

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert James Fink, M.D.
(NPI: 1447327531),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-3863

Decision No. CR4511

Date: January 20, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through a CMS administrative contractor, revoked the enrollment and Medicare billing privileges of Robert James Fink, M.D. (Dr. Fink or Petitioner) because Dr. Fink was not operational at a practice location that he provided to CMS and did not timely report a change in his practice location's address to CMS. Dr. Fink requested a hearing to dispute the revocation. Because Dr. Fink's practice location on record with CMS was a United Parcel Service (UPS) Store, which undisputedly was not an operational practice location for providing physician services, and, as Dr. Fink concedes, he failed to report the address of his new practice location within 30 days of establishing that location, I affirm CMS's revocation of Dr. Fink's billing privileges.

I. Background

Dr. Fink has been a licensed physician in Illinois since 1979 and an enrolled Medicare supplier since 1996.¹ CMS Exhibit (Ex.) 1 at 6; Petitioner (P.) Ex. 1 ¶ 1. On June 11, 2015, a CMS administrative contractor informed Dr. Fink that his Medicare enrollment

¹ Physicians are considered suppliers in the Medicare program. 42 U.S.C. § 1395x(d).

and billing privileges were being revoked retroactively to May 20 2015, and that Dr. Fink was barred from reenrollment for two years. CMS Ex. 3. The initial determination to revoke stated the following:

42 CFR 424.535(a)(5) On-site review

Robert Fink is no longer operational to furnish Medicare covered items or services. An on-site review conducted on May 20, 2014 at 3712 N Broadway Suite 158 Chicago, Illinois 60613 – 4235 revealed no signage for Robert Fink and another unrelated business appeared to be operating at the location. In addition, Robert Fink has not submitted any claims within 90 days of the mailing of this letter.

42 CFR 424.535(a)(9) Failure to report

Robert Fink's enrollment record reflects the current practice location at 3712 N Broadway Suite 158 Chicago, Illinois 60613 – 4235. However, a site verification conducted on May 20, 2015 at his location revealed no sign of this provider. A different unrelated business was occupying the location. The location was an operating UPS Store. In addition, Robert Fink had not submitted any claims within 90 days of the mailing of this letter. Robert Fink failed to notify CMS of his change of practice location within 30 days as required by 42 CFR §424.516.

CMS Ex. 3 at 1 (emphasis in original).

By letter dated July 1, 2015, Dr. Fink requested reconsideration of the revocation. He stated that the person who handles his billing had been using the wrong address. Dr. Fink also indicated that he corrected his address with CMS using a Medicare enrollment application. CMS Ex. 4.

On July 20, 2015, a CMS administrative contractor issued an unfavorable reconsidered determination. The reconsidered determination stated that the reconsideration request did not provide any indication as to why Dr. Fink failed to notify CMS of the change of address within the 30-day time period to report such a change and that Dr. Fink did not provide evidence to show full compliance with the standards for which he had been revoked. CMS Ex. 5.

On August 3, 2015, Dr. Fink requested a hearing to further appeal his revocation. Dr. Fink stated that when he first became a Medicare supplier, he worked in a group practice. When this group practice ended, Dr. Fink did not have an office, but would go to different hospitals and clinics and provide consultations in those places. Dr. Fink used

the post office box at 3712 North Broadway, Chicago, Illinois 60613 to receive checks and explanation of benefits documents only. Dr. Fink indicated that it was an oversight not to inform CMS within 30 days of establishing an office at 33 West Delaware Place, 1st Floor, Chicago, Illinois 60610. Hearing Request at 1.

In response to my September 3, 2015 Acknowledgement and Pre-hearing Order (Order), CMS filed a brief and 6 exhibits (CMS Exs. 1-6). Petitioner, through counsel, filed a brief and one exhibit (P. Ex. 1).

II. Decision on the Record

Neither party objected to any of the proposed exhibits that the parties submitted in this case. Therefore, I admit all of the proposed exhibits into the record. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e).

CMS and Petitioner each submitted written direct testimony for one witness (CMS Ex. 6; P. Ex. 1). Order ¶ 8; CRDP § 19(b). Neither party requested to cross-examine the witness presented by the other party. Order ¶ 9; CRDP § 16(b). Therefore, I issue this decision based on the written record. Order ¶¶ 10-11; CRDP § 16(d).

III. Issue

Whether CMS has a legitimate basis to revoke Dr. Fink's Medicare enrollment and billing privileges because Dr. Fink was not operational at the practice location on file with CMS and because Dr. Fink failed to report a change in his practice location within 30 days of that change.

IV. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 405.803(a), 424.545(a)(1), 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 Analysis²

CMS may revoke the Medicare billing privileges of a supplier 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 reenrollment 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; however, when CMS

² My numbered findings of fact and conclusions of law appear in bold and italics.

finds a supplier to be nonoperational, the revocation is effective the date that CMS determines that the supplier was not operational. 42 C.F.R. § 424.535(g).

- 1. A CMS inspector attempted to conduct a site visit of Dr. Fink's practice location on May 20, 2015, at the address on file (3712 North Broadway, Chicago, Illinois 60613); however, a UPS Store and not Dr. Fink's medical office occupied that location.***

Dr. Fink has practiced medicine for over 30 years and was enrolled in the Medicare program as a supplier since 1996. CMS Ex. 1 at 6; P. Ex. 1 ¶ 3. Until 2000, Dr. Fink worked for a group practice, which handled billing for him. P. Ex. 1 ¶ 4. Starting in 2000, Dr. Fink saw patients at various hospitals, but established and used a post office box at a UPS Store located at 3712 North Broadway, in Chicago, Illinois to receive checks and explanation of benefits documents. P. Ex. 1 ¶ 5.

In 2010, in response to a request to revalidate his Medicare enrollment information, Dr. Fink submitted an enrollment application (CMS-855I) in which he certified that 3712 North Broadway, Suite 158, Chicago, Illinois 60613 was his practice location. CMS Ex. 1 at 19-20, 36, 41. Dr. Fink also added another practice location (1150 North State Street, 2nd Floor, Chicago, Illinois 60610-7481) and deleted two other practice locations. CMS Ex. 1 at 31-32, 34. A CMS administrative contractor received the revalidation enrollment application on May 19, 2010, and on June 16, 2010, the CMS administrative contractor requested additional information from Dr. Fink. CMS Ex. 1 at 1, 16. On August 5, 2010, personnel from the CMS administrative contractor spoke to Dr. Fink on the telephone and Dr. Fink stated that he no longer needed to add the State Street address as a practice location because he did not see Medicare patients there. CMS Ex. 1 at 5, 34. On August 16, 2010, Dr. Fink returned a call from the CMS administrative contractor and stated that his primary practice location was 3712 North Broadway, Suite 158. CMS Ex. 1 at 5, 36. On October 4, 2010, the CMS administrative contractor notified Dr. Fink that it approved his revalidation enrollment application. CMS Ex. 1 at 6-8.

On May 20, 2015, a CMS inspector from the Center for Program Integrity in Chicago, Illinois attempted to conduct a site inspection of Dr. Fink's 3712 North Broadway practice location. CMS Ex. 6 ¶¶ 2, 3. When the inspector arrived at Dr. Fink's address, he found a UPS Store. CMS Ex. 2; CMS Ex. 6 ¶ 4. Dr. Fink admits that the 3712 North Broadway address is a UPS Store and that he never practiced medicine at that location. P. Ex. 1 ¶¶ 6, 8.

- 2. Dr. Fink did not report a change in his practice location until July 2015, when he submitted an enrollment application (CMS-855I) with his request for reconsideration of CMS's revocation of his enrollment and Medicare billing privileges, and Dr. Fink submitted that enrollment application more than 30 days after he changed practice locations.***

Although Dr. Fink indicated in his 2010 revalidation enrollment application that his primary practice location was the 3712 North Broadway address (CMS Ex. 1 at 5, 36), Dr. Fink did not see patients at that address. P. Ex. 1 ¶¶ 6, 8. Dr. Fink testified that he sees patients at Methodist Hospital, located at 5025 North Paulina Avenue, Chicago, Illinois 60640, and that he has an office at 33 West Delaware Place, 1st Floor, Chicago, Illinois 60610. P. Ex. 1 ¶ 7. Dr. Fink reported these practice locations on an enrollment application submitted with his July 2015 reconsideration request. CMS Ex. 4. Dr. Fink stated on the application that he started to see patients at Methodist Hospital in 1985 and at the West Delaware Place office in 2005. CMS Ex. 4 at 21-22. Dr. Fink also deleted 3712 North Broadway as a practice location. CMS Ex. 4 at 23. Petitioner testified that he did not timely report to CMS the change in his practice location. P. Ex. 1 ¶ 16.

3. CMS had a legitimate basis to revoke Dr. Fink's Medicare enrollment and billing privileges because Dr. Fink was not operational under 42 C.F.R. § 424.535(a)(5), at the practice location on file with CMS.

Dr. Fink admits that the 3712 North Broadway address was not a practice location, but that he merely failed to inform CMS timely of his true practice locations where he in fact was operational to see patients. P. Ex. 1 ¶¶ 6-8, 12-14, 16.

A supplier is “operational” when it:

has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered) to furnish these items or services.

42 C.F.R. § 424.502. CMS may revoke a currently enrolled supplier's Medicare billing privileges in the following circumstance.

Upon on-site review, CMS determines that-

(i) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii).

Although Dr. Fink asserts that he has an office to see patients at 33 West Delaware Place and sees patients at a hospital at 5025 North Paulina Avenue, the regulatory definition of the term “operational” refers to the “qualified physical practice location” of a supplier. 42 C.F.R. § 424.502. Significantly, the enrollment application requests the address of a supplier’s practice location (*see* CMS Ex. 1 at 31-32, 34) and a supplier must be able to provide documentation of its “practice location” with its enrollment application. 42 C.F.R. § 424.510(d)(2)(ii). CMS may perform on-site inspections to verify that the enrollment information submitted by a supplier is accurate and to determine compliance with Medicare requirements. 42 C.F.R. § 424.517(a). This means that CMS will inspect the “qualified physical practice location” that has been provided by the supplier and is currently on file with CMS. *See, e.g., JIB Enterprises, LLC, DAB CR3010, at 9 (2013)*. Therefore,

when CMS or [its] contractor determines that a provider or supplier is no longer operating at the practice location provided to Medicare on a paper or electronic Medicare enrollment application that the revocation should be effective with the date that CMS or [its] contractor determines that the provider or supplier is no longer operating at the practice location.

73 Fed. Reg. 69,725, 69,865 (Nov. 18, 2008).

In the present matter, CMS provided undisputed evidence that Dr. Fink was not operational at the 3712 North Broadway address, which was the only address Dr. Fink had on file with CMS at the time of the May 20, 2015 attempted site visit. Therefore, I conclude that CMS had a legal basis to revoke Dr. Fink’s enrollment and billing privileges under 42 C.F.R. § 424.535(a)(5)(ii).

4. CMS had a legitimate basis to revoke Dr. Fink’s Medicare enrollment and billing privileges because Dr. Fink did not report to CMS his change in practice location within 30 days in accordance with 42 C.F.R. § 424.535(a)(9).

CMS may revoke a supplier’s enrollment and billing privileges if the supplier does not comply with the reporting requirements in the regulations. 42 C.F.R. § 424.535(a)(9). The regulations require physicians enrolled in the Medicare program to report a change in their practice locations within 30 days of the change. 42 C.F.R. § 424.516(d)(1)(iii).

Dr. Fink concedes that he failed to properly report to CMS his change in practice location within 30 days of that change. P. Ex. 1 ¶¶ 12, 15-16. Therefore, I conclude that CMS also had a legitimate basis to revoke Dr. Fink’s Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(9).

5. Dr. Fink's other arguments do not provide a basis to reverse the revocation.

Dr. Fink asserts that he never intended to mislead CMS as to his practice location and simply made “one mistake,” failing to provide notice of the change in his practice location within 30 days. P. Ex. 1 ¶¶ 13, 16. Dr. Fink also indicates that many physicians are no longer accepting Medicare and that the revocation of his enrollment and billing privileges is harming his patients. P. Ex. 1 ¶¶ 17, 19. Dr. Fink further argues that barring him from reenrollment for two years is a severe penalty for a clerical error. P. Br. at 4, 5.

To the extent that Dr. Fink requests that I reverse the revocation in this matter because there are mitigating or equitable reasons to do so, 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 CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review. *See id.* at 10.

Further, in regard to Dr. Fink's assertion that CMS's reenrollment bar is too lengthy, I do not have jurisdiction to consider this issue. *See Ravindra Patel, M.D.*, DAB CR2171, at 7 n.5 (2010); *Emmanuel Brown, M.D. & Simeon K. Obeng, M.D.*, DAB CR2145, at 10 (2010).

VI. Conclusion

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

/s/

Scott Anderson
Administrative Law Judge