

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Francis J. Gerner, Ph.D.,
(NPI: 1346213543),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-233

Decision No. CR2556

Date: June 19, 2012

**DECISION TO DISMISS AND REMAND TO THE CENTERS FOR
MEDICARE AND MEDICAID SERVICES**

Petitioner, Francis J. Gerner, Ph.D., is a Kansas psychologist who challenges the Centers for Medicare and Medicaid Services (CMS) revocation of his enrollment and billing privileges in the Medicare program. CMS has moved for summary disposition based on Petitioner's failure to timely respond to a revalidation information request. However, I find CMS did not cite a legitimate basis for the revocation, and Petitioner has now come forward with responsive information. I dismiss this case and remand the matter to CMS pursuant to 42 C.F.R. § 498.56(d).

By letter dated June 6, 2011, the CMS contractor revoked Petitioner's enrollment in the Medicare program effective June 3, 2011. The contractor cited 42 C.F.R. § 424.535(a)(6) as its basis for revocation because Petitioner failed to furnish revalidation information to CMS within 60 calendar days of notification. The notice also informed Petitioner that he was barred from re-enrollment for a one-year period. CMS Exhibit (Ex.) 4. On November 11, 2011, CMS upheld the initial determination because it still did not receive copies of Petitioner's diploma or driver's license for signature verification. CMS Ex. 6.

With his request for administrative law judge (ALJ) review, Petitioner submitted his diplomas and a copy of his driver's license. Hearing Request.

On March 25, 2011, 42 C.F.R. § 424.535(a)(6) changed and no longer provided the basis upon which CMS articulated in its initial determination and now before me in its motion for summary disposition. *See* 76 Fed. Reg. 5,862, 5,964-5,965 (Feb. 2, 2011); CMS Ex. 4; CMS motion for summary disposition at 4-5. CMS has never contended that it revoked Petitioner's enrollment on the revised authority:

(a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:

* * *

(6) *Grounds related to provider and supplier screening requirements.* (i)(A) An institutional provider does not submit an application fee or hardship exception request that meets the requirements set forth in §424.514 with the Medicare revalidation application; or

(B) The hardship exception is not granted and the institutional provider does not submit the applicable application form or application fee within 30 days of being notified that the hardship exception request was denied.

(ii)(A) Either of the following occurs:

(1) CMS is not able to deposit the full application amount into a government-owned account.

(2) The funds are not able to be credited to the U.S. Treasury.

(B) The provider or supplier lacks sufficient funds in the account at the banking institution whose name is imprinted on the check or other banking instrument to pay the application fee; or

(C) There is any other reason why CMS or its Medicare contractor is unable to deposit the application fee into a government-owned account.

42 C.F.R. § 424.535(a)(6)(2011).

Instead, CMS based Petitioner's revocation on the previous version of the subsection which was entitled, "Inadequate reverification information," and provided for enrollment revocation for failure to furnish documentation within 60 days of a CMS notification. 42 C.F.R. § 424.535(a)(6) (2010).

Further, 42 C.F.R. § 424.535(c) was revised so that, as of July 16, 2012, a re-enrollment bar does not apply when based upon a supplier's failure to respond timely to a revalidation request. *See* 77 Fed. Reg. 29,002, 29,030 (May 16, 2012). Specifically, it was considered "unnecessarily punitive" and "results in unnecessarily harsh consequences for the provider or supplier and causes beneficiary access issues in some cases." *Id.* at 29,009. Further, it was suggested that temporary deactivation would be a less restrictive regulatory remedy. *Id.*

Upon remand I direct that, within 40 days, CMS shall consider the information Petitioner has now provided. If this documentation satisfies its revalidation request, I direct CMS to eradicate its one year re-enrollment bar against Petitioner and revalidate Petitioner's enrollment and billing privileges retrospectively to his June 3, 2011 revocation date.

If this issue is not resolved on remand, I direct CMS to issue a new notice letter to Petitioner with a legitimate basis for the revocation. CMS's new notice letter will terminate its obligations under 42 C.F.R. § 498.56(d) and my decision. Upon receiving CMS's new notice letter, Petitioner may exercise his right to request a hearing in accordance with 42 C.F.R. § 498.40.

/s/
Joseph Grow
Administrative Law Judge