Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Chaturbhai B. Patel, M.D.
Docket No. A-17-56
Decision No. 2809
July 28, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Chaturbhai B. Patel, M.D. (Petitioner) appeals a February 15, 2017 decision by an administrative law judge (ALJ), *Chaturbhai B. Patel, M.D.*, DAB CR4792 (ALJ Decision). The ALJ sustained on summary judgment a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare billing privileges "pursuant to 42 C.F.R. § 424.535(a)(9) for failure to report to CMS or its contractor a change in practice location within 30 days as required by 42 C.F.R. § 424.516(d)(1)(iii)." ALJ Decision at 1. For the reasons set out below, we affirm the ALJ Decision.

Legal Background

The Medicare program is administered by CMS, which in turn delegates certain program functions to private contractors. Social Security Act (Act) §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b). A supplier must be enrolled in the Medicare program and maintain active enrollment status in order to receive payment for items and services covered by Medicare. 42 C.F.R. §§ 424.500, 424.502, 424.505, 424.510, 424.516.[1] The regulations require a supplier to report a change in practice location to its CMS contractor within 30 days. 42 C.F.R. § 424.516(d)(1)(iii).

The regulations authorize CMS to perform an "onsite review" of a supplier "to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements." 42 C.F.R. § 424.517(a). CMS may revoke a supplier's Medicare enrollment for any of the "reasons" specified in paragraphs one through 14 of 42 C.F.R. § 424.535(a). Relevant here is 42 C.F.R. § 424.535(a)(9), which permits revocation if the supplier does not comply with the reporting requirements found at 42 C.F.R. § 424.516(d)(1)(ii) and (iii).

[1] We cite to, and apply, the version of 42 C.F.R. Part 424 that was in effect on March 10, 2016, the date that CMS's contractor issued the initial revocation determination. *John P. McDonough III, Ph.D., et al.*, DAB No. 2728, at 2 n.1 (2016).

Revocation effectively terminates any provider agreement and bars the provider or supplier from participating in Medicare from the effective date of the revocation until the end of the re-enrollment bar. 42 C.F.R. § 424.535(b), (c). The re-enrollment bar is set for between one year and three years, depending on the severity of the basis for revocation. *Id.* § 424.535(c). A provider or supplier whose Medicare enrollment has been revoked may request reconsideration by CMS or its contractor, and then appeal the reconsidered determination, to an ALJ and then to the Board, in accordance with the procedures at 42 C.F.R. Part 498. *Id.* §§ 424.545(a), 498.3(b)(17), 498.5(l)(1)-(3), 498.22(a).

Case Background[2]

It is undisputed that Petitioner was enrolled in the Medicare program as a supplier, operating a private medical practice at 458 Glessner Avenue, Mansfield, Ohio. Request for Review (R.R.) at 1.

By letter dated March 10, 2016, CGS Administrators, LLC (CGS), a CMS contractor, notified Petitioner that his Medicare billing privileges were being revoked under 42 C.F.R. § 424.535(a)(9). CGS's March 10, 2016 revocation letter states in relevant part:

> Chaturbhai Patel, M.D.'s Medicare enrollment record reflects a practice location address at 458 Glessner Avenue, Mansfield, Ohio 44903. On January 20, 2016, a site visit at 458 Glessner Avenue, Mansfield, Ohio 44903 revealed a for sale sign. He did not notify CMS of this change of practice location as required under 42 CFR §424.516.

CMS Ex. 1, at 1. CGS imposed a two-year re-enrollment bar. *Id.*

In a letter to CGS dated April 15, 2016, Petitioner stated that he closed his private practice on May 30, 2010. CMS Ex. 2, at 1. Petitioner also stated that he has worked as a hospitalist since 2009. *Id*. In another letter dated April 18, 2016, Petitioner requested reconsideration, stating that he closed his "private practice at 458 Glessner Ave in Mansfield, OH in May 2010 and . . . was not aware that the necessary notifications were not submitted to Medicare." CMS Ex. 3, at 1. Petitioner also stated that he had been employed at "Miami Valley Hospitalist Group since March 2, 2015." *Id*. Petitioner attached form CMS-855I, in which he stated that he saw his first Medicare patient at Miami Valley Hospitalist Group in Dayton, Ohio on March 2, 2015. *Id.* at 11.

[2] The factual information in this section is drawn from the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal.

On May 27, 2016, CGS denied the request for reconsideration, citing 42 C.F.R. § 424.516(d)(2) as the basis for revocation. CMS Ex. 4, at 1. CGS issued a revised reconsidered determination on July 26, 2016 that denied reconsideration pursuant to 42 C.F.R. §§ 424.535(a)(9) and 424.516(d)(1)(iii). CMS Ex. 5. The July 26, 2016 determination stated in relevant part:

> In accordance with 42 C.F.R. § 424.516(d)(1)(iii), providers are required to report a change in practice location within 30 days. Dr. Patel did not notify CGS of his office closure within the required timeframe. CMS has determined that the revocation of Dr. Patel's Medicare enrollment and two-year re-enrollment bar were issued correctly under 42 CFR §§ 424.535(a)(9) & 424.516(d)(1)(iii). For this reason, the reconsideration request is hereby denied.

Id. at 2.

On June 13, 2016, Petitioner timely requested an evidentiary hearing before an ALJ.[3] Request for Hearing. In its hearing request, Petitioner stated that Dr. Patel had not actually closed his practice "from a legal or factual perspective," and that CMS lacked the authority to issue the July 26, 2016 revised determination. *Id.* at 1. Petitioner also requested that, if Dr. Patel's enrollment privileges were to be revoked, the re-enrollment bar be limited to a period significantly less than two years. *Id.* at 2.

CMS filed a pre-hearing brief and motion for summary judgment (CMS Br.),[4] asserting that there were no disputes of material fact and that the revocation was lawful under subsections 424.535(a)(9) and 424.516(d)(1)(iii). Citing to Petitioner's April 15, 2016 and April 18, 2016 letters, in which Petitioner twice admitted to closing his private practice location, CMS asserted that Petitioner's claim in its Request for Hearing that he did not close his practice location equated to a "bare assertion" unsubstantiated by evidence. CMS Br. at 7-8. Based on Petitioner's admissions, CMS argued that "there is no genuine dispute that Petitioner closed his practice location at 458 Glessner Avenue, Mansfield, Ohio, and that he failed to properly report the closure." *Id.* at 8. CMS further argued that the "duration of the re-enrollment bar is not reviewable" and that ALJs are "not authorized to grant equitable relief." *Id.* at 9-10.

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[3] Petitioner originally appealed the May 27, 2016 determination, which erroneously cited 42 C.F.R. § 424.516(d)(2) as the basis for revocation. CMS Ex. 7. The case was docketed as C-16-654. On September 2, 2016, the ALJ dismissed the request for hearing in docket number C-16-654, and consolidated the requests for hearing under docket number C-16-847. Consolidation Order at 1.

[4] CMS filed seven exhibits with its pre-hearing brief. These were entered into evidence by the ALJ and are designated as CMS Exhibits 1-7.

Petitioner filed his pre-hearing brief (P. Br.) in opposition, and also requested summary judgment.[5] Petitioner asserted that when "Dr. Patel stated that he had "closed [his] private practice," Dr. Patel was claiming "that he was no longer going to provide treatment to patients" at that location, but still owned the building. P. Br. at 1. Petitioner stated that CMS "failed to present evidence that Dr. Patel sold the structure on Glessner Avenue…[or] any evidence demonstrating that Dr. Patel opened a new medical facility subsequent to May 30, 2010 in lieu of working at the Glessner Avenue location…[and] there is nothing to prevent him from re-opening the medical practice at the same location." *Id.* at 3. Petitioner further asserted "that simply closing a practice, without actually changing the practice location, does not require any type of notification to CMS." *Id.*

CMS filed a reply to Petitioner's pre-hearing brief, in which it again requested summary judgment; Petitioner subsequently filed a sur-reply.

ALJ Decision

The ALJ concluded that "[t]here is no genuine dispute as to any material fact in this case and summary judgment in favor of CMS is appropriate." ALJ Decision at 7. Additionally, he stated, "[t]he undisputed facts show that there is a basis for the revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(9)." *Id.*

The ALJ rejected Petitioner's argument that Petitioner was under no obligation to notify CMS of a change in practice location, writing in relevant part:

> I conclude that Petitioner's arguments are without merit. There is no dispute that Petitioner was enrolled in Medicare with a practice location at the Glessner Avenue address. In May 2010, he closed that location. After Petitioner closed the Glessner Avenue location, his patients could no longer see him at that location, a change from the enrollment information on file with CMS and CGS. After closing his Glessner Avenue location, Petitioner

[5] Petitioner's filing was titled "Pre-hearing Brief and Motion for Summary Disposition." The ALJ treated the "Motion for Summary Disposition" as a Motion for Summary Judgment "as provided for by Prehearing Order, para. II. D & G.; the Civil Remedies Division Procedures § 19; Fed. R. Civ. Pro. 56; and various decisions of the Departmental Appeals Board[.]" ALJ Decision at 2-3.

> concedes that he continued to practice medicine as a hospitalist. CMS Exs. 2, 3. The plain language of 42 C.F.R. § 424.516(d) supports a conclusion that closing the Glessner Avenue location constituted a "change in practice location" that Petitioner was obligated to timely report to CMS under 42 C.F.R. § 424.516(d)(1)(iii).
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> I conclude that Petitioner failed to report within 30 days that he closed his Glessner Avenue location, and that the closure of a practice location is the same as a change of practice location within the meaning of 42 C.F.R. § 424.516(d)(1)(iii). I further conclude that Petitioner's violation of 42 C.F.R. § 424.516(d)(1)(iii) is a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(9).

Id. at 9.

The ALJ stated that, "had CMS decided to pursue it, another basis for revocation existed because "closing the location was clearly a change in enrollment information that Petitioner failed to report within 90 days as required by 42 C.F.R. § 424.516(d)(2), and the failure to satisfy that Medicare enrollment requirement would be a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(5)(ii)." *Id.* (emphasis in original).

The ALJ also rejected Petitioner's request that the Medicare re-enrollment bar should be less than two years. The ALJ concluded that "[t]here is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes" and that "[t]he 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 is not subject to ALJ review. *Vijendra Dave*, DAB No. 2672, at 10-11 (2016)." *Id.*

Petitioner appealed the ALJ Decision.

Standard of Review

The ALJ decided this case by granting summary judgment to CMS. Whether summary judgment is appropriate is a legal issue that we address *de novo*. *1866ICPayday.com*, DAB No. 2289, at 2 (2009), citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004). Summary judgment is appropriate when the record shows that there is no genuine dispute of fact material to the result. *1866ICPayday.com* at 2, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. *Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (*Guidelines*) at http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-toboard/guidelines/enrollment.

Discussion

Petitioner's appeal rests on two assignments of error. First, Petitioner asserts that the ALJ erred as a matter of law in determining that closing a practice location equates to a "change in practice location" pursuant to 42 C.F.R. § 424.516(d)(1)(iii). R.R. at 3. Second, Petitioner asserts that the ALJ erred as a matter of law in determining that CMS could have pursued a violation of 42 C.F.R. § 424.516(d)(2). *Id*.

For the following reasons, we affirm the ALJ's decision.

I. *The ALJ did not err in finding that Petitioner's closure of his practice location constituted a "change in practice location" pursuant to 42 C.F.R. § 424.516(d)(1)(iii).*

Petitioner contends that the ALJ "erred as a matter of law" in finding that Petitioner changed his practice location pursuant to 42 C.F.R. § 424.516(d)(1)(iii). R.R. at 2. Petitioner asserts that closing "a practice location does not amount to 'changing' a practice location, as is required for CMS to revoke [P]etitioner's enrollment privileges pursuant to 42 C.F.R. § 424.516(d)(1)(iii)." Petitioner's Reply on appeal (P. Reply) at 1. Petitioner argues that he did not trigger the reporting requirements for a change in practice location because 1) Petitioner did not sell the physical building at 458 Glessner Avenue, and 2) Petitioner did not open a new private practice location.

The ALJ rejected Petitioner's arguments, concluding they were "without merit." ALJ Decision at 9. Specifically, the ALJ rejected Petitioner's argument that "closing" the practice location at 458 Glessner Avenue did not equate to a "change in practice location" within the meaning of 42 C.F.R. § 424.516(d)(1)(iii), citing the plain language of 42 C.F.R. § 424.516(d) for support. *Id*. The ALJ also noted that Petitioner did not support his interpretation of 42 C.F.R. § 424.516(d)(1)(iii) with legal authority. *Id.* at 8 ("Petitioner cites no legal authority to support his interpretation of the regulation.").

We affirm the ALJ's conclusion that closing a practice location equates to a "change in practice location" pursuant to 42 C.F.R. § 424.516(d)(1)(iii). To begin with, we do not read the word "change" as restricted to the replacement of one location by another. The "cardinal rule" in statutory construction is "that a statute is to be read as a whole … since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 (1991); *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"); 2A Sutherland Statutory Construction § 46:5 (7th ed.). The Board has long recognized the "whole statute" interpretation as a

central tenet of statutory construction, and has stated that the meaning of a statute "is determined by reference to the language itself, the specific context in which that language is used, by purposes inferred from those directives or from the statute as a whole, and by the statute's overall structure." *Breton Lee Morgan, M.D.*, DAB No. 2264, at 5 (2009) (citations omitted), *aff'd*, *Morgan v. Sebelius*, 694 F.3d 535 (4th Cir. 2012). We thus read the regulations in Part 424 as a whole and apply meaning to their words or phrases consistently and in harmony with one another. The various regulations in Part 424 "inform one another consistent with the purpose of the regulations, which is to assure that providers and suppliers meet and continue to meet enrollment requirements." *Adora Healthcare Services, Inc.*, DAB Ruling No. 2017-4, on Request for Reconsideration of Decision No. 2714, at 6 (2017). Accordingly, we analyze the term "change in practice location" within this model of statutory construction to help elucidate the intent of the drafters.

The term "change in practice location" is not defined in 42 C.F.R. Part 424, subpart P, but the Board has previously recognized the plain language meaning of the term "practice location" as "a physical location, as in a medical office, where the physician meets with patients and provides medical care and treatment." *Wendell Foo, M.D.*, DAB No. 2769, at 3 n.2 (2017). The term "practice location" is also referenced many times in the regulations outside of subsection 424.516(d)(1)(iii). For example, a supplier must provide documentation of its "practice location" with its enrollment application. 42 C.F.R. § 424.510(d)(2)(ii). Another reference is found within the definition of "operational," which states that there must be a "qualified physical practice location" that is "open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked … to furnish these items or services." 42 C.F.R. § 424.502.

Implicit in these regulations is the principle that accurate, updated enrollment information about where a provider or supplier is operating and how beneficiaries may access services is crucial to the oversight function of CMS. The regulations provide that CMS may perform on-site inspections of practice locations to verify the accuracy of the enrollment information and to determine whether a supplier is compliant with Medicare requirements. 42 C.F.R. § 424.517(a). When a supplier closes a practice location, the information provided in its enrollment application is no longer accurate and up-to-date. If the closure is not timely reported to the CMS contractor, CMS cannot conduct on-site visits, nor can CMS verify that the supplier is receiving the correct Medicare payment amounts based on location. Failure to report a closure to the CMS contractor thus undermines an essential goal of the Medicare program to ensure that beneficiaries have

access to properly functioning medical suppliers. The drafters stressed the importance of the reporting requirements for the proper functioning of the Medicare program in the preamble to the final rule promulgating the current language found at 42 C.F.R. § 424.516(d)(1)(iii):

> We believe that changes of ownership, adverse legal actions, and changes in practice locations can and should be reported within 30 days of the reportable event. By reporting these types of reportable events within 30 days, the Medicare program can take the necessary steps to ensure that we are paying physicians and NPPs [nonphysician practitioners] correctly and ensure that only eligible physicians and NPPs are enrolled in the Medicare program.
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> We note that individual practitioners and physician and NPP organizations routinely notify staff, the U.S. Post Office, telephone and electric companies, suppliers, vendors, State medical associations and other practitioner partners prior to a change in practice location. Accordingly, we believe that it is appropriate that physicians and NPP organizations notify the Medicare contractor in advance of any pending change of practice location, but no later than 30 days after the reportable event.

73 Fed. Reg. 69,726, 69,780 (Nov. 19, 2008). Moreover, if a supplier fails to update its enrollment information, it creates an unnecessary burden on CMS, which has limited resources to oversee the Medicare program. CMS argued as much in its pre-hearing brief by citing to a prior ALJ ruling in a case involving the revocation of a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS):

> [C]ase law in the DMEPOS supplier revocation context further demonstrates the rationale behind Petitioner's burden to notify CMS of an address change. The burden for notifying the contractor/CMS of an address change must remain with the supplier, for "CMS has scarce resources to regulate a vast number of suppliers through unannounced site visits, and the change of address rules, which Petitioner clearly did not take reasonable care to follow, serve an important function in this compliance work." *Homemakers A+ Servs.*, DAB No. CR2322 at 6 (2011). This rationale applies equally in the physician [supplier] enrollment context.

CMS Br. at 7 n.1. We agree with CMS that the rationale adopted by the ALJ in *Homemakers* applies here. In sum, failure to report the "closure" of a practice location impedes CMS' ability to properly carry out its oversight function as authorized by the regulations.

It is therefore a supplier's affirmative duty to report a change in practice location, even if the "change" is a "closure" rather than a relocation. We reject Petitioner's inference that an old practice location must be "sold" in order for there to be a "change in practice location." The regulations specify nothing about the ownership status of the location but only its operation as a physical practice so we see no support for the idea that ending the use of a location for practice is insufficient to show a change unless the site is also sold. Likewise, we reject Petitioner's argument that a new practice location of the same "type" (e.g. private practice) must be opened to trigger the reporting requirements of 42 C.F.R. § 424.516(d)(1)(iii). The regulations do not stipulate any such requirements, nor does the context of Part 424 as a whole support this interpretation. Reading these requirements into an interpretation of 42 C.F.R. § 424.516(d)(1)(iii) would be antithetical to the purpose of the regulations as articulated by the drafters. For the foregoing reasons, we conclude that the "closure" of a practice location is within the meaning of a "change in practice location" found at 42 C.F.R. § 424.516(d)(1)(iii), and must therefore be reported to CMS within 30 days.

Here, Petitioner admitted that he closed his practice location at 458 Glessner Avenue and thus failed to maintain an operational "practice location" consistent with section 424.502. As noted by the ALJ, when Petitioner closed this practice location, "his patients could no longer see him at that location, a change from the enrollment information on file with CMS and CGS." ALJ Decision at 9. We agree with the ALJ that Petitioner had an affirmative duty under the regulations to report the closure of the Glessner Avenue location within 30 days and that his failure to report the closure was a proper basis for revocation pursuant to 42 C.F.R. § 424.535(a)(9).

CMS argues that, in light of Petitioner's admissions that he has worked as a hospitalist since 2009 (CMS Ex. 2, at 1), and has worked at Miami Valley Hospitalist Group since March, 2015 (CMS Ex. 3, at 1), the revocation is also justified on the basis that Petitioner did not disclose that he was seeing patients at other practice locations. CMS Response at 7. Petitioner contends that he notified CMS of his new practice location at Miami Valley Hospitalist Group by obtaining a new Medicare number. P. Reply at 2. Petitioner has not shown that his application for a new provider number constituted a report that his prior practice location has changed. In light of our conclusion that Petitioner's failure to report the closure of the Glessner Avenue location supports the revocation, however, we need not decide whether his failure to report his new practice locations as a hospitalist would also support the revocation.

II. *The ALJ's observation that CMS could have revoked Petitioner's Medicare billing privileges for a violation of 42 C.F.R. § 424.516(d)(2), while not erroneous, was merely dictum.*

In his decision, the ALJ wrote:

> [E]ven if I accepted Petitioner's argument that closing the practice location is not the same as changing the practice location, closing the location was clearly a change in enrollment information that Petitioner failed to report within 90 days as required by 42 C.F.R. § 424.516(d)(2), and the failure to satisfy that Medicare enrollment requirement would be a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(5)(ii). Thus, had CMS decided to pursue it, another basis for revocation existed as a result of Petitioner's failure to report his change in practice location.

ALJ Decision at 9 (emphasis in original). Petitioner contends that the ALJ "erred as a matter of law in determining that [P]etitioner violated 42 C.F.R. § 424.516(d)(2) as a result of allegedly failing to inform Medicare of a change in enrollment information." R.R. at 3. Petitioner notes that CMS did not allege a violation of 42 C.F.R. § 424.516(d)(2) in its July 26, 2016 determination, and that it was outside the ALJ's "authority to suspend [P]etitioner's enrollment privileges based on a violation of this statute." *Id.*

Because CMS did not rely on a violation of 42 C.F.R. § 424.516(d)(2) as a basis for revocation in the reconsidered determination, the ALJ lacked the authority to cite this regulation as the legal basis for revocation. We construe the ALJ's comments, however, to be intended as general dictum, and not a conclusion of law on which the merits of this case rest. The ALJ stated that a violation 42 C.F.R. § 424.516(d)(2) could have been another basis for revocation "had CMS decided to pursue it." ALJ Decision at 9. The ALJ made clear that "Petitioner's Medicare enrollment and billing privileges are revoked pursuant to 42 C.F.R. § 424.535(a)(9), based on a violation of 42 C.F.R. § 424.516(d)(1)(iii). *Id*. at 10. As CMS notes, "[t]here is no mention of these regulations in the decision's numbered findings of fact and conclusions of law" and that they are absent from the introduction and conclusion of the decision. CMS Response on appeal at 8. Hence, we need not further consider what action CMS might have taken based on failure to report a change in enrollment information within 90 days, since no such action is before us.

Conclusion

For the reasons stated above, we affirm the ALJ's February 15, 2017 decision that CMS lawfully revoked Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(9) for failure to report to CMS or its contractor a change in practice location within 30 days as required by 42 C.F.R. § 424.516(d)(1)(iii).

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member