Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Facundo B. Dovale, M.D.
(NPI: 1689798696),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-829

Decision No. CR4952

Date: October 13, 2017

DECISION

I sustain the determination of a Medicare contractor, as affirmed on reconsideration, to deny the Medicare enrollment application of Petitioner, Facundo B. Dovale, M.D.

I. Background

The Centers for Medicare & Medicaid Services (CMS) moved for summary judgment. With its motion CMS filed seven proposed exhibits that it identified as CMS Ex. 1-CMS Ex. 7. Petitioner opposed the motion, filing a brief (P. Br.), but no exhibits.

Neither Petitioner nor CMS proffered witness testimony. In light of that, it is unnecessary that I decide whether the criteria for summary judgment are met. There is no need for an in-person hearing given that there is no testimony for me to receive and evaluate. I decide the case based on the parties' written exchanges and I receive into the record CMS Ex. 1-CMS Ex. 7.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue is whether a Medicare contractor appropriately denied Petitioner's application to participate in Medicare.

B. Findings of Fact and Conclusions of Law

The contractor denied Petitioner's Medicare enrollment application because it found that Petitioner failed to disclose a prior adverse action, specifically, the revocation of his Medicare enrollment in 2016. CMS Ex. 3. On March 20, 2017, Petitioner filed an enrollment application with the contractor by completing an internet-based form via the Provider Enrollment Chain and Ownership System (PECOS). Section 3 of that form requires an applicant such as Petitioner to report each final legal action against him or her and to attach a copy of that action. CMS Ex. 5 at 2. In his application Petitioner listed a prior suspension of his license to practice medicine but failed to report the Medicare enrollment revocation. *Id.*

CMS or a Medicare contractor may deny a supplier's Medicare enrollment application if the supplier submits false or misleading information on his or her application. 42 C.F.R. § 424.530(a)(4). Petitioner's application for enrollment was at the least misleading because he failed to advise the contractor of his Medicare enrollment revocation. The omission of that information plainly violated enrollment requirements and was grounds for denial of his application.

Petitioner contends that any omission by him when he supplied information was inadvertent. He asserts that he was under pressure when he filed his application and that the PECOS form is complicated and potentially misleading. P. Br. at 2. Thus, according to Petitioner, he made a simple error, an error for which he should not be penalized. Amplifying this argument, Petitioner asserts that the regulation only applies to instances where the providing of false or misleading information is intentional. Petitioner contends that the regulation is inapplicable here because he did not commit an intentional act. Petitioner argues also that the regulation applies only to revocations of participation and not to denials of applications to participate in Medicare. P. Br. at 4-6.

I find these arguments to be without merit. First, the regulation does not apply only to those situations where an individual dishonestly files a false or misleading Medicare enrollment application. Each supplier who files an enrollment application must certify that his or her application is accurate. That supplier is responsible for all of the contents of the application and for assuring that the application is correct. Filing an application that contains substantial errors is a deliberate act even if the applicant is not willfully dishonest. Thus, Petitioner is liable for his failure to disclose his Medicare participation

revocation, whether or not dishonesty motivated that failure to disclose. *Mark Koch, D.O.*, DAB No. 2610 at 4 (2014).

Second, I disagree with Petitioner's contention that the regulation applies only to determinations to revoke participation and not to denials of applications to participate. There is simply nothing in the regulation's language that permits this asserted distinction.

Petitioner also contends that he actually advised the contractor of his participation revocation, evidently asserting that this adverse action may be inferred from his admission that his license to practice medicine was suspended. I disagree. The suspension of Petitioner's physician's license was a *state* action and not one by federal authorities. While it is true that federal revocation of participation in Medicare usually follows suspension of one's license, revocation is nonetheless an independent and discretionary action by federal authorities. One adverse action doesn't necessarily follow the other. Moreover, the application completed by Petitioner left it to the contractor to guess what additional adverse actions flowed from Petitioner's license suspension. It was *Petitioner's* duty to report what had occurred and not the contractor's duty to draw inferences and make deductions.

Petitioner's arguments have an equitable flavor. Essentially, Petitioner asserts that to deny participation to him is unfair. I have no authority to consider equitable arguments such as those made by Petitioner. *U.S. Ultrasound*, DAB No. 2302 at 8 (2010).

_____/s/_____
Steven T. Kessel
Administrative Law Judge