Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

David Burkett, M.D.,

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-279

Decision No. CR2830

Date: June 19, 2013

DECISION

Pinnacle Business Solutions, Inc. (Pinnacle), an administrative contractor acting on behalf of the Centers for Medicare and Medicaid Services (CMS), notified Petitioner, David Burkett, M.D., that his Medicare enrollment and billing privileges were revoked effective May 23, 2012, for noncompliance with enrollment requirements and failure to report an adverse legal action. Petitioner appealed. For the reasons stated below, I grant summary judgment to CMS and affirm CMS's determination to revoke Petitioner's enrollment and billing privileges, effective May 23, 2012.

I. Case Background and Procedural History

Petitioner is a cardiologist in Monroe, Louisiana. He was enrolled in the Medicare program as a supplier.[1] On May 23, 2012, the Louisiana State Board of Medical Examiners (Louisiana Board) issued an Order for Summary Suspension of Medical License, suspending Petitioner's medical license, effective immediately. CMS Exhibit (Ex.) 2; Petitioner (P.) Ex. 1, at 1.

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[1] The Medicare program considers a physician to be a "supplier." 42 C.F.R. §§ 400.202, 498.2.

On July 5, 2012, Pinnacle informed Petitioner that his Medicare Provider Transaction Access Numbers (PTANs) and Medicare billing privileges were revoked, effective May 23, 2012, based on violations of 42 C.F.R § 424.535(a)(1) and (a)(9). Specifically, Pinnacle determined that Petitioner was noncompliant with enrollment requirements under the regulations because his Louisiana medical license had been suspended effective May 23, 2012. Further, Pinnacle determined that Petitioner failed to report the suspension (i.e., an adverse legal action) by the Louisiana Board to the Medicare contractor as required by 42 C.F.R. § 424.516(d)(1)(ii).[2] Pinnacle informed Petitioner that, pursuant to 42 C.F.R. § 424.535(c), it imposed a bar for one year on Petitioner's re-enrollment in the Medicare program. CMS Ex. 1; P. Ex. 5.

On August 23, 2012, Petitioner filed a request for reconsideration with Pinnacle. Petitioner acknowledged that his Louisiana medical license was suspended, but claimed that his office reported his license suspension by telephone within a week after it occurred. Petitioner stated that he was "at that time not personally able to communicate" because he had entered an inpatient facility for treatment. Petitioner requested that the revocation of his billing privileges last only so long as his medical license was suspended. CMS Ex. 3; P. Ex. 5, at 11-12.[3]

On November 17, 2012, Novitas Solutions (Novitas), issued a reconsidered determination.[4] CMS Ex. 4. Novitas noted that Petitioner did not dispute the finding of his license suspension, but that he appeared to dispute the failure to timely report the adverse legal action. Novitas reviewed the documentation submitted by Petitioner and found that he had not provided any evidence of having reported the adverse action. Accordingly, Novitas concluded that Petitioner was not in compliance with the Medicare enrollment requirements under 42 C.F.R. § 424.535(a)(1) and (a)(9), and upheld the revocation of Petitioner's billing privileges. CMS Ex. 4; P. Ex 5, at 14-17.

On December 26, 2012, Petitioner timely filed a request for a hearing with the Departmental Appeals Board, Civil Remedies Division. In accordance with my January 10, 2013 Acknowledgment and Pre-hearing Order (Pre-hearing Order), CMS timely filed a motion for summary judgment and brief (CMS Br.), along with CMS Exs. 1-5.

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[2] Pinnacle's July 5, 2012 letter incorrectly refers to 42 C.F.R. § 424.535(a)(9) as 42 C.F.R. § 424.535(9).

[3] Petitioner stated that his medical license in Texas had also been suspended as a result of the suspension of his Louisiana license. CMS Ex. 3.

[4] Novitas replaced Pinnacle as the administrative contractor acting on behalf of CMS. *See* CMS Ex. 4, at 1.

Petitioner timely filed his pre-hearing exchange, which included a response brief (P. Br.) and P. Exs. 1-5. Because neither party objected to any of the proposed exhibits, I admit all of the proposed exhibits into the record.

The Pre-hearing Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Pre-hearing Order ¶¶ 8, 9, and 10; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). CMS did not offer any proposed witnesses. Petitioner listed four proposed witnesses, but failed to comply with the Pre-hearing Order because he did not submit written direct testimony for any of them. However, as explained below, I am granting CMS's motion for summary judgment. Therefore, a hearing in this case is unnecessary.

II. Discussion

In order to participate in the Medicare program as a supplier, individuals must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510, and 424.516. CMS may revoke the Medicare billing privileges of suppliers who do not continue to comply with all enrollment requirements. *Id.* § 424.535(a)(1). CMS may also revoke the billing privileges of a supplier who fails to timely inform CMS of any adverse legal action taken against the supplier. *Id.* §§ 424.516(d)(1); 424.535(a)(9).

A. Issues

This case presents the following four issues:

1. whether summary judgment is appropriate;
2. whether CMS had a legitimate basis to revoke Petitioner's billing privileges under 42 C.F.R. § 424.535(a)(1);
3. whether CMS had a legitimate basis to revoke Petitioner's billing privileges under 42 C.F.R. § 424.535(a)(9); and
4. whether the one-year bar to re-enrollment as a Medicare supplier can be reduced to less than a year.

B. Findings of Fact, Conclusions of Law, and Analysis[5]

1. Summary judgment is appropriate in this case.

When appropriate, administrative law judges (ALJs) may decide a case arising under 42 C.F.R. Part 498 by summary judgment. *See* Civil Remedies Division Procedures § 7; *Livingston Care Ctr. v. U.S. Dep't of Health & Human Srvcs.*, 388 F.3d 168, 172 (6th Cir. 2004) (citing *Crestview Parke Care Ctr. v. Thomson*, 373 F.3d 743 (6th Cir. 2004). Summary judgment is appropriate if "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." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574,587 (1986). "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." *Senior Rehab*., DAB No. 2300, at 3. To determine whether there are genuine issues of material fact for hearing, an administrative law judge must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.* When ruling on a motion for summary judgment, an administrative law judge may not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

In the present case, CMS has moved for summary judgment to uphold a revocation based on 42 C.F.R. § 424.535(a)(1) for noncompliance with Medicare enrollment requirements for physicians and 42 C.F.R. § 424.535(a)(9) for failure to timely report an adverse legal action as required by 42 C.F.R. § 424.516(d)(1)(ii). Petitioner's revocation under section 424.535(a)(1) turns on the interpretation and application of the regulations that govern revocation of enrollment in the Medicare program. The material facts relating to the suspension of Petitioner's medical license are not disputed and thus, summary judgment in favor of CMS on this issue is appropriate. I conclude, however, that the facts are disputed concerning whether Petitioner timely reported his suspension to the Medicare contractor. Therefore, for purposes of summary judgment, I do not uphold Petitioner's revocation based on a violation of section 424.535(a)(9). Because Petitioner's revocation is supported by a violation of section 424.535(a)(1), it is unnecessary to decide whether Petitioner also violated section 424.535(a)(9).

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[5] My findings of fact and conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

2. CMS had a legitimate basis to revoke Petitioner's enrollment and billing privileges in the Medicare program pursuant to 42 C.F.R. § 424.535(a)(1), because Petitioner was no longer in compliance with enrollment requirements once his Louisiana medical license was suspended.

Pursuant to 42 C.F.R. § 424.535(a)(1), CMS is authorized to revoke a currently enrolled supplier's billing privileges if the supplier is determined to no longer meet the requirements for enrollment for its supplier type, subject to an opportunity for the supplier to make corrections before revocation. Among the applicable requirements for a supplier to maintain enrollment is compliance with the applicable federal and state licensure requirements for his supplier type. 42 C.F.R. § 424.516(a)(2). A supplier who is a physician, as Petitioner is, must be "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." *Id*. § 410.20(b).

In order to enroll in Medicare and receive billing privileges, Petitioner needed to be licensed by the State of Louisiana, the state where he practiced as a physician. Petitioner does not dispute that his medical license in the State of Louisiana was suspended on May 23, 2012 (P. Br. at 2; P. Exs. 1, at 1; 2, at 1; CMS Ex. 2, at 2) and the suspension lasted until December 3, 2012. P. Ex. 1, at 10-14; CMS Ex. 2, at 3-7. Further, Petitioner admitted that "he practices only in Louisiana." P. Ex. 2, at 2.

When Petitioner's medical license was suspended by the Louisiana Board, he no longer met the enrollment requirement of 42 C.F.R. § 410.20(b). As stated above, noncompliance with the enrollment requirements is a basis for revocation of Medicare billing privileges and enrollment. 42 C.F.R. § 424.535(a)(1). Based on the undisputed facts, CMS had the authority to revoke Petitioner's enrollment and billing privileges in the Medicare program based on the suspension of his Louisiana medical license.

3. I do not base summary judgment in this case on Petitioner's alleged failure to report adverse legal action as required by 42 C.F.R. §§ 424.516(d)(1)(ii) and 424.535(a)(9) because there are material facts related to this issue in dispute.

Pursuant to 42 C.F.R. § 424.516(d)(1)(ii), a supplier who is a physician must report "any adverse legal action" to the Medicare contractor within 30 days. The phrase "adverse legal action" is not specifically defined in 42 C.F.R. Part 424. However, "final adverse action" is defined in the regulations to include "[s]uspension or revocation of a license to provide health care by any State licensing authority." *Id*. § 424.502. If a physician fails to report this information, CMS may revoke billing privileges. *Id*. § 424.535(a)(9).

CMS argues that Petitioner failed to report the suspension of his medical license to the Medicare contractor within 30 days as required by 42 C.F.R. § 424.516(d)(1)(ii), and thus, another basis for revocation of Petitioner's billing privileges exists under 42 C.F.R. § 424.535(a)(9). CMS claims that summary judgment is also appropriate for this basis of revocation because Petitioner offered no evidence to show he timely notified Medicare of the adverse legal action.

Petitioner, however, asserts in both his request for reconsideration and his brief that his staff informed the Medicare contractor by telephone that his medical license had been suspended. P. Ex. 5, at 11; P. Br. at 4. Petitioner submitted as an exhibit a written statement from his office manager who asserts that she twice called Pinnacle, on June 4 and 5, 2012, and discussed Petitioner's suspended license in the context of adding a new supplier to Petitioner's practice. P. Ex. 4, at 1. According to the office manager, she was never informed by Pinnacle's representative that she needed to provide written notice of Petitioner's suspension. Petitioner argues, moreover, that when the Louisiana Board suspended his license, he was receiving treatment for substance abuse at an out-of-state inpatient facility where "his freedom to communicate and act with the outside world was severely constrained." P. Br. at 4. Petitioner claims that the Louisiana Board immediately informed CMS of his license suspension and that there was no intention to conceal his license suspension from CMS. P. Br. at 4.

CMS contends that there is no documentation among the contractor's records it reviewed that establishes that Petitioner informed Pinnacle of his license suspension. CMS Br. at 6-7; CMS Ex. 4, at 3. CMS notes that, according to Pinnacle's telephone call sheet, a staff person at Petitioner's clinic contacted Pinnacle on May 30, 2012. CMS Ex. 5. According to this telephone record, the reason for Petitioner's call was to inquire as to "[w]hich application needs to be completed." CMS Ex. 5. CMS asserts that Petitioner's telephone inquiry related to the enrollment of another supplier and made no reference to Petitioner's license suspension.

Because the facts are disputed as to whether or not Petitioner notified Pinnacle of his license suspension, I must draw all reasonable inferences in Petitioner's favor. A reasonable inference drawn from the statement of Petitioner's office manager is that she raised Petitioner's suspension during a telephone call with a Pinnacle representative, in the context of enrolling another supplier. Given the context of the situation (i.e., that Petitioner could not report the matter himself because he was in a treatment facility), Petitioner might be considered to have sufficiently met the requirement to report the suspension to the Medicare contractor, especially since the regulations do not specify how notice to the contractor is to be made. *See* 42 C.F.R. § 424.516(d)(1)(ii). Therefore, I find that summary judgment is not appropriate for CMS related to this issue.

4. When CMS revoked Petitioner's billing privileges, the regulations required CMS to impose a re-enrollment bar that is at least one year in duration.

Whenever CMS has properly imposed revocation on a supplier, CMS must also determine how long the supplier will be barred from seeking re-enrollment as a supplier. The regulations at 42 C.F.R. § 424.535(c) provide:

> After a . . . supplier . . . has had their billing privileges revoked, they are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar is a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation.

Here, CMS imposed a one-year re-enrollment bar on Petitioner. CMS Ex. 1, at 3. Petitioner argues that he should not be subjected to a one-year bar given that his license suspension lasted less than a year. Petitioner also makes numerous equitable arguments, asking that I take into consideration the circumstances particular to his individual case. P. Br. at 5; Request for Hearing. He contends that "no constructive purpose" will be served by the fact that his re-enrollment bar "will run fully twice as long as the license suspension did" before he is able to reapply to Medicare. P. Br. at 4. Petitioner states that his suspension was unrelated to any Medicare program impropriety or substandard medical care. P. Br. at 3; Request for Hearing. Petitioner notes that the Louisiana Board and the state monitoring program have determined that he is able to resume his practice, and he argues that his continued suspension from Medicare would run counter to the goals of the state program, which seeks to help physicians with abuse issues and not put them out of the profession. P. Br. at 3; Request for Hearing. Petitioner claims that the impact on his practice is "severe" because most of his patients are Medicare patients. P. Br. at 5.

Even if I had authority to review the length of the re-enrollment bar, I could not grant Petitioner what he seeks: a re-enrollment bar that lasts less than a year. 42 C.F.R. § 424.535(c). CMS properly imposed the minimum re-enrollment bar of one year mandated by the regulations. 42 C.F.R. § 424.535(c). CMS and I are both bound by the regulations because they have the force and effect of federal law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295-296 (1979); *1866ICPayday.com, L.L.C.,* DAB No. 2289, at 14 (2009).

III. Conclusion

Because the undisputed facts establish that Petitioner violated 42 C.F.R. § 424.535(a)(1), I grant CMS's motion for summary judgment and affirm the revocation of Petitioner's enrollment and billing privileges in the Medicare program.

/s/

Scott Anderson
Administrative Law Judge