Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kendall Medical Center, Inc.
(PTAN: K8703)
(NPI: 1811951247),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-351

Decision No. CR4948

Date: October 5, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Petitioner, Kendall Medical Center, Inc. (Kendall or Petitioner), pursuant to 42 C.F.R. § 424.535(a)(8)(i) because Petitioner abused its billing privileges. Specifically, Petitioner submitted claims for services rendered to beneficiaries that identified Melvyn Sarnow, D.O., as the rendering physician. However, Dr. Sarnow was not in the state where Kendall is located on the dates the services were provided. Therefore, as explained more fully below, I conclude that CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges.

I. Background

Petitioner is a health care clinic in the state of Florida enrolled in the Medicare program under the National Provider Identifier (NPI) 1811951247. CMS Exhibit (Ex.) 1. Dr. Sarnow serves as Petitioner's medical director. CMS Ex. 3 at 2.

Data analysis conducted on claims billed by Petitioner revealed twenty-three (23) claims submitted for services rendered to beneficiaries in Florida identifying Dr. Sarnow as the

rendering physician. CMS Ex. 2. The dates of service were between June 16, 2015 and September 14, 2015. *Id*. However, Dr. Sarnow was in the state of Washington during this time. Request for Hearing (RFH) at 3.

In a letter dated August 17, 2016, CMS revoked Petitioner's billing privileges under 42 C.F.R. § 424.535(a)(8)(i). CMS Ex. 2. On September 8, 2016, Petitioner submitted a request for reconsideration admitting that Dr. Sarnow did not render the services that led to the revocation. CMS Ex. 3 at 3. In a reconsidered determination dated December 5, 2016, CMS, through its Provider Enrollment & Oversight Group, upheld the revocation. CMS Ex. 1.

Petitioner requested a hearing and the case was assigned to me. I issued an Acknowledgement and Pre-Hearing Order (Order) dated February 17, 2017, which directed each party to file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Order ¶¶ 4-5. The Order also explained that the parties should submit written direct testimony for any witnesses in lieu of in-person direct testimony. Order ¶ 8. Finally, the Order explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Order ¶ 10.

In response to the Order, CMS filed a motion for summary judgment and brief (CMS Br.) and six proposed exhibits (CMS Exs. 1-6). Petitioner has not objected to CMS's exhibits. Therefore, in the absence of objection, I admit into the record CMS Exs. 1-6. Petitioner, through counsel, filed a brief opposing summary judgment (P. Br.) and affidavits from three witnesses.[1] CMS has not requested to cross-examine Petitioner's witnesses, and has therefore waived cross-examination. Thus, a hearing is not necessary, and I decide the case on the written record without considering whether the standard for summary judgment is met.

II. Issue

Whether CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges because it submitted claims for services rendered to beneficiaries while Dr. Sarnow was not in the state of Florida.

[1] Petitioner submitted the affidavits of Dr. Edward Suarez, Dr. Juan Gabriel Camayd, and Dr. Melvyn Sarnow. The affidavits appear as attachments to Petitioner's Brief and are not marked as exhibits. I do not admit them as evidence. The affidavits of Dr. Edward Suarez and Dr. Juan Gabriel Camayd need not be admitted as they are of record as CMS Ex. 3 at 8-13. I reject the affidavit of Dr. Sarnow because it addresses an issue that is irrelevant to my decision in this case.

III. Jurisdiction

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

IV. Discussion

A. Statutory and Regulatory Framework

Petitioner is a "supplier" for purposes of the Medicare program as an entity that offers physician services. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1). In order to participate in the Medicare program as a supplier, individuals and entities must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke the enrollment and billing privileges of a supplier for any reason stated in 42 C.F.R. § 424.535. When CMS revokes a supplier's Medicare billing privileges, CMS establishes a reenrollment bar for a period ranging 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, but if the revocation is based on a felony conviction, the revocation is effective with the date of the conviction. 42 C.F.R. § 424.535(g).

B. Findings of Fact, Conclusions of Law, and Analysis

1. CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(8)(i) because Petitioner submitted claims for services rendered to beneficiaries that identified Dr. Sarnow as the rendering physician when Dr. Sarnow was not in the state on the dates the services were provided. [2]

Pursuant to 42 C.F.R. § 424.535(a)(8), CMS may revoke a supplier's enrollment in the Medicare program if a supplier abuses its billing privileges. Abuse of billing privileges includes any of the following:

> (i) The provider or supplier submits a claim or claims for services that could not have been furnished to a specific individual on the date of service. These instances include but are not limited to the following situations:
>
> > (A) Where the beneficiary is deceased.
> > (B) The *directing physician* or beneficiary is not in the state or country when services were furnished.
> > (C) When the equipment necessary for testing is not present where the testing is said to have occurred.

[2] My numbered findings of fact/conclusions of law appear in bold italic type.

42 C.F.R. § 424.535(a)(8)(i) (emphasis added).

In its brief, Petitioner specifically admits that it submitted claims to Medicare for services allegedly furnished by Dr. Sarnow on dates when Dr. Sarnow was in another state:

> CMS identified 22 Medicare claims submitted by Kendall for services rendered between June 16, 2015 and September 14, 2015 on which Kendall identified Dr. Sarnow as the rendering provider. Dr. Sarnow was in Washington State during that time period.

P. Br. at 2 (internal citations omitted). Instead, Petitioner represents, and CMS does not dispute, that the services for which the claims were submitted were for "'medical services provided by other Florida licensed physicians who maintain an employment relationship with Kendall.'" *Id.* On this basis, Petitioner argues that it did not submit fraudulent bills to Medicare. RFH at 5. Petitioner represents that the claimed services were in fact furnished to beneficiaries by licensed medical professionals, although not by Dr. Sarnow. P. Br. at 3-5; CMS Ex. 3 at 3. With its reconsideration request, Petitioner submitted the affidavits of Dr. Edward Suarez and Dr. Juan Gabriel Camayd. CMS Ex. 3 at 8-13. In the affidavits, both Dr. Suarez and Dr. Camayd aver that they provided medical services to patients at Petitioner's facility between June 16, 2015 and September 14, 2015, and used Dr. Sarnow's billing number when filling out the corresponding claim forms. *Id.* As Petitioner admits, Dr. Sarnow was not in the state on the dates Dr. Suarez and Dr. Camayd provided the medical services for which Petitioner submitted claims using Dr. Sarnow's billing number. RFH at 3; P. Br. at 2.

Petitioner's arguments miss the point. To support its revocation determination, CMS need not prove that Petitioner's conduct was fraudulent. *See, e.g., Louis J. Gaefke, D.P.M.*, DAB No. 2554 at 7 (2013) ("the regulation contains no requirement that CMS establish that the supplier acted with fraudulent or dishonest intent"). Nor is CMS required to prove that Petitioner provided no service at all on the claimed dates of service. Rather, the regulations authorize CMS to revoke a supplier's Medicare billing privileges if a supplier (1) submits a claim for services and (2) that claim could not have been furnished to a specific individual on the date of service. As specifically enumerated in the regulation, CMS may consider these conditions met when the directing physician is not in the state when services were furnished. 42 C.F.R. § 424.535(a)(8)(i)(B). A proper claim, then, is one that identifies both the specific named beneficiary who received a service and the specific named physician who furnished the service to the beneficiary. Thus, if the physician identified on a claim is not in the state when services were furnished, the claimed services "could not have been furnished" within the meaning of

section 424.535(a)(8)(i). *See Mohammed Nawaz, M.D. & Mohammad Zaim, M.D., PA*, DAB CR4244 at 5 (2015), *aff'd*, DAB No. 2687 (2016), *aff'd, Nawaz v. Price*, No. 4:16cv386, 2017 WL 2798230 (E.D. Tex. 2017) (a physician's admission that he was out of the country on claimed dates of service "is all that CMS needs . . . to authorize revocation").

In the present case, CMS presented evidence that Petitioner submitted 23 claims for services allegedly furnished by Dr. Sarnow on dates when he was in another state. Petitioner admits that it filed at least 22 such claims. P. Br. at 2. On its face, section 424.535(a)(8) authorizes CMS to revoke billing privileges when a provider or supplier submits even a single improper claim. However, in the preamble to the regulation, the drafters explained that CMS will exercise its discretion to revoke only in instances where a provider or supplier has submitted at least three claims described in section 424.535(a)(8). 73 Fed. Reg. 36,448, 36,455 (June 27, 2008). Here, the number of improper claims is well in excess of three. I therefore conclude that CMS was authorized to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(8)(i)(B).

2. Petitioner's arguments in equity are not a basis to reverse the revocation of Petitioner's Medicare enrollment and billing privileges.

Petitioner argues that, if I interpret the regulations as allowing CMS to revoke Petitioner's billing privileges under the circumstances presented here, a medical facility would have to shut down whenever the medical director is unable to physically appear at the facility. P. Br. at 4. This argument is a straw man. A facility need not shut down if the medical director is not present. It may continue to submit claims that accurately reflect the identity of the physician(s) who furnished the claimed services.[3]

Moreover, to the extent Petitioner is arguing that revocation of its Medicare enrollment and billing privileges is inequitable under the circumstances presented, CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances. *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008). Rather, "the right to review of CMS's determination by an [administrative law judge] serves to determine whether CMS had the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the [administrative law judge's] discretion about whether to revoke." *Id*. Once CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review. *See id*. at 10; *see also Abdul*

[3] To the extent Petitioner reads the phrase "directing physician" in 42 C.F.R. § 424.535(a)(8)(i)(B) to mean the medical director of a facility, I disagree with this interpretation. I understand "directing physician" to mean the specific physician who has furnished, ordered, or supervised the claimed service.

Razzaque Ahmed, M.D., DAB No. 2261 at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2nd 167 (D. Mass. 2010) (if CMS establishes the regulatory elements necessary for revocation, an administrative law judge may not substitute his or her "discretion for that of CMS in determining whether revocation is appropriate under all the circumstances"). Accordingly, because I have determined that CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(8)(i)(B), the regulations do not authorize me to second-guess CMS's decision to revoke.

V. Conclusion

For the reasons stated, I affirm CMS's determination to revoke Petitioner's Medicare enrollment and billing privileges.

____/s/_____
Leslie A. Weyn
Administrative Law Judge