Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Summit Shah, M.D.
(NPI: 1871702613 / PTAN: 4312952),

and

Premier Allergy, LLC
(NPI: 1710289293 / PTAN: 939491),

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-895

Decision No. CR5013

Date: January 25, 2018

DECISION

The Medicare enrollment and billing privileges of Petitioners, Summit Shah, M.D. and his practice Premier Allergy, LLC are revoked pursuant to 42 C.F.R. § 424.535(a)(3) and (9),[1] effective August 25, 2016.

I. Background

CGS, a Medicare Administrative Contractor (MAC) for the Centers for Medicare & Medicaid Services (CMS), notified Petitioners by letter dated December 21, 2016, that

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[1] References are to the 2016 revision of the Code of Federal Regulations (C.F.R.), the revision in effect at the time of the initial determination in this case, unless otherwise stated.

their Medicare enrollment and billing privileges were revoked effective August 25, 2016. The MAC stated that revocation was pursuant to 42 C.F.R. § 424.535(a)(3) and (9). CMS Exhibits (Exs.) 1 at 32-33; 2 at 32-33. The MAC advised Petitioners that they were subject to a three-year bar to re-enrollment beginning 30 days from the postmark on MAC's notice letter. CMS Exs. 1 at 33, 2 at 33.

On February 15, 2017, Petitioners submitted a consolidated request for reconsideration. CMS Exs. 1 at 9-10, 2 at 9-10. On May 15, 2017, a Medicare Hearing Office upheld revocation of the Medicare enrollment and billing privileges of Petitioner Summit Shah, M.D. effective August 25, 2016, pursuant to 42 C.F.R. § 424.535(a)(3) and (9). CMS Ex. 1 at 1-7. On May 12, 2017, the Medicare Hearing Officer upheld revocation of Petitioner Premier Allergy's Medicare enrollment and billing privileges effective August 25, 2016, pursuant to 42 C.F.R. § 424.535(a)(3) and (9). CMS Ex. 2 at 1-7.

On July 12, 2017, Petitioners timely filed a consolidated request for hearing before an administrative law judge (ALJ). On July 21, 2017, the case was assigned to me for hearing and decision, and an Acknowledgement and Prehearing Order (Prehearing Order) was issued at my direction.

On August 21, 2017, CMS filed a combined prehearing brief and motion for summary judgment (CMS Br.) with CMS Exs. 1 through 14. On September 19, 2017, Petitioners filed a combined prehearing brief, cross-motion for summary judgment, and opposition to CMS's motion for summary judgment (P. Br.), with no exhibits. CMS filed its response to Petitioners' cross-motion for summary judgment on October 4, 2017. Petitioners did not object to my consideration of CMS Exs. 1 through 14 and they are admitted.

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 the MACs. 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.[2] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395u(h)(1)). Petitioners are a physician and his practice and they are suppliers.

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[2] 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," *(Continued next page.)*

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.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its Medicare contractor 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 effective date of the revocation is controlled by 42 C.F.R. § 424.535(g).

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, 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).

(Continued from preceding page.)

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.

B. Issues

Whether summary judgment is appropriate; and

Whether there was a basis for the revocation of Petitioners 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. A supplier whose enrollment has been revoked has a right to a hearing and judicial review. A hearing on the record is required under the Act. Act §§ 205(b), 1866 (h)(1), (j) (42 U.S.C. § 1395cc(h)(1), (j)); 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17), 498.5; *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, Petitioners have not waived the right to oral hearing or otherwise consented to a decision based only upon the documentary evidence or pleadings. Accordingly, disposition on the written record alone is not permissible, unless summary judgment is appropriate.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations at 42 C.F.R. pt. 498 that establish the procedure to be followed in adjudicating Petitioners' case 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 Fed. R. Civ. Pro. 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, para. II.D and G. 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.

Summary judgment is appropriate when there is no genuine dispute as to any 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 differ 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 & 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 satisfy 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 F.App'x 181 (6th Cir. 2005).

Viewing the evidence before me in a light most favorable to Petitioners and drawing all inferences in Petitioners' favor, I conclude that there are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3) or (9) that require a hearing in this case. The issues in this case raised by Petitioners related to revocation under 42 C.F.R. § 424.535(a)(3) and (9) must be resolved against them as a matter of law. Accordingly, summary judgment is appropriate.

2. The issue for hearing and decision is whether there is a basis for revocation of Petitioners' Medicare enrollment and billing privileges and, if there is a basis for revocation, my jurisdiction does not extend to review of whether CMS properly exercised its discretion to revoke Petitioners Medicare enrollment and billing privileges.

3. The Secretary has determined and provided by regulation that any felony for which mandatory exclusion from Medicare is required by section 1128(a) of the Act (42 U.S.C. §1320a-7(a)), is detrimental to the Medicare program or its beneficiaries. 42 C.F.R. § 424.535(a)(3)(ii)(D).

4. Petitioner Shah was convicted of felony offenses for which mandatory exclusion from Medicare was required by section 1128(a) of the Act.

5. There is a basis for revocation of Petitioners' enrollment in Medicare and their billing privileges pursuant to 42 C.F.R. § 424.535(a)(3).

6. There is no dispute that neither Petitioners nor anyone on their behalf notified CMS or the MAC of Petitioner Shah's conviction within 30 days of the date of conviction as required by 42 C.F.R. § 424.516(d)(1)(ii).

7. There is a basis for revocation of Petitioners' enrollment in Medicare and their billing privileges pursuant to 42 C.F.R. § 424.535(a)(9) for violation of 42 C.F.R. § 424.516(d)(1)(ii).

8. Petitioners' Medicare enrollment and billing privileges are revoked effective August 25, 2016. 42 C.F.R. § 424.535(g).

9. I have no authority to review CMS's determination to impose a three-year bar on Petitioners' Medicare re-enrollment.

10. Pursuant to 42 C.F.R. § 424.535(c)(1), the three-year bar to reenrollment began to run 30 days from the date CMS or the MAC mailed the notice of revocation, but the Secretary and CMS have discretion not to enroll one convicted of a felony determined detrimental to the best interests of Medicare or its beneficiaries for up to ten years from the date of conviction. Act § 1866(b)(2)(42 U.S.C. § 1395cc(b)(2)); 42 C.F.R. § 424.530(a)(3).

a. Facts

The following material facts are undisputed.

Petitioners were enrolled in Medicare effective November 8, 2010. CMS Ex. 8, 9.

On August 25, 2016, in the Court of Common Pleas, Franklin County, Ohio, Case No. 16 CR 4628, Petitioner Shah pleaded guilty to two felony counts of selling, purchasing, distributing, or delivering dangerous or investigational drugs in violation of Ohio Revised Code § 4729.51. CMS Ex. 4. In the same court, in Case No. 16 CR 4629, Petitioner Shah pleaded guilty to two felony counts of selling, purchasing, distributing, or delivering dangerous drugs in violation of Ohio Revised Code § 4729.51(C)(1). CMS Ex. 5. Petitioner was convicted on August 25, 2016 pursuant to his pleas. CMS Exs. 4, 5; P. Br. at 2-3.

There is no dispute that Petitioners did not report Petitioner Shah's conviction to CMS or the MAC.

Petitioner Shah was excluded by the Inspector General (I.G.), U.S. Department of Health and Human Services from participation in Medicare, Medicaid, and all federal health care programs pursuant to 1128(a)(1) of the Act based on his August 25, 2016 conviction. CMS Ex. 14.

b. Analysis

The MAC revoked Petitioners' Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3) and (9). Sections 424.535(a)(3) and (9) provide in pertinent part:

> (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:
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> * * * *
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> (3) *Felonies*. (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.
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> (ii) Offenses include, but are not limited in scope or severity to –
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> * * * *
>
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

* * * *

> (9) *Failure to report.* The provider or supplier did not comply with the reporting requirements specified in § 424.516(d)(1)(ii) and (iii) of this subpart.

42 C.F.R. § 424.535(a)(3)(ii)(D) and (9). The Act specifically grants the Secretary authority not to enroll or to revoke the enrollment of a provider or supplier convicted under federal or state law of a felony offense that the Secretary determines is detrimental to the program or its beneficiaries. Act § 1866(b)(2)(D). Section 424.516(d)(1) of 42 C.F.R. requires that a physician report any adverse legal action within 30 days of the event. The elements for revocation under both 42 C.F.R. § 424.535(a)(3)(ii)(D) and (9) are satisfied by the undisputed facts in this case.

Petitioner Shah does not dispute that he was convicted but argues that his conviction was not one that required mandatory exclusion by the I.G. under 1128(a) of the Act or that had to be reported under 42 C.F.R. § 424.516(d)(1)(ii) and (iii). P. Br. at 1, 4-8.

On December 30, 2016, the I.G. notified Petitioner Shah that he was being excluded pursuant to section 1128(a)(1) of the Act based on his felony convictions, as summarized above, because they were criminal offenses related to the delivery of an item or service under Medicare or a state health care program. Petitioner Shah challenged the exclusion before an ALJ on grounds that his offense was not related to the delivery of an item or service under Medicare or a state health care program. Petitioner Shah did not prevail and his exclusion pursuant to section 1128(a) of the Act was upheld. *Summit S. Shah, M.D.*, DAB No. CR4927 (2017) *aff'd* DAB No. 2836 (2017); CMS Ex. 14.

Accordingly, I conclude that there is a basis for revocation of Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(ii)(D).

I further conclude that the failure to report the conviction within 30 days as required by 42 C.F.R. § 424.516(d)(1)(ii) is an independent basis for revocation of Petitioners' enrollment pursuant to 42 C.F.R. § 424.535(a)(9). Failure of a physician or a physician organization to comply with reporting requirements established by 42 C.F.R. § 424.516(d)(1)(ii) is an authorized basis for revocation of Medicare enrollment and billing privileges. Pursuant to 42 C.F.R. § 424.516(d)(1)(ii) a physician and his practice are required to report any adverse legal action within 30 days of the action. The regulations specify that a final adverse legal action includes a conviction in state or federal court of a felony offense, as defined by 42 C.F.R. § 424.535(a)(3)(i), that occurred within the last ten years preceding enrollment, revalidation of enrollment, or re-enrollment. 42 C.F.R. § 424.502. Any felony conviction that triggers mandatory exclusion under section 1128(a) of the Act is included among the felonies within the scope of 42 C.F.R. § 424.535(a)(3)(i). Petitioners do not deny Petitioner Shah's

conviction was not reported based on their mistaken belief that his conviction was not one that needed to be reported.
Accordingly, I conclude that there is a basis for revocation of Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(9).

Summary judgment is also appropriate as to the effective date of revocation of Petitioners' Medicare enrollment and billing privileges.

The Act specifies that one is convicted of a criminal offense when a judgment of conviction has been entered against an individual by a federal, state, or local court; when there has been a finding of guilt by a federal, state, or local court; when a guilty plea or no contest plea is accepted by a federal state, or local court; or when an individual has entered an arrangement where a judgment of conviction has been withheld. Act § 1128(i) (42 U.S.C. § 1320a-7(i)). The undisputed evidence shows that Petitioner pleaded guilty and the guilty plea was accepted on August 25, 2016. Accordingly, I conclude that, as a matter of law, Petitioner was convicted on August 25, 2016, within the meaning of section 1128(i) of the Act.

The effective date of the revocation is controlled by 42 C.F.R. § 424.535(g). The regulation provides that when revocation is based on a felony conviction, the effective date of revocation is the date of the conviction. 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.

42 C.F.R. § 424.535(g) (emphasis added). This regulation grants CMS and its contractor no discretion to choose an effective date of revocation other than the date of the conviction. Accordingly, the effective date of Petitioners' exclusion pursuant to 42 C.F.R. § 424.535(a)(3) was August 25, 2016. Although failure to report the conviction is an independent basis for revocation under 42 C.F.R. § 424.535(a)(9) that would normally be effective 30 days after notice of the initial determination, the

regulation does not grant CMS or its contractor discretion to choose the later effective date.

When 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). In this case, CMS determined that a three-year bar was appropriate. There is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)) ; 42 C.F.R. §§ 424.535(c), 424.545, 498.3(b), and 498.5. The Board has held that the duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in 42 C.F.R. § 498.3(b) and, thus, is not subject to ALJ review. *Vijendra Dave*, DAB No. 2672 at 11 (2016).

I have no authority to review the exercise of discretion by CMS or its contractor to revoke where there is a basis for revocation. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F.Supp.2d 167 (D. Mass. 2010). The scope of my authority is limited to determining whether there is a legal basis for revocation of Petitioners Medicare enrollment and billing privileges. *Id*. I have concluded that there is a basis for CMS to revoke Petitioners Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3).

III. Conclusion

For the foregoing reasons, I conclude that Petitioners' Medicare enrollment and billing privileges are properly revoked pursuant to 42 C.F.R. § 424.535(a)(3) and (9), effective August 25, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge