

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

David K. Caletri, M.D.
(NPI: 1730277831),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-13

Decision No. CR2344

Date: April 1, 2011

DECISION

Petitioner, David K. Caletri, M.D., appeals the determination of the Centers for Medicare and Medicaid Services (CMS) to revoke his enrollment and billing privileges as a supplier in the Medicare program for non-compliance with Medicare enrollment requirements under 42 C.F.R. Sections 424.535(a)(1) and 424.516(d)(1)(ii). For the reasons set forth below, I find that a legitimate basis existed for CMS to revoke Petitioner's billing privileges, and I grant CMS's motion for summary judgment.

I. Background

Petitioner is a physician who was licensed in, and practiced, radiation oncology in and around Lafayette, Louisiana. CMS Exhibit (Ex.) 1 (setting forth Consent Order, Number 90-I-489 (Consent Order)); Petitioner Ex. 1. On December 14, 2009, Petitioner entered into a Consent Order with the Louisiana State Board of Medical Examiners (State Board), consenting to a 90 day license suspension, which was retroactive from August 7, 2009

until November 5, 2009.¹ *Id.* at 2. Petitioner's license suspension coincided with the date that Petitioner entered inpatient treatment for a chemical dependency medical condition. Petitioner's Opposition to Respondent's Motion for Summary Judgment and Petitioner's Cross-Motion for Summary Judgment (Petitioner's Motion) at 2. In addition, the Consent Order set forth that Petitioner's license was "reinstated on probation" for five years. CMS Ex. 1, at 3; Petitioner Ex. 1, at 3.

Petitioner failed to report his retroactive medical license suspension to CMS within 30 days after the effective date of December 14, 2009. *See* CMS Motion for Summary Judgment (CMS Motion) at 4; Petitioner's Motion at 5 (noting Petitioner "reasonably assumed" Board would make "requisite notice" such that CMS "had constructive knowledge of the Consent Order"). Instead, the State Board notified CMS's Medicare Contractor, Pinnacle Business Solutions, Inc. (Pinnacle), of the retroactive suspension by letter, dated January 7, 2010. CMS Motion at 4; Petitioner's Motion at 5. On February 5, 2010, Pinnacle subsequently notified Petitioner that it was revoking his Medicare billing privileges, based on noncompliance with 42 C.F.R. § 424.535(a)(1) and 42 C.F.R. § 424.516(d)(1)(ii), effective August 7, 2011. CMS Ex. 3; Petitioner's Ex. 3. Pinnacle revoked Petitioner's billing privileges for three years, which Pinnacle noted was the length of time of Petitioner's re-enrollment bar. *Id.* at 3. In addition, Pinnacle assessed an overpayment of \$14,936.14 against Petitioner, finding that he continued to furnish services "after a final adverse action precluded enrollment in the Medicare program." *Id.*

Petitioner subsequently submitted a corrective active plan (CAP) request to Pinnacle on February 22, 2010, which was within thirty days of the February 5, 2010 revocation letter. Petitioner Ex. 4 (setting forth CAP request, dated February 22, 2010). Pinnacle denied the CAP request on June 10, 2010, noting that Petitioner failed to report the suspension of his medical license to CMS within thirty days. Petitioner Ex. 6 (setting forth CAP denial letter, dated June 10, 2010). On March 30, 2010, Petitioner requested that Pinnacle reconsider Petitioner's revocation and reinstate his billing privileges. Petitioner Ex. 5. On August 5, 2010, a Medicare Senior Enrollment Hearing Officer issued an unfavorable reconsideration decision, finding that Petitioner's enrollment and billing privileges in the Medicare program were properly revoked. Petitioner Ex. 7.

Pursuant to 42 C.F.R. § 498.40, Petitioner timely filed a request for an Administrative Law Judge (ALJ) hearing by letter dated October 4, 2010. I issued an Acknowledgment and Pre-Hearing Order on October 19, 2010. CMS subsequently filed a motion for summary judgment on November 18, 2010. CMS accompanied its submission with CMS Exhibits 1-7. On December 20, 2010, my office received Petitioner's Opposition to Respondent's Motion for Summary Judgment and Petitioner's Cross-Motion for

¹ Petitioner acknowledged, approved, accepted, and consented to the entry of the Consent Order on December 3, 2011. *See* CMS Ex. 1 at 8. The State Board then agreed to the Consent Order on December 14, 2011, which I will use as its effective date.

Summary Judgment, dated December 16, 2010, and nine exhibits. I receive P. Exs. 1-7 and CMS Exs. 1-9 into the record.

II. Applicable Regulations

Medicare Part B pays for physicians' services if a professional, "who is legally authorized to practice by the State in which he or she performs the functions or actions, and who is acting within the scope of his or her license," furnishes them. 42 C.F.R. § 410.20(b). CMS may revoke the Medicare billing privileges of a currently enrolled provider or supplier, if the provider or supplier is "determined not to be in compliance" with Medicare enrollment requirements. 42 C.F.R. § 424.535(a)(1). The regulations further specify, in part:

(d) Reporting requirements for physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations. Physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations must report the following reportable events to their Medicare contractor within the specified timeframes:

- (1) Within 30 days—
 - (i) A change of ownership;
 - (ii) Any adverse legal action; or
 - (iii) A change in practice location.

42 C.F.R. § 424.516(d)(1).

The regulations define "final adverse action" to include "[s]uspension or revocation of a license to provide health care by any State licensing authority." 42 C.F.R. § 424.502. CMS may revoke an enrolled supplier or provider's Medicare billing privileges if that provider or supplier fails to report to the Medicare contractor an adverse legal action or change in practice location within thirty days, in compliance with the reporting requirements of 42 C.F.R. § 424.516(d)(1)(ii) and 42 C.F.R. § 424.516(d)(1)(iii). In addition, a provider that does not comply with the reporting requirements of 42 C.F.R. § 424.516(d)(1)(ii) "is assessed an overpayment back to the date of the final adverse action." 42 C.F.R. § 424.565.

III. Issue

The issue in this case is whether a legitimate basis exists for CMS to revoke Petitioner's enrollment as a supplier in the Medicare program.

IV. Discussion

A. A Legitimate Basis Exists for CMS to Revoke Petitioner's Enrollment in Medicare.

As noted above, Petitioner entered into a Consent Order, which took effect on December 14, 2009, to retroactively suspend his medical license for ninety days, from August 7, 2009 to November 5, 2009. Petitioner asserts, however, that the record “clearly establishes [that] there has been no evidence submitted by CMS that Dr. Caletri ever actually was suspended from his practice a single day in real time between August 7, 2009 through November 6, 2009.” Petitioner Motion at 7. Petitioner argues that the Consent Order “fails to establish any real time suspension,” such that “CMS failed to have sufficient basis to revoke his Medicare privileges.” *Id.* at 8.

Petitioner further opines:

Please understand that during the suspension of Dr. Caletri's medical license he received no notice from Pinnacle regarding his noncompliance for Medicare billing purposes, he also had completely ceased all activities related to his care and treatment of patients and did not submit any Medicare billings for this time period. Dr. Caletri resumed Medicare billing only after the Louisiana Board of Medical Examiners reinstated his license to practice medicine as provided by the Consent Order. Consequently, Dr. Caletri conducted no act that was not in compliance with 42 C.F.R. § 424.535(a)(1).

Petitioner's Hearing Request at 2.

CMS may revoke the billing privileges of a participating Medicare provider for noncompliance with Medicare enrollment requirements. Such noncompliance includes the surrender of a physician's license to practice medicine. Here, Petitioner voluntarily surrendered his medical license retroactively when he acknowledged, approved, accepted, and entered into the December 14, 2010 Consent Order. Once Petitioner failed to meet the licensing requirement of 42 C.F.R. § 410.20(b), a legitimate basis arose for CMS to revoke Petitioner's billing privileges for noncompliance with Medicare enrollment requirements effective to the date of the license suspension. 42 C.F.R. § 424.535(g). Petitioner's arguments regarding a “real time suspension” are unavailing. Petitioner's license was suspended. The fact that the suspension occurred retroactively does not diminish the fact that the suspension actually occurred and carries consequences. Accordingly, I conclude that a legitimate basis exists to revoke Petitioner's billing privileges and enrollment in Medicare, pursuant to 42 C.F.R. § 424.535(a)(1), effective

August 7, 2009. I also uphold the basis for CMS's finding that Petitioner is responsible for any resultant overpayment occurring after this date.

While I find that CMS had a legitimate basis to revoke Petitioner's Medicare enrollment solely due to his noncompliance with 42 C.F.R. § 424.535(a)(1), I also examine whether an additional basis for revocation exists due to Petitioner's failure to report the suspension of his medical license. *See Houston v. CMS*, DAB CR2071, at 4 (2010) ("License suspension and failure to inform CMS of a change in circumstances are independent grounds for revocation of enrollment. Either basis, standing alone, is sufficient authority for CMS to revoke Petitioner's enrollment."). Petitioner does not dispute that he failed to report that his medical license was suspended. Instead, Petitioner presumed that the State Board would notify CMS of the suspension, which it did on January 7, 2010. However, the fact that CMS learned about the suspension from a source other than Petitioner did not relieve Petitioner of his duty to inform CMS of the change in his circumstances, especially because no evidence exists to show that Petitioner was aware that the State Board reported the suspension to CMS within 30 days. Petitioner does not dispute that suspension of his license constitutes an adverse legal action, as 42 C.F.R. § 424.502 contemplates, that he was explicitly required to report. Petitioner's failure to report provides an additional basis to revoke his enrollment, even if CMS may have learned about the license suspension from another source. Accordingly, I conclude that a basis also exists to revoke Petitioner's billing and enrollment privileges, pursuant to 42 C.F.R. § 424.535(a)(9).

B. Petitioner's Due Process Rights Were Not Denied

Petitioner asserts that CMS violated the requirements of 42 C.F.R. § 424.535(a)(1), which provides, in part, "[a]ll providers and suppliers are granted an opportunity to correct the deficient compliance requirement before a final determination to revoke billing privileges." Petitioner's Motion at 8. Petitioner asserts that he should have been given the opportunity to correct any deficiencies that may have existed before his Medicare enrollment was revoked.

CMS did provide Petitioner the opportunity to submit a CAP. Pinnacle subsequently denied the CAP on June 10, 2010, explaining that Petitioner did not report his license suspension to CMS within 30 days. CMS Ex. 6. Pinnacle's decision not to reinstate Petitioner based on the CAP is not subject to appeal. *See DMS Imaging, Inc.*, DAB No. 2313, at 7-8 (2010) ("The hearing officer conducting the reconsideration (and the ALJ . . .) are limited to reviewing the basis for revocation set out in the initial notice, not the merits of any contractor decision that correction action under a CAP was unacceptable."); *Emmanuel Brown, M.D. and Simeon K. Obeng, M.D. v. CMS*, DAB CR2145, at 7 (2010) (noting that CAP evaluation is unappealable).

B. Summary Judgment is Appropriate.

The Board stated the standard for summary judgment:

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing 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.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ’s role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009). The Board has further stated, “[i]n addition, it is appropriate for the tribunal to consider whether a rational trier of fact could regard the parties’ presentation as sufficient to meet their evidentiary burden under the relevant substantive law.” *Dumas Nursing and Rehab., L.P.*, DAB No. 2347, at 5 (2010).

The issue in this case turns on the interpretation and application of the regulations that govern revocation of enrollment in Medicare. The material facts are not in dispute. Petitioner does not deny that he entered into a Consent Agreement on December 14, 2009 that resulted in the suspension of his medical license. Petitioner does not deny that he failed to report to CMS that his medical license was suspended. I have accepted all facts that Petitioner asserted as true and drawn all inferences in his favor. However, in doing so, I could reach no different result under the law. I conclude summary judgment is appropriate, as a legitimate basis existed for CMS to revoke Petitioner’s enrollment in Medicare.

V. Conclusion

CMS had the authority to revoke Petitioner's enrollment and billing privileges for noncompliance with Medicare enrollment requirements under 42 C.F.R. § 424.535(a)(1) and 424.516(d)(1)(ii). I therefore grant the CMS motion for summary judgment.

/s/

Joseph Grow
Administrative Law Judge