Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sandra E. Johnson, CRNA,
(NPI: 1063440030),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-504

Decision No. CR4209

Date: September 10, 2015

DECISION

Petitioner, Sandra E. Johnson, CRNA, challenges the reconsidered determination of the Centers for Medicare & Medicaid Services (CMS) upholding the revocation of Petitioner's Medicare enrollment and billing privileges for submitting false or misleading information in Medicare enrollment applications. I grant CMS's motion for summary judgment and affirm its determination to revoke Petitioner because undisputed facts establish that Petitioner submitted Medicare enrollment applications in which she certified as "true" false or misleading statements regarding adverse actions imposed against her.

I. Case Background and Procedural History

Petitioner is a Nurse Anesthetist in Michigan. She participated in Medicare as a "supplier" of services.[1] By letters dated August 1, 2014,[2] CMS notified Petitioner that it

[1] A "supplier" is "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202.

was revoking her Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4) because CMS learned that Petitioner failed to disclose two CRNA license suspensions and one license revocation in Medicare enrollment applications she submitted in 2011 and 2013. CMS stated that it was revoking Petitioner's enrollment and billing privileges effective August 31, 2014. CMS also imposed a one-year Medicare re-enrollment bar on Petitioner. CMS Ex. 6.

On September 15, 2014, Petitioner requested reconsideration of CMS's initial determinations to revoke her billing privileges. CMS Ex. 7. In response, on October 20, 2014, CMS issued a reconsidered determination upholding the revocation. The hearing officer explained that, while Petitioner claimed she did not submit the applications that failed to disclose her license suspensions and revocation, she did sign certification statements saying she had reviewed them and that Petitioner is responsible for the applications she signs. CMS Ex. 8.

By letter dated November 6, 2014, Petitioner requested a hearing before an administrative law judge (ALJ) to challenge the reconsidered determination. This case was assigned to me, and on December 4, 2014, I issued an Acknowledgment and Prehearing Order (Prehearing Order) that established general procedures for developing the record in this case. My Prehearing Order permitted either party to file a motion for summary judgment. Prehearing Order ¶ 4. CMS filed a motion for summary judgment on January 8, 2015, along with a supporting brief (CMS Br.) and eight proposed exhibits (CMS Exs. 1-8).

On February 19, 2015, Petitioner filed an opposition to CMS's summary judgment motion, a supporting brief (P. Br.), and six proposed exhibits (P. Exs. 1-6). Petitioner named 15 witnesses whose testimony she sought to introduce. My Prehearing Order required each party to file written direct testimony for any witness whose testimony the party sought to introduce in this proceeding. Prehearing Order ¶ 8. Petitioner did not submit written direct testimony for any of her 15 witnesses, an omission that Petitioner's counsel acknowledged by stating that he "is aware that the [15] witnesses should have sworn statements attached" and that he "will obtain sworn statements from the above witnesses ASAP." *Petitioner, Sandra E. Johnson, CRNA's Witness List*, at 2. Petitioner's counsel attributed his omission to injuries he had recently suffered, in recognition of which I had already granted him an extension to file Petitioner's prehearing exchange. On February 27, 2015, CMS filed a reply brief (CMS Reply) and objected to Petitioner's exhibits, which I discuss below.

---

[2] CMS issued eight separate initial determination letters each of which revoked a separate Provider Transaction Number that belonged to Petitioner. CMS Ex. 6. The initial determination letters all reference a "revocation letter dated July 15, 2014," and each states that it "supersedes" the prior letter. The July 15, 2014 letters are not in the record before me.

On March 10, 2015, nearly a month after Petitioner submitted her prehearing exchange, Petitioner filed an unsigned affidavit for one witness. Petitioner's counsel promised that he would file the signed affidavit as soon as he received it, which he did three days later, on March 13, 2015. Petitioner's counsel said nothing of the 14 other witness statements that he had promised to file "ASAP." Nevertheless, CMS did not object to the late-filed affidavit. *See* March 13, 2015 letter from CMS Counsel. Therefore, I admit the March 10, 2015 affidavit.

On March 18, 2015, I instructed the attorney-advisor assisting me with this case to contact the parties by email and inform them that Petitioner must file any additional witness statements she intended to file no later than 15 days from the date of the communication. Additionally, I required Petitioner to state good cause for her failure to timely submit witness statements for 14 of the 15 witnesses on whose testimony she intended to rely and to state whether CMS opposed any additional witness statements Petitioner intended to submit.

In response, Petitioner's counsel filed an affidavit for Petitioner herself on March 26, 2015. He filed an affidavit for a second witness on April 1, 2015. CMS objected (CMS Objections) to the two affidavits on April 9, 2015. CMS argued that Petitioner's counsel had not followed my instructions, which the attorney-advisor's March 18, 2015 email set forth for the parties. Petitioner filed a reply (P. Reply) to CMS's objections on April 21, 2015. Petitioner's counsel stated that his injuries were the good cause for his not having filed the two affidavits in a timely fashion and that it was "self-evident" that it was difficult for Petitioner's counsel to obtain the affidavits given the nature of the statements they contained. P. Reply at 1-2.

Petitioner did not state good cause for filing these affidavits out of time. Nevertheless, I will admit the affidavits that Petitioner filed on March 26 and April 1, 2015, in the interest of granting Petitioner the fullest measure of due process and finding CMS is not prejudiced in any way by my decision to admit them.

II. Statutory and Regulatory Framework

The Social Security Act authorizes the Secretary of Health and Human Services to establish by regulation procedures by which providers and suppliers enroll in the Medicare program. 42 U.S.C. § 1395cc(j)(1)(A). The Secretary promulgated enrollment regulations for providers and suppliers in 42 C.F.R. Part 424, Subpart P. *See* 42 C.F.R. §§ 424.500 – 424.570 (2014). The regulations authorize CMS to revoke the billing privileges of an enrolled provider or supplier under certain enumerated circumstances. *Id.* § 424.535(a). Relevant to this case, CMS may revoke a supplier's billing privileges if the supplier "certified as 'true' misleading or false information on the enrollment application to be enrolled or maintain enrollment in the Medicare program." 42 C.F.R. § 424.535(a)(4). In addition, after CMS revokes a supplier's enrollment, CMS must

impose a bar on re-enrollment for a period between one and three years. *Id.* § 424.535(c). Once the re-enrollment bar has expired, the supplier must submit a new enrollment application to re-enroll in the Medicare program. *Id.* § 424.535(d).

A provider or supplier may request reconsideration of the initial determination to revoke his or her billing privileges. 42 C.F.R. §§ 498.5(*l*)(1), 498.22(a). If dissatisfied with the reconsidered determination, the supplier may request a hearing before an ALJ. *Id.* § 498.5(*l*)(2).

III. Evidentiary Ruling

CMS objects to the admission of P. Exs. 1-6 on the twin bases that the documents are new evidence that Petitioner did not submit at the reconsideration level, and Petitioner has not stated good cause for why I should admit them now. CMS Reply at 6-7. Petitioner's exhibits 1 through 6 include an April 2014 email from the Ohio Department of Medicaid to Petitioner's counsel (P. Ex. 1) and application materials Petitioner submitted to: ABC Billing (P. Ex. 2); Oakland Regional Hospital (P. Ex. 3); Peninsula Health Group (P. Ex. 4); Allied Health Group (P. Ex. 5); and, MidMichigan Medical Center (P. Ex. 6), all of which disclose Petitioner's license suspensions to varying degrees. Petitioner neither disputes that she did not submit P. Exs. 1-6 at the reconsideration level nor states good cause for submitting them for the first time in this proceeding. Each of these documents appears to have existed at the time Petitioner requested reconsideration of CMS's initial determination to exclude her. As I informed the parties in ¶ 6 of my Prehearing Order, I must exclude any new evidence that Petitioner offers where Petitioner has not shown good cause for not previously submitting it. *See* 42 C.F.R. § 498.56(e). I am bound by the regulations, and Petitioner did not provide a basis for not submitting these documents to the hearing officer at the reconsideration stage of review. Therefore, I do not admit P. Exs. 1-6 into evidence.[3]

IV. Discussion

A. Issues

This case presents two issues:

1. Whether CMS is entitled to summary judgment; and

2. Whether CMS was authorized to revoke Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(4).

[3] Even if I were to consider P. Exs. 1-6, they would not change the outcome of this proceeding because they do not create any dispute of the material facts which dictate the outcome here.

B. Findings of Undisputed Fact and Conclusions of Law

1. Summary judgment is appropriate.

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. Indus. 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. To determine whether there are genuine issues of material fact for hearing, an ALJ 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 of any material fact in this case. CMS has presented evidence showing that Petitioner submitted two separate Medicare enrollment applications that contained false or misleading information that Petitioner certified as true. Petitioner specifically certified that no adverse actions had been taken against her when, in fact, three adverse actions had been taken against her. Petitioner does not dispute that she signed the certification statements in the applications, nor does she dispute that the applications did not list the adverse actions that both Michigan and Ohio took against her. P. Br. at 3, 4, 5, 6, 11. Petitioner argues that her employer's billing agent submitted one application on her behalf, and she had otherwise informed numerous employers, as well as the Medicare program itself, of her nursing license suspensions. P. Br. at 6, 7. She claims that a "shady doctor who employed her and works her business out of her home" was responsible for the other application. P. Br. at 9. Petitioner argues that "a lazy form preparer did not look at her information but apparently **assumed** she had no adverse history to disclose and submitted an inaccurate CMS form without Johnson's knowledge." P. Br. at 11 (emphasis in original). With respect to CMS's motion for summary judgment, Petitioner claims that she "presents unique genuine issues of material fact that cry out for a hearing . . . ." P. Br. at 10. Petitioner does not identify what those issues of fact may be or otherwise identify any evidence that demonstrates the existence of any dispute of material fact.

I accept as true, for purposes of summary judgment, that Petitioner only signed the relevant certification statements in the enrollment applications, rather than preparing the entire enrollment applications herself. CMS Ex. 1 at 12; CMS Ex. 2 at 24. However,

whether Petitioner personally prepared the applications is not material to the outcome here. Rather, the applicable regulation permits CMS to revoke if Petitioner "certified as 'true' false or misleading information on [an] enrollment application." 42 C.F.R. § 424.535(a)(4). Any evidence or factual inferences that may be drawn showing that the applications Petitioner, her employer's billing agent, or a former employer submitted were unintentional or clerical errors do not alter the plain language of the regulation and do not impact the result here. Petitioner has not submitted any evidence or arguments that detract from CMS's evidence establishing a basis for CMS to revoke Petitioner's enrollment and billing privileges. This case turns on a matter of law and is therefore appropriate for summary judgment.

2. The undisputed facts show that Petitioner submitted Medicare enrollment applications in which she certified as "true" false or misleading statements regarding adverse actions imposed against her.

In support of its motion for summary judgment, CMS presented two CMS Form 855-I Medicare enrollment applications bearing Petitioner's signature. CMS Exs. 1-2. Each application contains a Section 3 that presents the question: "Have you, under any current or former name or business entity, ever had a final adverse legal action listed on page 12 of this application imposed against you?" Each application was marked "NO." CMS Ex. 1 at 8; Ex. 2 at 11. Each application contains extensive definitions of "final adverse legal action," that include "any revocation or suspension of a license to provide health care by any State licensing authority." CMS Ex. 1 at 7; Ex. 2 at 10. Each application contains a "Certification Statement" which attests that Petitioner, "the undersigned, certif[ies] to the following . . . [she has] read the contents of this application, and the information contained herein is true, correct, and complete." CMS Ex. 1 at 11; Ex. 2 at 23. Petitioner signed the Certification Statements in the applications on August 15, 2011, and April 23, 2013. CMS Ex. 1 at 12; CMS Ex. 2 at 24.

CMS presented evidence, however, that the Ohio Board of Nursing "permanently revoked" Petitioner's Ohio nursing license on May 21, 2010. CMS Ex. 3. CMS also presented evidence that the state of Michigan imposed summary suspensions of Petitioner's Michigan Nurse Anesthetist license on February 8, 2005, and May 9, 2006. CMS Ex. 5.

In response, Petitioner does not dispute that Michigan had suspended her license on two occasions or that Ohio had previously permanently revoked her license at the time she submitted the two enrollment applications in question. P. Br. at 3, 4, 5. Nor does Petitioner dispute that the signatures on the two enrollment applications CMS offered as evidence were her true and correct signatures. For at least one of the applications, Petitioner alleges that her employer's biller "gave [Petitioner] only the signature page and not the entire Medicare package to sign," which I will infer for purposes of summary judgment as true. *See* P. Br. at 7. Nevertheless, on both Medicare enrollment

applications, Petitioner certified as "true" that no adverse legal actions had been imposed on her when, in fact, three adverse legal actions had been imposed on her.

3. CMS was authorized to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4).

Once CMS determined that Petitioner submitted Medicare enrollment applications that contained false or misleading statements that Petitioner certified as "true," it was then authorized to revoke Petitioner's Medicare enrollment and billing privileges. 42 C.F.R. § 424.535(a)(4). My review authority is limited to determining whether CMS was *authorized* to revoke Petitioner's Medicare enrollment and billing privileges, rather than to substitute my judgment for CMS's.[4] *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2006); *John Hartmann, D.O*, DAB No. 2564, at 5-6 (2014) ("Once the Board (or an ALJ) finds that the revocation was based on one of the 'reasons' specified in paragraphs (1) through (9) of section 424.535(a), and that the reason cited was grounded in fact and satisfied the applicable regulatory criteria, the Board is obligated to uphold the revocation.").

Petitioner's primary defenses are that she was unaware that the erroneous applications had been submitted and that she was truthful in other instances regarding her license suspensions and revocation. Petitioner blames a biller and a former employer for the applications. Yet, it is well established that suppliers are responsible for the applications and information that their billers or others submit on their behalves where the supplier certifies the information contained in the application as "true." *Mark Koch, D.O.*, DAB No. 2610, at 4 (2014). Indeed, "section 424.535(a)(4) does not require proof that Petitioner subjectively intended to provide false information, only proof that [s]he *in fact provided* misleading or false information that [s]he certified as true." *Id.* (emphasis in original). Moreover, as in *Koch*, Petitioner's lack of awareness regarding the contents of the applications submitted under her signature is evidence that she had not, in fact "read the contents of th[e] application[s]," contrary to the certification statements she signed.

[4] Petitioner argues "never has a nurse been punished **so harshly** for **so long** over a one-time, routine misdemeanor DUI that occurred in 2003." P. Br. at 1 (emphasis in original). Even assuming Petitioner is correct in implying that CMS's termination is disproportionate to the offense, she is not, in fact being "punished" for her DUI offense, but rather she is being revoked for false statements she certified as true in two Medicare enrollment applications. Petitioner's arguments would have been better made earlier to the hearing officer, who could exercise CMS's discretion in deciding whether to revoke Petitioner's Medicare enrollment and billing privileges, rather than to an ALJ who does not have that discretion.

V. Conclusion

I grant summary judgment in favor of CMS. There is no genuine dispute of material facts and CMS is entitled to judgment affirming its revocation of Petitioner's Medicare enrollment and billing privileges because Petitioner certified on enrollment applications that she had no adverse actions taken against her. Petitioner's revocation is effective August 31, 2014, and her one-year re-enrollment bar commenced on that date.

/s/
Joseph Grow
Administrative Law Judge