Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Andrew S. Martin, M.D.
(NPI: 1417007345)
(PTAN: V110196),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-293

Decision No. CR4693

Date: August 29, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Andrew S. Martin, M.D. (Petitioner or Dr. Martin) pursuant to 42 C.F.R. § 424.535(a)(9) because Dr. Martin failed to report to CMS within 30 days that his license to practice medicine had been suspended by the Nevada State Board of Medical Examiners (State Board). Dr. Martin acknowledges that he did not report his license suspension to CMS within 30 days as was required. Accordingly, CMS had a legal basis to revoke Dr. Martin's Medicare enrollment and billing privileges.

I. Background

Dr. Martin is an orthopedic surgeon. Petitioner's Exhibit (P. Ex.) 2 at ¶ 4. He was originally licensed to practice medicine in the State of Nevada on April 20, 2005. P. Ex. 2 at ¶ 3. The State Board suspended Dr. Martin's license to practice medicine on September 23, 2014. P. Ex. 2 at ¶ 6. On October 5, 2014, Dr. Martin entered an inpatient rehabilitation program for chemical dependency, where he was treated until November 7,

2014. P. Ex. 2 at ¶ 7; *see also* P. Ex. 3 at 14. After his release from the inpatient rehabilitation program, he continued treatment on an outpatient basis. P. Ex. 2 at ¶ 7; *see also* P. Ex. 3 at 15.

On or about December 8, 2014, the State Board reinstated Dr. Martin's medical license, subject to probation. P. Ex. 2 at ¶ 10; *see also* P. Ex. 3 at 16. According to a compliance letter, dated February 20, 2015, the State Board opined that the conditions of probation "do not restrict or limit [Dr. Martin's] license to practice medicine as an Orthopedic Surgeon." P. Ex. 3 at 16.

At the time of his license suspension, Dr. Martin was a partner with Desert Orthopaedic Center, Ltd., an orthopedic group practice. P. Ex. 2 at ¶ 4; *see also* P. Ex. 3 at 22-30. Desert Orthopaedic Center terminated its relationship with Dr. Martin on or about December 8, 2014. P. Ex. 2 at ¶ 12; *see also* P. Ex. 3 at 17. Desert Orthopaedic Center did not notify Medicare that Dr. Martin's license to practice medicine had been suspended. P. Ex. 2 at ¶ 9; *see also* P. Ex. 3 at 17.

On or about February 24, 2015, Dr. Martin applied for individual Medicare billing privileges under his own name and for group privileges under the name A.S. Martin Orthopedics, P.C. P. Ex. 2 at ¶ 13; *see also* P. Ex. 3 at 42-51. In these applications, Dr. Martin disclosed that his Nevada medical license had been suspended and reinstated subject to a probationary period of 24 months. P. Ex. 2 at ¶ 13; *see also* P. Ex. 3 at 38. In letters dated April 24, 2015, Noridian Healthcare Solutions (Noridian), a Medicare administrative contractor, notified Dr. Martin that his enrollment applications were approved. P. Ex. 2 at ¶ 14; *see also* P. Ex. 3 at 31, 40.

In a letter dated August 5, 2015, Noridian informed Dr. Martin that his Medicare billing privileges were being revoked effective September 4, 2015, pursuant to 42 C.F.R. § 424.535(a)(9), based on his failure to report timely the suspension of his Nevada medical license. P. Ex. 3 at 5. In addition, Noridian barred Dr. Martin from re-enrolling in the Medicare program for one year. P. Ex. 3 at 6. On or about August 12, 2015, Dr. Martin requested reconsideration. P. Ex. 3 at 8, 13. By letter dated December 30, 2015, Noridian issued an unfavorable reconsidered determination reaffirming the initial determination to revoke Dr. Martin's Medicare billing privileges. P. Ex. 3 at 53-55.

Petitioner, through counsel, submitted a hearing request dated January 27, 2016, which was received February 5, 2016. The case was initially assigned to Administrative Law Judge Scott Anderson, but effective July 15, 2016, the case was reassigned to me. Judge Anderson issued an Acknowledgement and Pre-Hearing Order (Order) dated February 11, 2016, 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. The Order also explained that the parties should submit written direct testimony for

any witnesses in lieu of in-person direct testimony. Order ¶ 8. Finally, the Order explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Order ¶¶ 9, 10.

In response to the Order, CMS filed a brief (CMS Br.), exhibits (CMS Exs. 1-7), and a response to Petitioner's brief (CMS Resp.). Petitioner, through counsel, filed a brief (P. Br.) and three exhibits (P. Exs. 1-3). Neither party objected to any proposed exhibit. I admit the parties' exhibits into the record.

CMS represented that it did not intend to present any witness testimony; accordingly, it did not submit the written direct testimony of any witness. Petitioner submitted the written direct testimony of Dr. Martin. P. Ex. 2. CMS did not ask to cross-examine Dr. Martin. The parties cross-moved for summary judgment. However, as an in-person hearing to cross-examine witnesses is not necessary, I decide this case based on the written record. I therefore deny the parties' cross-motions for summary judgment.

II. Issues

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

If CMS had a legal basis to revoke Dr. Martin's Medicare enrollment and billing privileges, whether the revocation was effective 30 days from the date of the revocation notice or the date Dr. Martin's medical license was suspended.

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. Findings of Fact, Conclusions of Law, and Analysis[1]

As a physician, Dr. Martin is 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). 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

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

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).

1. Dr. Martin's license to practice medicine in the State of Nevada was suspended September 23, 2014; however, Dr. Martin did not report the suspension to the Medicare contractor until on or about February 24, 2015.

Dr. Martin does not dispute that his license to practice medicine was suspended from September 23, 2014, to December 8, 2014. P. Br. at 2; *see also* P. Ex. 2 at ¶¶ 6, 10. Further, he does not dispute that he first reported to Noridian that his license had been suspended on or about February 24, 2015, which is more than 30 days after the date his license was suspended. P. Br. at 3; *see also* P. Ex. 2 at ¶ 13. As discussed in the following section, Dr. Martin's reasons for failing to report timely the suspension of his license do not provide a basis for reversing the revocation of his Medicare enrollment and billing privileges.

2. CMS had a legal basis to revoke Dr. Martin's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(9) because Dr. Martin 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.

It is true that that the regulations do not separately define the phrase "any adverse legal action" as used in 42 C.F.R. § 424.516(d)(1)(ii). However, if anything, the phrase "any adverse legal action" in section 424.516(d)(1)(ii) is broader than the term "final adverse action," as defined in section 424.502, because the word "any" 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). Further, in the present case, Dr. Martin has not argued that the suspension of his

license to practice medicine in Nevada was not an "adverse legal action" or that he was under no duty to report the suspension to Noridian. Instead, he argues, in essence, that his failure to report the suspension should be excused.

Dr. Martin admits that he did not report his license suspension within 30 days. However, he contends that he was unable to report timely because, during the 30 days following the suspension, he was admitted to an inpatient rehabilitation program that restricted him from outside contact. P. Ex. 2 at ¶ 8. He further asserts that he assumed that the credentialing department of his former practice group would (and did) report on his behalf. P. Ex. 2 at ¶ 9. Neither of these circumstances relieves Dr. Martin of his duty to report under the regulation.

First, although Dr. Martin suggests that he was an inpatient at all times during the 30 days immediately following his license suspension, the documents he submitted do not fully bear this out. In particular, the facility that treated Dr. Martin issued a verification letter stating that he was admitted to the facility on October 5, 2014, and was discharged on November 7, 2014. P. Ex. 3 at 14. There is no evidence to suggest that he was admitted to any other facility at an earlier date. Thus, there is no evidence that Dr. Martin was admitted as an inpatient until 12 days following his license suspension. Therefore, I am not persuaded that it was impossible for Dr. Martin to have reported his license suspension within the required time frame.[2] Moreover, even after his release from inpatient treatment, Dr. Martin did not immediately report to Noridian that his license had been suspended and explain why the report was filed beyond the 30-day deadline.

Second, Dr. Martin's assumption that his former practice group would notify Noridian on his behalf does not relieve him of the duty to report. I am aware of no authority that would permit Dr. Martin to avoid responsibility for his failure to report by shifting responsibility to an agent or employee. *See George E. Anderson, M.D.*, DAB CR4631 at 12 (2016). 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

[2] Although I need not and do not reach the issue here, it is not clear that the regulations contemplate that incapacity would relieve a physician of the duty to report. *See, e.g., Phyllis Barson, M.D.*, DAB CR2510 at 7 (2012) (stating that "[t]here are no exceptions to the requirement to report").

and physician organizations to report adverse legal actions, Dr. Martin was required to report his license suspension whether or not his former practice group fulfilled its duty to report.

Apparently, neither Dr. Martin nor his former practice group was aware of the duty to report his license suspension within 30 days. *See* P. Ex. 2 at ¶ 14; *see also* P. Ex. 3 at 17. 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).

Dr. Martin failed to notify Noridian within 30 days following the suspension of his license to practice medicine in Nevada. Therefore, I conclude that CMS had a legal basis to revoke Dr. Martin's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(9).

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

Dr. Martin points out that he fully disclosed that his license to practice medicine had been temporarily suspended when he filed his enrollment applications on or about February 24, 2015, and that Noridian approved those applications on April 24, 2015, with a retroactive effective date of February 9, 2015. P. Ex. 2 at ¶¶ 13, 14; *see also* P. Ex. 3 at 31, 40. Petitioner argues that Noridian approved Dr. Martin's enrollment applications after the opportunity to evaluate fully the circumstances of his license suspension. On these facts, Petitioner argues that CMS exercised its discretion to approve Dr. Martin's Medicare enrollment applications in April 2015 and should be foreclosed from later exercising its discretion to revoke Dr. Martin's enrollment in August 2015 based on facts that were apparent at the time the enrollment applications were approved. P. Br. at 5.

Petitioner's argument assumes that it was apparent on the face of Dr. Martin's enrollment applications that grounds for revoking his Medicare enrollment and billing privileges existed. The argument further assumes that, in approving the enrollment applications, Noridian decided that revocation on those grounds was not warranted. I do not agree with these assumptions. What was apparent from Dr. Martin's enrollment applications was that his license to practice medicine in Nevada had been suspended and that the suspension had later been lifted. The enrollment applications provided no information indicating whether Dr. Martin had previously reported his license suspension to Noridian. Significantly, the regulatory bases that authorize a Medicare administrative contractor to deny an enrollment application under 42 C.F.R. § 424.530 do not parallel in all instances the bases for revocation under 42 C.F.R. § 424.535. Relevant here, the failure to report an adverse action during a prior enrollment period is not a basis to deny enrollment under 42 C.F.R. § 424.530. *See Dana Marks, M.D.*, DAB CR4616 at 5 (2016). Thus,

Noridian's actions approving Dr. Martin's enrollment applications are not a basis to infer that Noridian had even considered, at that point, whether Dr. Martin had failed to report his earlier license suspension.[3]

Petitioner argues that the enrollment applications provided Noridian with sufficient information to determine whether Dr. Martin had violated the requirement to report adverse actions within 30 days. P. Br. at 5. Petitioner argues, in essence, that it was unreasonable that Noridian did not make a determination on this point until approximately six months after the effective date it approved for Dr. Martin's enrollment applications. *Id.* I find this argument unpersuasive. Nothing in the regulations authorizes me to invalidate a revocation based on the amount of time it took CMS or its contractor to investigate the basis for the revocation. The only issue before me is whether there is a legal basis for the revocation.

Petitioner argues that Dr. Martin relied on the approval of his enrollment applications by treating Medicare beneficiaries, for whose care he will not be reimbursed as a result of the revocation of his enrollment. P. Br. at 5. This argument implicitly relies on the doctrine of equitable estoppel, i.e., that CMS should be estopped from revoking Dr. Martin's Medicare enrollment because he relied to his detriment on Noridian's earlier approval of his enrollment applications. Whether the government can ever be estopped from enforcing valid regulations based on the misrepresentations of government employees or their agents is highly questionable. *See Heckler v. Cmty. Health Servs. of Crawford Cnty.*, 467 U.S. 51, 63 (1984); *Schweiker v. Hansen*, 450 U.S. 785 (1981). Yet, even if estoppel could be asserted against CMS under some set of circumstances, it would not lie here. An administrative law judge is not "authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements." *US Ultrasound*, DAB No. 2302 at 8 (2010).

Moreover, to the extent Petitioner argues that revocation of Dr. Martin's 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*. (emphasis original). Once CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke

[3] I note, additionally, that CMS instructs contractors, such as Noridian, to process enrollment applications within specific time frames, and that the applicable processing requirements primarily involve verifying the accuracy of the entries submitted rather than reviewing the supplier for historical compliance. *See* Medicare Program Integrity Manual §§ 15.6, 15.7.

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").

4. I do not disturb CMS's determination that Dr. Martin's Medicare enrollment and billing privileges were revoked effective September 4, 2015, because even if revocation had occurred earlier, Dr. Martin would nevertheless be barred from applying for re-enrollment until at least September 4, 2016.

Petitioner argues that his Medicare enrollment and billing privileges should be revoked, if at all, as of September 23, 2014, the date his license was suspended. P. Br. at 6. CMS argues that Noridian correctly set the effective date as September 4, 2015 (i.e. 30 days after the date of notice). CMS Resp. at 3 n.3; *see also* P. Ex. 3 at 5.

As an initial matter, it is not clear to me that I have authority to change the effective date on which CMS revoked a provider or supplier's Medicare enrollment. [4] The regulation at 42 C.F.R. § 498.3(b) does not include the effective date of revocation among the list of "initial determinations" that are subject to my review. However, I need not reach this issue, nor decide whether the effective date of Dr. Martin's revocation should be changed, because these issues have no practical effect on the outcome of this case.

This is because when Noridian revoked Dr. Martin's Medicare enrollment and billing privileges, it imposed a one-year re-enrollment bar. P. Ex. 3 at 6. The applicable regulation, at section 424.535(c)(1) provides:

> The re-enrollment bar begins 30 days after CMS or its contractor mails notice of the revocation and lasts a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation.

Thus, even if the effective date of revocation were changed in Dr. Martin's case, the re-enrollment bar did not begin to run until 30 days after the date of the WPS notice, that is on September 4, 2015. Thus, the earliest Dr. Martin is eligible to apply for re-enrollment

[4] In interpreting 42 C.F.R. § 1001.2002(b), a provision similar to 42 C.F.R. § 424.535(g), the Departmental Appeals Board and administrative law judges of the Civil Remedies Division have long held that they lack authority to change the effective date of an exclusion imposed by the Office of Inspector General pursuant to section 1128 of the Social Security Act. *See, e.g., Shaikh M. Hasan, M.D.*, DAB No. 2648 at 7-13 (2015) (and cases discussed therein).

is September 4, 2016. Moreover, I am without authority to direct that Dr. Martin be re-enrolled in Medicare at any point before he submits a new application for enrollment which is approved by CMS or its contractor. 42 C.F.R. § 424.535(d)(1); *see also* 42 C.F.R. § 424.520(d)(1).

V. Conclusion

I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

/s/
Leslie A. Weyn
Administrative Law Judge