Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gary J. Ordog, M.D.
(NPI: 1205954955),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-900

Decision No. CR4806

Date: March 7, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare enrollment and billing privileges of Gary J. Ordog, M.D. (Dr. Ordog or Petitioner) based on Dr. Ordog's felony conviction for health care fraud related to the Medicare program. Dr. Ordog requested a hearing before an administrative law judge (ALJ) to dispute the revocation. Because I conclude that Dr. Ordog was convicted of a crime that is considered to be per se detrimental to the best interests of the Medicare program and its beneficiaries, I affirm CMS's determination to revoke Dr. Ordog's Medicare enrollment and billing privileges.

I. Background and Procedural History

Dr. Ordog is a physician licensed in the state of California. Petitioner's Response to Order to Show Cause, Attachment 7 (P. Att. 7) at 1. Until 2016, Dr. Ordog was enrolled in the Medicare program as a supplier for many years. CMS Exhibit (Ex.) 4 at 5; *see* 42 U.S.C. § 1395x(d) (defining a "supplier" in the Medicare program to include "a physician or other practitioner").

In a June 7, 2016 initial determination, a CMS administrative contractor revoked Dr. Ordog's Medicare enrollment and billing privileges, retroactive to April 28, 2016, for the following reason:

> **42 CFR §424.535(a)(3) – Felony Conviction**
>
> On April 28, 2016 in the U.S. District Court, Central District of California, [Dr. Ordog] pled guilty to a felony count of health care fraud charges for submitting false claims to Medicare.

CMS Ex. 3 at 1 (emphasis in original). The CMS administrative contractor barred Petitioner from reenrolling in the Medicare program for three years. CMS Ex. 3 at 2.

Dr. Ordog requested reconsideration of the revocation, filing arguments and documents to support his request. CMS Ex. 4. In the reconsideration request, Dr. Ordog conceded that he signed a plea agreement and was convicted of "Medicare Fraudulent claims"; however, he indicated he only did so to avoid the possibility of going to prison and to avoid the high cost of presenting a defense to the criminal charges. CMS Ex. 4 at 5. Petitioner disputed the validity of the criminal charges against him and submitted affidavits from many of his patients. CMS Ex. 4 at 5, 15-54.

On September 1, 2016, a hearing officer with CMS's Center for Program Integrity issued an unfavorable reconsidered determination. In upholding the revocation, the hearing officer provided additional information about Petitioner's conviction. The hearing officer found that Petitioner pled guilty on April 28, 2016, in the United States District Court for the Central District of California to a felony count of health care fraud for submitting false claims to the Medicare program in violation of 18 U.S.C. § 1347. The hearing officer concluded that, under 42 C.F.R. § 424.535(a)(3)(ii)(D), CMS may revoke a supplier's Medicare billing privileges when, within the preceding ten years, the supplier is convicted of a felony offense that would result in mandatory exclusion from participation in federal health care programs under section 1128(a) of the Social Security Act (42 U.S.C. § 1320a-7(a)). The hearing officer further concluded that a conviction for Medicare fraud is a conviction warranting exclusion and, thus, revocation.[1] The hearing

[1] The hearing officer reasoned that Petitioner's felony conviction would warrant exclusion under section 1128(a)(3) of the Social Security Act (42 U.S.C. § 1320a-7(a)(3)). As discussed *infra*, Petitioner's offense would in fact subject him to exclusion under section 1128(a)(1) of the Act (42 U.S.C. § 1320a-7(a)(1)), which means that section 1128(a)(3) is not applicable to this. However, the *revocation* basis on which the hearing officer relied and which I review here – a felony offense that would result in mandatory exclusion (42 C.F.R. § 424.535(a)(3)(ii)(D)) – was correct.

officer indicated that Petitioner's arguments did not invalidate CMS's authority to revoke Petitioner. CMS Ex. 5.

Dr. Ordog timely requested a hearing. I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of prehearing exchanges. CMS requested an extension of time to file its prehearing exchange, which I granted. In accordance with the amended submission schedule, CMS filed its prehearing exchange, which included a motion for summary judgment and prehearing brief (CMS Br.), and five proposed exhibits (CMS Exs. 1-5). Petitioner failed to file a timely prehearing exchange. After I issued an Order to Show Cause, Dr. Ordog responded that he did not intend to abandon his hearing request, but had been delayed in submitting his exchange due to a significant health issue. P. Att. 1; P. Att. 2; P. Att. 11 at 3. Further, Dr. Ordog filed a written argument (P. Br.), affidavits from many individuals (P. Att. 9), and a variety of other exhibits (P. Atts. 3-8, 10, 11).[2]

II. Decision on the Record

Petitioner has shown good cause for filing his prehearing exchange late, and I will not dismiss his hearing request.

Neither CMS nor Petitioner objected to any of the proposed exhibits that the parties submitted in this case. *See* Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e). Therefore, I admit CMS Exs. 1-5 and P. Atts. 1-11 into the record.

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8-10; CRDP §§ 16(b), 19(b); *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

[2] Dr. Ordog, who is representing himself, asked that I exempt him from the requirement to file all documents electronically. I granted this request. When Dr. Ordog responded to the Order to Show Cause and filed his prehearing exchange, Dr. Ordog did not mark the documents he filed. However, the Civil Remedies Division staff uploaded .pdf versions of Dr. Ordog's documents to the electronic filing system. When doing so, the staff assigned descriptive names to the .pdf files and consecutively numbered the documents as Attachments. Therefore, when citing the documents Petitioner submitted, I will cite the attachment number provided on the .pdf file. Further, although Petitioner's brief was labeled as his Response to Order to Show Cause, I will cite this document as P. Br. Finally, my citation to specific page numbers in each document will be to the page showing when viewing the .pdf version of the document uploaded into the electronic filing system.

witnesses). Petitioner submitted affidavits from numerous individuals. P. Att. 9. However, CMS did not seek to cross-examine these individuals, nor did it offer the testimony of any witnesses who Petitioner could request to cross-examine. Consequently, I will not hold an in-person hearing in this matter, and I issue this decision based on the written record. Order ¶¶ 8-11; CRDP § 19(d).

III. Issue

Whether CMS had a legitimate basis to revoke Dr. Ordog's Medicare enrollment and billing privileges.

IV. Jurisdiction

I have jurisdiction to hear and decide this case. *See* 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

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

My findings of fact and conclusions of law are set forth in italics and bold font.

The Social Security Act authorizes the Secretary of Health and Human Services (Secretary) to create regulations governing the enrollment of suppliers in the Medicare program, and to discontinue the enrollment of a physician or other supplier who "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 [Medicare] program or program beneficiaries." 42 U.S.C. §§ 1395u(h)(8), 1395cc(j).

Under the Secretary's regulations, CMS may revoke a supplier's Medicare enrollment and billing privileges when a supplier is convicted within the last ten years of a federal or state felony offense that CMS determines is detrimental to the best interests of the Medicare program or its beneficiaries. 42 C.F.R. § 424.535(a)(3)(i). Further, the regulations provide a non-exhaustive list of the types of felony offenses that CMS considers detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3)(ii). That list of felonies includes all felonies the conviction of which would result in a mandatory exclusion from participation in federal health care programs under section 1128(a) of the Social Security Act (42 U.S.C. § 1320a-7(a)). 42 C.F.R. § 424.535(a)(3)(ii)(D). The Social Security Act mandates exclusion when an individual is convicted of any criminal offense related to the delivery of items or services under the Medicare program. 42 U.S.C. § 1320a-7(a)(1); 42 C.F.R. § 1001.101(a).

When a supplier is convicted of a felony specifically listed in the regulations, an ALJ applies a deferential review standard. Such felonies are considered per se detrimental to

the best interests of the Medicare program and its beneficiaries. *Letantia Bussell, M.D.*, DAB No. 2196 at 9 (2008).

1. On April 28, 2016, Petitioner pled guilty to one count of health care fraud, in violation of 18 U.S.C. § 1347, based on filing fraudulent claims to the Medicare program, and the U.S. District Court for the Central District of California (District Court) accepted the guilty plea and scheduled a sentencing hearing.

In order to prove that Petitioner pled guilty to health care fraud, CMS filed a Department of Justice news release dated April 28, 2016, that stated the following:

> A Valencia, California, doctor pleaded guilty today to submitting more than $2.4 million in fraudulent claims to Medicare.
>
> . . .
>
> Gary J. Ordog, M.D., 61, pleaded guilty before U.S. District Court Judge Fernando M. Olguin of the Central District of California to one count of health care fraud. Sentencing has been scheduled for Aug. 18, 2016.
>
> According to admissions made as part of his plea agreement, Ordog purported to be a physician, specializing in toxicology. Ordog admitted that he submitted false claims to Medicare for purported visits with Medicare beneficiaries, when in fact those visits never actually occurred, including on dates when Ordog was out of the country. He also admitted to billing for services provided to beneficiaries who were deceased on the dates Ordog purportedly treated them and for services totaling more than 24 hours in one day. Ordog fabricated patient records to support false claims, he admitted.
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> Between January 2009 and February 2015, Ordog submitted approximately $2,435,089 in false and fraudulent claims to Medicare, he admitted. Medicare paid approximately $1,295,699 of those claims, according to the plea agreement.

CMS Ex. 1 at 1.

In the reconsidered determination, the hearing officer indicated that she reviewed the documents in Petitioner's file and stated that he pled guilty to violating 18 U.S.C. § 1347. CMS Ex. 5 at 3-4.

Petitioner has not contradicted any of these facts and has corroborated his guilty plea and conviction related to filing fraudulent Medicare claims. P. Br. at 1; Hearing Request at 1; CMS Ex. 4 at 5;

2. CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(3) to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner was convicted of a felony within the last ten years related to the delivery of items or services under the Medicare program and, therefore, was convicted of a felony that is per se detrimental to the best interests of the Medicare program and its beneficiaries.

CMS may revoke a supplier's Medicare billing privileges if the supplier is: (1) convicted of a federal or state felony offense within the last ten years; and (2) the felony offense is one that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries. 42 C.F.R. § 424.535(a)(3).

In the present case, the record establishes that, for revocation purposes, Petitioner was convicted of a felony on April 28, 2016. This is because Petitioner pled guilty to an offense under 18 U.S.C. § 1347 on April 28, 2016, and the District Court accepted it and set a date for a sentencing hearing. CMS Ex. 1 at 1; CMS Ex. 5 at 3-4. A guilty plea accepted by a court is considered a conviction for revocation purposes. *See* 42 C.F.R. §§ 424.535(a)(3)(i), 1001.2 (definition of *Convicted*). Further, Petitioner's crime is a felony because the maximum sentence prescribed for that violation is 10 years imprisonment. 18 U.S.C. §§ 1347, 3559(a). Therefore, Petitioner was convicted of a felony offense within the last ten years.

Further, the record supports the conclusion that Petitioner was convicted of an offense that is per se detrimental to the interests of the Medicare program and its beneficiaries. Specifically, Petitioner was convicted of a criminal offense for which mandatory exclusion would result because Petitioner's criminal offense was related to the delivery of items or services under the Medicare program. 42 U.S.C. § 1320a-7(a); 42 C.F.R. §§ 424.535(a)(3)(ii)(D), 1001.101(a)(1). The record is clear that Petitioner pled guilty to submitting approximately $2,435,089 in false and fraudulent claims to Medicare and that Medicare paid approximately $1,295,699 of those false claims. CMS Ex. 1 at 1. Therefore, Petitioner's conviction was "related" to the delivery of an item or service under Medicare. *See Jack W. Greene*, DAB No. 1078 (1989) (false billing made to the Medicaid program was related to the delivery of an item or service in a state health care program), *aff'd, Greene v. Sullivan*, 731 F. Supp. 835 (E.D. Tenn. 1990); *Michael Travers, M.D.*, DAB No. 1237 (1991), *aff'd, Travers v. Sullivan*, 791 F. Supp. 1471, 1481 (E.D. Wash. 1992), *aff'd, Travers v. Shalala*, 20 F.3d 993 (9th Cir. 1994).

Petitioner does not dispute that the offense for which he was convicted is per se detrimental to the Medicare program or its beneficiaries. Rather, Petitioner asserts that he is innocent of criminal conduct and only pled guilty to avoid the chance of going to prison and the significant cost of defending himself in his criminal case. Petitioner states that he correctly billed the Medicare program. He does acknowledge that twice he billed Medicare incorrectly, but explained that those were clerical mistakes. Petitioner also submitted affidavits from numerous Medicare patients who support his continued participation in the Medicare program. Finally, Petitioner indicates that he was diagnosed with a brain tumor and submitted statements from medical professionals that the tumor may have limited his ability to defend himself in his criminal case. P. Br. at 1-2; Hearing Request at 1-2; P. Att. 4; P. Att. 5; P. Atts. 9-10.

Petitioner's arguments that he is really innocent of the criminal charges that were made against him and to which he pled guilty or that he was impaired when he entered into his plea agreement are collateral attacks on his criminal conviction. However, the regulations do not authorize an ALJ to consider whether the supplier was innocent of a crime in order to reverse the revocation. *See David L. Tolliver, D.O.*, DAB CR2281 at 10 (2010); *Ravindra Patel, M.D*, DAB CR2171 at 6 (2010); *Leigh Gilburn, D.O.*, DAB CR1890 at 9 (2009). CMS has the discretion to revoke or not revoke a supplier's Medicare billing privileges based on a criminal conviction (*Brian K. Ellefsen, DO*, DAB No. 2626 at 6-7 (2015)); however, I cannot review that exercise of discretion. *Bussell*, DAB No. 2196 at 13. Rather, an ALJ's review of CMS's revocation is "limited to whether CMS had established a legal basis for its actions." *Id*. Thus, once CMS establishes a legal and basis on which to proceed with a revocation, I must uphold the revocation. *See id*. at 10. Further, I do not have the authority to grant equitable relief. *See US Ultrasound*, DAB No. 2302 at 8 (2010); *1866ICPayday.com*, L.L.C., DAB No. 2289 at 14 (2009) (("[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground . . .").

Accordingly, I conclude that CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3)(ii)(D).

VI. Conclusion

I affirm the revocation of Petitioner's Medicare enrollment and billing privileges.

/s/
Scott Anderson
Administrative Law Judge