Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Victor Lyapis, M.D.
(PTAN: G12564),

and

Victor Lyapis, M.D., P.C.
(PTAN: FQ163A),

Petitioners,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2051

Decision No. CR4476

Date: December 2, 2015

DECISION

Noridian Healthcare Solutions (Noridian), an administrative contractor for the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Victor Lyapis, M.D. and his professional corporation, Victor Lyapis, M.D., P.C. (Petitioners, collectively), pursuant to 42 C.F.R. § 424.535(a)(12), because Noridian determined that Petitioners had been terminated from enrollment in the California Medicaid program, known as Medi-Cal. Noridian upheld Petitioners' revocations upon reconsideration because Noridian determined that Petitioners' appeal rights from their Medi-Cal termination had been exhausted. Petitioners then requested a hearing before an administrative law judge. CMS now moves for summary judgment, which Petitioners oppose.

For the reasons set forth below, I deny CMS's motion for summary judgment and reverse the revocation of Petitioners' Medicare enrollment and billing privileges. The undisputed facts before me show that at the time Noridian revoked Petitioners' Medicare enrollment, Petitioners had not exhausted all available appeals related to their Medi-Cal termination. Therefore, there is no basis to revoke Petitioners' Medicare enrollment.

I. Case Background and Procedural History

Petitioners are a physician in California and his solely-owned professional corporation. On May 3, 2012, Petitioners submitted an enrollment application to Medi-Cal to enroll the professional corporation. *See* Petitioners' Exhibit (P. Ex.) 1 at 4-5. During a review of the application, the California Department of Health Care Services (DHCS) determined that the enrollment application failed to disclose that the Medical Board of California previously disciplined Dr. Lyapis. P. Ex. 1 at 5.

In a letter dated July 15, 2013, DHCS denied the Medi-Cal enrollment application. DHCS determined that Petitioners "failed to disclose the required information." CMS Exhibit (Ex.) 1 at 1. The notice letter continued, stating:

> Under the provisions of [California] W & I [Welfare & Institutions] Code Section 14043.28(b)(1), DHCS is deactivating your provider number . . . effective 20 days (15-day statutory notification plus five days mailing) from the date of this notification.[1]
>
> * * *
>
> W & I Code Sections 14043.28(b)(1) and 14043.65(b), stated above are applicable to Victor Lyapis, M.D. and Victor Lyapis, M.D., Professional Corporation, located at 2320 Sutter Street, Suite 101, in San Francisco.

CMS Ex. 1 at 2.

On August 2, 2013, Petitioners requested administrative review from the DHCS Director. *See* P. Ex. 1 at 5. On September 21, 2013, DHCS's Office of Administrative Hearings and Appeals issued a proposed decision affirming the application denial and removal of Petitioners from the Medi-Cal program. P. Ex. 1 at 3-12. On September 25, 2013, a letter from the Chief of Administrative Appeals adopted the proposed decision as the

[1] The "deactivation" of Medi-Cal billing privileges also results in the provider being "removed from enrollment in the Medi-Cal program by operation of law." Cal. Welf. & Inst. § 14043.28(b)(1).

"Final Decision of the Department of Health Care Services." P. Ex. 1 at 1. The letter then stated:

> This concludes the appeal process provided for under Welfare and Institutions Code section 14043.65. Any further appeal shall be required to be filed in accordance with the Code of Civil Procedure section 1085.

P. Ex. 1 at 1.

On November 22, 2013, Petitioners filed in the Superior Court of California, County of Sacramento, a Petition for Writ of Mandate pursuant to section 1085 of the California Code of Civil Procedure. P. Ex. 2 at 2. The court denied a temporary restraining order against DHCS on February 19, 2014, and later reassigned the case to a different docket within the court "effective 12/16/2014." *See* P. Ex. 2 at 1.

On December 23, 2014, Noridian notified Petitioners that their Medicare billing privileges were revoked pursuant to 42 C.F.R. § 424.535(a)(12) because Petitioners were terminated from the Medi-Cal program, and Medi-Cal "confirmed that [Petitioners'] appeal rights have been exhausted with respect to this termination."[2] CMS Ex. 2 at 1. On January 23, 2015, Petitioners requested reconsideration, noting, in part, that they had filed a Petition for a Writ of Mandate in the Sacramento Superior Court, and that "[n]o action has been taken on the Petition." CMS Ex. 3 at 4.

On March 11, 2015, Noridian issued a reconsidered determination that upheld the revocation of Petitioners' Medicare enrollment and billing privileges. CMS Ex. 4. Noridian again found that Petitioners had been "terminated from the California Medicaid [Medi-Cal] program," and that Medi-Cal "confirmed that [Petitioners'] appeal rights have been exhausted with respect to this termination." CMS Ex. 4 at 1. According to Noridian, Petitioners, specifically Dr. Lyapis, "had not provided evidence to show full compliance with the standards for which you were revoked." CMS Ex. 4 at 1.

On March 27, 2015, Petitioners requested a hearing before an administrative law judge. The case was assigned to me, and on April 29, 2015, I issued an Acknowledgment and Pre-hearing Order (Order) setting forth procedures for each party to present its argument and evidence. CMS filed a motion for summary judgment and supporting brief (CMS

---

[2] The initial determination letter told Petitioners that the revocation would be effective January 15, 2015, which was 23 days after the determination notice. CMS Ex. 2. The applicable regulations provide that a revocation is effective *30 days* after the initial determination notice except in certain circumstances not present in this case. 42 C.F.R. § 424.535(g). However, I do not need to correct this error because I conclude that there was not a sufficient legal basis for the revocation.

Br.) as well as four proposed exhibits (CMS Exs. 1-4). Petitioner filed an opposition to summary judgment and supporting brief (P. Br.) as well as two proposed exhibits (P. Exs. 1-2). Neither party offered the written direct testimony of any witnesses. *See* Order ¶ 8; Civil Remedies Division Procedures (CRDP) § 19(b). In the absence of objections from either party, I admit CMS Exs. 1-4 and P. Exs. 1-2 into the record for consideration.

II. Issue

The issue in the case is whether CMS had a legal basis to revoke Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(12).

III. Findings of Fact and Conclusions of Law

1. CMS is not entitled to summary judgment.

Summary judgment is appropriate if there is no genuine dispute 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). When evaluating the appropriateness of summary judgment, an adjudicator must "view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Id.* For the purposes of summary judgment, the administrative law judge should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

Here, while there does not appear to be any material facts in dispute, as discussed below, CMS is not entitled to judgment as a matter of law because Petitioners did not exhaust all applicable appeal rights of their termination from the Medi-Cal program before the CMS contractor revoked Petitioners' Medicare enrollment and billing privileges. *See* 42 C.F.R. § 424.535(a)(12)(ii) ("Medicare may not terminate unless and until a provider or supplier has exhausted all applicable appeal rights."). Therefore, CMS is not entitled to summary judgment in its favor, and I deny its motion.

I decide this case on the full merits of the written record by weighing and evaluating the evidence and applying it to the applicable legal standards. An in-person hearing is not necessary because neither party submitted direct written testimony that would require the opportunity for cross-examination. *See* Order at ¶¶ 8-11; CRDP § 19(d).

2. Petitioners had not exhausted all applicable appeals of their termination from the Medi-Cal program at the time CMS revoked Petitioners' Medicare enrollment and billing privileges.

On July 15, 2013, DHCS denied the Medi-Cal enrollment application of Dr. Lyapis's professional corporation and deactivated Dr. Lyapis's provider number, which under

California law meant that Dr. Lyapis was "removed from enrollment in the Medi-Cal program . . . ." *See* CMS Ex. 1 at 2; Cal. Welf. & Inst. § 14043.28(b)(1). The parties do not dispute that the action DHCS took is equivalent to a "termination" of Petitioners from the Medi-Cal program because neither Dr. Lyapis nor his professional corporation could participate in the Medi-Cal program as a result of DHCS's decision. *See* CMS Br. at 1-2; P. Br. at 6-7; *see also Douglas Bradley, M.D.*, DAB No. 2663, at 7 (2015) ("Focusing on the *nature and effect*, rather than the label, of the State Medicaid Agency's action is consistent with – and likely necessary to achieve – section 424.535(a)(12)'s purpose . . . .").

Petitioners appealed the July 15, 2013 determination to the DHCS Director in accordance with California law. *See* P. Ex. 1 at 5; Cal. Welf. & Inst. § 14043.65(a). As noted above, on September 21, 2013, a hearing officer issued a proposed decision that upheld the denial of the professional corporation's enrollment application as well as the deactivation of Dr. Lyapis's Medi-Cal enrollment. P. Ex. 1 at 3-12. In a September 25, 2013 letter, the Director's designee, the Chief of Administrative Appeals, adopted the September 21 proposed decision as the "Final Decision" of DHCS. P. Ex. 1 at 1. The letter stated that the appeal rights in section 14043.65 of the California Code of Welfare & Institutes had concluded and that any "further appeal shall be required to be filed in accordance with the Code of Civil Procedure section 1085." P. Ex. 1 at 1.

It is undisputed that on November 22, 2013, Petitioners filed a Petition for a Writ of Mandate in the Superior Court of California, County of Sacramento, pursuant to section 1085 of the California Code of Civil Procedure. P. Ex. 2 at 2. The "Civil Case Details" printout that Petitioner has provided in this case, which CMS has not disputed, provides the "Register of Actions" taken in the Sacramento Superior Court regarding the Petition for a Writ of Mandate. CMS Ex. 2. The Civil Case Details show that as of June 29, 2015 – the date of the printout – the Petition remained pending. CMS Ex. 2 at 1. Accordingly, it follows that as of December 23, 2014, the day Noridian revoked Petitioners' Medicare enrollment and billing privileges, the Petition for a Writ of Mandate regarding the underlying DHCS decision to terminate Petitioners' Medi-Cal enrollment remained pending in the Sacramento Superior Court. *See* P. Ex. 2 at 1.

Noridian concluded, apparently based on the representations of Medi-Cal to Noridian, that Petitioners' had exhausted their available appeal rights after they requested review from the DHCS Director and received a decision after that level of review. *See* CMS Ex. 4 at 1. In neither its initial nor reconsidered determination did Noridian consider the pending Petition for a Writ of Mandate. CMS Ex. 2; CMS Ex. 4. Before me CMS simply repeats Noridian's conclusion that Petitioners exhausted their available appeal rights for the Medi-Cal termination. However, California provides appeal rights to individuals or entities whose Medi-Cal applications have been denied or whose Medi-Cal enrollment has been deactivated or terminated:

> Notwithstanding any other law, any applicant whose application for enrollment as a provider or whose certification is denied; or any provider who is denied continued enrollment or certification, or denied enrollment for a new location . . . who has had one or more business addresses used to obtain reimbursement from the Medi-Cal program deactivated, or whose provisional provider status or preferred provisional provider status has been terminated pursuant to this article or Section 14107.11, or Section 100185.5 of the Health and Safety Code . . . may appeal this action by submitting a written appeal, including any supporting evidence, to the director or the director's designee . . . . The appeal procedure shall not include a formal administrative hearing under the Administrative Procedure Act and shall not result in reactivation of any deactivated provider numbers during appeal. An applicant, provider, or billing agent that files an appeal pursuant to this section shall submit the written appeal along with all pertinent documents and all other relevant evidence to the director or to the director's designee within 60 days of the date of notification of the department's action. The director or the director's designee shall review all of the relevant materials submitted and shall issue a decision within 90 days of the receipt of the appeal. The decision may provide that the action taken should be upheld, continued, or reversed, in whole or in part. The decision of the director or the director's designee shall be final. Any further appeal shall be required to be filed in accordance with Section 1085 of the Code of Civil Procedure.

Cal. Welf. & Inst. § 14043.65(a).

Section 1085 of the California Code of Civil Procedure provides for a writ of mandate (also referred to as a writ of mandamus), and states:

> A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.

Cal. Civ. Proc. § 1085(a).

California courts have repeatedly determined that a petition for a writ of mandate made pursuant to section 1085 of the Code of Civil Procedure is part of the "direct attack" of an administrative decision that otherwise precludes conclusive effect of the administrative decision. *See Long Beach Unified Sch. Dist. v. California*, 225 Cal.App.3d 155, 169 (1990). The California Supreme Court clarified that exhaustion of judicial remedies

through a petition for a writ of mandate "is necessary to avoid giving binding effect to the administrative agency's decision because that decision has achieved finality due the aggrieved party's failure to pursue the exclusive judicial remedy for reviewing administrative action." *Johnson v. Loma Linda*, 5 P.3d 874, 879 (Cal. 2000) (quotation marks and citation omitted). In other words, if an aggrieved party has filed a petition for a writ of mandate, the administrative decision has not yet achieved finality. *See Johnson*, 5 P.3d at 880 (holding that the petitioner exhausted its administrative remedies but did not timely file a petition for a writ of mandate, making the administrative decision final). The California appellate courts have thus considered a writ of mandate made pursuant to section 1085 of the Code of Civil Procedure to be part of the applicable appeals available to a party aggrieved by an administrative decision. Indeed, the Chief of Administrative Appeals recognized as much when he notified Petitioners of their right to seek further review as provided in section 1085. *See* P. Ex. 1 at 1.

Here, the evidence before me shows that Petitioners still had a pending Petition for a Writ of Mandate on their Medi-Cal termination as of June 29, 2015. P. Ex. 2. Accordingly, because a petition for a writ of mandate is part of the applicable appeal rights available to Petitioners to challenge their Medi-Cal termination, and because Petitioners timely filed a Petition for a Writ of Mandate that the court had yet to rule on, I find that Petitioners' had not exhausted all of their applicable appeal rights as of December 23, 2014, the date Noridian revoked Petitioners' Medicare enrollment and billing privileges.

3. There was no basis for CMS or its contractor to revoke Petitioners' Medicare enrollment on December 23, 2014, pursuant to 42 C.F.R. § 424.535(a)(12).

CMS or its contractor may revoke a supplier's Medicare enrollment and billing privileges for any of the reasons stated in 42 C.F.R. § 424.535(a). In this case, CMS has relied on subsection 424.535(a)(12), which provides:

> (12) *Medicaid termination.*
>
> > (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.

There is no dispute that Medi-Cal "terminated or revoked" Petitioners' billing privileges. CMS Ex. 1. However, at the time Noridian revoked Petitioners' Medicare enrollment on December 23, 2014, Petitioners still had a pending Petition for a Writ of Mandate in the Sacramento Superior Court and thus had not exhausted all applicable appeal rights under California law. P. Ex. 2; *see Johnson*, 5 P.3d at 879. Pursuant to section 424.535(a)(12)(ii), there was no basis for Noridian to revoke Petitioners' Medicare

enrollment and billing privileges when it did. The regulation expressly prohibits Medicare "termination" – which is reasonably read as "revocation" in this subsection – until all applicable appeal rights are exhausted, a regulatory requirement that was not satisfied in this case.

IV. Conclusion

As of December 23, 2014, Noridian, on behalf of CMS, did not have authority to revoke Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(12) because Petitioners had not exhausted all of their applicable appeal rights. Accordingly, the revocation of Petitioners' Medicare enrollment and billing privileges is reversed.

/s/
Joseph Grow
Administrative Law Judge