**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Alan D. Mendelsohn, M.D.,
(NPI: 1053308460),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-15

Decision No. CR4557

Date: March 24, 2016

# DECISION

Petitioner, Alan M. Mendelsohn, M.D., is a physician, practicing as an ophthalmologist in the State of Florida, who participated in the Medicare program until December 1, 2010, when he voluntarily terminated his enrollment. On December 9, 2010, he pled guilty in federal court to felony conspiracy to commit wire fraud, file false tax returns, and make false statements. He recently reapplied for program enrollment but, because of his felony conviction, the Centers for Medicare & Medicaid Services (CMS) denied his application. Petitioner now appeals the denial.

I find that CMS was authorized to deny Petitioner Mendelsohn's reenrollment application because, within the ten years preceding his filing, he was convicted of a felony that CMS determined is detrimental to the best interests of the Medicare program and its beneficiaries. I therefore affirm CMS's determination.

**Background**

By letter dated June 29, 2015, the Medicare contractor, First Coast Service Options, Inc., denied Petitioner Mendelsohn's application for reenrollment in the Medicare program. CMS Ex. 5. As the letter explains, the contractor acted pursuant to 42 C.F.R. § 424.530(a)(3)(i)(B) because Petitioner was convicted of a felony that CMS determined is detrimental to the best interests of the program and its beneficiaries.

Petitioner requested reconsideration. In a reconsidered determination, dated August 6, 2015, the contractor upheld the denial, citing Petitioner's June 1, 2011 conviction for conspiracy to commit wire fraud (18 U.S.C. § 371). CMS Ex. 10.[1] Petitioner timely appealed and that appeal is now before me.

CMS moves for summary judgment, which Petitioner opposes.

Because CMS presents no witnesses and has not asked to cross-examine Petitioner's witnesses (whose written direct testimony is in the record), an in-person hearing would serve no purpose. *See* Acknowledgment and Pre-hearing Order at 5 (¶¶ 8, 9) and 6 (¶ 10). The matter should therefore be decided based on the written record, without considering whether the standards for summary judgment are satisfied. However, Petitioner asks to cross-examine the hearing officer who issued the reconsidered determination. Petitioner wants "to inquire about Ms Waldron's review and analysis of Petitioner's enrollment application, as well as her qualifications to determine whether Petitioner's criminal history is a basis to deny Petitioner's application pursuant to 42 C.F.R. § 424.530(a)(3)(i)(B)." P. Opp. to CMS's Motion for Summary Judgment at 8.

I deny Petitioner's request to "cross-examine" the hearing officer. First, I am authorized to receive into evidence testimony and documents that are "relevant and material." 42 C.F.R. § 498.60(b)(1). Neither the hearing officer's qualifications nor her underlying "review and analysis" are relevant or material here. The parties agree that, within the last ten years, Petitioner Mendelsohn was convicted of a felony. The sole question before me is purely legal: whether Petitioner Mendelsohn's felony conviction is "detrimental to the best interests of the Medicare program and its beneficiaries" within the meaning of section 424.530(a)(3). If so, CMS acted within its discretion to deny his enrollment application, and I must affirm, without regard to the process by which the hearing officer reached her correct conclusion. *See Fady Fayad, M.D.*, DAB No. 2266 (2009), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011) (holding that the "ALJ

[1] In the reconsidered determination, the contractor quotes the regulatory language that "CMS *may* deny" an enrollment application. CMS Ex. 10 at 1. I am satisfied that the contractor consciously exercised its discretion to deny enrollment, and Petitioner has not suggested otherwise.

proceeding is not an appellate or quasi-appellate review of the adequacy of the federal agency's decision-making process. Rather, the ALJ hearing under 42 C.F.R. Part 498 is a de novo proceeding in which the ALJ determines the legality of the challenged determination based on the evidence presented in that proceeding.").[2]

Moreover, the hearing officer's deliberations, like those of other administrative decision-makers and, for that matter, judges, have long been protected. *U.S. v. Morgan*, 313 U.S. 409, 422 (1941) (holding that "it was not the function of the court to probe the mental processes of the Secretary [of Agriculture]. . . . Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected."). The hearing officer simply cannot be compelled to testify.

Exhibits. CMS has submitted 12 exhibits (CMS Exs. 1-12). Petitioner objects to two of CMS's proposed exhibits: CMS Exs. 11 and 12. They are: 1) the contractor's August 7, 2015 acknowledgment that it received Petitioner's July 31, 2015 application for Medicare enrollment; and 2) the contractor's October 8, 2015 letter returning the application because it was submitted before the time to appeal his prior application had expired. These documents were filed well after the application (submitted April 1, 2015) and denial (dated June 29, 2015) that are the subjects of this appeal. CMS Exs. 3, 4, 5. I agree that the documents are neither relevant nor material, and I decline to admit them.

Petitioner has submitted thirteen exhibits (P. Exs. 1-13). CMS objects to P. Exs. 7, 8, and 13. P. Exs. 7 and 8 are "composite exhibits," consisting of hundreds of letters attesting to Petitioner's "professionalism, judgment, and integrity," written by patients and colleagues to the sentencing judge. *See* P. Response to CMS Objections at 2. CMS objects to their admission, pointing out that Petitioner's enrollment application was denied because he was convicted of a financial crime, wholly unrelated to his medical practice. CMS Objections to P.'s Exhibits at 2-3. I would consider the letters irrelevant under any circumstances, even if Petitioner had been convicted of crimes related to his medical practice. By law, a conviction on any one of the listed felonies (as well as others since the list is not exhaustive) means that CMS may determine that the convict's program participation is detrimental to the best interests of the program and its beneficiaries. The good opinions of his colleagues and patients do not alter that fact. I therefore decline to admit the composite exhibits.

P. Ex. 13 is a December 15, 2015 letter from Blue Cross Blue Shield of Florida's Medicare Advantage program, advising Petitioner that his Medicare patients will not be eligible for Medicare Part D benefits unless he is enrolled in the Medicare program. Petitioner claims that the letter is relevant to show that, unless enrolled, he will not be

[2] For my discussion of why *Fayad* was soundly decided and should be followed, see *Kimberly Bergeron NP, et al.*, DAB CR3438 at 8-14 (2014); *Gibraltar Healthcare Supplies, LLC*, DAB CR3422 at 4-9 (2014).

able to write prescriptions for the patients on whom he operates. P. Response to CMS Objections at 3. That Petitioner may not enroll in the Medicare program obviously has consequences affecting his Medicare-eligible patients, but that fact is irrelevant to the question of whether his conviction falls within the ambit of section 424.530(a)(3). Because the letter is irrelevant, I decline to admit it. *See Fayad*, DAB No. 2266 at 16 (precluding my considering factors such as the potential impact on Medicare beneficiaries).

I therefore admit CMS Exs. 1-10 and P. Exs. 1-6 and 9-12.

**Discussion**

> ***CMS may deny Petitioner enrollment in the Medicare program because, within the last ten years, he was convicted of conspiracy to commit wire fraud, file false tax returns, and make false statements, which are felonies that CMS finds detrimental to the best interests of the Medicare program and its beneficiaries***.[3]

Statute and regulations. CMS 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 also* 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), (D) (emphasis added).

Petitioner's felony offense. In an information dated December 9, 2010, Petitioner Mendelsohn was charged with one felony count of conspiracy to commit wire fraud, file false tax returns, and make false statements, in violation of 18 U.S.C. § 371. CMS Ex. 6. The information describes Petitioner Mendelsohn as a lobbyist and political campaign consultant, who, with others, set up several political action committees (PACs) for which they raised money. CMS Ex. 6 at 1. Among the specific allegations to which he pled guilty:

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

- Petitioner Mendelsohn *filed false federal income tax returns* for the years 2003 through 2006, in that he "willfully failed to include material amounts of income" from his medical practice, lobbying services, and money he diverted from the PACs, in violation of federal law (26 U.S.C. § 7206(1)). CMS Ex. 6 at 3 (Information ¶ 9a);

- to conceal the income he paid to himself and others from the PACs, he "mischaracterized and inaccurately reported" or "falsely reported" to the Internal Revenue Service the actual recipients of the funds paid. CMS Ex. 6 at 3 (Information ¶ 9b);

- Petitioner made false representations via wire transmission in interstate commerce to his lobbying clients to induce them to make PAC contributions and other donations, in violation of 18 U.S.C. §§ 1343 and 2. CMS Ex. 6 at 3 (Information ¶ 9c);

- in order to conceal and perpetuate the conspiracy, he made false statements to federal agents in violation of 18 U.S.C. § 1001(a)(2). CMS Ex. 6 at 4 (Information ¶ 9d).

The information details the manner and means by which Petitioner Mendelsohn carried out his crimes, and it details his overt acts. CMS Ex. 6 at 4-8. According to the information, he failed to report to the IRS approximately $618,770 in income, and he caused $82,000 to be paid to an individual associated with a state senator for the state senator's benefit. CMS Ex. 6 at 8-9 (Information ¶¶ 19h and i).

On December 9, 2010, Petitioner Mendelsohn pled guilty to the charge. In his plea agreement, he conceded that "the objects of the conspiracy charged" included *filing a false tax return* in violation of 26 U.S.C. § 7206(1), wire fraud (18 U.S.C. § 1343), and making false statements to a federal agent (18 U.S.C. § 1001). CMS Ex. 7 at 1-2 (Plea Agreement ¶ 2). He specifically admitted that he knowingly filed a false tax return for the years charged; that he signed the returns under penalties of perjury; and that he acted willfully. CMS Ex. 7 at 2-3 (Plea Agreement ¶¶ 2a, b, and c). *See* CMS Ex. 7 at 17-23 for list of the facts that Petitioner specifically admitted.

The court accepted the guilty plea and sentenced Petitioner to four years in prison followed by two years of supervised release. CMS Ex. 8 at 19-21. The court also imposed a $10,000 fine. CMS Ex. 8 at 23.

Notwithstanding these undisputed facts surrounding his conviction, Petitioner maintains that his Medicare enrollment should not be denied. He points out that his conviction did not relate to the practice of medicine, the "delivery of health care items or services," or a federal or state health care program, which is true, but omits a major category of cases

listed in section 424.530(a)(3): non-program-related financial crimes. *See Fayad*, DAB No. 2266 at 15 (holding that CMS may revoke Medicare enrollment based on a felony conviction that is unrelated to health care or a health care program).

Ultimately recognizing that a disqualifying crime need not be program or practice-related, Petitioner also argues that his was not among the financial crimes listed in the regulation. He makes much of what he regards as a distinction between his crime, "conspiracy to commit tax evasion," and tax evasion itself, which, he acknowledges, would subject him to enrollment denial. But in pleading guilty, Petitioner admitted that he filed false tax returns and deliberately concealed from the IRS significant income. If his crime is not tax evasion (and I think it is), it is so close as to be virtually indistinguishable from it and must be considered an "other similar crime," for which CMS may deny his enrollment. The Departmental Appeals Board and federal courts have affirmed CMS's exercise of its discretion to revoke or deny enrollment based on felony convictions that were further removed from those listed in the regulation. In *Abdul Razzaque Ahmed, M.D.*, the Board (and district court) agreed that obstruction of a criminal health care fraud investigation was "similar to" insurance fraud, for which the physician's Medicare enrollment could be revoked. DAB No. 2261 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 167, 174 (D. Mass. 2010). In *Fady Fayad*, where a physician falsified immigration forms, the Board noted that the petitioner's crime was detrimental to the Medicare program "because it evidenced a lack of trustworthiness in his dealings with the federal government." DAB No. 2266 at 17, *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011). Similarly, here – where Petitioner lied to his lobbying clients, to the federal agents, and to the IRS – his felony evidenced a lack of trustworthiness, which would justify CMS's determination even if the crime were not specifically listed in the regulation.

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.

Petitioner also argues that, because his felony does not "squarely fall within the disqualifying offenses" listed in the regulation, the contractor should have conferred with CMS so that CMS could decide the matter. In Petitioner's view, only CMS can decide whether his crimes were detrimental to the program. P. Response to CMS Objections at 4. In *Fayad*, the Board (and federal court) considered and rejected a similar argument, finding that the Act authorizes CMS to sub-delegate to the Medicare contractors (private insurance companies) its authority to deny or revoke Medicare enrollment. DAB No. 2266 at 17-20; 803 F. Supp. 2d at 706; *see* Act §§ 1842 (providing that administration of Medicare Part B "shall be conducted through contracts with Medicare administrative contractors under section 1874A"); 1874A (authorizing CMS to contract with "any eligible entity to serve as a Medicare administrative contractor with respect to the performance of any and all of the functions described in section 1874A(a)(4)"); 1874A(a)(4) (listing functions, including those "necessary to carry out the purpose of this

title."); *see also* 42 C.F.R. § 405.803(b) (providing that reconsideration of a determination to deny enrollment is handled by the CMS regional office or a contractor hearing officer).

## Conclusion

CMS may deny Petitioner Mendelsohn's Medicare enrollment application because he was convicted of felony that CMS determined is detrimental to the best interests of the Medicare program and its beneficiaries. I therefore affirm CMS's determination.

/s/
Carolyn Cozad Hughes
Administrative Law Judge