Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rey R. Palop, M.D.,
(PTAN: 090100011),
(NPI: 1750349239),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-570

Decision No. CR3273

Date: June 24, 2014

DECISION

Petitioner, Rey R. Palop, M.D., is a physician, licensed to practice in the State of Wisconsin, who has participated in the Medicare program as a supplier of services. In 2008, he was convicted of felony drug fraud. He did not timely report his conviction to the Medicare contractor, which initially approved his 2009 application to reassign his Medicare benefits. Having learned of the conviction and his failure to report it as required, the Centers for Medicare & Medicaid Services (CMS) retroactively denied that application and his Medicare enrollment. Petitioner appeals the retroactive denial.

CMS has filed a motion for summary judgment, which Petitioner opposes. However, because CMS presents no witnesses and has not asked to cross-examine Petitioner's sole witness, an in-person hearing would serve no purpose. *See* Acknowledgment and Pre-hearing Order at 5 (¶ 8) and 6 (¶ 10). This matter may therefore be decided based on the written record, without considering whether the standards for summary judgment are satisfied.

CMS properly denied Petitioner Palop's 2009 enrollment application, because, within the ten years preceding his filing it: 1) he was convicted of a felony that CMS determined is detrimental to the best interests of the Medicare program and its beneficiaries; and 2) he did not report that conviction to the Medicare contractor.

Background

2006 Enrollment Application. On March 24, 2006, Petitioner Palop applied for enrollment in the Medicare program. CMS exhibits (Exs.) 1, 2. In responding to questions on his application, he acknowledged that the State of Wisconsin brought an "adverse legal action" against him on October 17, 2005, but wrote that the action – a "felony or misdemeanor conviction . . . relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance" – had been dismissed in June 2005. CMS Ex. 1 at 5.

The Medicare contractor, Wisconsin Physicians Service Insurance Corporation (WPS), asked for more information about the adverse legal action. CMS Ex. 3. In response to the query, Petitioner Palop submitted two documents from the Wisconsin Medical Examining Board:

- A "Final Decision and Order," dated March 17, 2004, indicating that Petitioner Palop was charged with eleven felony counts of "obtaining controlled substances by fraud," in violation of Wisconsin state law (§ 961.43(1)(a) Wis. Stats.). According to this document, Petitioner wrote prescriptions for the controlled substance, Fioricet. The drugs were meant for his wife, but he used a fictitious patient name, apparently to conceal the extent of her drug consumption.[1] His wife then presented the fraudulent prescriptions at local pharmacies. The medical board reprimanded Petitioner Palop for unprofessional conduct, limited his license to practice medicine, and ordered him to complete a course in medical ethics. CMS Ex. 4 at 1-2.

- A "Reinstatement of DEA Registration," indicating that Petitioner Palop completed his ethics course and allowing him to reapply for and hold DEA (Drug Enforcement Administration) registration. CMS Ex. 4 at 3.

Petitioner's submissions were apparently sufficient to satisfy WPS, because, in a letter dated April 10, 2006, the contractor welcomed him into the Medicare program. CMS Ex. 5.

[1] Another physician had already prescribed Fioricet for her. According to Dr. Palop, the physicians they consulted would not increase the dosage because of "'*standards of care*' issues and clinician imposed limitations regarding the use of narcotic pain medications . . . ." P. Ex. 1 at 1.

November 6, 2009 Enrollment Application. On November 6, 2009, Petitioner Palop filed another enrollment application, in order to reassign his benefits to a different supplier. CMS Ex. 6. In a letter dated December 2, 2009, WPS approved the application, with an effective billing date of November 5, 2009. CMS Ex. 9.

March 23, 2013 Revalidation Application. Every five years, currently-enrolled suppliers must recertify the accuracy of their enrollment information by filing a new enrollment application. 42 C.F.R. § 424.515. In revised enrollment applications, signed May 30, 2013 and July 2, 2013, Petitioner Palop admitted that an adverse legal action had been imposed against him. He wrote that, on October 10, 2008, he pled guilty/no contest to one count of obtaining a controlled substance by fraud, which is a felony. He again explained that he prescribed the drugs to treat his wife's pain. He successfully completed probation and the court issued a discharge certificate on November 23, 2012. CMS Ex. 11 at 11-12, 25; CMS Ex. 13 at 3-6.

Retroactive Enrollment Denial and Appeal. By letter dated August 27, 2013, WPS advised Petitioner that his November 6, 2009 enrollment application was retroactively denied. The contractor advised Petitioner that it denied the application, because, when he filed it, he was not in compliance with Medicare requirements. 42 C.F.R. § 424.530(a)(1). First, within the preceding ten years, he had been convicted of a felony that CMS has determined is detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.530(a)(3). Second, he did not report his conviction to WPS within thirty days, as required by regulation. 42 C.F.R. § 424.516(d)(1)(ii). CMS Ex. 14.

Petitioner requested reconsideration. In a reconsidered determination, dated November 22, 2013, an enrollment specialist for the new Medicare contractor, National Government Services (NGS), upheld the revocation. CMS Ex. 18. Petitioner timely appealed, and that appeal is now before me.

The parties have filed briefs (CMS Br.; P. Br.), and CMS filed a reply brief (CMS Reply). CMS submitted 18 exhibits (CMS Exs. 1-18), and Petitioner submitted five exhibits (P. Exs. 1-5). In the absence of any objections, I admit into evidence CMS Exs. 1-18 and P. Exs. 1-5.

Discussion

> ***CMS appropriately denied Petitioner's November 2009 enrollment application, because, within the preceding ten years, Petitioner had been convicted of a felony offense detrimental to the best interests of the Medicare program and its beneficiaries and because he failed to report timely that conviction to the Medicare contractor.***[2]

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").

Petitioner argues that section 424.530(a)(3) applies only to crimes that are violent, financial, or program-related, and his was none of these, so his enrollment should not be denied. P. Br. at 2-4. In fact, the regulatory definition of offenses "detrimental to the best interests of the program and its beneficiaries" is broader than Petitioner claims. It includes "felonies outlined in section 1128 of the [Social Security] Act." 42 C.F.R. § 424.530(a)(3)(i)(D). Among the crimes listed in section 1128 are felony convictions "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." Act § 1128(a)(4). Petitioner's conviction for felony drug fraud is thus detrimental the best interests of the Medicare program and its beneficiaries and justifies denial of his enrollment application.

At the time of his conviction, suppliers were required to report, within 90 days, any changes to the information they furnished on their enrollment applications. 42 C.F.R. § 424.520(b) (2008).[3] No one disputes that Petitioner Palop was convicted of a felony in October 2008, but he did not report the conviction to WPS until March 2013, when he

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[2] I make this one finding of fact/conclusion of law.

[3] Effective January 1, 2009, the time period was shortened to 30 days and the relevant section redesignated section 424.516. 73 Fed. Reg. at 69,726, 69,940. So, to enroll in the Medicare program (or to maintain active enrollment), a physician must report any adverse legal action within 30 days of its occurrence. 42 C.F.R. § 424.516(d).

answered the questions on his revalidation application. Thus, his failure to report timely also justifies denial of his enrollment application.

Petitioner complains that the enrollment denial is retroactive, which means that neither he nor the supplier to which he assigned his benefits will be paid for services he rendered. I note first that this was a problem of Petitioner's own making. Had he reported the conviction, as required, the contractor could have acted accordingly. Moreover, as the Departmental Appeals Board has observed, section 424.530(a)(1) authorizes denial "at any time" the supplier is found not to be in compliance with enrollment requirements. In the Board's view, this permits CMS "to deny an application previously approved in error where CMS discovers the supplier did not meet [enrollment] requirements at the time of enrollment." *US Ultrasound*, DAB No. 2302 at 6-7 (2010).

Petitioner also complains that the 2009 application form did not explicitly ask him about any adverse legal actions, a purported omission that, in his view, relieved him of responsibility for reporting. P. Br. at 5. I note first that, by November 2009, he had long since violated the reporting requirement. Moreover, when he enrolled in the program he promised to abide by the Medicare laws, regulations and program instructions. He acknowledged that those laws, regulations, and instructions were available through the Medicare contractor. CMS Ex. 1 at 13. He thus knew or should have known that he was obliged to report his conviction. *See Gulf South Med. & Surgical Inst., and Kenner Dermatology Clinic, Inc*., DAB No. 2400 at 9 (2011) and cases cited therein (holding that, as participants in the program, suppliers have a duty to familiarize themselves with Medicare requirements).

Finally, Petitioner attacks the quality of the reconsideration proceedings. Specifically, he complains that he was not afforded a contractor hearing as he requested. P. Br. at 4. But the regulations do not entitle him to a hearing at the reconsideration level. If a request for reconsideration is properly filed, CMS (or its contractor) "[r]eceives *written* evidence and statements that are relevant and material to the matters at issue"; it considers the initial determination, the findings on which that determination was based, the evidence considered in making that determination, and "any other *written* evidence submitted. . . ." 42 C.F.R. § 498.24 (emphasis added). Based on this *written* record, CMS makes its reconsidered determination. *Id*.[4]

[4] I recognize that the quality of the reconsidered determination here leaves something to be desired. Nevertheless, the purpose of administrative review is to correct agency errors and reach the correct decision, based on the evidence presented. Here, Petitioner has been fully apprised of the bases for CMS's actions and has not complained about the adequacy of the notice provided. The matter has been full briefed, and, the law and undisputed facts lead to one conclusion. Petitioner is absolutely not entitled to prevail, no matter what the shortcomings of the reconsidered determination. My remanding the case – to allow CMS to present a more thorough determination – would unnecessarily prolong

Conclusion

Because, within ten years preceding November 2009, Petitioner was convicted of a felony offense detrimental to the best interests of the Medicare program and its beneficiaries; and because he failed to report that conviction timely, CMS properly denied his November 2009 Medicare enrollment application and his Medicare enrollment.

/s/
Carolyn Cozad Hughes
Administrative Law Judge

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these proceedings, requiring all parties to expend additional time and resources to achieve the same result.