Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

True Medical and Foot Group, LLC
(NPI: 1134469349)
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-124

Decision No. CR4604

Date: May 6, 2016

DECISION

The Medicare enrollment application of Petitioner, True Medical and Foot Group, LLC, is denied pursuant to 42 C.F.R. § 424.530(a)(3).

I. Background

National Government Services (NGS), the Medicare administrative contractor for the Centers for Medicare & Medicaid Services (CMS), notified Petitioner by letter dated May 15, 2015, that its application to enroll in Medicare was denied. NGS stated that the denial was pursuant to 42 C.F.R. § 424.535(a)(3) and (4), based upon its owner Dr. Atiyeh Salem's (NPI: 1477561553) felony conviction of money laundering within ten years of the application and his submission of false or misleading information on the

enrollment application.[1] NGS advised Petitioner that it imposed a ten-year bar to re-enrollment effective the date of Dr. Salem's felony conviction pursuant to 42 C.F.R. § 424.535(c). CMS Ex. 1 at 10-11; 8.

Petitioner requested reconsideration on June 23, 2015. CMS Ex. 1 at 5-202. On August 5, 2015, NGS upheld the denial of enrollment on reconsideration based on Dr. Salem's felony conviction and the alleged entry of false or misleading information on Petitioner's enrollment application. The reconsidered determination cited 42 C.F.R. § 424.535(a)(3) and (4) and advised Petitioner that Dr. Salem was barred from enrolling in Medicare for ten years from the date of his conviction. CMS Ex. 1 at 1-3.

The May 15, 2015 initial determination and the August 5, 2015 reconsidered determination cited the wrong regulations as the legal authority for denial of enrollment. The regulation applicable to denial of enrollment is 42 C.F.R. § 424.530 rather than 42 C.F.R. § 424.535, which was cited by the NGS notices. In the May 15, 2015 initial determination letter, NGS erroneously cited 42 C.F.R. § 424.535(a)(3) and (a)(4) as the basis for the enrollment denial rather than citing 42 C.F.R. § 424.530(a)(3) and (a)(4). CMS Ex. 1 at 10; CMS Ex. 8. The initial determination also erroneously cited 42 C.F.R. § 424.535(c) as the basis for a ten-year bar to re-enrollment, instead of 42 C.F.R. § 424.530(a)(3)(ii), which makes Dr. Salem ineligible to enroll Petitioner for ten years following the date of Dr. Salem's most recent conviction. In the reconsidered determination, NGS also erroneously cited 42 C.F.R. § 424.535(a)(3) and (a)(4), instead of 42 C.F.R. § 424.530(a)(3) and (a)(4). CMS Ex. 1 at 1. Petitioner does not cite these errors or argue that they amount to a denial of due process. Petitioner has not articulated any prejudice due to the defective initial determination or reconsidered determination letters. The regulations are clear that 42 C.F.R. § 424.530 applies to denials of enrollment such as this case and 42 C.F.R. § 424.535 applies to revocations of Medicare enrollment and billing privileges. I conclude, based on my review of Petitioner's request for hearing and briefs, that Petitioner was not confused by the incorrect citations to the regulations or prevented from mounting a defense to the enrollment denial. Accordingly, I conclude that the incorrect regulatory citations were harmless error that caused no prejudice to Petitioner or its ability to defend.

The initial determination letter also incorrectly lists 2008 as the date of Dr. Salem's money laundering conviction. However, the court records pertaining to Dr. Salem's conviction show that a verdict of guilty was reached by a jury on August 3, 2006; Dr.

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[1] Although the initial determination does not explicitly state the relationship between Dr. Salem and Petitioner, the record shows, and Petitioner does not dispute, that Dr. Salem is Petitioner's owner. CMS Exhibit (Ex.) 2.

Salem was sentenced on August 16, 2007; and the judgment and order of commitment was entered on August 20, 2007. CMS Ex. 9 at 13, 17-18, 25-26. The incorrect date of Dr. Salem's conviction in the initial determination letter caused no prejudice to Petitioner[2] as it was clear that Petitioner was denied enrollment based on Dr. Salem's conviction rather than having a prior enrollment revoked due to his conviction.

On November 5, 2015, Petitioner filed a request for hearing (RFH) before an administrative law judge (ALJ). On December 3, 2015, the case was assigned to me for hearing and decision, and an Acknowledgement and Prehearing Order (Prehearing Order) was issued at my direction.

On December 22, 2015, CMS filed a motion to dismiss Petitioner's RFH on grounds that it was not timely filed. CMS filed a motion for summary judgment and CMS Exs. 1 through 9 on January 4, 2016. On January 8, 2016, Petitioner filed a response in opposition to the CMS motion to dismiss with Petitioner's exhibits (P. Exs.) 1 through 18. On January 15, 2016, I denied CMS's motion to dismiss. On January 27, 2016, Petitioner filed a combined prehearing brief and opposition to CMS's motion for summary judgment (P. Br.) with P. Exs. 1 through 17.

On February 10, 2016, CMS filed a reply brief (CMS Reply). CMS objected to P. Exs. 1 through 13 and 15 through 17 on the grounds that Petitioner failed to show good cause for submitting new documentary evidence for the first time at the ALJ level. CMS Reply at 8-9. Petitioner filed a sur-reply on February 23, 2016 (P. Sur-reply).

Petitioner has not objected to my consideration of CMS Exs. 1 through 9, and they are admitted as evidence. P. Exs. 1 through 3, 5, 9 through 11, and 13 through 17 are not admitted as evidence and not considered. The only issue before me is whether CMS or its contractor had a basis to deny Petitioner's enrollment in the Medicare program. 42 C.F.R. § 498.5(l)(1)-(2). I may only admit evidence that is relevant and material. 42 C.F.R. § 498.60(b)(1). P. Exs. 1 through 3, 5, and 9 through 17, which contain certificates, letters of reference or recommendation, various notes related to providing evidence to NGS, and other materials with no tendency to show whether or not Dr. Salem was convicted, are not relevant as to whether there is a basis for denial of Petitioner's enrollment due to Dr. Salem's convictions. P. Exs. 4, 6, 7, and 8 are relevant as evidence of Dr. Salem's federal felony conviction in California. P. Ex. 12 is relevant as evidence, in the form of the admissions of Dr. Salem of his August 2007 conviction in the federal district court in California and his January 23, 2008 conviction of forgery in the

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[2] However, the date of "conviction" may impact the running of the ten-year period during which Dr. Salem is ineligible to enroll Petitioner in Medicare. 42 C.F.R. § 424.530(a)(3).

Eighteenth Judicial Circuit of DuPage County, Illinois. P. Ex. 12 at 3, 21. P. Exs. 4, 6, 7, 8, and 12 are admitted as evidence and there is good cause to do so on summary judgment as they establish that there is no dispute as to the material fact that Petitioner was convicted of two felony offenses in two separate criminal proceedings, one state and one federal.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as NGS. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[3] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395u(h)(1)). Petitioner is a supplier under the Act.

The Act requires the Secretary of Health and Human Services (Secretary) to issue regulations that establish a process for the enrollment in Medicare of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations, such as denial of enrollment and revocation of enrollment and billing privileges. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a supplier such as Petitioner must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

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[3] A "supplier" furnishes services under Medicare and includes physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) (42 U.S.C. § 1395f(g)) and 1835(e) (42 U.S.C. § 1395n(e)) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

The Secretary has delegated the authority to accept or deny enrollment applications to CMS. Pursuant to the Secretary's regulations, CMS may deny a provider's or supplier's enrollment application for any of the reasons set out in 42 C.F.R. § 424.530(a). In this case, CMS denied Petitioner's application under 42 C.F.R. § 424.530(a)(3) and (4), which provides in pertinent part:

> (a) *Reasons for denial*. CMS may deny a provider's or supplier's enrollment in the Medicare program for the following reasons:
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> * * * *
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> (3) *Felonies*. The provider, supplier, or **any owner or managing employee of the provider or supplier** was, within the preceding 10 years, convicted (as that term is defined in 42 CFR 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.
>
> (i) Offenses include, but are not limited in scope or severity to —
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> * * * *
>
> (B) Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
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> * * * *
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> (ii) Denials based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.
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> (4) *False or misleading information.* The provider or supplier has submitted false or misleading information on the enrollment application to gain enrollment in the Medicare program. (Offenders may be referred to the Office of Inspector General for investigation and possible criminal, civil, or administrative sanctions.)

42 C.F.R. § 424.530(a)(3) and (4) (emphasis added)[4]; Act §§ 1842(h)(8), 1866(b)(2)(D). The initial determination indicates that NGS determined to impose a ten-year enrollment bar, effective the date of Dr. Salem's felony conviction. However, pursuant to 42 C.F.R. § 424.530(a)(3)(ii), a person convicted of felonies in more than one proceeding, is ineligible to enroll in Medicare for a minimum period of ten years. The regulations grant no right to review of the determination of the duration of the bar if CMS or its contractor exercises discretion in determining the duration of ineligibility based on felony convictions. 42 C.F.R. § 424.545.

A prospective supplier whose enrollment application has been denied may request reconsideration and review as provided by 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a). A prospective supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a), (b). CMS or its contractor must give notice of its reconsidered determination to the prospective supplier, giving the reasons for its determination, specifying the conditions or requirements the prospective supplier failed to meet, and advising of the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the prospective supplier, the prospective supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The prospective supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate; and

Whether there was a basis for the denial of Petitioner's application to enroll in the Medicare program.

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

My conclusions of law are set forth in bold text followed by my findings of fact and analysis.

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[4] The current version of 42 C.F.R. § 424.530(a)(3) has been in effect since February 3, 2015. 79 Fed. Reg. 72,500, 72,531-2 (Dec. 5, 2014).

1. Summary judgment is appropriate.

CMS requested summary judgment. As noted above, a supplier denied enrollment in Medicare has a right to a hearing and judicial review, and a hearing on the record is required under the Act. Act §§ 205(b), 1866(h)(1), (j); 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17), 498.5; *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing but must do so affirmatively in writing. 42 C.F.R. § 498.66. In this case, Petitioner has not waived the right to oral hearing or otherwise consented to a decision based only upon the documentary evidence or pleadings. Accordingly, disposition on the written record alone is not permissible, unless CMS's motion for summary judgment has merit.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations at 42 C.F.R. pt. 498 that establish the procedure to be followed in adjudicating Petitioner's case do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g.*, *Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. Pro. 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of this case by my Prehearing Order. The parties were given notice by the Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Fed. R. Civ. Pro. 56 will be applied.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 4 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differ from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

In this case, I conclude that there is no genuine dispute as to any material fact pertinent to a denial of enrollment under 42 C.F.R. § 424.530(a)(3) that requires a trial. There is no dispute that Petitioner's owner, Dr. Salem, was convicted of two felonies before two different tribunals within the ten years preceding his application to enroll Petitioner in Medicare. CMS Ex. 2 at 15, 26-27. Petitioner admits that, on August 16, 2007, Dr. Salem was convicted in the U.S. District Court, Central District of California, of one count of conspiracy to commit money laundering and, on January 23, 2008, he was convicted in Illinois state court of forgery. [5] P. Exs. 4, 6, 7, 8, 12. Petitioner does not dispute that Dr. Salem's convictions occurred within the ten years preceding the filing of the enrollment application signed by Dr. Salem on November 3, 2014 and received by NGS on November 7, 2014. CMS Ex. 2 at 1, 27. Based on these undisputed material facts, there is a basis for the denial of Petitioner's enrollment in Medicare under 42 C.F.R. § 424.530(a)(3). Accordingly, I conclude that summary judgment based on the violation of 42 C.F.R. § 424.530(a)(3) is appropriate.

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[5] The initial determination referred only to the money laundering conviction. CMS Ex. 1 at 10. The reconsidered determination referred only to a "felony conviction." CMS Ex. 1 at 1. Before me, there is no dispute that Petitioner was, in fact, convicted of two different felonies before two different tribunals. One felony is all that is required to deny Petitioner enrollment under 42 C.F.R. § 424.530(a)(3). The conviction for forgery in Illinois in January 2008 is only relevant in this proceeding to the extent that it triggers the mandatory ten-year period of ineligibility to enroll in Medicare established by 42 C.F.R. § 424.530(a)(3)(ii).

However, summary judgment is not appropriate for deciding the issue of whether there is a basis for the denial of Petitioner's enrollment under 42 C.F.R. § 424.530(a)(4). In the initial determination, 42 C.F.R. § 424.535(a)(4) (false or misleading information on an application) was cited as one of the bases for denial and stated "Atiyeh Salem DPM failed to provide documentation pertaining to the money laundering conviction in 2008." CMS Exs. 1 at 10; 8 at 1. In the reconsidered determination, NGS again cited 42 C.F.R. § 424.535(a)(4) as one of the bases for denial; however, it provided no further information related to this basis for denial other than stating Petitioner had not provided evidence of compliance with Medicare requirements. CMS Ex. 1 at 1-2. The factual basis for the CMS determination is not clear from either the initial or reconsidered determinations. Dr. Salem has not conceded that he failed to provide documentation regarding his conviction and there is some evidence of an effort to disclose his prior convictions. Petitioner alleges that information about Dr. Salem's conviction was entered on the enrollment applications and that Petitioner responded to CMS's requests for additional documentation related to his conviction. P. Br. at 4, 8-11, 15-16; P. Sur-reply at 2, 5-6. A hearing would be needed to address what documentation Petitioner and Dr. Salem were required to produce, what they failed to produce, how what was produced was insufficient or inadequate, and how their conduct violated a regulatory requirement and provided a basis for denial of enrollment. Drawing all favorable inferences for Petitioner, as required in ruling on summary judgment, I conclude that there are genuine disputes of material fact. Therefore, summary judgment will not lie for CMS on the issue of whether there is a basis for denial under 42 C.F.R. § 424.530(a)(4). Because CMS may deny enrollment for any one of the reasons listed in 42 C.F.R. § 424.530(a), I conclude that a hearing is unnecessary to permit CMS an opportunity to attempt to prove a basis under 42 C.F.R. § 424.530(a)(4).

2. Petitioner's owner was convicted of two separate felony offenses in separate criminal proceedings, one state and one federal.

3. The Secretary has determined and provided by regulation that financial crimes or similar crimes are detrimental to the Medicare program or its beneficiaries. 42 C.F.R. § 424.530(a)(3)(i)(B).

4. Petitioner's owner was convicted in federal court of conspiracy to commit money laundering and, in state court, of forgery, which are financial crimes within the meaning of 42 C.F.R. § 424.530(a)(3)(i)(B).

5. There is a basis for denial of Petitioner's enrollment in Medicare pursuant to 42 C.F.R. § 424.530(a)(3).

6. The issue for hearing and decision is whether there is a basis for denial of Petitioner's Medicare enrollment and, if there is a basis for denial, my jurisdiction does not extend to review of whether CMS properly exercised its discretion to deny Petitioner's Medicare enrollment application.

7. Pursuant to 42 C.F.R. § 424.530(a)(3)(ii), the minimum period of ineligibility for Petitioner to enroll in Medicare is ten years from the date of Dr. Salem's last conviction, January 23, 2008, due to the existence of two felony convictions.

a. Facts

The facts material to the denial of Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.530(a)(3) are undisputed.

On or about August 3, 2006, Petitioner's owner, Dr. Salem, was found guilty by a jury in the U.S. District Court for the Central District of California, of one felony count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956. CMS Ex. 9 at 13, 25, 32; P. Br. at 2, 6. Dr. Salem was sentenced on August 16, 2007, to 33 months in prison, supervised release for three years upon release from imprisonment, and to pay a fine of $10,000 and a special assessment of $100. CMS Ex. 9 at 2, 13, 17-18, 25-26, 32; P. Br. at 6. On or about January 23, 2008, Dr. Salem was convicted of a felony count of forgery in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois, and sentenced to confinement to run concurrently with his federal sentence. CMS Ex. 1 at 159, 164, 169; CMS Ex. 7 at 9, P. Br. at 3-4, 8. Dr. Salem admits both of these felony convictions. P. Br. at 1-4; 6-8, 11, 19; P. Reply at 1-3.

On or around November 3, 2014, Dr. Salem signed a CMS 855I application to enroll Petitioner, Dr. Salem's podiatry practice. The application was received by NGS on November 7, 2014. CMS Ex. 2 at 1, 27. Dr. Salem also signed a CMS 855R application on November 3, 2014 that was received by NGS on November 7, 2014, reassigning his claims for services provided to Medicare-eligible beneficiaries to Petitioner. CMS Ex 3. On the CMS 855I, in the section "Final Adverse Legal Actions/Convictions," Dr. Salem disclosed that he had been convicted of "money laundering/forgery" in 2007 in California and that his probation had been terminated.[6] CMS Ex. 2 at 14. It is undisputed that Dr. Salem's 2007 and 2008 convictions occurred within the ten years preceding the filing of the CMS 855I and CMS 855R enrollment applications in November 2014.

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[6] Dr. Salem also listed another adverse legal action, which he described as "advertising issue with name" which occurred in "20013[sic]" in Illinois. CMS Ex. 2 at 13.

b. Analysis

CMS may deny an enrollment application if it determines that the supplier, "was, within the preceding 10 years, convicted . . . of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries." 42 C.F.R. § 424.530(a)(3). Among the types of felony offenses that CMS considers to be detrimental to the best interests of the program and its beneficiaries are "[f]inancial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted . . . ." 42 C.F.R. § 424.530(a)(3)(i)(B).

Petitioner disputes the characterization that the offenses of which Dr. Salem was convicted were financial crimes that are detrimental to the best interests of the Medicare program or its beneficiaries. P. Br. at 8, 12, 17; P. Reply at 1-3, 5-7. Petitioner argues that Dr. Salem was innocent and offers a lengthy explanation of the circumstances that resulted in Dr. Salem's convictions. P. Br. at 1-4, 6-8, 12, 19; P. Reply at 1-3, 5, 6-7.

Petitioner's arguments regarding whether or not Dr. Salem was actually guilty of the offenses for which he was convicted carry no weight in this proceeding. Petitioner's arguments amount to a collateral attack on Dr. Salem's convictions. I have no authority to review Dr. Salem's convictions. In this proceeding, Dr. Salem and Petitioner are bound by the undisputed fact that he was convicted. Petitioner cites no legal authority to the contrary.

Whether or not the offenses of which Dr. Salem was convicted were financial crimes within the meaning of 42 C.F.R. § 424.530(a)(3)(i)(B) is, given the undisputed facts, an issue of law that must be resolved against him. It is true that Dr. Salem's crimes of conspiracy to commit money laundering and forgery are not among the specific examples of financial crimes listed in 42 C.F.R. § 424.530(a)(3)(i)(B). However, the use of the words "such as" and "other similar crimes" in the regulation clearly indicate that the crimes listed are not meant to be all-inclusive but, rather, that CMS intended the category of "financial crimes" to encompass more than the enumerated felonies. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 10 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010).

Dr. Salem was convicted of violating the federal money laundering statute at 18 U.S.C. § 1956. The statute states:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
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> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

18 U.S.C. § 1956(a). The record shows that Dr. Salem was a conspirator in a scheme with others whereby he conducted numerous financial transactions "knowing that the source of the funds used in those transactions was proceeds from the sale of pseudoephedrine . . . to methamphetamine manufacturers." CMS Ex. 9 at 33. There can be no doubt that Dr. Salem engaged in unlawful financial transactions and that his conviction for conspiracy to commit money laundering constitutes a financial crime within the meaning of 42 C.F.R. § 424.530(a)(3)(i)(B).[7]

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[7] CMS also argues that Dr. Salem's conviction for conspiracy to commit money laundering could fall under 42 C.F.R. § 424.530(a)(3)(i)(D) ("Any felonies that would result in mandatory exclusion under section 1128(a) of the [Social Security] Act." CMS Br. at 15 n.5. CMS argues that, pursuant to section 1128(a)(4) of the Act, the Secretary must exclude any individual or entity from participation in any federal health care program that has been convicted of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled

(Continued next page.)

Similarly, I find that Dr. Salem's felony conviction for forgery was also a financial crime under 42 C.F.R. § 424.530(a)(3)(i)(B). The record reflects that Dr. Salem "was convicted of Forgery, pursuant to 720 ILCS 5/17-3(a), a Class 3 felony." CMS Ex. 1 at 159. The Illinois state law provision of which he was convicted states:

> § 17-3. Forgery.
>
> (a) A person commits forgery when, with intent to defraud, he or she knowingly:
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> > (1) makes a false document or alters any document to make it false and that document is apparently capable of defrauding another; or
> >
> > (2) issues or delivers such document knowing it to have been thus made or altered; or
> >
> > (3) possesses, with intent to issue or deliver, any such document knowing it to have been thus made or altered; or
> >
> > (4) unlawfully uses the digital signature, as defined in the Financial Institutions Electronic Documents and Digital Signature Act, of another; or
> >
> > (5) unlawfully uses the signature device of another to create an electronic signature of that person, as those terms are defined in the Electronic Commerce Security Act.

(Continued from preceding page.)

substance. CMS argues that Petitioner's conviction for conspiracy to commit money laundering relates to the unlawful manufacture or distribution of a controlled substance, and would result in his exclusion under section 1128(a)(4), thereby establishing a basis for denial under 42 C.F.R. § 424.530(a)(3)(i)(D). Because I conclude that Petitioner's convictions are financial crimes which fall under 42 C.F.R. § 424.530(a)(3)(i)(B), it is not necessary for me to address CMS's additional argument.

720 Ill. Comp. Stat. 5/17-3(a) (internal footnotes omitted). While the exact details of the forgery offense are not clear from the record, Dr. Salem referred to forgery of a credit card in his account of what occurred. P. Sur-reply at 2-3. The fact that a credit card was involved further supports that Dr. Salem engaged in fraudulent financial activity and supports my conclusion that his forgery offense constituted a financial crime.

The offenses of which Dr. Salem was convicted are financial crimes, one of the categories of offenses the Secretary has determined to be detrimental to Medicare and its beneficiaries. 42 C.F.R. § 424.530(a)(3)(i)(B). There is no dispute that his convictions occurred within the ten years preceding the filing of the CMS 855I and CMS 855R applications in November 2014. The Secretary has specifically provided that if a supplier was, within the preceding ten years of filing an enrollment application, convicted of a financial crime, then the application may be denied on that basis by CMS or its contractor. 42 C.F.R. § 424.530(a)(3)(i)(B). Accordingly, I conclude that there is a basis to deny Petitioner's enrollment in Medicare pursuant to 42 C.F.R. § 424.530(a)(3)(i)(B).

Petitioner argues that NGS failed to exercise discretion not to deny its enrollment application and it is unclear whether officials at NGS understood that they had discretion not to deny in this case. P. Br. at 16-17. I have concluded that there was a basis for the denial of Petitioner's Medicare enrollment. NGS issued an initial determination to deny Petitioner's enrollment application. An NGS hearing officer subsequently upheld the denial on reconsideration. Petitioner requested my de novo review and CMS has advocated before me that there was a proper exercise of discretion to deny Petitioner's enrollment in Medicare. Given the facts, whether or not NGS understood its discretion is not the issue before me. CMS, which is fully appraised of the facts, has elected to proceed with the denial of enrollment. There is no question that CMS could have at any time during the course of this proceeding reopened and revised the reconsidered determination and withdrawn the denial. 42 C.F.R. § 498.30. CMS did not choose to do so. Petitioner availed itself of the administrative review process in order to challenge NGS's determination, and I conclude that it has received the process due it under the Act and the Secretary's regulations. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5, 498.22(a), and 498.25.

I have no authority to review the exercise of discretion by CMS or its contractor to deny enrollment where there is a basis for such action. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). The scope of my authority is limited to determining whether there is a legal basis for the denial of Petitioner's Medicare enrollment. *Id*. I have concluded that there is a basis for CMS to deny Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.530(a)(3)(i)(B). Thus, a regulatory basis for denial of enrollment exists.

Petitioner argues that Dr. Salem's crimes are not detrimental to the best interests of the Medicare program. P. Br. at 17-18. Petitioner asserts that I should consider the following "mitigating" circumstances: Dr. Salem never harmed any patients; he is rehabilitated; he has regained his medical license; and his patients wish to receive care from him again. P. Br. at 17-19; P. Sur-reply at 4-5, 7-8. As discussed above, Dr. Salem was convicted of offenses which CMS determined to be detrimental to the program and its beneficiaries. I may not substitute my judgment for that of CMS and find his felony convictions not to be detrimental. As for the allegedly mitigating factors Petitioner argues, they are irrelevant to the issue of whether or not CMS or its contractor had a basis to deny Petitioner's enrollment application. To the extent that Dr. Salem's assertions may be construed as a request for equitable relief, I have no authority to grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) ("Neither the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements."). Furthermore, I am bound to follow the Act and regulations, and I have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (noting that "[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.").

Petitioner seeks a reduction of the ten-year period during which Dr. Salem is ineligible to enroll himself or an entity he owns or manages in Medicare. Petitioner argues that nine years have passed since Dr. Salem was convicted. Under the regulations, a supplier whose denial is based on a felony conviction is ineligible to enroll "for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses." 42 C.F.R. § 424.530(a)(3)(ii). There is no statutory or regulatory provision that provides Petitioner ALJ review of the period of ineligibility and, in this case with two felony convictions, the minimum authorized period is established by the regulation as ten years. Act § 1866(j)(8); 42 C.F.R. §§ 424.530(a)(3)(ii); 424.545; 498.3(b); and 498.5.

III. Conclusion

For the foregoing reasons, I conclude that there was a basis to deny Petitioner's application to enroll in Medicare. Petitioner and Dr. Salem are ineligible to enroll in Medicare for ten years, from January 23, 2008, the date of Dr. Salem's most recent felony conviction.

/s/
Keith W. Sickendick
Administrative Law Judge