

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Mark Koch, D.O.
Docket No. A-14-72
Decision No. 2610
December 18, 2014

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Mark Koch, D.O. (Petitioner) appeals a March 18, 2014 decision by an administrative law judge (ALJ) that the Centers for Medicare & Medicaid Services (CMS) had lawfully revoked Petitioner's enrollment in the Medicare program. *Mark Koch, D.O.*, DAB CR3161 (2014) (ALJ Decision). For the reasons stated below, we affirm the ALJ Decision.

Background

CMS is authorized to revoke the enrollment of a Medicare "supplier" (a term that includes physicians such as Petitioner) for any of the "reasons" listed in 42 C.F.R. § 424.535(a). Those reasons include criminal convictions (section 424.535(a)(3)), providing "misleading or false" information on a Medicare enrollment application (section 424.535(a)(4)), and failing to report information that might affect enrollment status (section 424.535(a)(9)).

In early 2013, CMS (acting through one of its contractors) revoked Petitioner's Medicare enrollment effective February 24, 2012. CMS Ex. 3. As grounds for the revocation, CMS stated that Petitioner had recently pled guilty to a felony conspiracy charge, provided misleading or false information on Medicare enrollment applications, and failed to timely notify Medicare of adverse legal actions (including his recent guilty plea). *Id.* A hearing officer later upheld the revocation determination on those grounds at the reconsideration level. CMS Ex. 4.

Petitioner then requested an ALJ hearing to challenge the revocation. The parties submitted documentary evidence and written direct testimony. Upon reviewing that material, the ALJ determined that an in-person hearing was unnecessary and decided the case based on the submitted material. He concluded that CMS had lawfully revoked

Petitioner's enrollment under 42 C.F.R. §§ 424.535(a)(3), 424.535(a)(4), and 424.535(a)(9). ALJ Decision at 5-10. Petitioner asks the Board to reverse the ALJ Decision, but, as the discussion below makes clear, Petitioner has not demonstrated that the decision rests on factually unsubstantiated or legally improper grounds.

Standard of Review

The Board's standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, available at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html> (*Guidelines*). The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *Id.*

Discussion

We consider each of the regulatory grounds that the ALJ found to justify Petitioner's revocation, beginning with section 424.535(a)(3). That regulation states that CMS may revoke the enrollment of a supplier who, within the 10 years preceding enrollment or revalidation of enrollment, has been 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. § 424.535(a)(3). The regulation further states that offenses which CMS has determined to be detrimental to Medicare include "[a]ny felonies that would result in mandatory exclusion under section 1128(a) of the [Social Security] Act." *Id.* § 424.535(a)(3)(i)(D). Section 1128(a) requires the Secretary of Health & Human Services to exclude from any "federal health care program" the individuals or entities described in paragraphs (1) through (4) of that section, including, as specified in paragraph (4) –

[a]ny individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996 [HIPAA], under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

42 U.S.C. § 1320a-7(a)(4).

Judicial records submitted by CMS show that on September 22, 2011, Petitioner pled guilty, in a federal district court, to a single count of conspiracy to distribute and possess with intent to distribute anabolic steroids in violation of 21 U.S.C. § 846. *See* CMS Ex. 10 (¶ 2); CMS Ex. 11, at 2. Petitioner entered the plea in accordance with a written Plea

Agreement that he signed. CMS Ex. 10; CMS Ex. 11, at 2. The plea agreement incorporated by reference a separate document, called a “Factual Resume,” which described Petitioner’s “offense conduct.” CMS Ex. 10, at 3. In both documents, Petitioner affirmed that the Factual Resume’s description of his offense was “true and correct.” *Id.* at 3, 14. On February 24, 2012, the district court entered a formal criminal judgment against Petitioner based on his earlier plea and sentenced him to five years of probation and a \$10,000 fine. CMS Ex. 8; CMS Ex. 11, at 16-17.

Relying on the judicial records submitted by CMS, the ALJ found that Petitioner had pled guilty to a felony and that his conviction of that offense occurred within 10 years of his enrollment, or the revalidation of his enrollment, in Medicare. ALJ Decision at 5, 6. The ALJ also found that Petitioner met the conditions for mandatory exclusion under section 1128(a)(4) of the Act – namely, that he had been (1) convicted (2) following the enactment of HIPAA (3) of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. *Id.* at 7-8. Based on these findings, the ALJ concluded that CMS had a legitimate basis to revoke Petitioner’s Medicare enrollment under section 424.535(a)(3)(i)(D). *Id.* at 8.

Petitioner does not challenge that conclusion (or question its supporting rationale). In fact, he concedes that the record of his conviction “would lead [one] to believe that I was involved in and plead guilty to a crime involving anabolic steroids.” July 8, 2014 Request for Review (RR) at 1. Petitioner instead asks the Board to overlook the judicial record and “review my case individually based on the *untold story*, not just what the record in my case reflects.” *Id.* He then describes his history of drug use and recovery and the circumstances which led to his indictment and conviction. *Id.* at 1-2. He asserts that his ex-wife “set me up” in retaliation for a divorce, that the government’s evidence against him was thin, that the government may have withheld or destroyed exculpatory evidence, that he pled guilty under duress (because of health problems), and that his actual conduct did not amount to a crime.* *Id.* at 1-3.

These allegations, which question the validity of his conspiracy conviction, reveal no error by the ALJ because CMS’s authority to revoke a supplier’s enrollment under section 424.535(a) is based on *the fact* of a conviction (including one that is based on a guilty plea) that meets the regulatory criteria. Petitioner’s conspiracy conviction is a matter of judicial record, and there is no evidence that the conviction has been vacated or

* In support of these (and other) assertions, Petitioner attached 14 exhibits to his request for review. In provider or supplier enrollment appeals, the Board is barred by regulation from considering evidence not provided at the reconsideration or ALJ hearing level. 42 C.F.R. § 498.86(a). Only two of the exhibits attached to Petitioner’s request for review – exhibit 3 and exhibit 14 – were submitted at those lower levels of review. Accordingly, we must decline to consider the other 12 attached documents. Our review is limited to the evidence that the ALJ admitted into the record.

overturned. Petitioner's evidence or belief about the merits of the government's criminal case and the voluntariness of his guilty plea does not change the fact that he stands convicted of felony conspiracy to distribute a controlled substance. Consequently, the ALJ properly relied on the judicial records submitted by CMS (rather than the "untold story") to determine whether the circumstances of Petitioner's offense and conviction were an adequate basis for revocation under section 424.535(a)(3). As noted, Petitioner does not contend that those records misrepresent the factual basis for his guilty plea, nor does he contend that his offense, as described in the plea agreement's Factual Resume, is not one which CMS has determined to be detrimental to the best interests of Medicare or otherwise fails to satisfy the regulatory criteria. Under the circumstances, we conclude that the Petitioner has not identified any factual or legal error in the ALJ's conclusion that CMS lawfully revoked Petitioner's enrollment under section 424.535(a)(3)(i)(D).

The second regulatory ground for Petitioner's revocation, section 424.535(a)(4), provides that CMS may revoke a supplier's enrollment if the supplier "certified as 'true' misleading or false information on the enrollment application to be enrolled or maintain enrollment in the Medicare program." The ALJ found that Petitioner: (1) submitted an application to the Medicare program in December 2012 for the purpose of revalidating his enrollment; (2) indicated on the application that no "final adverse legal action" (as defined in the application to include a conviction, within the past 10 years, for a "felony offense that CMS has determined to be detrimental to the best interests of the [Medicare] program and its beneficiaries") had been imposed against him; and (3) certified on the application that he had read its contents and that the information he had provided was true, correct, and complete. *See* ALJ Decision at 8 (citing CMS Ex. 2). The ALJ further found that Petitioner had provided "false" information on the December 2012 enrollment application – information he had certified as true – because the answer "no" was checked on the application form in response to the question asking whether he had been the subject of a final adverse legal action within the past 10 years. *Id.* at 9-10. Based on these findings, the ALJ concluded that Petitioner's revocation was authorized under section 424.535(a)(4). *Id.* at 10.

Petitioner does not challenge the ALJ's finding that he provided – and certified as true – false information on the December 2012 enrollment application. Instead, he alleges (as he did before the ALJ) that his failure to disclose his guilty plea and conviction was inadvertent or accidental, a product of an innocent mistake made by an employee of his physician group. RR at 3-4. The ALJ properly rejected this claim, however, because section 424.535(a)(4) does not require proof that Petitioner subjectively intended to provide false information, only proof that he *in fact provided* misleading or false information that he certified as true. We note that even if Petitioner did not subjectively intend to mislead the Medicare program on the December 2012 application, he was not

without fault. Petitioner admits that, contrary to his signed certification, he did not read the completed application before signing and submitting it to Medicare. RR at 4. That omission was certainly negligent and exhibited indifference to Medicare requirements.

We conclude that the ALJ committed no error in concluding that CMS had a legitimate basis to revoke Petitioner's billing privileges under section 424.535(a)(4).

Under section 424.535(a)(9), the third regulatory ground considered by the ALJ, CMS may revoke a physician's enrollment if the physician fails to comply with "reporting requirements" specified in 42 C.F.R. § 424.516(d)(1)(ii) and (iii). Section 424.516(d)(1)(ii) required Petitioner to report any "adverse legal action" to the Medicare program within 30 days. The ALJ held that Petitioner's felony conviction was an "adverse legal action" and found that Petitioner did not report that action within 30 days, as required by section 424.516(d)(1)(ii). Consequently, the ALJ concluded that Petitioner's reporting failure provided a valid basis to revoke Petitioner's enrollment under section 424.535(a)(9). Petitioner does not mention, much less challenge, that conclusion in his request for review. We therefore summarily affirm it.

In short, we find no legal or factual reason to disturb the ALJ's conclusion that CMS lawfully revoked Petitioner's Medicare enrollment under sections 424.535(a)(3), 424.535(a)(4), and 424.535(a)(9).

Petitioner asserts that because of the revocation, he is "unemployable" and that his "patients have suffered" as well. He asks us to consider those circumstances, as well as his ongoing and successful effort to overcome substance abuse, in deciding whether to affirm the revocation of his enrollment. These circumstances, even if true, do not provide a basis for reversing the ALJ's conclusions that CMS was authorized to revoke Petitioner's billing privileges on three separate regulatory grounds. Moreover, the Board's guidelines for review of provider/supplier enrollment cases state that the Board will not consider issues not raised in a request for review nor issues that could have been presented to the ALJ, but were not. *Guidelines* at 5. Petitioner did not argue before the ALJ that these circumstances would establish a basis for reversing the revocation, even if the ALJ determined that, as a matter of law, CMS was authorized to revoke his billing privileges under the cited provisions.

Conclusion

For the reasons stated above, we affirm the ALJ Decision in its entirety.

_____/s/
Sheila Ann Hegy

_____/s/
Constance B. Tobias

_____/s/
Judith A. Ballard
Presiding Board Member