Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

John H. Schneider, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1165

Decision No. CR3066

Date: January 7, 2014

DECISION

Noridian Healthcare Solutions (Noridian), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), notified Petitioner, John H. Schneider, M.D., that his Medicare enrollment and billing privileges were revoked effective October 14, 2012, for failure to report an adverse legal action. Petitioner appealed. For the reasons stated below, I affirm CMS's determination to revoke Petitioner's enrollment and billing privileges, effective October 14, 2012.

I. Case Background and Procedural History

Petitioner is a neurosurgeon licensed to practice medicine in Wyoming, Montana, and Utah. Petitioner was enrolled in the Medicare program as a supplier.[1] Petitioner admits that on December 1, 2011, one of his surgical patients died at home following his release from the hospital. According to an autopsy report, the patient likely died from a "mixed drug overdose." On January 28, 2012, the Wyoming Board of Medicine (Wyoming Board) temporarily suspended Petitioner's medical license in an "emergency action" related to Petitioner's prescription of "fentanyl transdermal patches (Duragesic®) for

[1] The Medicare program considers a physician to be a "supplier." 42 C.F.R. §§ 400.202, 498.2.

management of post-operative pain." On February 10, 2012, Petitioner met with the Wyoming Board to discuss the suspension. Following this meeting, Petitioner entered into a consent agreement with the Wyoming Board where he agreed to take a "controlled substance prescribing course" and to stop prescribing "fentanyl transdermal patches (Duragesic®) for any patient." Petitioner also agreed to have his practice monitored for a six-month period. Petitioner fulfilled the requirements of the consent agreement, following which the Wyoming Board reinstated his medical license, effective March 21, 2012. CMS Exhibits (Exs.) 2; 3, at 1, 4-5, 8; 4.

On September 14, 2012, Noridian issued an initial determination revoking Petitioner's Medicare enrollment and billing privileges, effective October 14, 2012, because he had failed to notify CMS that his license was suspended effective January 28, 2012. The initial determination also informed Petitioner that he was barred for one year from October 14, 2012 from participating in Medicare. The initial determination stated that if Petitioner decided to appeal the revocation he must do so within 60 days of his receipt of the determination, which is presumed to be five days after the date of the notice (here September 19, 2012). CMS Ex. 5. Thus, calculating from the date of the notice, Petitioner had until November 18, 2012 to appeal.

The parties agree that Petitioner did not appeal the revocation by November 18, 2012. Petitioner asserts, however, that his "billing company did not receive the September 14, 2012 letter from Noridian." Petitioner asserts his office contacted Noridan in January 2013 when he received a "Medicare denial." CMS Ex. 14, at 2; *see* CMS Ex. 8, at 1.

On January 15, 2013, Noridian faxed a copy of the September 14, 2012 notice to Petitioner. Noridian noted in the fax transmittal accompanying the notice that it was too late for Petitioner to submit an appeal of the revocation. Noridian told Petitioner to instead submit new enrollment applications, which Noridian would then deny and from which Petitioner could appeal the denial. If the appeal of the denial was unsuccessful, Noridian noted Petitioner could then file an appeal for an administrative law judge (ALJ) hearing. CMS Ex. 6. On January 16, 2013, Petitioner filed Medicare enrollment applications CMS-855I (Physicians and Non-Physician Practitioners) and 855R (Reassignment of Medicare Benefits). CMS Ex. 7. In the CMS-855I, Petitioner notified Medicare of the suspension and reinstatement of his Wyoming license. CMS Ex. 7, at 6, 15.

By letter dated January 25, 2013, Petitioner also asked Noridian to reconsider its decision revoking his billing privileges, arguing that he should be retroactively re-enrolled because he did not receive the September 14, 2012 notice letter. Petitioner did not allege that he informed Noridian of the temporary suspension within 30 days of January 28, 2012. Instead, Petitioner asserted that letters (including a Medicare enrollment form CMS-855I) concerning the temporary suspension were sent to all the "payers that I am contracted

with, including Medicare, on April 12, 2012." CMS Ex. 8. Noridian received Petitioner's reconsideration request on February 8, 2013. CMS Ex. 11.

On February 16, 2013, Noridian returned Petitioner's CMS-855I and 855R forms stating that because Petitioner's enrollment and billing privileges had been revoked, any enrollment applications Petitioner submitted must be returned. CMS Exs. 9, 10.

On March 7, 2012, Noridian informed Petitioner that it would make a determination with regard to Petitioner's February 8, 2013 reconsideration request within 90 days from the date of the request. CMS Ex. 11. On March 22, 2013, Noridian issued a letter that Petitioner's request was untimely. CMS Ex. 12.

On May 31, 2013, however, Noridian issued a reconsidered determination. The May 31, 2013 reconsidered determination found Petitioner's appeal "timely submitted." It then upheld the revocation, stating that Petitioner "failed to comply with the reporting requirements specified in 42 CFR 424.516(d)(1)(ii) or (iii), which pertain to the reporting of changes in adverse actions and practice locations, respectively, within 30 days of the reportable event," a violation of 42 C.F.R. § 424.535(a)(9). CMS Ex. 13. The May 31, 2013 reconsidered determination also afforded Petitioner the right to request a hearing before an administrative law judge. CMS Ex. 13.

Petitioner requested a hearing by letter dated August 2, 2013. In accordance with my August 16, 2013 Acknowledgment and Pre-hearing Order (Pre-hearing Order), CMS timely filed a "Motion to Dismiss, or in the Alternative, Motion for Summary Judgment," (CMS Br.), accompanied by 15 exhibits (CMS Exs. 1-15). Petitioner failed to timely file his pre-hearing exchange or a response to CMS's motions. On November 6, 2013, I issued an Order to Show Cause giving Petitioner until November 26, 2013, to explain why he had not timely filed. By letter dated November 24, 2013, Petitioner responded (P. Response).[2] He stated that:

> I have attempted on multiple occasions to confirm that Rocky Mountain Medical Services of Powell Wyoming, the representative contractor whom (sic) performed my practice billing and credentialing function, communicated with Medicare within the contract parameters after January 25, 2011 regarding my temporary Wyoming license suspension. This contractor represented this communication occurred however they have no documentation to provide me confirming this claim. I am unable to

[2] Petitioner did not file any exhibits with his response. Petitioner did submit a number of documents as a supplement to his hearing request. With the exception of pages seven and eight of these supplemental documents, all supplemental documents have been admitted into the record as CMS exhibits. In making my decision, I have considered pages seven and eight, although they are not formally entered into the record as marked exhibits.

produce documentation therefore to substantiate what this contractor had claimed which is the basis for my objection to the findings against my Medicare participant contract.

II. Decision on the Record

In the absence of objection, I admit CMS Exs. 1-15 into the record.

My Pre-hearing Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Pre-hearing Order ¶¶ 8 - 11; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002).[3] (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). Neither party offered proposed witness testimony. Thus, a hearing in this case is unnecessary. Although CMS has moved for summary judgment, I do not decide the case on summary judgment. Instead, in the absence of witness testimony, I decide this case on the full written record, which includes the parties' arguments and CMS's exhibits.

III. Findings of Fact, Conclusions of Law, and Analysis[4]

1. CMS's Motion to Dismiss is denied.

CMS requests that I dismiss this case because Petitioner failed to preserve his right to a hearing when he failed to timely request reconsideration of Noridian's September 14, 2012 initial determination. CMS Br. at 4, *citing* 42 C.F.R. §§ 424.545(a), 498.5(l)(2), 498.20(b), and 498.22(a) and (b)(3). CMS recognizes that on May 31, 2013, Noridian issued a reconsidered determination deciding the case on the merits and notifying Petitioner that he had a right to appeal to an administrative law judge. But, CMS argues that the May 31, 2013 reconsideration determination incorrectly states that Petitioner's reconsideration request was timely filed. CMS asserts instead that it is clear from Noridian's March 22, 2013 letter that Petitioner's reconsideration request was untimely filed. CMS asserts that the May 31, 2013 reconsidered determination only issued because the March 22, 2013 letter did not give the address for filing an appeal with the administrative law judge. CMS Br. at 3. CMS offered no documentary or testimonial evidence to support this claim, and I find nothing in the record to substantiate CMS's

[3] Administrative decisions cited in this decision are accessible on the internet at: http://www.hhs.gov/dab/decisions/index.html.

[4] My numbered findings of fact and conclusions of law appear in bold and italics.

explanation for the discrepancy between the March 22, 2013 letter and May 31, 2013 reconsidered determination.

A request for reconsideration must be submitted within 60 days of receipt of the initial determination. 42 C.F.R. § 498.22(b)(3). The CMS contractor may, however, permit an untimely filed request for reconsideration for good cause. 42 C.F.R. § 498.22(d). In this case it appears that Petitioner did not receive Noridian's initial determination revoking his Medicare enrollment and billing privileges when the notice letter was mailed in September 2012. Instead, Petitioner only obtained a copy of the notice letter in January 2013. CMS Exs. 6, 8. Although Noridian indicated that it was rejecting Petitioner's reconsideration request as untimely on March 22, 2013, it is undisputed that in its May 31, 2013 reconsideration determination, Noridian considered Petitioner's reconsideration request to be timely and provided an analysis upholding the initial determination, as well as notice of Petitioner's right to appeal to an administrative law judge. CMS Exs. 12, 13. Although Noridian did not state why it found Petitioner's reconsideration request to be timely in its May 31, 2013 reconsideration determination, it may have done so because it found good cause to extend the filing deadlines due to Petitioner's assertion that it did not receive Noridian's initial determination until January 2013. For the same reason, Noridian may have reopened the case to issue the reconsidered determination. Why Noridian decided to do so is not determinative, however. Noridian had the authority to extend the time for filing, to reopen the case, and to issue a reconsidered determination. I am without the authority to review such actions. *See Better Health Ambulance*, DAB No. 2475, at 4-5 (2012). Once a reconsidered determination is issued, a supplier may request a hearing before an administrative law judge. 42 C.F.R. § 498.5(l); *Hiva Vakil, M.D.*, DAB No. 2460, at 4-5 (2010).

2. The Wyoming Board suspended Petitioner's medical license on January 28, 2012, and Petitioner did not report the suspension to Noridian within 30 days of the suspension.

The Wyoming Board temporarily suspended Petitioner's medical license on January 28, 2012. CMS Exs. 1, at 1; 2, at 2; 3, at 2-3; 4; 7, at 15. Thus, Petitioner had until February 28, 2012, to report the suspension to Noridian. Petitioner admits he has no documentation to show that that he or his billing company did so. P. Response. Petitioner notes instead that he tried to provide notice of his suspension through an April 10, 2012 letter (and April 12, 2012 CMS-855I form). Petitioner's Request for Hearing; CMS Ex. 8, at 2; *see also* CMS Ex. 4.

3. CMS had a legitimate basis to revoke Petitioner's enrollment and billing privileges in the Medicare program pursuant to 42 C.F.R. §§ 424.516(d)(1)(ii) and 424.535(a)(9) because Petitioner failed to report an adverse legal action, the temporary suspension of his Wyoming medical license, to Noridian within 30 days of the suspension.

Under 42 C.F.R. § 424.535(a)(9), CMS or its contractor may revoke a supplier's Medicare enrollment and billing privileges if the supplier fails to comply with the "reporting requirements specified in § 424.516(d)(1)(ii) and (iii)." The reporting requirements mandate, in relevant part, that a supplier such as Petitioner report to the appropriate CMS contractor "[a]ny adverse legal action" within 30 days. 42 C.F.R. § 424.516(d)(1)(ii). Petitioner's license suspension is an adverse legal action requiring notice to CMS. *Akram A. Ismail, M.D.*, DAB No. 2429, at 9-11 (2011) (holding that a suspension still pending an appeal is an "adverse legal action" for purposes of the revocation regulations); *see also Gulf South Med. & Surgical Inst., and Kenner Dermatology Clinic, Inc.*, DAB No. 2400, at 6, 8 (2011). In his November 24, 2013 response to my Order to Show Cause, Petitioner admits that he cannot obtain proof from his billing service that it timely informed Noridian of the temporary suspension of his Wyoming medical license within 30 days of January 28, 2012, the effective date of the temporary suspension. Therefore, Petitioner failed to notify Noridian and CMS of the temporary suspension within 30 days. Accordingly, pursuant to 42 C.F.R. §§ 424.516(d)(1)(ii) and 424.535(a)(9), CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges.

Revocation of billing privileges based on a violation of 42 C.F.R. § 424.535(a)(9) is a discretionary act of CMS or its contractors. 42 C.F.R. § 424.535(a) (introductory text). I do not have the authority to review CMS's discretionary act to revoke a provider or supplier. *Letantia Bussell*, 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*. (emphasis in original). Once CMS establishes a legal basis on which to proceed with a revocation, then the action to revoke is a permissible exercise of discretion. *See id*. at 10.

4. The revocation of Petitioner's Medicare enrollment and billing privileges requires at least a one-year Medicare re-enrollment bar.

Petitioner requests reinstatement retroactive "to October 14, 2012 so as not to have a lapse in the Medicare Part B program." CMS Ex. 14, at 2. I am unable to give Petitioner the relief he seeks.

Whenever CMS properly revokes a Medicare supplier's enrollment and billing privileges, CMS must also determine how long the supplier will be barred from seeking re-enrollment. The regulation at 42 C.F.R. § 424.535(c) provides:

> After a . . . supplier . . . has had their billing privileges revoked, they are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment

> bar is a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation.

Here, CMS imposed the minimum one year re-enrollment bar mandated by 42 C.F.R. § 424.535(c). CMS Ex. 5, at 1. I am bound by the regulations, which has the force and effect of law, and I must sustain the one-year re-enrollment bar because it is mandated by the regulations. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009); *David Burkett, M.D.*, DAB CR2830, at 7 (2013).

IV. Conclusion

Based on the above, I affirm the revocation of Petitioner's enrollment and billing privileges in the Medicare program for a one-year period, effective October 14, 2012.

/s/
Scott Anderson
Administrative Law Judge