Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michael S. Otruba, D.O.,
(NPI: 1649255316)
(PTAN: F281311162)

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-148

Decision No. CR4943

Date: October 2, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, Palmetto GBA (Palmetto), revoked the Medicare enrollment and billing privileges of Michael S. Otruba, D.O. (Petitioner) pursuant to 42 C.F.R. § 424.535(a)(1), 42 C.F.R. § 424.535(a)(9), and 42 C.F.R. § 424.535(a)(12). The undisputed evidence shows that Petitioner's license to practice medicine was suspended by the South Carolina Board of Medical Examiners, Petitioner failed to report the suspension to CMS, and Petitioner was terminated from the South Carolina State Medicaid program. Petitioner acknowledges the underlying facts of the case. Accordingly, I affirm CMS's determination to revoke Petitioner's Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner is a doctor of osteopathy, licensed by the South Carolina State Board of Medical Examiners, who was enrolled as a supplier of Medicare services. CMS Exhibit (Ex.) 3; *see also* CMS Ex. 1. On August 4, 2015, the South Carolina State Board of

Medical Examiners indefinitely suspended Petitioner's license to practice medicine.[1] CMS Ex. 3. On August 31, 2015, the South Carolina Department of Health and Human Services terminated Petitioner from participation in the South Carolina Medicaid program. CMS Ex. 4.

In a letter dated December 3, 2015, Palmetto notified Petitioner that his Medicare billing privileges were revoked for the following reasons:

> **42 CFR §424.535(a)(1) – Noncompliance**
>
> The State Board of Medical Examiners for South Carolina suspended Michael Otruba's license effective August 4, 2015.
>
> **42 CFR §424.535(a)(9) – Failure to Report**
>
> Michael Otruba's South Carolina medical license was suspended by the State Board of Medical Examiners for South Carolina on August 4, 2015. He did not notify CMS of this revocation within 30 days as required under 42 CFR §424.516.
>
> **42 CFR §424.535(a)(12) – Medicaid Termination**
>
> By letter dated August 31, 2015, Michael Otruba was informed that he was terminated from the South Carolina Medicaid program. South Carolina Medicaid confirmed that Michael Otruba's appeal rights have been exhausted with respect to this termination.

CMS Ex. 1 at 1 (bold type original).

In a letter dated June 4, 2016, Petitioner requested reconsideration of the December 3, 2015 revocation determination. Petitioner's Exhibit (P. Ex.) 3.[2] In that letter, Petitioner explained that correspondence from Palmetto and the South Carolina Medicaid program was sent to his employer, McLeod Regional Medical Center, while he was not working, preventing the submission of a Corrective Action Plan (CAP). P. Ex. 3 at 1. Palmetto accepted the reconsideration request as timely and issued an unfavorable reconsidered determination dated August 25, 2016. CMS Ex. 2.

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[1] Petitioner represents that the suspension was temporary because of an anxiety condition. Petitioner's Brief (P. Br.) at 1.

[2] Petitioner submitted three documents as attachments to his brief. I treat the attachments as proposed exhibits, numbered one through three.

Petitioner submitted a hearing request dated November 17, 2016 (RFH),[3] which was received on November 28, 2016. The case was assigned to me, and I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) on December 29, 2016. On February 1, 2017, Petitioner filed a brief (P. Br.), along with P. Exs. 1-3. P. Br. at 3. On February 2, 2017, CMS submitted its Motion for Summary Judgment (CMS Br.), along with four exhibits (CMS Exs. 1-4). Petitioner did not file a response to CMS's Motion for Summary Judgment. Neither party objected to the exhibits offered by the opposing party. Accordingly, in the absence of objection, I admit CMS Exs. 1-4 and P. Exs 1-3 into the record.

Neither party proposed to call any witnesses. As I informed the parties in my Pre-Hearing Order, a hearing is only necessary if a party requests to cross-examine a witness proposed by the opposing party. Pre-Hearing Order ¶ 10. Because an in-person hearing to cross-examine witnesses is not necessary, I decide this case based on the written record, without considering whether the standards for summary judgment are satisfied.

II. Issue

Whether CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(1), 42 C.F.R. § 424.535(a)(9), and 42 C.F.R. § 424.535(a)(12).

III. Jurisdiction

I have jurisdiction to hear and decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Discussion

A. Statutory and Regulatory Background

The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and

[3] Petitioner's RFH was filed after the 60 day window to file an appeal. Petitioner argues that he never received anything in writing concerning the reconsideration from Palmetto. RFH at 2. Instead, Petitioner states that he was informed by telephone on September 6, 2016 about the unfavorable reconsideration. *Id.* CMS does not dispute Petitioner's claim; therefore, I accept Petitioner's RFH as timely filed.

suppliers.[4] 42 U.S.C. §§ 1302, 1395cc(j). The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. In order to maintain Medicare billing privileges after being enrolled, a provider or supplier must meet the reporting requirements of 42 C.F.R. § 424.516. Under 42 C.F.R. § 424.516(d)(1)(ii), physicians must report any adverse legal action to their Medicare contractor within 30 days.

CMS or its Medicare contractor may revoke an enrolled supplier's Medicare enrollment and billing privileges for any of the reasons listed in 42 C.F.R. § 424.535. 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 be in compliance with enrollment requirements. Under 42 C.F.R. § 424.535(a)(9), CMS may revoke a supplier's enrollment and billing privileges if the supplier did not comply with the reporting requirements specified in 42 C.F.R. § 424.516(d)(1)(ii) and (iii). Additionally, pursuant to 42 C.F.R. § 424.535(a)(12), CMS may revoke a supplier's enrollment and billing privileges if the supplier's Medicaid billing privileges are terminated or revoked by a State Medicaid Agency.

If CMS revokes a provider's Medicare billing privileges, the revocation becomes effective 30 days after CMS or one of its contractors mails the revocation notice to the provider, subject to some exceptions not applicable in this case. After a supplier's Medicare enrollment and billing privileges are revoked, the provider is barred from reenrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

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

1. CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(1) because his license to practice medicine was suspended.[5]

Under 42 C.F.R. § 424.535(a)(1), CMS may revoke a Medicare supplier's enrollment and billing privileges if the supplier no longer meets the enrollment requirements for a supplier of its type and the supplier has not submitted a corrective action plan (CAP). Supplier enrollment requirements include complying with federal and state licensure provisions. 42 C.F.R. § 424.516(a)(2). As a physician, Petitioner must be licensed by the state in which he practices medicine. 42 C.F.R. § 410.20(b). Petitioner concedes that his license to practice medicine was suspended by the South Carolina Board of Medical Examiners. P. Br. at 1; *see also* CMS Ex. 3. Petitioner argues, however, that he did not

[4] As a physician, Petitioner is considered a "supplier" for purposes of the Act and the regulations. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. § 498.2; *see also* 42 C.F.R. § 400.202.

[5] My numbered findings of fact/conclusions of law appear in bold italic type.

have the opportunity to submit a CAP as described in 42 C.F.R. § 424.535(a)(1). P. Br. at 1. Implicit in this argument is the admission that Petitioner did not submit a CAP. In any event, as I explain in the following section, Petitioner's reasons for failing to submit a CAP do not provide a basis to overturn the revocation of his Medicare enrollment and billing privileges. Therefore, I conclude that CMS had a legal basis to revoke Petitioner's enrollment and billing privileges under 42 C.F.R. § 424.535(a)(1).

2. Whether CMS improperly deprived Petitioner of an opportunity to submit a corrective action plan is not an issue I may review.

Petitioner did not submit a CAP to Palmetto following the revocation of his Medicare enrollment and billing privileges. P. Br. at 1. Petitioner states that he did not submit a CAP because Palmetto and the South Carolina Medicaid program sent the notifications to his place of employment and his employer did not forward the documents to him. P. Br. at 1; RFH at 2. Petitioner represents that, had he received the notices, he would have complied and submitted a CAP. P. Br. at 2; RFH at 2. Even if it is true that Petitioner did not receive notice of the revocation in time to submit a CAP, this is not a basis to reverse the revocation. My review is limited to whether CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges. The regulations do not provide for administrative law judge review of CMS's acceptance or rejection of a CAP. *See* 42 C.F.R. § 405.874(e).

The decision to accept or reject a CAP is entirely within CMS's discretion. *See, e.g., Conchita Jackson, M.D.*, DAB No. 2495 at 6 (2013) ("the refusal by CMS or one of its contractors to reinstate a supplier after a correction attempt is not . . . . an action that constitutes an initial determination subject to administrative appeal under section 498.3(b)"). Thus, had Petitioner submitted a CAP, CMS was free to reject it, and that decision would be beyond my authority to review. By extension then, Petitioner's inability to submit a CAP is not material to any issue I may decide. This is all the more true because, as discussed in the following sections of this decision, CMS also had a legal basis to revoke Petitioner's Medicare enrollment based on 42 C.F.R. §§ 424.535(a)(9) and 424.535(a)(12). Suppliers do not have the opportunity to submit CAPs in response to revocations pursuant to these regulations.[6] Thus, even if I were to conclude that CMS was not authorized to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(1) because he did not have the opportunity to submit a

[6] Effective February 3, 2015, CMS deleted from the regulations language that formerly afforded providers and suppliers a broad right to submit a CAP before CMS would implement a revocation. *See* 79 Fed. Reg. 72,500, 72,532 (December 5, 2014). The preamble to the regulations explained, "[P]roviders and suppliers generally should not be exonerated from failing to fully comply with Medicare enrollment requirements simply by furnishing a CAP, for it is the duty of providers and suppliers to always maintain such compliance." 79 Fed. Reg. at 72,523.

CAP, I would nevertheless find that the revocation was proper under 42 C.F.R. §§ 424.535(a)(9) and 424.535(a)(12).

3. CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(9) because he failed to notify CMS or its contractor that his license had been suspended.

The regulation at 42 C.F.R. § 424.516(d)(1)(ii) requires a supplier to report any adverse legal action to CMS within 30 days. Section 424.502 defines a "final adverse action" to include "[s]uspension . . . of a license to provide health care by any State licensing authority." 42 C.F.R. § 424.502. Petitioner admits that he did not inform CMS within 30 days that the South Carolina Board of Medical Examiners had suspended his license. P. Br. at 1; RFH at 1. Petitioner argues that he was unaware of the requirement to report. *Id.* However, a party's misunderstanding or ignorance of the regulation is not a defense. *See Emmanuel Brown, M.D. & Simeon K. Obeng, M.D.*, DAB CR2145 at 6 (2010). Accordingly, pursuant to 42 C.F.R. § 424.535(a)(9), CMS had a legal basis to revoke Petitioner's enrollment and billing privileges for failure to comply with the reporting requirement at 42 C.F.R. § 424.516(d)(1)(ii).

4. CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(12) because he was terminated from participation in the South Carolina Medicaid program and he did not appeal the termination.

Pursuant to 42 C.F.R. § 424.535(a)(12), CMS may revoke a supplier's Medicare billing privileges when a supplier is terminated from a state Medicaid program and the supplier has exhausted all appeal rights. In a letter dated August 31, 2015, the South Carolina Department of Health and Human Services notified Petitioner that it was terminating his participation in the South Carolina Medicaid program. CMS Ex. 4. The letter informed Petitioner that he could appeal the termination within 30 days after he received the letter. CMS Ex. 4 at 2. As far as the record reveals, Petitioner did not file an appeal to the South Carolina Medicaid Program. CMS Ex. 1 at 1.[7] Thus, when Palmetto GBA notified Petitioner, on December 3, 2015, that his Medicare privileges were revoked, his appeal rights to the South Carolina Medicaid program had been exhausted, as it was more than 30 days after his participation in the South Carolina Medicaid program was terminated. *See* CMS Exs. 1, 4. Accordingly, CMS had a legal basis to revoke Petitioner's enrollment and billing privileges because he was terminated from the South Carolina Medicaid program and that termination was administratively final.

[7] In its initial determination letter, Palmetto represents that "South Carolina Medicaid confirmed that [Petitioner's] appeal rights have been exhausted with respect to this termination." CMS Ex. 1 at 1. Petitioner does not contend that he did not exhaust (or waive) his appeal rights with regard to the Medicaid termination. P. Br.

5. I have no authority to reinstate Petitioner's Medicare and billing privileges based on his equitable arguments.

Petitioner argues that a reenrollment bar of two years is overly harsh and that, absent approval to bill Medicare, he is virtually unemployable. P. Br. at 2. Petitioner further represents that he is a "qualified, experienced, and compassionate physician" who practices at a hospital that "provides a large volume of indigent medical care to the Pee Dee area of South Carolina." *Id.* I have no reason to doubt the truth of these assertions. However, under the applicable regulations, these arguments are not a basis to overturn the revocation of Petitioner's Medicare enrollment and billing privileges.

First, in regard to Petitioner's assertion that CMS's reenrollment bar is too lengthy, I do not have the authority to consider this issue. *See Vijendra Dave, M.D.*, DAB No. 2672 at 8-11 (2016). In addition, to the extent Petitioner argues that revocation of his Medicare enrollment and billing privileges is inequitable under the circumstances presented, CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances. *Letantia Bussell, M.D.*, 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.* (underscore 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; *see also Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2nd 167 (D. Mass. 2010) (if CMS establishes the regulatory elements necessary for revocation, an administrative law judge may not substitute his or her "discretion for that of CMS in determining whether revocation is appropriate under all the circumstances").

V. Conclusion

For the foregoing reasons, I affirm CMS's determination to revoke Petitioner's Medicare enrollment and billing privileges.

/s/
Leslie A. Weyn
Administrative Law Judge