Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Nancy E. Grayson, M.D.,
(NPI: 1386625762),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-570

Decision No. CR4941

Date: September 26, 2017

DECISION

Petitioner, Nancy E. Grayson, M.D., is a psychiatrist, licensed in the State of Oklahoma, who participated in the Medicare program until February 22, 2008, when the Centers for Medicare & Medicaid Services (CMS) revoked her enrollment. CMS took this action because, on September 28, 2007, the Oklahoma medical licensing board suspended her license to practice medicine, finding her guilty of unprofessional conduct (sexual contact with a patient and prescribing dangerous and excessive amounts of controlled substances). Petitioner Grayson recently reapplied for program enrollment but, in her applications, she did not disclose that her Medicare enrollment previously had been revoked. Based on her failure to disclose, CMS denied her applications, citing 42 C.F.R. § 424.530(a)(4). Petitioner now appeals the denial.

I find that CMS appropriately denied Petitioner Grayson's reenrollment under section 424.530(a)(4) because she submitted a false and misleading enrollment application. I therefore affirm CMS's determination.

Background

By letter dated October 27, 2016, the Medicare contractor, Novitas Solutions, denied Petitioner Grayson's applications for reenrollment in the Medicare program. As the notice letter explains, the contractor acted pursuant to 42 C.F.R. § 424.530(a)(4) because Petitioner submitted false or misleading information on one of her enrollment applications: she failed to disclose that her Medicare enrollment had been revoked in 2008. CMS Exhibit (Ex.) 9.[1]

Petitioner requested reconsideration. CMS Ex. 7. In a reconsidered determination, dated March 13, 2017, the contractor upheld the denial. CMS Ex. 5. Petitioner timely appealed and that appeal is now before me.

Exhibits. The parties have filed prehearing briefs (CMS Br.; P. Br.). With its brief, CMS submits 20 exhibits (CMS Exs. 1-20). Petitioner objects to one page of one of CMS's exhibits, page 3 of CMS Ex. 20, which she characterizes as "inadmissible hearsay." P. Br. at 5. The document in question is a page from CMS's electronic database, PECOS (Provider Enrollment, Chain, and Ownership System). PECOS monitors all Medicare enrollees, and the page in question is CMS's record of Petitioner Grayson's Medicare enrollment. CMS Ex. 20 (Huffman Decl.¶ 4).

The document is admissible. First, the rules of evidence do not apply to these proceedings, and hearsay is admissible. 42 C.F.R. § 498.61. But even under the rules of evidence, the document is admissible as a business record exception to the hearsay rule. CMS Insurance Specialist Abagail N. Huffman, who oversees enrollment activities for the State of Oklahoma, confirmed that the PECOS records are maintained in the regular course of CMS's business, and Petitioner has not shown that the method or circumstances under which the document was prepared is untrustworthy. Fed. R. Evid. 803(6). I find the document inherently reliable.

For these reasons, and, in the absence of any other objections, I admit into evidence CMS Exs. 1-20.

With her brief, Petitioner Grayson submits four exhibits (P. Exs. 1-4). CMS objects to my admitting Petitioner's exhibits because she did not submit them at the reconsideration level, and, in any event, P. Exs. 1-3 are irrelevant.

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[1] Petitioner apparently submitted two applications, CMS form 855I, which physicians and non-physician practitioners use to apply for program participation, and CMS form 855R, which allows the physician or non-physician practitioner to reassign her benefits to an organization or group. CMS Exs. 1 and 2. Based on the evidence before me, she provided misleading and false responses to questions posed on the 855I. CMS Ex. 1 at 3.

P. Ex. 4 is an order dated March 13, 2008, from the Oklahoma State Board of Medical Licensure and Supervision that reinstates Petitioner's medical license, but places her on probation for five years.[2] The three remaining exhibits consist of 2008 correspondence between the Office of the Inspector General for the Department of Health and Human Services and Petitioner's (then) counsel. They indicate that the Inspector General considered but declined to exclude Petitioner Grayson from program participation under section 1128(b)(4) of the Social Security Act.

I may admit new documentary evidence if I find good cause for Petitioner's failing to submit it at the reconsideration level. 42 C.F.R. § 498.56(e). In my prehearing order, I instructed Petitioner to identify specifically any new evidence and to explain in her brief why good cause exists for me to receive it. Acknowledgment and Pre-hearing Order at 4 (¶ 6) (April 19, 2017). In her brief and in a motion for extension of time, Petitioner explains that she no longer had "written evidence from 2008 that she believed supported her position." She contacted the attorney who had represented her in the 2008 matter. Her attorney eventually located the "evidence" on June 27, 2017. P. Motion for Extension of Time at 1-2 (June 28, 2017).[3]

Petitioner does not specify which documents she was missing – the 2008 correspondence with the Inspector General (P. Exs. 1-3), the document reinstating her medical license (P. Ex. 4), or all of her proposed exhibits. She provides no support, in the form of a signed affidavit or other evidence, for the claims made in her motion and brief; and, indeed, neither the motion nor the brief is even signed.

I find that Petitioner has not established good cause for failing to submit her exhibits at the reconsideration level. In its October 27, 2016 notice letter, the Medicare contractor explicitly warned Petitioner that she "must submit [any relevant] information with [her] request for reconsideration" if she wanted the hearing officer or, later, an administrative law judge to consider it. CMS Ex. 9 at 2; *see* CMS Ex. 6 (inviting Petitioner to submit additional information to the contractor hearing officer). Yet, Petitioner did not contact

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[2] A stipulation and agreed order from the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control, which is CMS Ex. 15, refers to the state licensing board's actions.

[3] Petitioner complains that she did not have adequate time to prepare her arguments regarding the Inspector General correspondence and "the lack of correspondence supporting [CMS's] revocation contention. . . ." P. Br. at 6. In fact, she has known about these issues since at least October 2016. Moreover, by regulation, I must resolve this matter no later than 180 days after the appeal was filed. 42 C.F.R. § 498.79. The regulations simply do not allow me the option of granting the parties additional time in which to present their cases.

her attorney until "March or April 2017," well after the deadline for submitting the evidence at reconsideration. P. Motion for Extension of Time at 2 (June 28, 2017). And she does not describe any efforts to secure the documents prior to the reconsideration stage.

Pursuant to section 498.56(e), I decline to admit P. Exs. 1-4. In any event, as the following discussion establishes, these documents are marginally relevant and certainly not material to the outcome of this case.

Witnesses. CMS proposes one witness and submits her written declaration. In my pre-hearing order, I advised Petitioner that she had the right to cross-examine CMS's witnesses and directed her to state affirmatively in her brief that she wished to do so. Acknowledgment and Pre-hearing Order at 5 (¶¶ 9, 10). Petitioner has not asked to cross-examine CMS's witness and has therefore waived cross-examination.

For her part, Petitioner lists herself as a witness, but she does not submit her written direct testimony – as my order requires – so she has waived her right to present that testimony. Acknowledgment and Pre-hearing Order at 3, 5 (¶¶ 4(c)(iv), 8).

Thus, an in-person hearing would serve no purpose, and the case may be decided based on the written record.

Discussion

> ***CMS properly denied Petitioner Grayson's enrollment in the Medicare program because she submitted false and misleading information in her enrollment application; specifically, she did not disclose that her Medicare enrollment previously had been revoked***.[4]

Statute and regulations. CMS may deny a provider's or supplier's enrollment in the Medicare program if she has submitted "false or misleading information" on her Medicare enrollment application. 42 C.F.R. § 424.530(a)(4); *see* Act § 1866(b)(2)(A) (authorizing the Secretary to deny enrollment after he ascertains that the provider failed to comply with the Secretary's regulations).

As discussed below, Medicare enrollment applications direct the applicant to disclose any "final adverse legal action." *See, e.g.*, CMS Ex. 1 at 3. A Medicare-imposed revocation of any Medicare billing privileges is a "final adverse action." 42 C.F.R. § 424.502.

Revocation of Petitioner's Medicare enrollment. CMS approved Petitioner Grayson's enrollment in the Medicare program on March 7, 2007, with an effective date of October

[4] I make this one finding of fact/conclusion of law to support my decision.

24, 2006. CMS Ex. 19 at 67; CMS Ex. 20 at 3; *see* CMS Ex. 19 at 1-57; CMS Ex. 20 at 2 (Huffman Decl. ¶ 5); CMS Br. at 6.

Thereafter, in a "Final Order of Suspension," dated September 28, 2007, the Oklahoma State Board of Medical Licensure and Suspension suspended indefinitely Petitioner Grayson's license to practice medicine. CMS Ex. 19 at 63. The Board found that, for about six years (2000 to 2006), Petitioner Grayson had a sexual relationship with one of her patients, and, during that time, she prescribed for him massive amounts of controlled dangerous drugs (Schedule II), for which she could show no legitimate medical need.[5] *Id*. at 59. She prescribed large quantities of controlled dangerous drugs for that patient's mother, who was also her patient, again, without showing a legitimate medical need. *Id*. at 61. On March 21, 2008, the state board reinstated her license, subject to terms and conditions, including a five-year period of probation. CMS Ex. 15 at 2.

In the meantime, on February 22, 2008, CMS revoked Petitioner Grayson's Medicare enrollment, citing her noncompliance with the program requirement that she be professionally licensed. CMS Ex. 20 at 3.

Time passed, and, in applications dated September 19, 2016 (CMS 855R) and October 6, 2016 (CMS 855I), Petitioner Grayson reapplied for Medicare enrollment. CMS Exs. 1, 2. Under the question about any final adverse legal action, she responded "suspended license." CMS Ex. 1 at 3. She did not mention that her Medicare enrollment had been revoked.

Petitioner claims that she was unaware that her Medicare enrollment had been revoked. She points out that the Inspector General declined to exclude her from program participation, and, other than the Inspector General's letters, she received no correspondence from CMS regarding her enrollment. She also suggests that CMS should not have revoked her enrollment in the first instance because her medical license was only suspended, not revoked. P. Br. at 5.

As a threshold matter, CMS was compelled to revoke Petitioner Grayson's Medicare enrollment based on her license suspension. To participate in Medicare, a physician must be "legally authorized to practice by the state in which . . . she performs . . ." and she must also be "acting within the scope of . . . her license." 42 C.F.R. § 410.20(b). In Oklahoma (and, no doubt everywhere else), the holder of a suspended license is not entitled to practice medicine. 59 Okla. Stat. § 506.

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[5] Petitioner touts her "more than twenty (20) years of exemplary medical practice." P. Br. at 2. This claim rings hollow considering that, for six of those twenty years, she engaged in these unethical (and arguably illegal) activities.

Next, I find it highly unlikely that Petitioner did not know that her Medicare enrollment had been revoked. That the Inspector General opted not to exclude her under section 1128 of the Act did not preclude CMS from revoking her enrollment, and Petitioner should have known that she could not continue her Medicare enrollment with a suspended license. Any physician who has ever participated in the Medicare program should be aware of her Medicare status. As Petitioner points out, "[d]enial of Medicare participation is indisputably an adverse action that would follow [her] for the rest of her professional career." P. Br. at 1. Moreover, Petitioner obviously knew that she was no longer enrolled in the program because she reapplied. Did it never occur to her to inquire as to when or how that relationship had been severed?

But the issue is irrelevant. As the Departmental Appeals Board has repeatedly observed in similar contexts, the regulations "do not require proof that [the applicant] subjectively intended to provide false information, only proof that [s]he *in fact provided* misleading or false information that [s]he certified as true." *Sandra E. Johnson, CRNA*, DAB No. 2708 at 15 (2016), *citing Mark Koch, D.O.*, DAB No. 2610 at 4-5 (2014); *See Patrick Brueggeman, D.P.M.*, DAB No. 2725 (2016) and cases cited therein. Petitioner was obligated to ensure that the information on her enrollment application was complete and accurate. Because she did not do so, and the information she provided was objectively false and misleading, CMS appropriately denied her enrollment application.

Conclusion

CMS may deny Petitioner Grayson's Medicare enrollment because she submitted false and misleading information on her application. 42 C.F.R. § 424.530(a)(4). I therefore affirm CMS's determination.

/s/
Carolyn Cozad Hughes
Administrative Law Judge