Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Stephen Becker, M.D.
(PTAN: 103I933423; NPI: 1891741252),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-414

Decision No. CR4951

Date: October 12, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, Cahaba Government Benefit Administrators, LLC (Cahaba), revoked the Medicare enrollment and billing privileges of Stephen Becker, M.D. (Petitioner), because the Pennsylvania Department of Human Services terminated Petitioner's Medicaid provider agreement. Petitioner requested a hearing to dispute the revocation. Because CMS properly revoked Petitioner's Medicare enrollment and billing privileges and set a correct effective date for revocation, I affirm CMS's determination.

I. Background and Procedural History

Petitioner is a physician licensed to practice medicine in Tennessee. *See* CMS Exhibit (Ex.) 3 at 10.

In October 2012, Petitioner signed a Consent Order with the Tennessee Board of Medical Examiners in which he acknowledged that he had violated the Tennessee Medical Practice Act when he "incorrectly use[d] the tumescent liposuction procedure," to include removing an amount of fat from a patient that "exceeded the limit allowed for both a

Level I office-based surgery as well as a Level II office-based surgery." CMS Ex. 3 at 7-13. The Consent Order discussed that Petitioner was not qualified to perform Level II office-based surgery, did not have the appropriate equipment and safety procedures in place to perform Level II office-based surgery, and did not employ appropriate personnel to assist him with Level II office-based surgery. CMS Ex. 3 at 8-9. Petitioner agreed to the imposition of penalties that included five years of probation, restrictions on his medical license, and a total of $34,000 in monetary penalties and costs. CMS Ex. 3 at 10-11. The Tennessee Board of Medical Examiners approved the Consent Order on November 28, 2012. CMS Ex. 3 at 12.

In July 2013, Petitioner, with the advice of counsel, entered into a Consent Agreement and Order with the State Board of Medicine for the Commonwealth of Pennsylvania. CMS Ex. 3 at 1-6. Petitioner agreed to the following, in pertinent part:

> a. Respondent violated the Act at 63 P.S. §422.41(4) in that Respondent had disciplinary action taken by a proper licensing authority of another state.
>
> b. In consideration for not imposing other disciplinary sanctions, the parties propose, and the Board hereby accepts the permanent VOLUNTARY SURRENDER of Respondent's license number MD-043469-L, along with any other licenses issued by the Board to Respondent at the time this Consent Agreement is adopted by the Board. Respondent acknowledges that with the permanent voluntary surrender of his license(s), Respondent is surrendering any and all property rights he may have in those license(s) and will no longer be eligible to renew those licenses. As further stated consideration for the Commonwealth not seeking other disciplinary sanctions against Respondent, Respondent agrees not to apply for the issuance or reissuance/reinstatement of any other licenses issued by the Board and any future applications or petitioner submitted by the Respondent to the Board shall immediately be deemed denied.
>
> c. The permanent voluntary surrender of Respondent's license(s) shall be considered a disciplinary sanction by the Board and will be reported to other licensing authorities and any applicable national licensing databank as a disciplinary action by the Board.
>
> d. Upon adoption of this Consent Agreement and Order, Respondent shall not return to the practice of medicine in Pennsylvania, and shall not represent himself as a board licensee in any manner whatsoever.

CMS Ex. 3 at 2-3 (emphasis omitted).

On March 26, 2015, the Pennsylvania Department of Human Services informed Petitioner that it was terminating his Pennsylvania Medical Assistance (MA) Program provider agreement based on his voluntary surrender of his Pennsylvania medical license.[1] CMS Ex. 4. The letter provided instructions for Petitioner to appeal the termination of his Pennsylvania MA Program provider agreement. CMS Ex. 4 at 2-3.

Cahaba, in a July 9, 2015 initial determination, revoked Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(12), effective August 8, 2015, based on the termination of Petitioner's Pennsylvania Medicaid provider agreement. CMS Ex. 2 at 1. Cahaba also informed Petitioner that he was barred from re-enrolling in the Medicare program for two years, effective 30 days from the date of postmark of the letter. CMS Ex. 2 at 2.

Petitioner requested reconsideration of the revocation determination in December 2015.[2] CMS Ex. 5. Petitioner explained:

> Four years ago I found out that I was not following the Tennessee Board of Medicines [sic] rules concerning Tumescent Liposuction. Three years ago I was fined and placed on probation by the board of medical examiners. The only restriction on my license was that before performing cosmetic procedures I was to present proof to the board that I was adequately trained. Since stopping tumescent liposuction I have been an ER physician working as an independent contractor with Team Health and more recently Concord Medical Group.
>
> As a result of the probations the one other state where I still had an active license, Florida, and two states that grant lifetime licenses contacted me, New York and Pennsylvania. Having not practiced in the latter two states since 1976 and about 2003, and having no interest in practicing there in the future it was easier and less expensive to surrender my licenses in NY and

[1] The Pennsylvania MA Program is the state's Medicaid program. *See* 55 Pa. Code § 1101.21 (definitions) (defining Medicaid as "Medical Assistance provided under a State Plan approved by HHS under Title XIX of the Social Security Act."); 55 Pa. Code § 1101.11(b) ("The MA Program is authorized under Article IV of the Public Welfare Code (62 P.S. §§ 401-488) and is administered in conformity with Title XIX of the Social Security Act (42 U.S.C.A. §§ 1396 – 1396q) and regulations issued under it.")

[2] Petitioner alleged that he did not receive the initial determination until December 3, 2015. Petitioner ultimately filed a request for hearing, and Administrative Law Judge Leslie A. Weyn granted CMS's unopposed motion for remand. CMS Ex. 7 at 1. The reconsidered determination submitted as CMS Ex. 1, dated February 2, 2017, followed the Order of Remand and Dismissal and is the basis for the instant request for hearing.

> PA. Interestingly, PA said that for $10000 I could maintain my PA license. A number of months ago I received notification that the PA Medicaid was withdrawing me from their rooster [sic]. I assumed that the action was taken because I no longer have a PA medical license. That was not an issue with other states where I had practiced because once ones medical license becomes inactive one has to go through the credentialing from the beginning. In NY and PA all I would have had to do was pay a fee to activate my medical licenses. Florida will be returning my license to an active state as soon as the TN probation is lifted.

CMS Ex. 5 at 2.

In a reconsidered determination dated February 2, 2017, CMS's Provider Enrollment & Oversight Group upheld Petitioner's revocation based on 42 C.F.R. § 424.535(a)(12). The reconsidered determination stated:

> Dr. Becker voluntarily surrendered his Pennsylvania medical license in order to avoid other disciplinary sanctions, which led to the termination of his Pennsylvania Medicaid agreement. Dr. Becker's Medicare billing privileges were properly revoked under 42 C.F.R. § 424.535(a)(12).

CMS Ex. 1 at 3.

Petitioner timely requested a hearing. On April 4, 2017, I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of pre-hearing exchanges. CMS filed a pre-hearing exchange in accordance with the Order, to include a motion for summary judgment in lieu of a brief, along with seven exhibits (CMS Exs. 1-7). Petitioner filed a brief (P. Br.) in response to CMS's motion for summary judgment, along with two exhibits (P. Exs. 1-2). In the absence of any objections, I admit CMS Exs. 1-7 and P. Exs. 1-2 into the record.

Neither party has submitted the written testimony of any witness. Order, § 8. Because a hearing is not necessary for the purpose of cross-examination of any witnesses, I consider the record to be closed and the matter ready for a decision on the merits.[3] Order, §§ 9, 10.

[3] As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS's motion for summary disposition.

II. Issue

Whether CMS properly revoked Petitioner's Medicare enrollment and billing privileges, effective August 8, 2015.

III. Jurisdiction

I have jurisdiction to decide this issue. *See* 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis[4]

Petitioner is a physician and, therefore, he is a supplier for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of *Supplier*), 410.20(b)(1). CMS may revoke a supplier's Medicare billing privileges for any of the reasons stated in 42 C.F.R. § 424.535. When CMS revokes a supplier's Medicare billing privileges, CMS establishes a re-enrollment bar that lasts from one to three years. 42 C.F.R. § 424.535(c). Generally, a revocation becomes effective 30 days after CMS mails the initial determination revoking Medicare billing privileges. 42 C.F.R. § 424.535(g).

1. CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(12) to revoke Petitioner's Medicare enrollment and billing privileges because the Pennsylvania Department of Human Services terminated Petitioner's participation agreement in its Medicaid program and that determination is final.

On March 26, 2015, the Pennsylvania Department of Human Services informed Petitioner that it was terminating his Medicaid provider agreement. CMS Ex. 4 at 1. The letter informed Petitioner that the Pennsylvania Department of Human Services had previously informed Petitioner of its intent to terminate his provider agreement, retroactive to the date of his surrender of his Pennsylvania medical license on September 17, 2013, and Petitioner did not submit a response. CMS Ex. 4 at 1. The March 26, 2015 letter informed Petitioner that he could appeal the termination of his Medicaid provider agreement. CMS Ex. 4 at 2. Petitioner did not appeal the termination. P. Br.[5] (Petitioner's statement that he "did not appeal because the Petitioner no longer desired to practice medicine in the state of Pennsylvania as evidence[d] by not holding an active

[4] My findings of fact and conclusions of law are set forth in italics and bold font.

[5] I do not provide pinpoint citations to Petitioner's brief because the brief is not paginated.

license since 2008."); CMS Ex. 5 at 2 (Petitioner's explanation that he "assumed the [termination] action was taken because I no longer have a PA medical license.").

CMS revoked Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(12), which states that CMS may revoke a supplier's billing privileges if:

> (i) Medicaid billing privileges are terminated or revoked by a State Medicaid Agency.
>
> (ii) Medicare may not terminate unless and until a provider or supplier has exhausted all applicable appeal rights.

Based on the evidence of record, I conclude that CMS properly revoked Petitioner's Medicare billing privileges because his Medicaid billing privileges were terminated by the Pennsylvania Department of Human Services and Petitioner did not exercise his right to appeal the termination. P. Br.; CMS Ex. 5 at 2.

Petitioner argues that there are "inconsistencies" involving his revocation because he "won" an appeal of the termination of his Tennessee Medicaid enrollment and that the "only logical explanation [for his revocation] is the cost savings from avoiding $313,717.00 of Medicare bills payable to the Petitioner's employer Concord Medical Group, PLLC." P. Br. Regardless of whether there are "inconsistencies" or a resulting cost savings to Medicare program, as alleged by Petitioner, Petitioner has not shown that CMS and its contractor were not authorized to revoke his Medicare enrollment based on 42 C.F.R. § 424.535(a)(12). Simply stated, the Pennsylvania Department of Human Services terminated Petitioner's Medicaid agreement, and Petitioner did not appeal that action; CMS was therefore authorized to revoke Petitioner's Medicare enrollment and billing privileges. 42 C.F.R. § 424.535(a)(12).

2. CMS properly established August 8, 2015, as the effective date for the revocation of Petitioner's Medicare enrollment and billing privileges.

Cahaba issued its determination to revoke Petitioner's Medicare enrollment and billing privileges on July 9, 2015, and stated in that determination that the revocation would be effective 30 days from the date of the letter, on August 8, 2015.[6] CMS Ex. 2 at 1. Under the regulations, and as relevant here, a "[r]evocation becomes effective 30 days after CMS or the CMS contractor mails notice of its determination to the . . . supplier . . . ." 42 C.F.R. § 424.535(g). The effective date of Petitioner's revocation, August 8, 2015, is 30

[6] The reconsidered determination contains an obvious typographical error, in that the August 8, 2016 date listed as the effective date of revocation was incorrect and should have been listed at August 8, 2015. CMS Ex. 1 at 1.

days after the date CMS's administrative contractor issued its July 9, 2015 initial determination. As such, CMS properly assigned the effective date of revocation.

3. The two-year length of the reenrollment bar is not reviewable.

The Departmental Appeals Board (DAB) has explained that "CMS's determination regarding the duration of the re-enrollment bar is not reviewable." *Vijendra Dave, M.D.*, DAB No. 2672 at 11 (2016). The DAB explained that "the only CMS actions subject to appeal under Part 498 are the types of initial determinations specified in section 498.3(b)." *Id.* The DAB further explained that "[t]he determinations specified in section 498.3(b) do not, under any reasonable interpretation of the regulation's text, include CMS decisions regarding the severity of the basis for revocation or the duration of a revoked supplier's re-enrollment bar." *Id.* The DAB discussed that a review of the rulemaking history showed that CMS did not intend to "permit administrative appeals of the length of a re-enrollment bar." *Id.* I have no authority to review this issue and I do not disturb the two-year reenrollment bar.

V. Conclusion

I affirm CMS's determination to revoke Petitioner's Medicare enrollment and billing privileges, effective August 8, 2015.

/s/
Leslie C. Rogall
Administrative Law Judge