Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Daniel H. Kinzie IV, M.D.
(PTAN Nos. 8L13941, 8K8110, and 889272)

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-182

Decision No. CR2112

Date: April 12, 2010

DECISION

I enter summary disposition in favor of the Centers for Medicare & Medicaid Services (CMS) and sustain the determination of its fiscal intermediary, TrailBlazer Health Enterprises, LLC (TrailBlazer), to revoke the Medicare billing privileges and Medicare Provider Transaction Access Numbers (PTAN) of Petitioner, Daniel H. Kinzie IV, M.D., effective October 10, 2008.

I. Background

Petitioner is a physician, who is presently located in the Midland, Texas area. He participated in the Medicare program, and his participation in that program was governed by applicable laws and regulations, including regulations stating requirements for establishing and maintaining Medicare billing privileges at 42 C.F.R. §§ 424.500 *et seq.* In August and September, 2009, TrailBlazer sent notifications to Petitioner and his places of employment advising him that his Medicare billing privileges and PTANs were being revoked. Petitioner requested reconsideration of this determination. Reconsideration was denied. Then, Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision.

CMS filed a pre-hearing brief, which included a motion for summary disposition along with six proposed exhibits identified as CMS Ex. 1 – CMS Ex. 6. Petitioner filed a pre-hearing brief, which included opposition to CMS's motion, and a proposed exhibit that is identified as P. Ex. 1. Subsequently, I directed the parties to answers some questions concerning issues that I identified after reading their briefs. Order to Develop the Record, dated March 5, 2010. CMS and Petitioner filed responses to those questions. I receive into the record of this case CMS Ex. 1 – CMS Ex. 6 and P. Ex. 1.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether the undisputed material facts authorize CMS and/or TrailBlazer to revoke Petitioner's Medicare billing privileges and his PTANs.

B. Findings of fact and conclusions of law

I make the following findings of fact and conclusions of law (Findings).

1. The undisputed material facts establish that Petitioner failed to comply with Medicare enrollment requirements. Therefore, CMS and/or TrailBlazer were authorized to revoke Petitioner's Medicare billing privileges and his PTANs.

TrailBlazer revoked Petitioner's Medicare billing privileges and PTANs on the authority of 42 C.F.R. §§ 424.535(a)(1) and 424.516(d)(1)(ii). The first cited regulation authorizes CMS to revoke a provider's billing privileges when that provider has failed to comply with Medicare enrollment requirements. The second regulation states, as a Medicare enrollment requirement, that a physician must report within 30 days of its occurrence any adverse legal action to CMS, or to his or her Medicare contractor (TrailBlazer in this case).

The gravamen of CMS's case against Petitioner is that Petitioner failed to report the revocation of his license to practice medicine in California. Thus, according to CMS, Petitioner failed to comply with the Medicare enrollment requirement that is stated at 42 C.F.R. § 424.516(d)(1)(ii) and, consequently, revocation was authorized pursuant to 42 C.F.R. § 424.535(a)(1). Further, 42 C.F.R. § 424.535(g) required CMS to make the revocation of Petitioner's enrollment and billing privileges effective as of October 10, 2008, the date his State medical license was revoked.

I find these assertions to be supported by the undisputed material facts. It is undisputed that, on November 30, 2007, Petitioner entered into a consent order and settlement agreement (Mediated Agreed Order) with the Texas Medical Board to resolve a

disciplinary action that had been brought against his license to practice medicine in that State. CMS Ex. 1 at 15-22. As part of the consent order, the Texas Medical Board found that Petitioner had failed to meet standards of professional care in his treatment of 13 patients at a minor emergency clinic. The Board found multiple violations of standards of care, including: a lack of appropriate evaluation of patients' complaints and physical symptoms; failures to plan treatment provided to patients and failures to provide rationales for treatment; nontherapeutic prescription of medications, including giving patients multiple prescriptions or prescribing multiple medications that had the same or similar mechanisms of action; failures to maintain adequate medical records for treatments; and failure to supervise staff adequately. *Id.* at 16. The terms of the consent order included training requirements and the appointment of a Texas Medical Board designated monitor to oversee Petitioner's practice of medicine. *Id.* at 17-18. There were additional requirements as well, and the consent order contained prescribed penalties for violation of any of the order's requirements.

It is also undisputed that, on June 18, 2008, a formal accusation (complaint) was filed against Petitioner before the Medical Board of California. CMS Ex. 1 at 9-13. That complaint recited the action of the Texas Medical Board and asserted that this action constituted unprofessional conduct and/or grounds for disciplinary action against Petitioner's license to practice medicine in California. *Id.* at 12. The complaint sought relief, which included revocation or suspension of Petitioner's license to practice medicine in California. *Id.*

The undisputed facts also are that, on October 10, 2008, the Medical Board of California entered a default decision and order (Default) against Petitioner. CMS Ex. 1 at 4-7. The Default recited that the complaint had been served on Petitioner but that Petitioner had failed to file a response to it. *Id.* at 5. The Medical Board of California therefore revoked Petitioner's license to practice medicine in that State. *Id.* at 6-7.

Finally, it is undisputed that Petitioner failed to notify either CMS or TrailBlazer of his California license revocation. The foregoing facts plainly give CMS and/or TrailBlazer the authority to revoke Petitioner's Medicare billing privileges and his PTANs.

In revoking Petitioner's billing privileges and his PTANs, CMS relied on 42 C.F.R. § 424.516(d)(1)(ii), a regulation that became effective on January 1, 2009. This regulation requires a provider to notify CMS of any adverse legal actions within 30 days of their occurrence. CMS construes a license revocation – such as that which was taken against Petitioner's license by the State of California – as an adverse legal action. *See* 42 C.F.R. § 424.502. It asserts that Petitioner failed to comply with the regulation's requirements by not reporting his California license revocation. It argues further that Petitioner's failure to report the license revocation in accord with regulatory requirements is a violation of another regulation, 42 C.F.R. § 424.535(a)(1), which requires a provider, such as Petitioner, to comply with all Medicare participation requirements. CMS

contends that Petitioner's failure to report his license revocation is a failure by him to comply with Medicare participation requirements and, therefore, grounds for revocation of his billing privileges and PTANs.

The process that took place against Petitioner in California was both substantively and procedurally an adverse legal action. The proceeding had the potential of depriving Petitioner of his license to practice medicine in California and, in fact, that was its outcome. The proceeding was conducted pursuant to rules of procedure that were designed to ensure that Petitioner received due process of law. There was a formal complaint against Petitioner, which he had a right to answer with a formal pleading. CMS Ex. 1 at 30. That complaint was served with a statement (Statement to Respondent) that had all of the trappings of a summons in a court of law and which spelled out in detail Petitioner's rights. *Id.* at 23-24. The statement also warned Petitioner that action might be taken against him if he failed to answer the complaint. *Id.* A discovery request was also served against Petitioner. *Id.* at 25-27.

Petitioner essentially argues that the effective date of his revocation is inequitable. Section 424.535 was amended pursuant to notice and comment rulemaking and became effective January 1, 2009. Section 424.535(g) provides:

> 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 . . . license suspension or revocation. When a revocation is based on . . . license suspension or revocation, the revocation is effective with the date of . . . license suspension or revocation . . . .*

42 C.F.R. § 424.535(g) (2009) (emphasis added). The preamble of the final rule publication addressed the very issue raised by Petitioner. The preamble states that the changes to the regulations that can result in the revocation of enrollment and billing privileges becoming effective on a date earlier than the notice (effective retroactively to the date a State license is revoked or suspended) does not constitute a violation of due process rights because the physician is afforded appeal rights. 73 Fed. Reg. 69,726, 69,865 (Nov. 19, 2008). The preamble explains the rationale is to ensure that payments to providers who have had a state medical license suspended or revoked are immediately ceased to prevent wrongful payments. *Id.* at 69,865-66. The preamble states:

> We believe that these changes will ensure that providers and suppliers are afforded due process rights under 42 CFR Part 498, but also ensure that Medicare is not making or continuing to make payments to providers and suppliers who are no longer eligible to receive payments.

> We continue to believe that revocations such as felony convictions and license suspensions or revocations are determinations that do not lend themselves to a corrective action plan and that the revocation should be effective with the date of the felony conviction or license suspension or revocation action.

Id. at 69,866.

42 C.F.R. § 424.516 became effective several months after Petitioner's California license was revoked. Applying that regulation to the facts of this case raises a question as to whether that regulation also is being applied retroactively in Petitioner's case and, if so, whether that application is contrary to the Secretary's intent in adopting it. However, I do not have to reach this issue to decide this case.

The reporting requirements of 42 C.F.R. § 424.516 revised the previous reporting requirements stated at another regulation, 42 C.F.R. § 424.520(b) (2008). This regulation contains somewhat more general requirements than those set forth at 42 C.F.R. § 424.516. In relevant part, it states:

> [A] provider . . . must report to CMS any changes to the information furnished on the enrollment application and furnish supporting documentation within 90 calendar days of the change . . . *Failure to do so may result in the deactivation or revocation of the provider or supplier's Medicare billing privileges.*

42 C.F.R. § 424.520(b) (2008) (emphasis added). Petitioner's failure to report the revocation of his California license was a failure to report a change in the information he supplied in his enrollment application. Consequently, CMS was authorized to revoke his billing privileges and his PTANs, even if 42 C.F.R. § 424.516 does not apply retroactively.

I take notice that the Medicare application form for physicians, CMS 855I, requires the physician applicant to provide CMS with information as to his or her medical licensure. I note furthermore, that at pages 12-13 of the form, the physician must notify CMS of any adverse action, and these actions may include loss or revocation of a professional license. Thus, any failure by Petitioner to report a loss of his medical license, after he enrolled in Medicare, was a failure by him to report a change in his status, in that it was a failure to report a new adverse action against him.

Petitioner argues that he was under no obligation to report a change in his licensure as a change to the information he furnished on his enrollment application. According to him, all that he was required to report were changes in the basic provider information that he supplied as part of his application. That assertion is incorrect. As I have discussed,

Petitioner was under a continuing obligation to report adverse actions, because reporting adverse actions is a necessary element of the enrollment application.

Petitioner argues that he did not bother to reply to the California complaint because:

> He was told it was the policy of California that while it always revoked or suspended a license in . . . [the circumstances of an adverse action by another State's board], it then stayed such action and placed the physician on probation with the same terms as that contained in the other state. Petitioner was faced with an expensive trip to California which included the necessity to obtain counsel, the fact that he had not practiced in California since the early 60s, and the time away from his practice. Given these matters, Petitioner chose not to attend the hearing.

Petitioner's Brief at 8 (citing P. Ex. 1). However, assuming these contentions to be true, they do not provide any defense to Petitioner's failure to report the adverse legal action in California, nor do they vitiate TrailBlazer's and CMS's authority to revoke Petitioner's Medicare billing privileges and his PTANs. The undisputed facts are that Petitioner's California medical license was revoked and that the revocation was an adverse action. The fact that Petitioner may have elected, for personal reasons, not to dispute the California license revocation action does not change its status, nor does it eliminate his requirement to report it.

2. Petitioner has not created a dispute as to the material facts nor has he established that he has been denied due process.

Petitioner asserts that there is a dispute as to the facts on which I rely to find that CMS and TrailBlazer were authorized to revoke Petitioner's Medicare billing privileges and his PTANs. I find that Petitioner has asserted no facts that create a legitimate dispute as to material facts.

Petitioner asserts that he disputes that the allegations of the Board of Medical Examiners of California were based on the consent order entered against him in Texas. According to Petitioner, the consent order in Texas made "no mention" of unprofessional conduct by Petitioner. Petitioner's Brief at 5. Petitioner cites to nothing other than the consent order to support this assertion. *Id.; see* CMS Ex. 1 at 15. Petitioner's assertion is simply incorrect. The consent order made specific findings of fact that Petitioner violated professional standards of care, and Petitioner has offered nothing to show that the consent order does not accurately reflect what was found by the Texas Medical Board. CMS Ex. 1 at 16.

Moreover, Petitioner's assertion is irrelevant, even if it is true. The issue before me is not what was found in Texas but whether Petitioner failed to report an adverse legal action. The California action against Petitioner was adverse by any definition.

Petitioner's remaining assertions of fact and arguments relate to the notices that were sent to him by TrailBlazer and Petitioner's actions in reaction to those notions. Essentially, Petitioner claims that he was not properly notified of TrailBlazer's determination, not given a fair opportunity to challenge that determination, and not given the requisite opportunity to file a corrective action plan (CAP) to address the findings of noncompliance that are the basis for his billing privileges and PTAN revocations.

I find these assertions to be unsupported by the facts, including those relied on by Petitioner. The undisputed facts of this case are that: Petitioner received notice of TrailBlazer's determination and was fully apprised of his opportunity to file a CAP as well as a request for reconsideration of the initial determination. This is established not only by the notices that were sent to Petitioner but by the fact that Petitioner *acted* on those notices. He timely requested reconsideration of TrailBlazer's determination, and he purported to file a CAP. There was no denial of due process to Petitioner. He received all of the rights that he was entitled to receive and, indeed, exercised those rights.

TrailBlazer sent several notices of its adverse determination. On August 28, 2009, it sent notices to: Midland Community Healthcare Services; Premier Family Care I, Inc.; and Midland Minor PA. CMS Ex. 2 at 1-6. Each of these notices was captioned with the heading "Disciplinary Action taken Against Daniel H. Kinzie IV." I infer that these entities were entities that provided healthcare using PTANs held by Petitioner. Petitioner has offered no facts to challenge that inference. Moreover, it is clear that they, or at least some of them, were referred to Petitioner. He contends that he did not see any of these initial notices until September 22, 2009, but he does not deny having seen them. P. Ex. 1 at 3-4.

On September 18, TrailBlazer sent revised notices to the aforesaid entities, and one of these was addressed directly to Petitioner. CMS Ex. 3 at 1-6. Petitioner contends that these revised notices were "not appropriately addressed" and that he "did not see such letters until after which inappropriate time was given for response." Petitioner's Brief at 5. In his affidavit, Petitioner contends that he did not see the revised notices until January 2010. P. Ex. 1 at 4. But, in fact, Petitioner had already replied to the previously sent notices, and those notices had apprised Petitioner of the basis for TrailBlazer's determination. On September 23, 2009, Petitioner filed both a request for reconsideration of that determination and a CAP. CMS Ex. 4 at 1-2. Petitioner does not dispute that he did so.

Petitioner contends that he was unaware of the underlying basis for TrailBlazer's determination. In fact, he plainly was aware of it and responded to it. In a letter that Petitioner wrote to TrailBlazer on September 23, 2009, he states:

> The letter indicates that the reason . . . [for the revocation determination] was failure to report pursuant to 42 C.F.R. Section 424.516(d)(1)(ii). This section requires physicians to report any adverse legal action within 30 days.

CMS Ex. 4 at 2. Thus, Petitioner has offered no basis either in fact or in law for me to find any material dispute as to TrailBlazer's and CMS's authority to act in this case.

I note, moreover, that I have authority to raise new issues in a case so long as I provide notice to the parties and an opportunity for them to be heard. 42 C.F.R. § 498.56. I gave CMS and Petitioner notice that I might decide that Petitioner was obligated to report his California license revocation, pursuant to the requirements of 42 C.F.R. § 424.520. Both parties briefed that issue. Consequently, Petitioner was given fair notice of the possible basis for my decision.

/s/
Steven T. Kessel
Administrative Law Judge