

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Main Street Pharmacy, LLC,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-359

Decision No. CR2160

Date: June 18, 2010

DECISION

By a hearing request (HR) received January 20, 2010, Petitioner Main Street Pharmacy, LLC (MSP), timely appealed the November 27, 2009 reconsideration decision of a Medicare contractor hearing officer, which upheld the revocation of MSP's Medicare supplier enrollment. For the reasons explained below, I uphold the revocation.

I. Undisputed Facts and Procedural History

The following facts are undisputed. MSP is an Ohio pharmacy formed in 2004 as a limited liability corporation that Brian L. Martin and Kristina Gundler originally owned equally. On March 11, 2008, Mr. Martin was indicted on multiple counts of health care fraud of which he was convicted on September 22, 2008 and which consisted of filing false Medicaid claims for drugs never prescribed or dispensed to patients. CMS Ex. 10, at 41-77. Neither Ms. Gundler nor MSP itself was charged with any knowledge of, or involvement in, the crime (and the court found that Ms. Gundler helped uncover the scheme). *Id.* at 58, 64-67.

On June 16, 2008, Ohio's Medicaid agency suspended MSP's Medicaid provider number because of the indictment. *Id.* at 103-104. By letter dated September 15, 2008, Ms. Gundler notified CMS of the suspension of MSP's Medicaid number due to the indictment of one of its owners. *Id.* at 105. On October 3, 2008, eleven days after Mr. Martin's conviction, Ms. Gundler purchased Mr. Martin's interest in MSP and became sole owner. *Id.* at 87-102.

By letter dated August 6, 2009, CMS's contractor, the National Supplier Clearinghouse (NSC), notified MSP that its Medicare supplier number "will be revoked 30 days from the postmark of this letter." CMS Ex. 8, at 1. The letter then states that the "effective date of this revocation has been made retroactive to September 22, 2008, which is the date your felony conviction became effective." *Id.* The notice states that the reason for revocation was that "your company was convicted on September 22, 2008 of federal health care fraud charges" and cites "supplier standard number one," which requires suppliers to be "in compliance with all applicable Federal and State licensure and regulatory requirements." *Id.* The notice advised MSP that it could complete a corrective action plan within 30 days to achieve full compliance and that it had the right to request reconsideration within 60 days. *Id.* at 2.

By letter dated August 21, 2009, Ms. Gundler filed a request for reconsideration of MSP's revocation in which she pointed out that neither she nor the pharmacy was convicted of a felony and that Mr. Martin, who was convicted, had not owned MSP since October 2008. CMS Ex. 4. A copy of the purchase agreement was enclosed. CMS Ex. 5.

On November 27, 2008, the hearing officer issued a reconsideration decision upholding the revocation. CMS Ex. 1. The reconsideration decision quoted the explanation that Mr. Martin, not Ms. Gundler or MSP, was charged and convicted and noted that Mr. Martin was no longer an owner, as the purchase agreement reflected. *Id.* at 1-2. "However," the hearing officer concluded, "based upon the documentation in the case file, the NSC was not properly notified of the change," because no copy of the CMS Form 855S was found reflecting a notification of changed ownership. *Id.* at 2. The hearing officer further stated that MPS did not respond to a request for additional documentation and that Ms. Gundler's statement did not sufficiently substantiate compliance with supplier standard 1, because neither the letter nor the documentation in the case file explained "Ms. Gundler's status during the time period Mr. Martin was convicted" of health care fraud. *Id.* The hearing officer's acknowledgment of the reconsideration request and second letter notifying MPS of its "opportunity to submit additional evidentiary documentation to be reviewed in the reconsideration" are also in the record. CMS Ex. 2, at 1-3.

On January 12, 2010, MSP submitted a CMS 855S, reporting the change of ownership as well as the previous owner's conviction and the Medicaid suspension.¹ CMS Ex. 10, at 2, 16, 25. A week later, MSP timely requested a hearing before an Administrative Law Judge (ALJ) to review the November 27, 2009 reconsideration decision by a Medicare Hearing Officer that sustained revocation of its Medicare enrollment and billing privileges. HR at 1. A copy of the reconsideration decision, identified as Exhibit A, accompanied the hearing request. The case was originally assigned to ALJ Richard J. Smith and then transferred to me pursuant to 42 C.F.R. § 498.44.

On April 28, 2010, CMS filed a motion for summary judgment and accompanying memorandum (MSJ), along with 11 Exhibits. On May 19, 2010, MSP filed its answer brief (P. Answer), opposing CMS's motion and indicated that it had no objection to, and might rely on, any of CMS's exhibits (while reserving the possibility of submitting supplemental exhibits or witness lists if the case proceeded to hearing). On June 1, 2010, CMS submitted a reply brief (CMS Reply).

I admit Petitioner's Exhibit A and CMS Exhibits 1 – 11 for purposes of resolving the motion for summary judgment.

II. Issues

The central issue in this case is whether CMS is entitled to summary judgment that the revocation of Petitioner's enrollment in Medicare was legally authorized.

Before me, CMS contends that the revocation was legally authorized on two bases. First, CMS argues that the original basis for the revocation – that the supplier was convicted of a felony offense within the scope of section 424.535(a)(3) – was proper, because it is undisputed that Mr. Martin was an owner of MSP when he was convicted of health insurance fraud. MSJ at 6-9. CMS argues that the reconsideration decision's conclusion that MSP was not in compliance with supplier certification standard 1 in section 424.57(c)(1) (standard 1) was essentially the same reason for revocation, because the basis for finding that MSP was not operating in compliance with all legal requirements was the felony conviction. Second, CMS argues that revocation for failure to report timely that ownership in MSP changed was also proper, because any delay in

¹ CMS states that a new supplier number was issued on February 17, 2010 to Ms. Gundler "under the name 'Kfph LLC' located at the same address as 'Main Street Pharmacy.'" MSJ at 5 (citing CMS Ex. 11). Neither party explains why the new number was issued under a different name, when the January 12, 2010 CMS 855S used the name Main Street Pharmacy. Further, CMS does not explain how a new number was issued after a revocation that purported to impose a three-year bar against MSP filing an application to re-enroll in Medicare. Since neither party sought any action from me concerning this new enrollment, I have not developed the record and do not make any decision in regard to it.

raising this ground resulted from the fact that CMS was not aware of the change of ownership at the time the initial revocation notice was mailed and MSP had an adequate opportunity to respond to this basis. MSJ at 9-11.

Petitioner denies that either basis supports revocation and asserts that its due process rights have been violated.

III. Findings of fact and conclusions of law with supporting discussion

A. Applicable Standard

The Departmental Appeals Board (Board) has set out the standard for summary judgment as follows:

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . While the Federal Rules of Civil Procedure (FRCP) are not binding in this administrative appeal, we are guided by those rules and by judicial decisions on summary judgment in determining whether the ALJ properly granted summary judgment. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . If the moving party carries its initial burden, the non-moving party must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing 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.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ’s role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 4-5 (2009).

B. Analysis

1. CMS had a valid basis to revoke based on the felony conviction.

On August 6, 2009, the Medicare contractor notified MSP that its enrollment was revoked based on failure to comply with standard 1, which requires that a Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) supplier² “operates its business and furnishes Medicare-covered items in compliance with all applicable Federal and State licensure and regulatory requirements.” CMS Ex. 8, at 1 (citing 42 C.F.R. § 424.57(c)(1)). The notice specified that MSP failed to meet this standard, because, according to the United States Department of Justice (DOJ), the supplier “was convicted on September 22, 2008 of federal health care fraud charges.” CMS Ex. 8, at 1; CMS Ex. 6.

It is undisputed that the fraud consisted of co-owner Mr. Martin knowingly and willfully billing Medicaid using MSP’s Medicaid number for drugs never actually prescribed by a doctor and never dispensed by Mr. Martin. P. Answer at 3. MSP’s Medicaid number was suspended as a result of the indictment, and MSP notified CMS of that suspension as regulations required. *Id.*; CMS Ex. 10, at 103-105. MSP does not argue that a conviction for health care fraud in Medicaid cannot properly form the basis for finding a violation of standard 1. I conclude that such a conviction demonstrates on its face that a business is not being operated in compliance with applicable Federal and state regulatory requirements.

Petitioner does argue, however, that Mr. Martin’s conviction should not be imputed to the entity, MSP, which was not itself indicted or convicted. P. Answer at 3. CMS relies for the contrary position on 42 C.F.R. § 424.535(a)(3), which provides for revocation of a currently enrolled supplier’s billing privileges in the following circumstance:

The provider, supplier, **or any owner** of the provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries.

(Emphasis added); MSJ at 7, citing *Fady Fayad, M.D.*, DAB No. 2266 (2009).

No dispute exists that Mr. Martin was an owner of MSP during the period that he committed, was charged with, and was convicted of defrauding Medicaid. MSP does not deny that this crime is an offense covered by section 424.535(a)(3)(i)(B), i.e., a financial crime similar to insurance fraud.

² A DMEPOS supplier, such as MSP, is an entity that sells or rents Medicare-covered durable medical equipment, prosthetics, orthotics, and supplies. 42 C.F.R. § 424.57(a). Such suppliers must meet the certification requirements set out in section 424.57(c).

It is true that the contractor did not cite section 424.535(a)(3) as a separate basis for revoking MSP's enrollment. Nevertheless, I find that section informative in understanding what it means for a supplier not to be operating in compliance with Federal regulatory requirements under standard 1. Any owner's conviction of a crime detrimental to Medicare establishes that the supplier is in violation of section 424.535(a)(3). Section 424.535(a) is a Federal regulatory requirement. A supplier is in violation of standard 1 if it operates in violation of any Federal regulatory requirement. It therefore follows that MSP is in violation of standard 1, because having a co-owner convicted of a felony under section 424.535(a) put it in violation of a Federal regulatory requirement, even though the supplier entity was not itself charged or convicted of a felony.

I therefore reject Petitioner's argument that the fact that MSP itself was not charged or convicted of a crime precluded its revocation based on violation of standard 1.

2. *CMS was not required to reverse the revocation.*

Petitioner next argues that its revocation should be reversed under section 424.535(e), which provides:

If the revocation was due to adverse activity (sanction, exclusion, or **felony**) against **an owner**, managing employee, or an authorized or delegated official; or a medical director, supervising physician, or other personnel of the provider or supplier furnishing Medicare reimbursable services, the revocation **may** be reversed **if the provider or supplier terminates and submits proof that it has terminated its business relationship with that individual within 30 days of the revocation notification.**

(Emphasis added). Petitioner argues that MSP complied with this requirement, because its business relationship with Mr. Martin was terminated within 30 days of the revocation notice. P. Answer at 5. Petitioner points to a purchase agreement, which it submitted timely to the contractor with the August 21, 2009 request for reconsideration, showing that Ms. Gundler bought Mr. Martin's share of the business on October 3, 2008, while the notice of revocation was received on August 6, 2009. *Id.* at 6, citing CMS Exs. 4 and 5.

CMS contends that section 424.535(e) is permissive, not mandatory, vesting in CMS the discretion to decide whether to reverse a revocation, when a supplier timely terminates a business relationship with an individual whose adverse activity caused the revocation. MSJ at 8. CMS also asserts that its discretion in this regard is not subject to review and that I may not substitute my judgment as to whether a revocation should have been reversed under section 424.535(e). *Id.* In addition, CMS argues that, even if I were to review the exercise of discretion, I should uphold it here, because the false claims were submitted under MSP's Medicaid number. In addition, Ms. Gundler was "not

forthcoming” in reporting to CMS either the felony conviction or the change of ownership. *Id.* CMS also suggests that I should attribute responsibility for the false claims to Ms. Gundler as co-owner and noted that another ALJ has imputed an employee’s knowledge of a false claim to the employer. *Id.* at 9.

Petitioner does not deny that section 424.535(e) is permissive in nature, and I find that the use of the word “may” in the context of this regulation implies that a reversal is not necessarily required whenever proof of timely termination of relationship is provided. Petitioner’s question, however, whether the contractor or CMS ever actually considered section 424.535(e) or consciously exercised any discretion to reach a decision on whether to apply it. P. Answer at 6. Petitioner further argues that, “[e]ven if there is something in the record that proves CMS exercised its discretion, CMS abused that discretion.” *Id.* Petitioner bases that position on the grounds that MSP’s “only mistake was its failure to file a timely CMS 855S showing the change in ownership and conviction,” which it has since corrected. *Id.* (citing CMS Ex. 10).

I do not find in the regulations a basis for requiring that CMS or the contractor document a decision not to provide a supplier with the benefit of reversing a revocation under section 424.535(e). I agree with CMS that the regulation simply allows CMS to reverse a revocation under certain circumstances. However, the regulation does not require CMS to do so, or even to demonstrate that it considered whether to do so and documented its reasons not to. *See* CMS Reply at 3. I need not resolve the question of whether an abuse of discretion under section 424.535(e) is ever subject to review, because I find that Petitioner has presented no persuasive reason to view CMS’s declining to reverse this revocation as abusive, arbitrary, or capricious.

I accept for purposes of this motion that Ms. Gundler was entirely innocent in her partner’s scheme, even to the point of being a victim of and material witness against him. I also decline to accept CMS’s invitation to impute responsibility to her for actions of another co-owner, which is in any case not entirely analogous to an employer’s liability for the actions of an employee.

Nevertheless, the crime constituted a serious felony by an owner of MSP against a federal health care program involving fraudulent claims for payment processed through the supplier itself (as opposed to, for example, a less severe or non-criminal sanction, a conviction unrelated to the business or to health care finance, or a lower level staff person). Those factors provide reasonable bases for CMS to have rejected the option of reversing the revocation and are not arbitrary or capricious in nature. Petitioner’s argument that its mistake was failing to timely report the conviction or the change of ownership simply amounts to a concession of additional reasons why CMS might reasonably lack confidence in MSP sufficient to reinstate it after the former co-owner’s felony conviction.

I conclude that section 424.535(e) does not provide a basis for me to reverse Petitioner's revocation.

CMS's argues that an alternative basis exists for revocation. CMS argues that MSP's failure to report the change of ownership within 30 days violates supplier standards 1 and 2. MSJ at 10-11, citing 42 C.F.R. § 424.57(c)(2). CMS asserts, and MSP does not deny, that MSP did not provide notice of the conviction (as opposed to the resulting Medicaid suspension) or the change of ownership, until it submitted the purchase agreement to the hearing officer in August 2009 and then filed an application reporting the change and the conviction in January 2010, over a year late. MSJ at 11; CMS Ex. 10.

The hearing officer found that this constituted an independent basis for revocation. CMS Ex. 1, at 2. MSP contends that it lacked notice and an opportunity to correct under 42 C.F.R. § 424.535(a)(1), because this ground was not raised before the reconsideration decision. P. Answer at 5. This contention is somewhat disingenuous. MSP did not disclose the change of ownership to the contractor prior to the reconsideration process, when it sought to use the purchase agreement as a defense against the charge that it had violated supplier standard 1. *See* CMS Exs. 1, 5, and 10. Hence, the contractor could hardly have notified MSP prior to the reconsideration process that late reporting was an additional basis for revocation.

I find it unnecessary, however, to resolve whether failure to report constitutes a second valid basis for revocation in light of my resolution on standard 1.

3. I do not find a violation of due process.

MSP contends that CMS violated its due process rights, because the grounds on which the hearing officer upheld the revocation differed materially from the grounds set out in the initial notice of revocation. P. Answer at 7-8; *see* CMS Exs. 1 and 8.³ MSP bases this position on its view that the hearing officer accepted MSP's contention that it was never convicted of a felony, as alleged in the notice, and based its affirmance of the revocation on two new grounds: (1) that MSP failed to report the ownership change and (2) that Ms. Gundler failed to explain her "status during the time period of Martin's criminal conviction." *Id.* at 2, 8; CMS Ex. 1.

MSP does not accurately represent the basis for the hearing officer's decision. The initial notice based the revocation on a violation of supplier standard 1 in light of health care fraud conviction of MSP that DOJ reported. The hearing officer accepted MSP's documentation that the conviction was of a co-owner, rather than the company, while concluding that this information did not undercut the evidence that MSP was in violation

³ MSP states that it raises its due process arguments, as well as its abuse of discretion arguments, to preserve them for appeal, even if this tribunal lacks authority to review them.

of standard 1. Had MSP timely reported the conviction of its co-owner as the law required, the contractor would have been able to include the correct identity of the felon in the initial notice. I do not find that MSP lacked adequate notice of the basis for revocation, which continued to be the violation of supplier standard 1 resulting from the felony conviction as the reconsideration decision sets out. CMS Ex. 1, at 1-2.

I have addressed the question of MSP's failure to report as an independent basis for revocation above and do not revisit it here. For the same reason, I need not resolve MSP's claim that its failure to report could not be the basis of a revocation, because it was not offered an opportunity to correct it and that it did correct it by submitting the new application. P. Answer at 5. I note, however, that showing that a provider or supplier has returned to compliance is part of the corrective action plan process. As the Board has held, a contractor has discretion as to whether to accept such later correction and reverse a revocation. *DMS Imaging, Inc.*, DAB No. 2313 (2010). During the reconsideration and appeal process, the issue is whether a basis existed at the time of the revocation notice that supports CMS's action, not whether that basis was later eliminated.

I do not find that the hearing officer's comment that Ms. Gundler did not explain her "status" to be a separate basis for revocation. CMS Ex. 1, at 2. The statement is not entirely clear and adds little to the decision. The essential point is that the documentation and letter that Ms. Gundler submitted did "not substantiate . . . compliance . . . with supplier standard 1." *Id.* I agree. The conclusion of the hearing officer's decision is simply that MSP's revocation stands, because MSP "has not provided evidence to show they have fully complied with the standard for which they were non-compliant . . ." *Id.* The standard is the same as that for which they were cited in the initial notice, and the correction of the identity of the convicted felon was information entirely within MSP's control.

In any case, I have provided MSP with ample opportunity to present any arguments or evidence that it was precluded from presenting below, due to the change in the charges resulting from the new information, which MSP provided to the contractor during the reconsideration process. New evidence on appeal in these proceedings can be accepted only on a showing of good cause under 42 C.F.R. § 498.56(e). MSP, however, proffered no showing that it needed to submit new documentation, much less that it had good cause to do so. Hence, MSP has received due process during this proceeding.

I therefore find no violation of due process as MSP alleged.

IV. Conclusion

The undisputed facts entitle CMS to summary judgment as a matter of law. Petitioner has identified no material fact in dispute that, if resolved in its favor, could support a different outcome. I therefore grant summary judgment in favor of CMS.

/s/
Leslie A. Sussan
Board Member