Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Meindert Niemeyer, M.D.
(NPI: 1225168974; PTAN: 203825D),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-74

Decision No. CR4846

Date: May 11, 2017

DECISION

The Medicare enrollment and billing privileges of Petitioner, Meindert Niemeyer, M.D., are revoked pursuant to 42 C.F.R. § 424.535(a)(1), based on the suspension of his license to practice medicine in North Carolina on September 1, 2015. The effective date of revocation is September 1, 2015, the date the suspension of Petitioner's medical license began. 42 C.F.R. § 424.535(g).

I. Background

Palmetto GBA (Palmetto), a Centers for Medicare & Medicaid Services (CMS) Medicare administrative contractor (MAC), notified Petitioner by letter dated May 11, 2016, that his Medicare billing number and billing privileges were revoked effective August 15, 2015. Palmetto cited 42 C.F.R. § 424.535(a)(1) and (13) as the basis for revocation. Palmetto also advised Petitioner that he was subject to a three-year bar to re-enrollment pursuant to 42 C.F.R. § 424.535(c). CMS Exhibit (CMS Ex.) 3.

Petitioner submitted a request for reconsideration dated June 28, 2016. CMS Ex. 6. Petitioner submitted a corrective action plan (CAP) dated June 3, 2016 but shipped by a courier service on June 6, 2016.[1] CMS Ex. 4. On September 2, 2016, a contractor hearing officer issued a reconsideration decision in which she upheld the revocation pursuant to 42 C.F.R. § 424.535(a)(1) and (13) with no change to the effective date. CMS Ex. 1.

Petitioner filed a request for hearing before an administrative law judge (ALJ) on October 31, 2016. On November 9, 2016, the case was assigned to me for hearing and decision and an Acknowledgement and Prehearing Order (Prehearing Order) was issued at my direction.

On December 9, 2016, CMS filed a motion for summary judgment (CMS Br.), with CMS Exs. 1 through 8. On January 6, 2017, Petitioner filed its opposition to CMS's motion for summary judgment and a cross-motion for summary judgment (P. Br.). Petitioner filed Petitioner's exhibits (P. Exs.) 1 and 2 on January 6, 2017. On January 19, 2016, CMS filed a reply brief. Petitioner did not object to my consideration of CMS Exs. 1 through 7 (P. Br. at 14) and they are admitted as evidence.[2] CMS did not object to P. Ex. 1 and it is admitted.

Petitioner objects to the admission of CMS Ex. 8 on grounds that a decision on a CAP may not be issued by e-mail pursuant to CMS policy and the deviation from policy in the

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[1] Petitioner states in its brief that Petitioner submitted a CAP and request for reconsideration by letter dated May 17, 2016. The letter states that it is a request for "re-enrollment" but also refers to a CAP. CMS Ex. 2 at 1-2. I accept counsel's representation of the nature of the document submitted by the pro se Petitioner. I also note that counsel subsequently filed the more specific request for reconsideration and a CAP. CMS Exs. 4, 6.

[2] Petitioner notes that CMS failed to conform CMS Ex. 1 to the requirements of the Prehearing Order ¶ II.D.1. P. Br. at 14 n. 11. However, Petitioner specifically states he does not object to my consideration of CMS Ex. 1. Counsel for CMS is admonished to comply with the Prehearing Order in all future cases. Paragraph II.D.1 of the Prehearing Order specifies the content of CMS Ex. 1 in cases of this type to help minimize confusion about what was included among the materials considered by the reconsideration hearing officer. In this case, counsel's failure to comply with the Prehearing Order results in inconvenience for me, but no prejudice to the parties as there is no question raised as to the content of the file considered by the reconsideration hearing officer. I conclude no remedial action is necessary.

case of CMS Ex. 8 raises an issue as to the authenticity of the document. P. Br. at 12 n.10, 14. CMS does not specifically address the authentication issue while admitting that CMS policy recommends that a denial of a CAP generally be by letter. I conclude that there is a genuine issue as to the authenticity of CMS Ex. 8 raised by Petitioner and authenticity is not established by CMS. Accordingly, CMS Ex. 8 is not admitted. As explained in further detail hereafter, action by CMS or its contractor on a CAP is not subject to my review. Whether or not CMS or its contractor properly reviewed and acted upon Petitioner's CAP are not issues subject to my review. I have no authority to fashion any remedy even if I concluded Petitioner's CAP was not properly processed. 42 C.F.R. §§ 405.809(b)(2); 498.3(b).

CMS objects to the admission of P. Ex. 2 on grounds that it is new evidence and Petitioner has not shown good cause for the admission of the document for the first time before me. CMS Reply at 6. CMS does not cite the legal authority on which it relies. However, 42 C.F.R. § 498.56(e) requires in provider and supplier enrollment appeals that I determine whether good cause exists to admit new documentary evidence not considered on reconsideration. If I conclude good cause exists I "must include" the evidence. 42 C.F.R. § 498.56(e)(2)(i). P. Ex. 2 is an email thread. CMS does not object that the document is not authentic or relevant, and those objections are waived. Petitioner offers the document to challenge the legitimacy of the reconsidered determination. P. Br. at 11, 13. If, as Petitioner argues, the reconsidered determination is invalid, my jurisdiction is questionable. 42 C.F.R. § 498.5(k)(2) (CMS and provider or supplier right to request ALJ review of reconsidered determination). For purposes of the evidentiary ruling, I note that Petitioner could not challenge the legitimacy of the reconsidered determination until that determination was made and the basis for the challenge was discovered. The ALJ is the first decision-maker with the ability to consider issues related to the legitimacy of the reconsidered determination. Furthermore, it is always necessary for a decision-maker to first decide whether he or she has the authority or jurisdiction to decide an issue. Accordingly, I conclude there is good cause to admit P. Ex. 2 and I must admit it as evidence.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as Palmetto. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible

providers of services and suppliers.[3] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395u(h)(1)). Petitioner, a physician, is a supplier.

The Act requires the Secretary of Health and Human Services (Secretary) to issue regulations that establish a process for the enrollment in Medicare of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations, such as revocation of enrollment and billing privileges. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a supplier such as Petitioner must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

Suppliers must submit complete, accurate and truthful responses to all information requested in the enrollment application. 42 C.F.R. § 424.510(d)(2). Pursuant to 42 C.F.R. §§ 424.502 and 424.510(d)(3), a supplier's application to enroll in Medicare must be signed by an authorized official, i.e., one with authority to bind the provider or supplier both legally and financially. The regulation provides that the signature attests to the accuracy of information provided in the application. The signature also attests to the fact that the provider or supplier is aware of and abides by all applicable statutes, regulations, and program instructions. 42 C.F.R. § 424.510(d)(3). Suppliers must meet basic requirements depending on their type of service. 42 C.F.R. §§ 424.505, 424.516, 424.517. Suppliers are also subject to additional screening requirements depending upon the type of service they provide. 42 C.F.R. § 424.518.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its MAC may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. The regulatory authority cited for revocation in this case is 42 C.F.R. § 424.535(a)(1) and (a)(13). Pursuant to 42 C.F.R. § 424.535(a)(1), CMS may revoke a supplier's enrollment and billing privileges if the supplier is determined not to

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[3] A "supplier" furnishes services under Medicare and includes physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) (42 U.S.C. § 1395f(g)) and 1835(e) (42 U.S.C. § 1395n(e)) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

be in compliance with enrollment requirements. Pursuant to 42 C.F.R. § 424.535(a)(13)(i), CMS may revoke a supplier's enrollment in Medicare and billing privileges if a physician's Drug Enforcement Administration (DEA) Certificate of Registration is suspended or revoked. Pursuant to 42 C.F.R. § 424.535(a)(13)(ii), CMS may revoke if the state licensing authority suspends or revokes a physician's ability to prescribe drugs.

Generally, when CMS revokes a supplier's Medicare billing privileges for not complying with enrollment requirements, the revocation is effective 30 days after CMS or its contractor mails notice of its determination to the supplier. 42 C.F.R. § 424.535(g). However, when CMS revokes a supplier's billing privileges because the supplier's license is suspended or revoked, revocation is effective the date of the suspension or revocation of the license. 42 C.F.R. § 424.535(g). After a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a). A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination and specifying the conditions or requirements the supplier failed to meet, and advising of the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate; and

Whether there was a basis for the revocation of Petitioner's billing privileges and enrollment in Medicare.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold text followed by my findings of fact and analysis.

1. Summary judgment is appropriate.

Both parties request summary judgment and I conclude that partial summary judgment is appropriate as to both. A provider or supplier denied enrollment in Medicare or whose enrollment has been revoked has a right to a hearing and judicial review pursuant to section 1866(h)(1) and (j) of the Act and 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. Act §§ 205(b), 1866 (h)(1) and (j)(8); *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing, but must do so affirmatively in writing. 42 C.F.R. § 498.66. In this case, Petitioner has not waived the right to oral hearing or otherwise consented to decision based only upon the documentary evidence or pleadings. Accordingly, disposition on the written record alone is not permissible if summary judgment is not appropriate.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations that establish the procedure to be followed in adjudicating Petitioner's case are at 42 C.F.R. pt. 498. 42 C.F.R. §§ 424.545(a), 498.3(b)(5), (6), (15), (17). The regulations do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g., Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure do not apply in administrative adjudications such as this, but the Board has accepted that Federal Rule of Civil Procedure 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of this case by my Prehearing Order. The parties were given notice by the Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Fed. R. Civ. Pro. 56 will be applied. Prehearing Order ¶¶ II.D, II.G.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a

material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 4 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *see also*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differs from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing and Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to meet the burden. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

There is no genuine dispute as to any material fact in this case. The issues in this case raised by parties related to revocation under 42 C.F.R. § 424.535(a)(1) and (13) are issues of law. Summary judgment in favor of CMS is appropriate as a matter of law regarding revocation pursuant to 42 C.F.R. § 424.535(a)(1). Summary judgment in favor of Petitioner is appropriate as a matter of law regarding the effective date of revocation pursuant to 42 C.F.R. § 424.535(g) and revocation pursuant to 42 C.F.R. § 424.535(a)(13).

2. Suspension of Petitioner's license to practice medicine in North Carolina effective September 1, 2015, is a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(1).

3. The fact that Petitioner's medical license was active at the time of the initial and reconsidered determinations is not a defense to revocation pursuant to 42 C.F.R. § 424.535(a)(1) based on the prior suspension of Petitioner's medical license.

4. The effective date of revocation of Petitioner's Medicare enrollment and billing privileges was the date the suspension of Petitioner's license to practice medicine in North Carolina began, which was September 1, 2015. 42 C.F.R. § 424.535(g).

5. There was no basis for the revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(13).

a. Facts

The pertinent facts are not disputed.

Petitioner was enrolled in Medicare as a physician prior to the initial determination to revoke on May 11, 2016. Petitioner filed a revalidation application on February 25, 2015, which I infer was approved based on the subsequent revocation action by Palmetto effective August 15, 2015. CMS Ex. 7.

On July 1, 2015, Petitioner voluntarily entered a consent order with the North Carolina Medical Board (NCMB) to resolve an investigation by the NCMB. P. Ex. 1 ¶ 3; CMS Ex. 2 at 11, 14; CMS Ex. 4 at 2-3, 13, 16; CMS Ex. 6 at 1-2, 13, 16. On July 1, 2015, pursuant to the terms of the consent order, the NCMB suspended Petitioner's medical license for one year but stayed that sanction except for 60 days from September 1, 2015 to October 31, 2015.[4] The NCMB also imposed a fine of $10,000. P. Ex. 1 ¶ 6; P. Br. at 8 n.4; CMS Ex. 2 at 12; CMS Ex. 4 at 14; CMS Ex. 6 at 14. Petitioner's license to practice medicine in North Carolina was suspended effective September 1, 2015 and the suspension continued to October 31, 2015. The remainder of the suspension for a year was stayed and not effectuated.

The undisputed evidence shows that the NCMB issued Petitioner a license to practice medicine on September 21, 2006. CMS Ex. 4 at 19; CMS Ex. 6 at 19-20. Petitioner's license was suspended by the NCMB in 2009 for eight months. CMS Ex. 4 at 7; CMS Ex. 6 at 7-8; CMS Ex. 7 at 4. Petitioner's license was suspended again by the NCMB for two months from September 1 to October 31, 2015. P. Ex. 1 ¶ 6; P. Br. at 8 n.4; CMS Ex. 2 at 12; CMS Ex. 4 at 14; CMS Ex. 6 at 14. Except for the two periods of

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[4] CMS fails to mention in the Background section of its motion and brief and the undisputed facts section of its reply that all but 60 days of the suspension was stayed. CMS failed to mention that Petitioner's license to practice medicine was no longer under suspension at the time of the revocation action by Palmetto. CMS Br. at 2-3; CMS Reply at 2.

suspension, there is no dispute that Petitioner had an active license to practice medicine as a physician in North Caroline from on or about September 21, 2006 to the present. It is undisputed that Petitioner's license to practice medicine in North Carolina was active on August 15, 2015, the effective date of the revocation. Petitioner's license was active on May 11, 2016, the date of the initial determination to revoke and September 2, 2016, the date of the reconsidered determination. P. Br. at 6. The facts asserted by Petitioner that his license to practice medicine was active on the effective date of revocation, the date of the initial determination, and the date of the reconsidered determination are not denied or disputed by CMS. I specifically advised the parties in the Prehearing Order that a fact alleged and not specifically denied may be accepted as true for purposes of considering summary judgment. Prehearing Order ¶ II.G.

The NCMB did not suspend or revoke Petitioner's authority to prescribe drugs. Rather, the NCMB required as part of the consent order that Petitioner surrender his Certificate of Registration to the DEA for a period of five years from the date of the Consent Order. CMS Ex. 6 at 14-15. Petitioner voluntarily surrendered his DEA Certificate of Registration for cause on August 15, 2015, for five years. P. Br. at 8; CMS Ex. 6 at 22; P. Ex. 1 ¶ 4.

b. Analysis

Pursuant to 42 C.F.R. § 424.535(a)(1), CMS may revoke an enrolled supplier's Medicare billing privileges and supplier agreement if:

> (1) *Noncompliance*. The provider or supplier is determined not to be in compliance with the enrollment requirements described in this section, or in the enrollment application applicable for its provider or supplier type . . . .

42 C.F.R. § 424.535(a)(1). Petitioner raises two challenges related to 42 C.F.R. § 424.535(a)(1).

First, section 424.535(a)(1) of Title 42 C.F.R. requires that Petitioner be permitted to submit a plan of corrective action. The regulation provides that "[a]ll providers and suppliers are granted an opportunity to correct the deficient compliance requirement before a final determination to revoke billing privileges" except for certain bases for revocation not implicated in this case. 42 C.F.R. § 424.535(a)(1). Petitioner submitted a CAP and request for reconsideration. CMS Exs. 2, 4, 6. Revocation was upheld on reconsideration. Petitioner argues that Palmetto never issued a decision on the CAP. Petitioner does not deny that he was orally advised that the CAP was denied. However, Petitioner argues that an oral denial is not sufficient under CMS policy and that in this case even the oral advice was beyond the time allowed under CMS policy for issuing a decision on the CAP. P. Br. at 12-13. I can accord Petitioner no relief on this issue.

The refusal of CMS or its contractor to accept Petitioner's CAP is not an initial determination subject to my review. 42 C.F.R. §§ 405.809, 424.545(a), 498.3(b); *Conchita Jackson, M.D.*, DAB No. 2495 at 5-7 (2013); *Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395 at 9 (2011); *DMS Imaging, Inc.*, DAB No. 2313 at 5-8 (2010). Petitioner cites no authority to the contrary. It is not my responsibility to enforce CMS policies, particularly when those policies are unrelated to a matter within my authority to review and decide.

Petitioner challenges the revocation pursuant to 42 C.F.R. § 424.535(a)(1) based on the facts that Petitioner had completed his suspension and his license to practice medicine in North Carolina was restored at the time of the revocation. The initial denial dated May 11, 2016 by Palmetto stated that Petitioner's enrollment and billing privileges were being revoked pursuant to 42 C.F.R. § 424.535(a)(1) because Petitioner was no longer licensed to practice medicine as his license was suspended effective September 1, 2015. CMS Ex. 3 at 1. The reconsidered determination dated September 2, 2016, upheld revocation pursuant to 42 C.F.R. § 424.535(a)(1) on grounds that Petitioner was not licensed to practice medicine as a physician because his North Carolina license was suspended effective September 1, 2015. The initial and reconsidered determinations did not mention that the suspension of Petitioner's license ended on October 31, 2015.

Medicare Part B pays, subject to some limitations, for physician's services delivered by a doctor of medicine or osteopathy, a doctor of dental surgery or dental medicine, a doctor of podiatric medicine, a doctor of optometry, and certain chiropractors, but only if the practitioner is legally authorized to practice by the state in which the function or action is performed and the practitioner is acting within the scope of his or her license. 42 C.F.R. § 41.20(b); Act § 1861(q), (r) (42 U.S.C. § 1395x(q), (r)). There is no question in this case that to be eligible to maintain enrollment in Medicare and receive payment for his services as a physician Petitioner needed to have an active license to practice medicine in North Carolina. The undisputed evidence shows that except for eight months in 2009 and two months from September 1 to October 31, 2015, Petitioner has maintained an active license in North Carolina since 2006. The evidence is also undisputed that at the time of the initial determination on May 11, 2016 and the reconsidered determination on September 2, 2016, Petitioner's license to practice medicine in North Carolina was in an active status. Therefore, it is also not subject to dispute that when both the initial and reconsidered determinations were issued Petitioner's North Carolina medical license was no longer suspended and he was authorized to practice medicine in North Carolina. But, the authority to revoke granted CMS by 42 C.F.R. § 424.535(a)(1) contains no temporal limitation. Petitioner was not authorized to practice medicine in North Carolina when his suspension became effective on September 1, 2015. Therefore, on September 1, 2015, Petitioner did not meet the Medicare enrollment requirement to have a license to practice medicine and CMS and the MAC had authority to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(1). Petitioner points to no limitation imposed by law that prevents CMS from revoking Medicare enrollment

based on suspension of a medical license, even though by virtue of the end of the suspension, Petitioner may have again met the enrollment requirement to have an active license to practice medicine in North Carolina.

I conclude that there was a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(1), because the suspension of his medical license on September 1, 2015, caused Petitioner not to be in compliance with the requirements to enroll and maintain enrollment in Medicare. 42 C.F.R. § 41.20(b); Act § 1861(q), (r) (42 U.S.C. § 1395x(q), (r)).

Whether or not it is consistent with the purposes of the regulations or the Act to revoke Medicare enrollment and billing privileges based on suspension of a medical license after the suspension has expired, is not an issue for me to decide. P. Br. at 6-7. Because I conclude that the suspension of Petitioner's North Carolina medical license was a basis for revocation of Petitioner's enrollment and billing privileges, I have no authority to review the exercise of discretion by CMS to revoke Petitioner's Medicare enrollment and billing privileges. *Dinesh Patel, M.D.*, DAB No. 2551 at 10 (2013); *Fady Fayad, M.D.*, DAB No. 2266 at 16 (2009), *aff'd, Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 16-17, 19 (2009), *aff'd, Ahmed v. Sebelius*,710 F. Supp. 2d 167 (D. Mass. 2010). I have no authority to grant Petitioner any equitable relief. *US Ultrasound*, DAB No. 2302, at 8 (2010). I am also required to follow the Act and regulations and have no authority to declare statutes or regulations invalid. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14.

The initial determination also revoked Petitioner's enrollment and billing privileges pursuant to authority of 42 C.F.R. § 424.535(a)(13) on grounds that Petitioner voluntarily surrendered his DEA Certificate of Registration for five years beginning on August 15, 2015. CMS points to no provision of the Act or regulations that specifically requires that a physician have a DEA Certificate of Registration to enroll in and maintain enrollment in Medicare or otherwise have the ability to prescribe drugs. However, CMS is authorized to revoke a physician's Medicare enrollment and billing privileges if his or her DEA Certificate of Registration is "suspended or revoked," or the state licensing authority suspends or revokes the physician's ability to prescribe drugs. 42 C.F.R. § 424.535(a)(13). The undisputed facts show that the NCMB required as a condition of the consent order that Petitioner surrender his Certificate of Registration to the DEA. The NCMB did not take direct action to revoke Petitioner's prescribing privileges. CMS Ex. 6 at 14-15. The reconsidered determination specifically states that the revocation was based on the fact that Petitioner's DEA Certificate of Registration was surrendered. The reconsideration determination did not find or conclude that the NCMB suspended or revoked Petitioner's ability to prescribe drugs, contrary to the argument of CMS. CMS Br. at 6. The authority for revocation of Medicare enrollment and billing privileges based on suspension or revocation of the DEA certificate is 42 C.F.R. § 424.535(a)(13)(i). I conclude as a matter of law that 42 C.F.R. § 424.535(a)(13)(ii) is not at issue in this case.

Pursuant to 42 C.F.R. § 498.5(*l*)(1) a supplier dissatisfied with an initial determination, may request reconsideration. The regulation provides no right to ALJ review of the initial determination related to Medicare enrollment or revocation of enrollment. 42 C.F.R. § 498.5. Pursuant to 42 C.F.R. § 498.5(*l*)(2), CMS or its contractor, or a supplier such as Petitioner, that is dissatisfied with a reconsideration determination is entitled to a hearing before an ALJ. This regulation clearly indicates that the reconsidered determination, the last determination of CMS or its agent, is the determination that is subject to ALJ review. *Neb Group of Arizona LLC*, DAB No. 2573 at 7 (2014); *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572 at 5 (2014) (the reconsideration determination is the agency action that is subject to review). CMS did not request ALJ review and has thus waived issues of whether revocation may have been authorized on grounds other than those cited by the reconsidered determination.[5]

There is no genuine dispute that Petitioner voluntarily surrendered his DEA Certificate of Registration, albeit as a condition of his consent order with the NCMB. CMS Ex. 6 at 22.[6] The regulation is very specific that revocation is authorized if a physician's DEA Certificate of Registration "is suspended or revoked." 42 C.F.R. § 424.535(a)(13)(i). The issue of law urged by CMS is whether a "voluntary surrender" of a certificate is tantamount to a certificate being suspended or revoked. Congress has authorized the Attorney General to deny, suspend, or revoke a certificate as follows:

> (a) Grounds
>
> A registration pursuant to section 823 of this title to manufacture, distribute, or dispense a controlled substance or

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[5] The reconsidered determination also did not address other potential grounds for revocation including 42 C.F.R. § 424.535(a)(9) for failure to report pursuant to 42 C.F.R. § 424.516(d)1 (ii) the NCMB suspension. Only the authority for revocation cited in the reconsidered determination is considered in this decision.

[6] CMS suggests that the reference to "voluntary surrender" in the reconsidered determination is based on Petitioner use of that phrase. CMS Br. at 6 n.4. However, CMS mischaracterizes the record. It was the DEA that characterized Petitioner's surrender of his DEA Certificate of Registration as "voluntary surrender of registration for cause." CMS Ex. 6 at 22. In its reply CMS mischaracterizes the surrender as a suspension despite clear evidence to the contrary. CMS erroneously asserts that the revocation pursuant to 42 C.F.R. § 424.535(a)(13)(i) was based on a suspension of Petitioner's DEA certificate rather than a surrender. CMS Reply at 3. CMS does not bother to analyze either the applicable statutes or regulations of the DEA.

> a list I chemical may be suspended or revoked by the Attorney General upon a finding that the registrant—
>
> (1) has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;
>
> (2) has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance or a list I chemical;
>
> (3) has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or list I chemicals or has had the suspension, revocation, or denial of his registration recommended by competent State authority;
>
> (4) has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section; or
>
> (5) has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a–7(a) of title 42.
>
> A registration pursuant to section 823(g)(1) of this title to dispense a narcotic drug for maintenance treatment or detoxification treatment may be suspended or revoked by the Attorney General upon a finding that the registrant has failed to comply with any standard referred to in section 823(g)(1) of this title.

21 U.S.C. §824(a). Before taking action to suspend or revoke a Certificate of Registration the Attorney General must issue an order to show cause to the registrant and provide other due process specified in the statute. 21 U.S.C. § 824(c)-(d). The procedures are implemented by the regulations of the Administrator of the DEA. 21 C.F.R. § 1309.43. The Administrator's regulations reflect that a suspension or revocation

of a DEA Certificate of Registration is an adverse action pursued by the Administrator against the registrant but a voluntary surrender is an act initiated by the registrant. 21 C.F.R. § 1309.62. In this case, the DEA characterized the surrender as a voluntary surrender for cause. CMS Ex. 6 at 22. The Administrator defines "for cause" to mean that the registration is surrendered "in lieu of, or as a consequence of, any Federal or State administrative, civil or criminal action resulting from an investigation of the individual's handling of controlled substances or listed chemicals." 21 C.F.R. § 1309.72. I conclude that a voluntary surrender of a DEA Certificate of Registration for cause under the Administrator's regulations is not the same as a suspension or revocation of such a certificate. Indeed, the drafters of 42 C.F.R. § 424.535(a)(13) specifically stated when that provision was added in 2014:

> The voluntary surrender of a DEA certificate would not constitute grounds for revocation under Sec. 424.535(a)(13). The provision as written is limited to certificate revocations and suspensions. However, we may consider addressing this issue via future rulemaking.

79 Fed. Reg. 28,844, 29,897 (May 23, 2014).

Accordingly, I conclude that a voluntary surrender of a DEA Certificate of Registration is not an authorized basis for revocation pursuant to 42 C.F.R. § 424.535(a)(13)(i).

Applying the law to the undisputed facts, I conclude that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(1).

Summary judgment is also appropriate as to the effective date of revocation of Petitioner's Medicare enrollment and billing privileges. The initial and reconsidered determination set the effective date as August 15, 2015, the date Petitioner surrendered his DEA Certificate of Registration. Pursuant to 42 C.F.R. § 424.535(g):

> (g) *Effective date of revocation.* Revocation becomes effective 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, except if the revocation is based on Federal exclusion or debarment, felony conviction, **license suspension or revocation**, or the practice location is determined by CMS or its contractor not to be operational. When a revocation is based on a Federal exclusion or debarment, felony conviction, **license suspension or revocation**, or the practice location is determined by CMS or its contractor not to be operational, **the revocation is effective** with the date of exclusion or

> debarment, felony conviction, **license suspension or revocation** or the date that CMS or its contractor determined that the provider or supplier was no longer operational.

(Emphasis added). Petitioner voluntarily surrendered his DEA Certificate of Registration. Even assuming that the Certificate of Registration is a license within the meaning of 42 C.F.R. § 424.535(g) (which has not been established), I conclude that the voluntary surrender is not the same as a suspension or revocation for the reasons already discussed. In this case, the suspension that occurred was the suspension of Petitioner's North Carolina medical license on September 1, 2015, and not earlier as the suspension before that date was stayed. Accordingly, pursuant to 42 C.F.R. § 424.535(g), the effective date of the revocation of Petitioner's Medicare enrollment and billing privileges was September 1, 2015.

III. Conclusion

For the foregoing reasons, I conclude that Petitioner's Medicare enrollment and billing privileges were revoked September 1, 2015.

/s/
Keith W. Sickendick
Administrative Law Judge