

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dana Marks, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-163

Decision No. CR4616

Date: May 23, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare enrollment and billing privileges of Dana Marks, M.D. (Dr. Marks or Petitioner), because Dr. Marks failed to timely report to CMS the suspension of his license to practice medicine in Nevada from September 2014 to December 2014. Dr. Marks requested a hearing to dispute the revocation, arguing that he only received a temporary suspension of his Nevada license and that the regulations do not require him to report a suspension that is not a final adverse action. Because the regulations require physicians to report any adverse legal action, and not just final adverse actions, to CMS within 30 days and Petitioner did not report the suspension of his medical license to CMS within that time frame, I affirm CMS's revocation of Dr. Marks' Medicare enrollment and billing privileges.

I. Background and Procedural History

Dr. Marks is a physician licensed to practice medicine in Nevada. On September 19, 2014, the Nevada State Board of Medical Examiners (Medical Examiners Board) summarily suspended Petitioner's medical license based on a concern that Petitioner was placing the public at risk for harm. The Medical Examiners Board set a hearing for

October 15, 2014, to determine whether the summary suspension would remain in effect. Petitioner Exhibit (P. Ex.) 1.

On December 8, 2014, the Medical Examiners Board approved a settlement agreement involving Dr. Marks. Dr. Marks agreed to complete treatment and monitoring for substance abuse. Petitioner's summary suspension was also lifted. P. Ex. 3 at 15, 32-33.

In June 2015, Dr. Marks submitted an enrollment application in order to revalidate his enrollment in the Medicare program. CMS Ex. 1 at 1; P. Ex. 3. Dr. Marks disclosed on the enrollment application that he had been subject to a final adverse action, i.e., the summary suspension, and provided detailed information about the suspension. P. Ex. 3 at 15, 32-33. In an August 3, 2015 initial determination, a CMS administrative contractor approved Dr. Marks' revalidation. P. Ex. 4.

However, in an August 13, 2015 initial determination, the CMS administrative contractor revoked Dr. Marks' Medicare enrollment and billing privileges, effective September 12, 2015, for the following reason:

42 CFR §424.535(a)(9) – Failure to Report Changes

Your Nevada medical license was suspended from September 19, 2014 through December 5, 2014. This action was not reported within the required time frame.

CMS Ex. 2 at 1 (emphasis in original). CMS's administrative contractor barred Dr. Marks from re-enrolling in the Medicare program for one year. CMS Ex. 2 at 2.

The CMS administrative contractor mailed the initial determination to an incorrect address. Dr. Marks eventually learned of the revocation and requested additional time to file a reconsideration request. CMS Ex. 1 at 2. The CMS administrative contractor acknowledged that it mailed the initial determination to an incorrect address, accepted Dr. Marks' request for additional time as his reconsideration request, and proceeded to render, on November 25, 2015, an unfavorable reconsidered determination. CMS Ex. 3.

Petitioner timely requested a hearing, asserting that the CMS contractor failed to consider any evidence from Petitioner because it issued its reconsidered determination based on Petitioner's request for an extension of time to file a reconsideration request. 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 motion for summary judgment and brief, and three exhibits (CMS Exs. 1-3). Petitioner filed a brief (P. Br.) in opposition to summary judgment and four exhibits (P. Exs. 1-4).

II. Decision on the Record

I admit all of the parties' proposed exhibits into the record because neither party objected to any of them. *See* Order ¶ 7; Civil Remedies Division Procedures § 14(e). In regard to Petitioner's exhibits, I conclude that Petitioner had good cause to submit his exhibits to me. *See* 42 C.F.R. § 498.56(e). This is because the letter that CMS interpreted as Petitioner's reconsideration request did not have documents enclosed with it. In such a circumstance, the CMS administrative contractor was obligated to contact Petitioner and determine if Petitioner had any evidence to submit. 42 C.F.R. § 405.803(d). The CMS administrative contractor failed to do this.

Neither party submitted written direct testimony for any witnesses. Therefore, there are no witnesses to be cross-examined and I issue this decision based on the written record. Order ¶¶ 8-11; Civil Remedies Division Procedures §§ 16(b), 19(b), (d). Consequently, I deny CMS's motion for summary judgment.

III. Issue

Whether CMS had a legitimate basis to revoke Dr. Marks' Medicare enrollment and billing privileges.

IV. Jurisdiction

I have jurisdiction to hear and decide this case. *See* 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

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 a supplier's Medicare billing privileges for any of the reasons stated in 42 C.F.R. § 424.535. When CMS revokes a supplier's Medicare billing privileges, CMS establishes a re-enrollment bar that lasts 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. 42 C.F.R. § 424.535(g).

1. ***The Nevada Medical Examiners Board summarily suspended Dr. Marks' medical license on September 19, 2014, and lifted the summary suspension in December 2014, and Dr. Marks did not inform CMS of the summary suspension until June 2015.***

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

On September 19, 2014, the Medical Examiners Board issued an Order of Summary Suspension against Dr. Marks. The Medical Examiners Board based the summary suspension on preliminary findings, which included: Dr. Marks failed to appear for work at a hospital on August 30, 2014; the hospital contacted the police and the police went to Dr. Marks' residence; the police forcibly entered Dr. Marks' residence and found him asleep; Dr. Marks then went to the hospital to commence his work shift; staff at the hospital suspected that Dr. Marks was under the influence of alcohol or drugs; and, the hospital tested Dr. Marks and determined that Dr. Marks had a blood alcohol level three times the legal limit. The Medical Examiners Board concluded that the public's health, safety, and welfare were at imminent risk and that summary suspension of Dr. Marks' medical license was necessary to remove that risk. The Medical Examiners Board set a hearing for October 15, 2014, to consider whether the summary suspension ought to remain in effect. P. Ex. 1.

In December 2014, the Medical Examiners Board approved a settlement agreement with Dr. Marks. The summary suspension was lifted and Dr. Marks was ordered to engage in treatment for substance abuse. P. Ex. 3 at 32-33.

In an enrollment application filed with a CMS administrative contractor in June 2015, Dr. Marks, for the first time, informed CMS of the summary suspension imposed on him from September to December 2014. P. Ex. 3 at 15.

2. CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(9) to revoke Dr. Marks' Medicare enrollment and billing privileges because the Nevada Medical Examiners Board took an adverse legal action against Dr. Marks when it summarily suspended his medical license, and Dr. Marks did not report that adverse legal action to CMS within 30 days.

The regulations require that physicians report, within 30 days, "[a]ny adverse legal action" to their Medicare contractor. 42 C.F.R. § 424.516(d)(1)(ii). Failure to timely report is a basis to revoke a physician's Medicare enrollment and billing privileges. 42 C.F.R. § 424.535(a)(9).

CMS asserts that there is no dispute that the Medical Examiners Board summarily suspended Dr. Marks' medical license on September 19, 2014, or that Dr. Marks first informed CMS of the suspension in June 2015, long after the 30-day reporting period ended. Petitioner argues that the regulations required Dr. Marks to report only a "final adverse action," as defined in 42 C.F.R. § 424.502, and that he was not obligated to report the summary suspension of his medical license because, under Nevada law, a summary suspension is not a final administrative action. P. Br. at 3-4.

It is true that 42 C.F.R. § 424.502 defines the term "final adverse action" and that the regulations do not define the phrase "any adverse legal action" from 42 C.F.R.

§ 424.516(d)(1)(ii). However, there is no reason for me to conclude that these terms mean the same thing. To the contrary, the phrase in section 424.516(d)(1)(ii) is broader than the term “final adverse action,” because it can encompass all adverse legal actions, not just final adverse actions. *See Akram A. Ismail*, DAB No. 2429, at 10-11 (2011) (concluding that the plain language of the phrase “any adverse legal action” in 42 C.F.R. § 424.516(d)(1)(ii) requires the reporting of a license suspension, even if under appeal.).

In the present case, the Medical Examiners Board’s summary suspension order provided for the following: Petitioner’s Nevada medical license was suspended until further order; Petitioner had to undergo a drug and alcohol evaluation at his own expense; and Petitioner had to execute a release so that the Medical Examiners Board would receive a copy of the results of the drug and alcohol evaluation. P. Ex. 1 at 2-3. This summary suspension order not only deprived Petitioner from engaging in his profession, but required him to incur the expense of a medical evaluation, and curtailed his right to privacy regarding that evaluation. Such an order is obviously an adverse legal action as contemplated by the regulations.

Petitioner also asserts that he made an effort to properly inform all governmental entities of the summary suspension order and that he truthfully informed CMS of it when he filed the application to revalidate his enrollment. Petitioner states he made no effort to conceal the suspension from CMS. CMS Ex. 1 at 2-3. However, as stated in another case, “Petitioner’s pleas of ignorance [to the reporting requirement] are no defense. The regulation places the burden upon the Medicare participant to report ‘[a]ny adverse legal action.’ 42 C.F.R. § 424.516(d)(1)(ii). There are no exceptions to the requirement to report.” *Phyllis Barson, M.D.*, DAB CR2510, at 7 (2012). If there were exceptions, it would undermine the purpose of 42 C.F.R. § 424.516(d), which is “to provide CMS with information about adverse legal actions that CMS has determined are relevant to evaluating whether a supplier should continue to participate in Medicare.” *Gulf South Med. & Surgical Inst. & Kenner Dermatology Clinic, Inc.*, DAB No. 2400, at 8 (2011).

Petitioner also states that the CMS administrative contractor, having fully evaluated Petitioner’s revalidation enrollment application, including the information about his summary suspension, approved Petitioner’s revalidation before the CMS administrative contractor revoked Petitioner’s billing privileges. P. Br. at 4-5. Petitioner appears to argue that the CMS administrative contractor already exercised its discretion as to whether to take action against Petitioner during the revalidation process and choose not to do so.

Although the CMS administrative contractor’s actions in approving Petitioner’s revalidation application and then shortly thereafter revoking him appear inconsistent, the failure to report requirement in 42 C.F.R. § 424.535(a)(9) is not a basis to deny enrollment under 42 C.F.R. § 424.530. Therefore, the CMS administrative contractor may not have had any basis to deny the revalidation enrollment application and had to take action against Petitioner under the revocation regulations. In any event, the CMS

