

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

James H. Peak, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-1747

Decision No. CR4139

Date: August 19, 2015

**DECISION**

Petitioner, James H. Peak, M.D., was a child psychiatrist who was convicted of felony possession of child pornography. The Centers for Medicare and Medicaid Services (CMS) subsequently denied his Medicare enrollment application, finding that he had been convicted of a felony that was detrimental to the best interests of the Medicare program and its beneficiaries. Petitioner appeals, and CMS moves for summary judgment.

For the reasons explained below, I find that no material facts are in dispute and that CMS is entitled to judgment as a matter of law. I therefore grant CMS's motion.

**Background**

By letter dated December 15, 2014, the Medicare contractor, Noridian Healthcare Solutions, advised Petitioner that his application to enroll in the Medicare program was denied. The contractor took this action pursuant to 42 C.F.R. § 424.530(a)(3) because, on December 7, 2011, Petitioner Peak was convicted in U.S. District Court of felony possession of child pornography. CMS Ex. 11.

Petitioner requested reconsideration. In a reconsidered determination, dated March 6, 2015, the contractor upheld the denial. CMS Ex. 13. Petitioner timely appealed, and that appeal is now before me.

CMS moves for summary judgment and has filed a supporting brief (CMS Br.) as well as fourteen proposed exhibits (CMS Exs. 1-14). Petitioner filed a brief and response to CMS's motion (P. Br.). He agrees that no material facts are in dispute, but argues that CMS is not entitled to judgment as a matter of law.<sup>1</sup> P. Br. at 3.

## Discussion

*CMS is entitled to summary judgment because the undisputed evidence establishes that Petitioner was convicted of possessing child pornography, a felony offense detrimental to the best interests of the Medicare program and its beneficiaries.*<sup>2</sup>

Statute and regulations. CMS, acting on behalf of the Secretary of Health and Human Services, may deny a supplier's Medicare enrollment if, within the preceding ten years, the supplier was convicted of a federal or state felony offense that CMS "has determined to be detrimental to the best interests of the [Medicare] program and its beneficiaries." 42 C.F.R. § 424.530(a)(3); *see* Social Security Act (Act) §§ 1842(h)(8) (authorizing the Secretary to refuse to enter into an agreement with a physician who has been convicted of a felony offense that the Secretary determines is "detrimental to the best interests of the program or program beneficiaries") and 1866(b)(2)(D) (authorizing the Secretary to refuse to enter into an agreement after she ascertains that the practitioner was convicted of a felony that she "determines is detrimental to the best interests of the program or program beneficiaries").

In deciding whether an offense is detrimental to the program and its beneficiaries, CMS considers its severity. 42 C.F.R. § 424.530(a)(3). Offenses for which enrollment may be denied include felony crimes against persons, such as "murder, rape, or assault, and other similar crimes for which the individual has been convicted, including guilty pleas and adjudicated pretrial diversions." 42 C.F.R. § 424.530(a)(3)(i)(A).

Summary judgment. Summary judgment is appropriate if the case presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010); *see* CMS Br. at 1, 6.

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<sup>1</sup> In any event, neither party proposes any witnesses, so a hearing would serve no purpose.

<sup>2</sup> I make this one finding of fact/conclusion of law.

Here, the parties agree that no material facts are in dispute. P. Br. at 3; CMS Br. at 11. On August 15, 2011, Petitioner Peak pled guilty in federal district court for the District of Montana to one count of felony possession of child pornography, in violation of 18 U.S.C. § 2252(A)(5)(b). CMS Exs. 1, 2, 4. He admitted that he “knowingly possessed movies containing . . . images of child pornography” that had been shipped in interstate or foreign commerce or produced with materials shipped or transported in interstate or foreign commerce. CMS Ex. 2 at 3. The pornography included computer disks and other material that he knew contained “visual depictions of minors engaged in sexually explicit conduct.” He also knew that minors were sexually exploited in order to produce those images. CMS Ex. 2 at 4.

On December 8, 2011, the district court entered its judgment of conviction and sentenced Petitioner Peak to one year and a day in prison. CMS Ex. 7.

In an order dated May 18, 2012, the Board of Medical Examiners for the State of Montana noted that Petitioner Peak had been convicted of possessing child pornography and concluded that his conduct amounted to unprofessional conduct. The Board suspended indefinitely his license to practice medicine. Among other conditions, the Board stated that he would not be eligible to reactivate his license for at least two years. CMS Ex. 8 at 39-42. Thereafter, Petitioner Peak asked the licensing board to reconsider its May 18, 2012 order. In an amended final order, dated June 9, 2014, the Board issued Petitioner Peak a lifetime probationary license to which it attached multiple conditions, including that he practice only under a “supervised clinical preceptorship,”<sup>3</sup> that he subject himself to lifetime supervision by the Montana Professional Assistance Program, and that he disclose to each of his patients his status as a sex offender and his probationary license. CMS Ex. 8 at 22-28. However, the amended final order also provided that, after 18 months, the probationary license could be modified to a “full and unrestricted” license. CMS Ex. 8 at 26.

Petitioner argues that his crime does not fall within the category of cases for which denial of enrollment is justified. P. Br. at 3-4. The regulation lists offenses deemed detrimental to the best interest of the Medicare program or its beneficiaries, which fall into one of four categories: 1) serious crimes against persons; 2) financial offenses; 3) offenses that put the Medicare program at risk; and 4) felonies listed in section 1128 of the Social Security Act.<sup>4</sup> 42 C.F.R. § 424.530(a)(3)(i)(A)-(D). In Petitioner’s view, possession of child pornography does not fall into any of these four categories. He points out that:

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<sup>3</sup> Generally, a “preceptorship” involves a period of hands-on training between a student/novice and an experienced professional.

<sup>4</sup> Section 1128 provides that individuals and entities be excluded from program participation if convicted of various crimes, including program-related crimes and crimes related to patient abuse, controlled substances, and health care fraud.

- Of all the federal child pornography offenses, it is the least serious;
- He pled guilty to exactly what he did, rather than to some reduced charge;
- His conduct was not “hands on”;
- He turned himself in and provided a full and complete confession;
- The images he possessed were not as graphic as some; and
- He did not possess gross amounts of pornography compared with other cases.

P. Br. at 4-8. He also points out that the Departmental Appeals Board has never addressed the issue of whether possession of child pornography is an offense detrimental to the best interests of the Medicare program and its beneficiaries, and cites recommendations from his therapist, patients, and colleagues attesting to his trustworthiness and character. P. Br. at 8-11.

I note first that CMS has broad authority to determine which felonies are detrimental to the best interests of the program and its beneficiaries and that the categories of cases listed in the regulation were not intended to be exhaustive. “It would be impossible to identify . . . every felony offense that could result in a denial.” 79 Fed. Reg. 72500, 72511 (Dec. 5, 2014).

Moreover, possession of child pornography may not be the worst in the depressing panoply of crimes against children, but it is a serious crime against persons. Petitioner concedes that the crime is not victimless. P. Br. at 8. I agree with the Fifth Circuit Court of Appeals and with CMS: the possessor of child pornography perpetuates the abuse initiated by the producer, invades the privacy of the child depicted, and provides an economic motive for creating more child pornography. *United States v. Norris*, 159 F.3d 926, 929-30 (5th Cir. 1998); CMS Br. at 8-9, *citing* Molly Smolen, *Redressing Transgression: In Defense of the Federal Sentencing Guidelines for Child Pornography Possession*, 18 Berkeley J. Crim. L. 36, 41-42 (2013) (“possessing child pornography . . . creates a palpable and profound harm to its victims”; “the images of child pornography eternally memorialize scenes of horrific sexual abuse”; and “by purchasing the images, the child pornography possessor is creating a market for the abusive images.”).

As a child psychiatrist, Petitioner must have been aware of the harm he was inflicting on children.

