins' license to practice medicine had been suspended. *See* P. Br. at 3.

In a letter dated September 13, 2016, Palmetto GBA (Palmetto), a Medicare administrative contractor, informed Dr. Hutchins that his Medicare billing privileges were being revoked effective May 11, 2016, pursuant to 42 C.F.R. §§ 424.535(a)(1) and (a)(9), because his South Carolina medical license had been suspended and because he failed timely to report that suspension. CMS Ex. 2 at 1. In a letter dated October 6, 2016, Palmetto also informed Mobile Medical that its billing privileges were being revoked effective November 5, 2016, pursuant to the same regulations, because the medical license of Mobile Medical's sole owner (Dr. Hutchins) had been suspended and Mobile Medical had failed to report the suspension. CMS Ex. 3 at 1. In addition, Palmetto informed Dr. Hutchins and Mobile Medical that they were subject to a re-enrollment bar of three years. CMS Ex. 2 at 2; CMS Ex. 3 at 2.

¹ Petitioner's counsel represents that Dr. Hutchins is the sole owner of Mobile Medical and, as such, has authority to represent that entity here. *See* Petitioner's Brief at 1. I note that the record before me includes conflicting information on this point. In his hearing request, dated February 1, 2017, Dr. Hutchins stated that he no longer owned or operated Mobile Medical. RFH at 1. Similarly, in his reconsideration request, dated October 15, 2016, Dr. Hutchins stated, "In June of 2015 Mobile Medical Consultants became part of Liberty Doctors. I no longer have any control of billing" CMS Ex. 4 at 1. While the question of whether Dr. Hutchins retains an ownership interest in Mobile Medical such that he may represent the entity is not free from doubt, I accept the representation of counsel, as an officer of the court, that Dr. Hutchins is authorized to represent Mobile Medical here.

In a letter dated October 15, 2016, Dr. Hutchins requested reconsideration. CMS Ex. 4. Dr. Hutchins' letter specifically references the registration number of the revocation notice for Mobile Medical; however, his letter also states that he is requesting reconsideration as to his personal enrollment, so that he "may see [M]edicare patients outside of Mobile Medical Consultants." CMS Ex. 4 at 2. By letter dated January 19, 2017, Palmetto issued an unfavorable reconsidered determination reaffirming the initial determination to revoke the Medicare billing privileges of Mobile Medical and its owner (Dr. Hutchins). Palmetto Decision Letter (Recon.).² I infer that the reconsidered determination addresses both the revocation of Dr. Hutchins' personal Medicare billing privileges as well as those of Mobile Medical from the fact that the determination references both Dr. Hutchins' Provider Transaction Access Number (PTAN) (AA8833B212) and that of Mobile Medical (B212). Recon. at 1.

Petitioners requested a hearing and the case was assigned to me. I issued an Acknowledgement and Pre-Hearing Order (Order) dated February 14, 2017, which directed each party to file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Order ¶¶ 4-5. The Order also explained that the parties should submit written direct testimony for any witnesses in lieu of in-person direct testimony. Order ¶ 9. Finally, the Order explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Order ¶ 11. In response to the Order, CMS filed a motion for summary judgment and brief (CMS Br.) and four exhibits (CMS Exs. 1-4). Petitioner, through counsel, filed a brief opposing summary judgment (P. Br.) and one exhibit (P. Ex. 1). Neither party objected to any proposed exhibit. Therefore, in the absence of objection, I admit into the record CMS Exs. 1-4 and P. Ex. 1.

² CMS did not offer the Palmetto reconsidered determination as an exhibit in this case. For this reason, the only copy of the determination in the record is the copy Dr. Hutchins submitted as an attachment to his hearing request (identified as document 1a in the electronic file for this case). Perhaps CMS chose not to offer the reconsidered determination because it is virtually unintelligible. The only information I am able to glean from the document is that Palmetto determined that revocation was proper, based on 42 C.F.R. § 424.535(a)(1) and 42 C.F.R. § 424.535(a)(9). The determination does not include any explanation of why Palmetto reached this conclusion. It is not even entirely clear that the reconsidered determination addresses the revocation of the billing privileges of both Dr. Hutchins and Mobile Medical. I am mindful that my jurisdiction depends on the existence of a reconsidered determination. As deficient as the reconsidered determination is, it at least minimally serves the function of notifying Dr. Hutchins and Mobile Medical that an unfavorable determination was made, the regulations on which Palmetto relied, and that Dr. Hutchins and Mobile Medical have the right to request a hearing, which Dr. Hutchins in fact did.

CMS moved for summary judgment, arguing that there are no material facts in dispute that would require a hearing. CMS Br. at 1, 4. Petitioner opposes CMS's motion for summary judgment; however, Petitioner did not cross-move for summary judgment nor did he offer the written direct testimony of any witness. Thus, Petitioner has pointed to nothing that would require a hearing. As explained more fully below, I conclude that there is no dispute as to any material fact and CMS is entitled to judgment as a matter of law; I therefore grant CMS's motion for summary judgment.

II. Issues

The issues in this case are:

Whether CMS had a legal basis to revoke Dr. Hutchins' and Mobile Medical's Medicare enrollment and billing privileges because Dr. Hutchins' license to practice medicine in the State of South Carolina was suspended.

Whether CMS had a legal basis to revoke Dr. Hutchins' and Mobile Medical's Medicare enrollment and billing privileges because Dr. Hutchins and Mobile Medical failed to report timely to CMS an adverse legal action.

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Discussion

A. Statutory and Regulatory Framework

As a physician, Dr. Hutchins is a "supplier" for purposes of the Medicare program; as a medical practice, so is Mobile Medical. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1). In order to participate in the Medicare program as a supplier, individuals must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke the enrollment and billing privileges of a supplier for any reason stated in 42 C.F.R. § 424.535. When CMS revokes a supplier's Medicare billing privileges, CMS establishes a reenrollment bar for a period ranging from one to three years. 42 C.F.R. § 424.535(c). Generally, a revocation becomes effective 30 days after CMS mails the initial determination revoking Medicare billing privileges, but if the revocation is based on a license suspension or revocation, the revocation is effective with the date of such license suspension or revocation. 42 C.F.R. § 424.535(g).

B. Findings of Fact, Conclusions of Law, and Analysis

1. Summary judgment is appropriate because there is no dispute as to any material fact.³

Summary judgment is appropriate if “the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must “come forward with ‘specific facts showing that there is a genuine issue for trial’” *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). “To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case under governing law.” *Senior Rehab.*, DAB No. 2300 at 3 (citations omitted). To determine whether there are genuine issues of material fact for hearing, an administrative law judge must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party’s favor. *Id.*

There is no genuine dispute as to any material fact in this case. Dr. Hutchins acknowledges that his South Carolina medical license was suspended and that he did not report the suspension to CMS or its contractor, either on his own behalf or on Mobile Medical’s. P. Br. at 1-2. Instead, he represents that he believed his employer had complied with any reporting obligations on his behalf. P. Br. at 3. He further argues that CMS failed to prove that his employer did not report the license suspension. *Id.* For purposes of ruling on CMS’s motion for summary judgment, I accept that Dr. Hutchins believed his employer had reported or would report his license suspension to CMS. I further agree that the record before me does not include evidence to show whether or not Petitioner’s employer in fact reported the license suspension. Neither of these facts is material to the outcome of this case, however. This is so because Dr. Hutchins and Mobile Medical both had a duty to comply with the reporting requirement independent of Dr. Hutchins’ employer’s duty to report. Further, Dr. Hutchins and Mobile Medical are ultimately responsible for maintaining compliance with Medicare enrollment requirements. *See George E. Anderson, M.D.*, DAB No. 4631 at 12 (2016). Accordingly, summary judgment is appropriate.

³ My findings of fact and conclusions of law appear as numbered headings in bold italic type.

2. Dr. Hutchins' license to practice medicine in South Carolina was suspended May 11, 2016.

Dr. Hutchins does not dispute that his license to practice medicine was suspended from May 16, 2016, to September 1, 2016. P. Br. at 1; *see also* P. Ex. 1 at 2. As discussed in the following sections, the suspension of Dr. Hutchins' medical license, as well as his and Mobile Medical's failure to report timely the suspension of Dr. Hutchins' license, are grounds supporting CMS's determination to revoke the Medicare enrollment and billing privileges of Dr. Hutchins and Mobile Medical.

3. CMS had a legal basis to revoke Dr. Hutchins' and Mobile Medical's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(1) because Dr. Hutchins' license to practice medicine was suspended.

Pursuant to section 424.535(a)(1), CMS may revoke the Medicare billing privileges of a supplier if the supplier fails to comply with the "enrollment requirements described in this section." This includes the requirements in section 424.516. In relevant part, section 424.516 requires that a supplier comply with "Federal and State licensure, certification, and regulatory requirements" Because Dr. Hutchins' medical license was suspended, he was not, during that time, in compliance with the requirement that he be licensed to practice medicine. Thus, there was a basis to revoke Dr. Hutchins' Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(1).

4. The reinstatement of Dr. Hutchins' medical license does not remove the basis for revocation.

Dr. Hutchins points out that his license was reinstated in September 2016. While it is true that, effective with its final order of September 1, 2016, the State Board stayed further suspension of Dr. Hutchins' license, this is at best an item to be included in a Corrective Action Plan (CAP). The regulations do not provide for administrative law judge review of CMS's acceptance or rejection of a CAP. *See* 42 C.F.R. § 405.874(e). The decision to accept or reject a CAP is entirely within CMS's discretion. *See, e.g., Conchita Jackson, M.D.*, DAB No. 2495 at 6 (2013) ("the refusal by CMS or one of its contractors to reinstate a supplier after a correction attempt is not . . . an action that constitutes an initial determination subject to administrative appeal under section 498.3(b)").

In any event, even if the stay of Dr. Hutchins' license suspension could be viewed as removing the basis for revocation under 42 C.F.R. § 424.535(a)(1)—a finding I do not make—CMS would still have a basis to revoke the billing privileges of Dr. Hutchins and Mobile Medical pursuant to 42 C.F.R. § 424.535(a)(9).

5. *CMS had a legal basis to revoke Dr. Hutchins' and Mobile Medical's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(9) because Dr. Hutchins and Mobile Medical failed to report an adverse legal action within 30 days as is required by 42 C.F.R. § 424.516(d)(1)(ii).*

CMS may revoke a currently enrolled supplier's billing privileges in the following circumstance, among others:

The . . . supplier did not comply with the reporting requirements specified in 42 C.F.R. § 424.516(d)(1)(ii) and (iii) of this subpart.

42 C.F.R. § 424.535(a)(9). In turn, section 424.516(d)(1)(ii) requires physicians and other practitioners to report to their Medicare contractor, within 30 days, any "adverse legal action." Section 424.502 defines a "final adverse action" to include "[s]uspension . . . of a license to provide health care by any State licensing authority." 42 C.F.R. § 424.502.

Dr. Hutchins admits that he did not report his license suspension within 30 days. *See* P. Br. at 1, RFH at 1. Dr. Hutchins does not argue that Mobile Medical separately reported the license suspension. Dr. Hutchins contends that he did not report timely because he believed in good faith that his employer was taking care of it. P. Br. at 1-2. These circumstances do not relieve Dr. Hutchins or Mobile Medical of the duty to report under the regulations.

Dr. Hutchins' assumption that his employer would notify Palmetto on his behalf does not relieve him of the duty to report. I am aware of no authority that would permit Dr. Hutchins to avoid responsibility for his failure to report by shifting responsibility to an employer, employee, or other agent. *See George E. Anderson, M.D.*, DAB CR4631 at 12. Indeed, the regulations compel a contrary conclusion. Section 424.516(d)(1)(ii) of the regulations imposes the duty to report adverse legal actions on the affected physician independent of the reporting responsibility of any organization with which the physician may be affiliated. The regulation provides, "[p]hysicians, nonphysician practitioners **and** physician and nonphysician practitioner organizations must report the following reportable events to their Medicare contractor" 42 C.F.R. § 424.516(d) (emphasis added); *see also Gulf South Med. & Surgical Inst. & Kenner Dermatology Clinic, Inc.*, DAB No. 2400 (2011) (corporate entities as well as their physician owner had a duty to report). Because the regulation requires both physicians **and** physician organizations to report adverse legal actions, Dr. Hutchins was required to report his license suspension whether or not his employer fulfilled its duty to report. As a physician practitioner organization, Mobile Medical similarly had an independent duty to report.

Apparently, Dr. Hutchins was unaware of the duty to report his license suspension within 30 days. RFH at 1. However, a party's misunderstanding or ignorance of the regulation is not a defense. *See Emmanuel Brown, M.D. & Simeon K. Obeng, M.D.*, DAB CR2145 at 6 (2010).

Neither Dr. Hutchins nor Mobile Medical notified Palmetto within 30 days following the suspension of Dr. Hutchins' license to practice medicine in South Carolina. Therefore, I conclude that CMS had a legal basis to revoke the enrollment and billing privileges of Dr. Hutchins and Mobile Medical under 42 C.F.R. § 424.535(a)(9).

6. Dr. Hutchins' arguments in equity are not a basis to reverse the revocation of his Medicare enrollment and billing privileges.

In his hearing request, Petitioner argues that his family and patients are depending on his ability to practice medicine. *See* RFH at 1. To the extent Petitioner argues that revocation of his Medicare enrollment and billing privileges is inequitable under the circumstances presented, CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances. *Letantia Bussell, M.D.*, DAB No. 2196 at 13 (2008). Rather, "the right to review of CMS's determination by an [administrative law judge] serves to determine whether CMS has the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the [administrative law judge's] discretion about whether to revoke." *Id.* Once CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review. *See Id.* at 10; *see also Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2nd 167 (D. Mass. 2010) (if CMS establishes the regulatory elements necessary for revocation, an administrative law judge may not substitute his or her "discretion for that of CMS in determining whether revocation is appropriate under the circumstances").

V. Conclusion

For the reasons stated, I affirm CMS's determination to revoke the Medicare enrollment and billing privileges of Joshua Hutchins, M.D. and Mobile Medical Consultants PLLC.

_____/s/
Leslie A. Weyn
Administrative Law Judge