Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Precision Prosthetic, Inc.
(NPI: 127590001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1256

Decision No. CR3187

Date: April 2, 2014

DECISION

The Centers for Medicare & Medicaid Services (CMS) denied the Medicare enrollment of Petitioner, Precision Prosthetic, Inc., retroactive to April 10, 2006, when the National Supplier Clearinghouse (NSC), a CMS administrative contractor, received an enrollment application from Petitioner seeking to re-enroll in the Medicare program. The CMS contractor originally approved the application on September 5, 2006. CMS stated in its determination denying Petitioner's enrollment that Petitioner's owner, John Karl Lee, was convicted in 2005 of three felony counts of mail fraud and three felony counts of making false statements to obtain worker's compensation benefits, which CMS deems "financial crimes" under 42 C.F.R. § 424.530(a)(3)(i)(B), as well as felonies described in section 1128 of the Social Security Act (codified at 42 U.S.C. § 1395a-7). Petitioner appealed the determination denying its enrollment. For the reasons set forth below, I affirm CMS's denial of Petitioner's 2006 enrollment application.

I. Case Background and Procedural History

Petitioner is a company in El Paso, Texas, that sells durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). On April 10, 2006, NSC received from

Petitioner a CMS-855S form (2001 edition), one of several Medicare enrollment applications, in which Petitioner sought to re-enroll in the Medicare program as a "DMEPOS supplier."[1] CMS Exhibit (Ex.) 6. Following an on-site inspection and further development of Petitioner's 2006 enrollment application, on September 5, 2006, NSC notified Petitioner that it had been re-enrolled in the Medicare program and its supplier number was effective retroactive to December 17, 2002. CMS Exs. 9; 10.

On October 10, 2012, NSC notified Petitioner that it was revoking Petitioner's billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B), (D), retroactive to April 5, 2005. CMS Ex. 1. NSC cited the April 5, 2005 felony convictions of John K. Lee, Petitioner's "sole owner," for mail fraud and worker's compensation fraud as the basis for revoking Petitioner's billing privileges. CMS Ex. 1, at 2. NSC stated that John K. Lee's convictions would result in a "mandatory exclusion from the Medicare program." CMS Ex. 1, at 2. NSC also imposed a three-year bar on Petitioner's re-enrollment pursuant to 42 C.F.R. § 424.535(c). CMS Ex. 1. Petitioner requested reconsideration. On November 16, 2012, NSC issued a reconsidered determination that was unfavorable to Petitioner and upheld the revocation of Petitioner's billing privileges. CMS Ex. 4.

Petitioner then requested a hearing before an administrative law judge. CMS Ex. 5. The case was docketed in the Civil Remedies Division (CRD) with Docket Number C-13-135, and was assigned to me for a hearing and decision. Following the parties' prehearing submissions, I determined that NSC had not considered in its initial or reconsidered determination whether it could revoke Petitioner's enrollment retroactively to April 5, 2005, since the regulation authorizing retroactive revocation, 42 C.F.R. § 424.535(g), became effective on January 1, 2009. *See* 73 Fed. Reg. 69,726, 69,940-41 (Nov. 19, 2008). Therefore, on June 3, 2013, I remanded the case to CMS to consider that issue or, in the alternative, to consider whether NSC had intended to deny Petitioner's enrollment retroactively. I directed CMS to give Petitioner an opportunity to respond to CMS's proposed course of action following remand, issue a determination no later than August 30, 2013, and then return the case to me for further proceedings. *See* 42 C.F.R. § 498.56(d).[2] Therefore, I retained jurisdiction over this case during remand.

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[1] A "DMEPOS supplier" is "an entity or individual, including a physician or a Part A provider, which sells or rents Part B covered items to Medicare beneficiaries and which meets the standards in [42 C.F.R. § 424.57(c) and (d)]." 42 C.F.R. § 424.57(a).

[2] 42 C.F.R. § 498.56(d) states:

> At the request of either party, or on his or her own motion, in lieu of a hearing under paragraph (c) of this section, the ALJ may remand the case to CMS . . . for consideration of the new issue and, if appropriate, a determination. If necessary, the ALJ may direct CMS or the OIG to return the case to the ALJ for further proceedings.

On July 31, 2013, CMS's Center for Program Integrity provided Petitioner with a copy of a "Proposed Determination" and permitted Petitioner an opportunity to respond. The Proposed Determination stated that CMS intended to deny Petitioner's enrollment retroactive to Petitioner's enrollment application that NSC received in 2006. Katherine Lee responded to CMS by e-mail on August 21, 2013, and described the "process of submitting the April 2006 revalidation application, taking over [Petitioner] from [John K. Lee] and another past owner due to [John K. Lee's] military service and federal prison sentence, and submitting the 2012 revalidation application." CMS Ex. 11, at 2. On August 28, 2013, CMS issued its "Determination Pursuant to ALJ Anderson's June 11, 2013 Amended Order of Remand." CMS Ex. 11. The determination denied Petitioner's 2006 Medicare enrollment application. CMS Ex. 11, at 1. CMS filed its determination with CRD and the case was re-docketed under Docket Number C-13-1256.

On September 5, 2013, I issued an Acknowledgment and Pre-hearing Order (Pre-hrg. Order) that directed Petitioner to file a request for hearing by October 7, 2013, if it disagreed with CMS's August 28, 2013 determination denying Petitioner's 2006 enrollment application or, if it agreed with that determination, a notice to that effect. Petitioner timely filed its hearing request (RFH) on October 7, 2013, which disputed CMS's August 28, 2013 determination.

CMS filed a motion for summary judgment and brief (CMS Br.) on December 2, 2013, as well as 11 proposed exhibits (CMS Exs. 1-11). Petitioner filed a "Motion to Dismiss" (P. Mot.) on January 2, 2014, as well as eight proposed exhibits (P. Exs. 1-8). Petitioner's "Motion to Dismiss" did not seek dismissal of the case as its title suggests, but rather opposed a decision in favor of CMS and argued, in essence, that the denial of its 2006 enrollment application was wrong. In addition, Petitioner filed its objection to the admission of CMS Exs. 1-4 and 6-8. On January 21, 2014, Petitioner submitted a letter dated April 15, 2013, from the American Board for Certification in Orthotics, Prosthetics, & Pedorthics, Inc., as an additional proposed exhibit. On February 5, 2014, CMS filed an objection to the admission of the letter submitted January 21, 2014, but did not file a reply brief or objections to any other of Petitioner's proposed exhibits. On February 17, 2014, Petitioner filed additional documents, though those documents appear to be copies of documents already submitted as Petitioner's proposed exhibits.

II. Evidentiary Rulings

With the exception of CMS Ex. 6, Petitioner's objections to CMS's proposed exhibits do not challenge the relevance or authenticity of the documents, but merely dispute some of the substantive evidence presented in those documents. For example, Petitioner argues that CMS's August 28, 2013 determination (CMS Ex. 1) was addressed to John Karl Lee, but should have been addressed to Katherine Lee or Lisa Loza. Also, Petitioner's objection to a copy of NSC's original notice of revocation questions whether the revocation of its billing privileges was appropriate, but does not dispute the authenticity

or relevance of that proposed exhibit. However, admission of that evidence is not precluded based on substantive arguments or arguments meant to discredit it. Petitioner has not raised any relevant arguments that would preclude the admission of CMS's proposed exhibits. *See* 42 C.F.R. § 498.61. Petitioner argues that there may be additional documents that CMS should have presented, but that theory, even if true, does not prohibit the admission of the documents that CMS has actually produced as proposed exhibits. Regarding CMS Ex. 6, Petitioner argues that the exhibit may not be complete in light of the numerous blank pages. Petitioner states that it "believes CMS is withholding or lost documents." However, the "blank pages" in the exhibit appear to be the reverse side of a page with print on only one side. Petitioner's claim the document has been altered or that CMS is withholding evidence is speculative and an unreasonable interpretation of the "blank pages" in that exhibit. Moreover, CMS Ex. 6 is relevant as it is a copy of Petitioner's 2006 Medicare enrollment application that CMS has now denied. Aside from Petitioner's speculation, there is no basis to deem CMS's proposed exhibits as not relevant or not authentic. Therefore, I overrule Petitioner's objections and admit CMS Exs. 1-11 into the record.

CMS objects to the letter that Petitioner submitted on January 21, 2014. CMS argues that the document was untimely submitted because Petitioner's proposed exhibits were due on January 2, 2014. Petitioner offers no explanation, let alone good cause, for the untimely submission of this letter, and I find no basis to admit the letter as an exhibit. Therefore, I sustain CMS's objection and exclude the letter from the record. Even if it had been timely submitted, the letter is from April 15, 2013, while the focus of this case is on Petitioner's compliance at the time of its 2006 application for re-enrollment. Therefore, the relevance of the April 2013 letter is tenuous at best. In the absence of any objections to Petitioner's other proposed exhibits, I admit P. Exs. 1-8 into the record.

III. Decision on the Record

I informed the parties that they must submit written direct testimony from any witnesses that they wanted to testify in this proceeding. Pre-hrg. Order ¶ 8. Further, I informed the parties that I would only hold an in-person hearing if an opposing party requested to cross-examine a witness or witnesses for whom written direct testimony had been submitted. Pre-hrg. Order ¶ 10; *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). Neither party offered written direct testimony for any witnesses. Accordingly, the record is closed and I issue this decision based on the written record. *See* Pre-hrg. Order ¶ 11.

IV. Issue

The issue in this case is whether CMS had a legitimate basis to deny Petitioner's 2006 application for re-enrollment in the Medicare program.

CMS appears to have abandoned its theory that it was authorized to revoke Petitioner's billing privileges retroactive to April 5, 2005, the date of John K. Lee's felony convictions. My June 11, 2013 Amended Order of Remand (Remand Order) directed CMS to consider whether it could revoke Petitioner's billing privileges retroactively or, in the alternative, whether it intended to deny Petitioner's enrollment retroactively. Remand Order at 3-4. CMS's subsequent determination made it clear that it would deny Petitioner's enrollment retroactively rather than argue for retroactive revocation. CMS Ex. 11, at 1. Also, CMS has not argued in its brief that it was authorized to revoke Petitioner's billing privileges, but merely that it was authorized to deny them. CMS Br. at 7 (unnumbered). Accordingly, whether CMS was authorized to revoke Petitioner's billing privileges retroactive to April 5, 2005, is no longer at issue. It is expected that CMS has taken or will take the steps necessary to reverse the revocation of Petitioner's billing privileges retroactive to April 5, 2005, because that determination has been superseded by CMS's August 28, 2013 determination to deny Petitioner's April 2006 enrollment application.

V. Jurisdiction

I have jurisdiction to review CMS's denial of a supplier's enrollment in the Medicare program. 42 C.F.R. §§ 424.545(a), 498.3(b)(17), 498.5(*l*)(1)-(2); *see also* 42 U.S.C. § 1395cc(j)(8). I also have jurisdiction to conduct further proceedings following remand of a case to CMS to issue a new determination. 42 C.F.R. § 498.56(d).

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

The Social Security Act authorizes the Secretary of Health and Human Services to refuse to enter into an agreement or refuse to renew an agreement with a supplier "in the event that such physician or supplier has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries." 42 U.S.C. § 1395u(h)(8). By regulation, CMS or its contractor may deny the enrollment of a prospective provider or supplier if the "provider or supplier at any time is found not to be in compliance with the Medicare enrollment requirements described in this section or on the applicable enrollment application to the type of provider or supplier enrolling . . . ." 42 C.F.R. § 424.530(a)(1). Among the "Medicare enrollment requirements described in this section" is the authority for CMS to deny enrollment if "within the 10 years preceding enrollment or revalidation . . . any owner of the provider or supplier 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." 42 C.F.R. § 424.530(a)(3). The regulation lists "financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted . . ." as being offenses that form a basis for CMS to deny enrollment to a provider or supplier. *Id.* § 424.530(a)(3)(i)(B). The offenses listed in the regulation represent those offenses that CMS has determined are "detrimental per se" to the Medicare program and its beneficiaries. *See Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008).[3]

1. *At the time of Petitioner's 2006 Medicare enrollment application, John Karl Lee was an owner of Petitioner*.

Petitioner admits that John K. Lee first acquired an ownership interest in Petitioner on August 9, 1999. P. Ex. 8, Part 6, at 5. In 2006, Petitioner submitted an enrollment application (CMS-855S, 2001 edition) to re-enroll in the Medicare program as a DMEPOS supplier. CMS Ex. 6. It is undisputed that NSC received that application on April 10, 2006. In the application Petitioner deleted Kwon Yi as an owner effective February 2006, added Katherine Lee as a "director/officer" and "authorized official" effective December 2005, and added Lisa Loza as "managing employee." CMS Ex. 6, at 8-11. Petitioner also listed John Karl Lee as a "5% or greater owner" and an "authorized official" of the company. CMS Ex. 6, at 12. John K. Lee signed the application and, where prompted to provide his title or position, he wrote "owner." CMS Ex. 6, at 16.

In response to the application, NSC conducted an on-site visit of Petitioner's store. CMS Ex. 9, at 199-246. As part of the on-site inspection, Petitioner was to supply "a listing of all management and owners, including name and title." CMS Ex. 9, at 199. On May 2, 2006, Petitioner provided a "List of Contacts" on its own letterhead. CMS Ex. 9, at 225. John K. Lee is listed as "Owner." CMS Ex. 9, at 225. By contrast, Katherine E. Lee is listed as Petitioner's "President" and Lisa Loza is listed as Petitioner's "Office Manager." CMS Ex. 9, at 225.

The evidence contemporaneous with Petitioner's 2006 enrollment application shows that Petitioner held out John K. Lee as its owner. Petitioner argues that John K. Lee did not participate in the day-to-day operations of the company, nor could he have done so while he was incarcerated or deployed in the military. RFH at 1; P. Mot. at 1-3. Petitioner points out that Katherine Lee and Lisa Loza were added as authorized officials in the 2006 enrollment application and that John K. Lee could not have managed the company because he had been deployed overseas. RFH at 1. Petitioner even goes so far as to assert that *Katherine* Lee was listed as the "owner" in the 2006 application, but nowhere

[3] Administrative decisions cited in this decision are accessible on the internet at: http://www.hhs.gov/dab/decisions/index.html.

in that application is she listed as such. *See* CMS Ex. 6. Even if John K. Lee had a limited role in Petitioner's operations, that would not raise a genuine dispute about his ownership of the company.

Petitioner has never explained why it listed John K. Lee as Petitioner's "owner" in both the 2006 enrollment application and in the "List of Contacts" provided to the NSC site inspector on May 2, 2006, if he was not actually the owner as Petitioner now alleges. Petitioner has not submitted any documentary evidence to prove John K. Lee divested his ownership of Petitioner. This lack of explanation and evidence is even more significant when considering the fact that John K. Lee signed Petitioner's May 2012 revalidation enrollment application as Petitioner's owner. CMS Ex. 7, at 35. It is only in Petitioner's December 2012 revised revalidation enrollment application that Petitioner asserts that John K. Lee ceased to be an owner on May 1, 2004, and Katherine Lee became an owner. P. Ex. 8, Part 6, at 3, 5. These assertions, coming only after CMS's initial determination to revoke Petitioner's enrollment based on John K. Lee's criminal conviction in 2005, can only be viewed with extreme incredulity.

Therefore, in light of the fact that Petitioner bears the burden of demonstrating that it meets all enrollment requirements, 42 C.F.R. § 424.545(c), and there being no other reasonable inference based on the evidence before me, I find that John K. Lee was Petitioner's owner in 2006 during the submission and processing of Petitioner's enrollment application.

2. *John Karl Lee was convicted of six felonies on April 5, 2005, that are "financial crimes" pursuant to 42 C.F.R. § 424.530(a)(3)(i)(B).*

It is undisputed that John K. Lee was convicted on April 4, 2005, in the United States District Court for the Western District of Texas, of three counts of mail fraud in violation of 18 U.S.C. § 1341, and three counts of false statements to obtain Federal employees' compensation in violation of 18 U.S.C. § 1920. CMS Ex. 8, at 1. The offenses occurred between July 21, 1999 and November 13, 2001. CMS Ex. 8, at 1. The trial court sentenced John K. Lee to 24 months of incarceration followed by two years of supervised release, imposed a $172,000 fine, directed forfeiture of $157,963.25, and ordered him to pay $229,429.89 in restitution. CMS Ex. 8, at 6-7. It is also undisputed that John K. Lee was able to return to military service on March 13, 2007, after completing his sentence.

As stated in 18 U.S.C. § 3559(a), the maximum term of imprisonment authorized by the statute defining an offense determines whether that offense is a felony or misdemeanor, and, if a felony, the class of felony. A violation of 18 U.S.C. § 1341 is punishable by up to 20 years of incarceration. An offense that is punishable by less than 25 years but 10 or more years of incarceration is a "Class C felony." 18 U.S.C. § 3559(a)(3). A violation of 18 U.S.C. § 1920 is punishable by up to five years of incarceration. An offense that is

punishable by less than 10 years but five or more years is a "Class D felony." 18 U.S.C. § 3559(a)(4). Accordingly, I find that John Lee's convictions for violating 18 U.S.C. §§ 1341, 1920 were for felony offenses under Federal law.

The regulations provide that a felony conviction of a supplier's owner for a "financial crime" provides a basis for CMS to deny that supplier's enrollment in the Medicare program. 42 C.F.R. § 424.530(a)(3)(i)(B). The applicable section provides a non-exhaustive list of examples of offenses that constitute "financial crimes," including: "extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes . . . ." *Id.* Here, the felony offenses for which John K. Lee was convicted are not expressly mentioned in the regulation, but rather are "similar crimes" to those described. *See id.*; *see also Edgard Cruz Baez, M.D.*, DAB CR2483, at 2 (2012) ("[T]he regulation broadly interprets the term 'financial crime' to include any offense similar to those listed."). The offense of "frauds and swindles," also known as "mail fraud," 18 U.S.C. § 1341, requires the perpetrator to use the U.S. Postal Service or private carrier in furtherance of a scheme to "defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ." 18 U.S.C. § 1341. As outlined by the United States Circuit Court of Appeals for the Fifth Circuit (Case No. 05-51138) in an opinion affirming John K. Lee's convictions, by finding him guilty of mail fraud, the jury necessarily found he had made fraudulent misrepresentation on Office of Worker's Compensation Program forms to obtain disability benefits. CMS Ex. 2, at 13. In addition, the offense of "false statement or fraud to obtain Federal employees' compensation," 18 U.S.C. § 1920, requires that the perpetrator "knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit . . . ." 18 U.S.C. § 1920.

"Insurance fraud," which is listed in the regulation as being a "financial crime," generally prohibits "any person who, with an intent to defraud an insurance company, presents a written or oral statement in support of a claim for payment knowing that the statement contains false, incomplete, or misleading information concerning a fact material to such claim . . . ." 44A Am. Jur. 2d *Insurance* § 2060 (2014). The offenses for which John K. Lee was convicted hinged on his presenting false material information (including through the mail or other courier) to obtain financial benefit, which is remarkably similar to "insurance fraud." *Cf. Ahmed v. Sebelius,* 710 F. Supp. 2d 167, 174 (D. Mass. 2010) ("The DAB properly concluded that this conduct, as does insurance fraud, 'involves a false statement or misrepresentation in connection with a claim or application for insurance or insurance benefits.'"). Thus, because of their similarity to insurance fraud, the offenses for which John K. Lee was convicted are "financial crimes" as that phrase is used in 42 C.F.R. § 424.530(a)(3)(i)(B).

3. *CMS had a legitimate basis to deny Petitioner's 2006 enrollment application under 42 C.F.R. § 424.530(a)(3)(i)(B).*

The regulations authorize CMS to deny a supplier's enrollment application if, within the 10 years preceding that application, the supplier or "any of its owners" have been convicted of a felony that is detrimental to the Medicare program or its beneficiaries. 42 C.F.R. § 424.530(a)(3). Among the offenses that CMS has determined are "detrimental per se" to the Medicare program are "financial crimes." *Id.* § 424.530(a)(3)(i)(B). As explained above, John K. Lee was Petitioner's owner at the time Petitioner submitted its April 2006 enrollment application, and he had been convicted on April 5, 2005, of six felony offenses that are "financial crimes" under the regulation. Accordingly, CMS was authorized to deny Petitioner's 2006 enrollment application.

Here, CMS has exercised its authority to deny Petitioner's enrollment nearly seven years retroactively. The regulations authorize CMS to deny enrollment if the "provider or supplier at any time is found not to be in compliance with the Medicare enrollment requirements described in this section . . . ." 42 C.F.R. § 424.530(a)(1). The phrase "at any time" in 42 C.F.R. § 424.530(a)(1) means that CMS has the authority to deny an enrollment application retroactively, even if that application had been "previously approved in error." *See US Ultrasound*, DAB No. 2302, at 7 (2010). While CMS's authority to deny Petitioner's enrollment in this case is based on 42 C.F.R. § 424.530(a)(3)(i)(B), subsection (a)(1) incorporates "the Medicare enrollment requirements described in this section . . . ." Therefore, the language authorizing retroactive denials in 42 C.F.R. § 424.530(a)(1) applies to subsection (a)(3) as well.

It must be noted that Petitioner remarkably went through two revalidation cycles since being "approved" in 2006. It remains unclear what methods, if any at all, NSC had in place to ensure that providers or suppliers or their owners did not have prohibited felony convictions. Apparently, as this case exemplifies, NSC did not check whether DMEPOS owners were convicted and simply trusted that suppliers who were convicted felons — *i.e.*, those too untrustworthy to be part of the Medicare program — would report their own prior misdeeds.[4] Nevertheless, whether Petitioner or NSC is to blame for

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[4] CMS claims that it was authorized to deny Petitioner's April 2006 enrollment application pursuant to 42 C.F.R. § 424.530(a)(4) because Petitioner provided false or misleading information by not reporting John K. Lee's 2005 convictions. CMS Br. at 6. However, the 2001 edition of the CMS-855S, which is the enrollment application that Petitioner submitted in April 2006, required that only convictions stated in the application itself had to be reported. CMS Ex. 6, at 12. The offenses listed in the application were those committed in connection with or related to the delivery of a health care item or service or involved the unlawful manufacture or distribution of controlled substances. CMS Ex. 6, at 3.

Petitioner's mistaken approval as a DMEPOS supplier in September 2006, one must hope that CMS is concerned about what the facts of this case reveal.

VII. Conclusion

For the foregoing reasons, I affirm CMS's denial of Petitioner's 2006 Medicare enrollment application pursuant to 42 C.F.R. § 424.530(a)(3)(i)(B). John K. Lee, the listed owner of Petitioner, was convicted on April 5, 2005 of "financial crimes" and thus detrimental to the best interests of the Medicare program and its beneficiaries.

/s/

Scott Anderson
Administrative Law Judge