

AIS's Report on **MEDICARE COMPLIANCE**

Volume 18, Number 38 • October 26, 2009

Weekly News and Analysis on New Enforcement Initiatives and Billing/Documentation Strategies

CMS Convinces Appeals Board to Affirm Physician's Disenrollment From Medicare

HHS's highest appeals board has affirmed the revocation of a physician's Medicare billing privileges in a case that displays CMS's increasing show of force through its enrollment authority. The ruling also is a cautionary tale for attorneys, who should start thinking beyond Medicare exclusion when negotiating health fraud settlements, lawyers say.

In this case, the Departmental Appeals Board (DAB) agreed with an administrative law judge that CMS acted legally when it disenrolled Brookline, Mass., dermatologist Abdul Razzaque Ahmed, M.D., in 2007. CMS yanked Ahmed's billing privileges three days after he pleaded guilty to obstructing a federal health fraud investigation. Federal prosecutors in Boston said they had evidence to show he falsified medical records.

Billing revocations are a sharp tool in the Medicare program-integrity toolbox. In an April 21, 2006, regulation, CMS set forth 12 grounds for revoking billing privileges. They include certain felony convictions within 10 years preceding enrollment or re-validation (e.g., a financial crime) and misleading or false information on enrollment applications (see the Medicare Program Integrity Manual, Chapter 10, Sec. 13.2).

"This is another remedy the government has with respect to participation in Medicare and Medicaid," says former Associate U.S. Attorney Jim Sheehan, now the Medicaid Inspector General for New York state. "Historically, we had mandatory exclusions for health care-related crimes and permissive exclusions. Now there is a third arm, where CMS has the authority through its Medicare contractors to revoke enrollment privileges."

Billing privileges are revoked for one to three years, and then providers again must make the grade through the enrollment process, says San Francisco attorney Judy Waltz. "A broader base of conduct can be used as the basis for a revocation than for an OIG exclusion, yet the impact is the same — providers can't bill Medicare," says San Francisco attorney Judy Waltz.

Ahmed was under investigation by the U.S. attorney's office in Boston in the early 2000s for billing practices in his area of specialty, the diagnosis and treatment

of autoimmune skin blistering diseases. He prescribed intravenous immunoglobulin (IVIG) for patients suffering from pemphigus and pemphigoid, according to the DAB decision. But Medicare only covered IVIG for pemphigus between 1997 and 2001. So Ahmed billed patients as dual diagnoses to keep the reimbursement flowing, the decision states, citing the plea colloquy.

After CMS realized it paid him millions of dollars for IVIG, the U.S. attorney's office began an investigation, according to the DAB decision. Ahmed was served with a subpoena for records, and he turned over 94 patient files, then "supplemented these patient files with backdated documents, including correspondence and immunopathology reports, that falsely indicated that patients suffering from pemphigoid, the disease for which Medicare did not cover IVIG treatment, also suffered from pemphigus, the disease for which Medicare covered IVIG treatment," the decision states. Ahmed "admitted these facts during the plea colloquy," the decision states.

Convicted Felons Must Be Excluded

Because he pleaded guilty to obstruction, not health fraud, there was no automatic exclusion from Medicare and other federal health care programs. The HHS Office of Inspector General is required to exclude providers who are convicted of a health care-related felony. OIG also has permissive exclusion authority for 15 offenses, including convictions (e.g., fraud, obstruction) and license revocation. For some offenses (fraud and kickbacks, false and improper claims), OIG has to convince an administrative law judge (ALJ) that the provider should be kicked out of Medicare. For other offenses, OIG simply sends the provider a notice of exclusion under the permissive exclusion authority, but the provider can appeal to the ALJ and DAB.

Instead of an OIG exclusion, the Medicare contractor, acting on CMS's behalf, notified Ahmed that his billing privileges were being pulled because of a conviction for a financial crime. Ahmed appealed to the contractor's hearing officer and lost, and then to the ALJ, arguing that the crime for which he was convicted — obstruction of a criminal investigation of health care

fraud — is not a financial crime. He also claimed the Medicare contractor “abused due process” by not determining the revocation’s impact on patients who need treatment for the “rare and deadly diseases” he treats.

ALJ Keith Sickendick affirmed the revocation of Ahmed’s Medicare billing number on the grounds that his crime was a financial crime similar to insurance fraud. Also, the ALJ said the impact of the revocation on patients isn’t relevant; CMS’s enrollment regulation does not require Medicare contractors to consider mitigating factors.

Ahmed then took his case to the DAB, but the three-member panel rejected his arguments, sometimes with a sharp tongue (Decision No. 2261). The DAB said there was nothing legally wrong with the ALJ’s conclusion that Ahmed’s crime was similar to insurance fraud. “Elements of insurance fraud are present in the facts which the government identified as the basis” for Ahmed’s guilty plea, the decision noted. Ahmed admitted making false statements relating to Medicare patients for whom he obtained insurance payments.

In fact, Ahmed’s argument that obstruction is not a financial crime “entirely fails to acknowledge the context and nature of his offense,” the DAB wrote. The dermatologist didn’t plead guilty to generic obstruction of justice; “he pled guilty to obstructing an investigation of suspected health care fraud, an investigation that implicated, or potentially implicated, hundreds of thousands of dollars of Medicare payments to him. The offense was inextricably linked to Medicare’s finances.”

Ahmed also argued that CMS didn’t meet the requirement that the conviction occurred within 10 years before enrollment or revalidation. The DAB disagreed, noting that the Medicare contractor discovered Ahmed’s conviction through revalidation and disenrolled him. But Ahmed argued he should have been allowed to make a case for revalidation where he could cite positive factors that in his view outweighed his conviction (e.g., his expertise with a rare disorder).

The DAB responded that evaluating mitigating factors “overlooks the limited scope of administrative review.” It’s legal for CMS to revoke billing privileges if two standards are met, DAB asserted: (1) the provider is convicted of a felony “that CMS has determined to be detrimental to the best interests of Medicare and its beneficiaries,” and (2) the conviction happened up to 10 years before enrollment or revalidation. “If these conditions are satisfied, then the ALJ and the Board must sustain the revocation; we may not substitute our

discretion for that of CMS in determining whether revocation is appropriate under all the circumstances,” the DAB stated.

This may be the first case to emerge from the highest HHS appeals board on billing-privileges revocation since the 2006 regulation, although there have been a few other ALJ decisions in this area. CMS apparently wants this decision to set the stage for its enrollment crackdown on providers perceived as bad Medicare apples, Sheehan says. A footnote in the ALJ ruling states that CMS had no appeals process in place for billing-number revocations until after Ahmed filed his appeal, but pushed the case through anyway. “Prior to issuance of the final rule and its effective date,” the ALJ stated, CMS agreed to enter the HHS administrative appeals process for denial of enrollment or revocation of billing privileges (Decision No. 1864).

“CMS obviously moved this up the chain very quickly,” Sheehan says. “CMS is trying to develop a legal process they can use on an ongoing basis so the next person who wants to challenge revocation of their enrollment has to live with the Ahmed opinion, which is very strong for CMS,” he says. A provider was kicked out of Medicare for obstruction based on falsification of medical records, he adds.

“CMS is going to be using this as an enforcement tool as aggressively as OIG is using exclusion,” says Waltz, with Foley & Lardner. She says already providers have faced a lot of revalidation challenges over problems like missing documentation and delays and missteps in the process, though typically they can be resolved before deactivation or revocation of billing privileges.

Attorneys who represent providers in health fraud cases should pay attention to this decision, Sheehan notes. They may be unaware of the 2006 enrollment regulation or so focused on negotiating a deal that side-steps Medicare exclusion that they accept terms that leave clients vulnerable to the loss of billing privileges. Failure to take billing revocation into account when negotiating a plea or settlement could leave lawyers vulnerable to malpractice lawsuits, Sheehan adds.

Ahmed is forbidden from billing Medicare; he is not barred from other federal health care programs. He can now take his appeal to the federal court system.

Contact Waltz at jwaltz@foley.com. View DAB decisions at www.hhs.gov/dab/decisions/dabdecisions. ✧