Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Edgard Cruz Baez, M.D.,
(NPI: 1225014434),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-11-799

Decision No. CR2483

Date: January 6, 2012

DECISION

On June 21, 2002, Petitioner, Edgard Cruz Baez, M.D., was convicted of conspiracy to defraud the United States through solicitation and receipt of kickbacks in relation to Medicare referrals. Based on that conviction, the Centers for Medicare and Medicaid Services (CMS) has denied his request to enroll in the Medicare program as a supplier of services. Petitioner appeals. For the reasons set forth below, I find that the statute and regulations authorize CMS to deny Petitioner Baez's enrollment application. I therefore affirm CMS's determination.

Background

CMS, acting on behalf of the Secretary of Health and Human Services, may deny a provider's or supplier's enrollment in the Medicare program if, within the preceding ten years, he was convicted of a felony offense that CMS "has determined to be detrimental to the best interests of the program and its beneficiaries." 42 C.F.R. § 424.530(a)(3); *see* Social Security Act (Act) §§ 1842 (h)(8) (authorizing the Secretary to deny enrollment to a physician who has been convicted of a felony offense that the Secretary has determined is "detrimental to the best interests of the program or program beneficiaries") and

1866(b)(2)(D) (authorizing the Secretary to deny enrollment after she ascertains that the provider has been convicted of a felony that she "determines is detrimental to the best interests of the program or program beneficiaries"). Offenses for which billing privileges may be denied include financial crimes such as "extortion, embezzlement, income tax evasion, insurance fraud, and other similar crimes," as well as any felonies "outlined in section 1128 of the Act." 42 C.F.R. § 424.530(a)(3)(i)(B), (a)(3)(i)(D). Among the crimes outlined in section 1128 are "program-related" crimes, *i.e.*, offenses related to the delivery of an item or service under Medicare or a state health care program (Medicaid). Act § 1128(a)(1).

Here, initially and on reconsideration, the Medicare contractor, First Coast Service Options, Inc., denied Petitioner Baez's application for enrollment in the Medicare program. CMS Exs. 16, 18. Petitioner timely filed this appeal. The parties agree that no material facts are in dispute and have filed cross-motions for summary judgment. Each party has submitted a supporting brief (CMS Br.; P. Br.). CMS submitted nineteen exhibits (CMS Exs. 1-19).

Discussion

> ***CMS may deny Petitioner enrollment in the Medicare program because, within the last ten years, he was convicted of conspiracy to defraud the United States, a felony detrimental to the best interests of the Medicare program***.[1]

On June 21, 2002, Petitioner pled guilty and was convicted on one count of conspiracy to defraud the United States through the solicitation and receipt of kickbacks in relation to Medicare referrals (18 U.S.C. § 371), a class D felony. *Edgar Cruz Baez, M.D.*, DAB CR1140 (2004) at 2; CMS Ex. 1 at 2. Inasmuch as Petitioner conspired to defraud Medicare, which is, after all, an insurance program, his crime – insurance fraud – appears to be among those explicitly listed in 42 C.F.R. § 424.530(a)(3)(i)(B). Inexplicably, however, CMS says that the crime is not listed in the regulation. Instead, citing *Ahmed v. Sebelius*, 710 F. Supp. 167, 174 (D. Mass. 2010), in which the physician was convicted of obstruction of a criminal investigation of health care offenses, and *Fayad v. Sebelius*, 2011 WL 1120036 (E.D. Mich., March 25, 2011), in which the physician falsified immigration forms, CMS argues that, so long as the crime is "similar enough" to the financial crimes listed in the regulation, it can reasonably be considered detrimental to the best interest of the Medicare program. CMS Br. at 8. CMS is correct that the regulation broadly interprets the term "financial crime" to include any offense similar to those listed. Here, if not explicitly listed in the regulation, Petitioner's crime is as "similar" to insurance fraud as possible and must reasonably be considered detrimental to the best interests of the Medicare program.

[1] I make this one finding of fact/conclusion of law to support my decision.

In any event, even if Petitioner's crime were not a "financial crime" within the meaning of section 424.530, he was convicted of a felony that is also an offense "outlined in section 1128 of the Act." *See Edgar Cruz Baez, M.D.*, DAB CR1140 at 2(finding that Petitioner's conviction "falls squarely within the ambit of section 1128(a)(1)"). So, without regard to whether his crime falls under section (a)(3)(i)(B), CMS has the authority to deny his enrollment under section (a)(3)(i)(D).

Thus, under the plain language of the regulations, CMS may deny Petitioner's Medicare enrollment and I need look no further into the underlying rationale for its actions. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Christensen v. Harris County*, 529 U.S. 576, 583 (2000); and *In re: SEALED CASE*, 237 F.3d 657, 669 (D.C. Cir. 2001).

Petitioner nevertheless argues that CMS may not deny him enrollment because he committed only one felony. According to Petitioner, section 424.530 "clearly states that the minimum ten year ban applies only in cases where the provider has had a prior conviction, meaning that it applies to providers that have had a second conviction. . . ." P. Br. at 2. Petitioner simply misreads the regulation, which says nothing about prior convictions or multiple convictions; the regulation says "convicted of a Federal or State felony offense."[2]

Petitioner also faults CMS for failing to "weigh" the severity of his offense. As I have explained in earlier decisions, I have no authority to interject myself into the discretionary enforcement processes of the agency component to which the discretion to act has been explicitly granted. *Jason Bellak, M.D.*, DAB CR1680 at 3 (2007)(*citing Wayne E. Imber, M.D.*, DAB No. 1740 (2000)); *Brier Oak Terrace Care Ctr.*, DAB No. 1798 (2001). Once I find a legal and factual basis for denying Petitioner's enrollment, I am "without jurisdiction to evaluate on any basis whatsoever the propriety of [CMS's] exercise of discretion in deciding to proceed. . . ." *Michael J. Rosen, M.D.*, DAB CR1566 (2007); *cf. Puget Sound Behavioral Health*, DAB No. 1944 at 15-16 (2004), *aff'd County of Pierce, d/b/a/ Puget Sound Behavioral Health v. Leavitt*, D.C., No. CV-04-02308-JLR (2007) (finding where regulation uses permissive rather than mandatory language, ALJ had no authority to compel CMS to exercise its discretion). I thus decline to review the manner in which CMS opted to exercise its discretion.

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[2] Petitioner may have confused these provider/supplier enrollment regulations with the Inspector General's regulations governing mandatory exclusions from Medicare and state healthcare programs. The Inspector General excludes from program participation those convicted of certain criminal offenses. The minimum length of exclusion is generally five years, but, if an individual has been convicted "on one other occasion of one or more offenses" for which an exclusion is warranted, the period of exclusion must be for at least ten years. 42 C.F.R. § 1001.201(d).

Conclusion

Because Petitioner was convicted of felony conspiracy to defraud the Medicare program, CMS may deny his Medicare enrollment. I therefore deny Petitioner's motion for summary judgment and grant CMS's motion for summary judgment.

/s/
Carolyn Cozad Hughes
Administrative Law Judge