Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Ronald Paul Belin, DPM
Docket No. A-15-10
Decision No. 2629
March 30, 2015

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Ronald Paul Belin, DPM, appeals the September 3, 2014 ruling of an Administrative Law Judge (ALJ) dismissing the request for hearing to challenge the determination of the Centers for Medicare & Medicaid Services (CMS) to deny Dr. Belin's application to enroll in Medicare. *Ronald Paul Belin, DPM*, ALJ Ruling 2014-42 in Docket No. C-14-1181 (Sept. 3, 2014) (ALJ Ruling). The ALJ dismissed because he concluded that all material facts and legal issues were already resolved in a prior appeal decided by a different ALJ upholding denial of an earlier enrollment application filed by Dr. Belin. ALJ Ruling passim, citing *Ronald Paul Belin, DPM*, DAB CR2768 (2013) (*Belin* I).

For the reasons explained below, we conclude that the ALJ erred in finding that the principle of res judicata, as embodied in the hearing regulations at 42 C.F.R. § 498.70(a), supported dismissal of Dr. Belin's hearing request. We therefore remand the case for further proceedings consistent with this decision.

Legal Authority

Medicare is administered by CMS. CMS in turn delegates certain program functions to private contractors. *See* Social Security Act (Act) §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b).

In order to receive payment for services furnished to Medicare beneficiaries, a medical provider or supplier – the term "supplier" encompasses a physician – must be "enrolled" in Medicare.[1] 42 C.F.R. §§ 424.500, 424.505. Section 424.530(a) provides that "CMS

[1] "Providers" are hospitals, nursing facilities, or other medical institutions. 42 C.F.R. § 400.202. "Suppliers" include physicians and other non-physician health care practitioners. *Id.* (stating that, unless the context indicates otherwise, "[s]upplier means a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare").

may deny a provider's or supplier's enrollment in the Medicare program" for any of the reasons that follow, including:

> (3) *Felonies*. If within the 10 years preceding enrollment or revalidation of enrollment, the provider, supplier, or 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. CMS considers the severity of the underlying offense.
>
> (i) Offenses include—
> (A) Felony crimes against persons . . . .
> (B) Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
> (C) Any felony that placed the Medicare program or its beneficiaries at immediate risk . . . .
> (D) Any felonies outlined in section 1128 of the Act.
>
> (ii) Denials based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.

CMS has explained that, in applying this provision to determine whether to deny enrollment, it would make assessments considering any such felony convictions in the preceding 10 years and, "[i]n addition, we would consider the severity of the underlying offense." 71 Fed. Reg. 20,754, at 20,768 (Apr. 21, 2006). The regulations further provide that, if a provider or supplier appeals a denial, the "provider or supplier may reapply after notification that the determination was upheld." 42 C.F.R. § 424.530(b)(2).

Section 1866(j)(8) of the Act provides a right to an ALJ hearing for any supplier whose application for enrollment is denied. *See also* 42 C.F.R. § 498.3(b)(17). The hearing regulations provide that "[o]n his or her own motion, or on the motion of a party to the hearing, the ALJ may dismiss a hearing request either entirely or as to any stated issue," under any of the listed circumstances, including:

> (a) *Res judicata.* There has been a previous determination or decision with respect to the rights of the same affected party on the same facts and law pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, because the affected party did not timely request reconsideration, hearing, or review, or commence a civil action with respect to that determination or decision.

> (b) *No right to hearing.* The party requesting a hearing is not a proper party or does not otherwise have a right to a hearing.

42 C.F.R. § 498.70.

Factual Background and Case History

Dr. Belin submitted an application to enroll in Medicare as a new supplier to Wisconsin Physicians Service (WPS), a Medicare contractor, which marked it received on June 6, 2013. CMS Ex. 1, at 1. He disclosed that, on October 4, 2006, he had "Agreed to a Withhold of Adjudication on one count of Obtaining a Controlled Substance by Fraud," for which he served an 18-month probation. *Id.* at 27.

By letter dated November 20, 2013, WPS notified Dr. Belin that his application to enroll in Medicare was denied, stating that –

> **On October 4, 2006 you entered a guilty felony plea. You are still within 10 years of the felony. It is for this reason that your application is denied.**

CMS Ex. 3, at 1 (bold in original).

Dr. Belin timely sought reconsideration of this action, which was denied on March 22, 2014 based on 42 C.F.R. § 424.530(a)(3)(i)(B). CMS Ex. 6. The reconsideration decision included the following explanation:

> According to our records on October 4, 2006, Dr. Belin agreed to a withhold of adjudication on one count of obtaining a controlled substance by fraud and was convicted of a felony charge. CMS has determined the offense to be detrimental to the best interest of the program and its beneficiaries.
>
> DECISION: Ronald P. Belin, DPM has not provided evidence to show you have fully compliance [sic] with the standards for which you were denied. Therefore, we cannot grant you access to the Medicare Trust Fund . . . .

Id. at 2.

Dr. Belin then timely requested an ALJ hearing. Pursuant to the ALJ's June 2, 2014 prehearing order, CMS submitted a prehearing brief and a motion for summary judgment on July 7, 2014. On August 11, 2014, Dr. Belin submitted his prehearing brief. Each party's briefing was accompanied by exhibits and a witness list. On August 13, 2014, the

ALJ issued an order to both parties to show cause why he should not find all the issues in the case to be res judicata based on *Belin* I. Both parties filed briefs in opposition, but on September 3, 2014, the ALJ dismissed the case sua sponte citing 42 C.F.R. § 498.70(a) and (b).

Dr. Belin asked the Board to reverse the dismissal and remand for hearing. Request for Review at 4, 13. CMS stated that it did not oppose Dr. Belin's request and agreed with his contention that the denial at issue was based on a new application with different facts and that dismissal amounted to nullification of Dr. Belin's statutory right to appeal the denial. CMS Response at 1. At Dr. Belin's request, the Board conducted an oral argument on February 20, 2015 and the record was then closed.

Analysis

The Board has recently accepted CMS's position that its determination (and that of its contractors) about whether to deny a particular supplier's enrollment application under section 424.530(a)(3) is discretionary, not mandatory, even where the underlying conviction is for an offense within one of the categories that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. *Brian K. Ellefsen, DO*, DAB No. 2626 (2015). CMS expressly took the same position in the present case in opposing the ALJ's sua sponte order proposing to find that res judicata barred Dr. Belin's appeal, arguing –

> Because CMS' authority under the regulation is discretionary rather than mandatory, a provider may re-apply during the ten-year time frame. CMS may, at its discretion, consider the amount of time that has passed since the conviction a factor in determining whether to approve the application. Thus, each application is based on different facts, rendering the application of res judicata inappropriate.

CMS Res Judicata Letter Br. at 1-2. We do not revisit the issue here and the ALJ does not seem to have held otherwise.

CMS treats each such denial as a discrete action, even when the authority to deny arises from the same conviction. As CMS indicates, section 1866(j)(8) of the Act and 42 C.F.R. § 498.3(b)(17) confer a right to appeal that discrete action. We find that CMS's position is not inconsistent with the regulations, as discussed below, and conclude therefore that it was error to dismiss the appeal entirely on the ground that a prior ALJ decision addressing the denial of a prior application had already resolved all relevant issues.

We note several regulatory indicia that the Secretary has reserved the ability to assess each application individually. For example, the regulation provides that CMS may deny the enrollment and that denials based on felony convictions are "for a period to be

determined by the Secretary[.]" 42 C.F.R. § 424.530(a)(3)(ii). The regulation only restricts CMS's authority to admit a supplier after a felony conviction to a period of "not less than 10 years" if the individual had one or more additional prior convictions. *Id*. In other cases, the regulation does not impose a mandatory 10-year bar to re-enrollment but rather authorizes denials within the 10-year period. In addition, the regulations expressly permit a supplier to reapply after a denial once the determination to deny has been upheld after any appeals. 42 C.F.R. § 424.530(b)(2). CMS could have precluded reapplication once a denial based on a felony was upheld until after the 10-year period expired but chose not to place any such restriction on the timing of reapplications. The regulations are thus fully consistent with CMS's position here that each reapplication after a felony conviction is treated separately and that the contractor exercises discretion to consider the circumstances at the time, including the severity of the offense and the passage of time.

While Dr. Belin points to a variety of factual contentions and legal issues which he asserts distinguish the first and second denials and reconsiderations, for our purposes at this stage it is sufficient that CMS has reserved the authority to evaluate the appropriate period of denial after a felony conviction and that, therefore, the passage of time alone (as CMS argues) creates a different set of circumstances on each application. Two denial determinations based on felony convictions cannot therefore rightly be said to be on all fours with each other. Contrary to the ALJ's holding, CMS did not need to explicitly cite any other facts on which it relied in denying the second application in order to make it evident that the bases for the decisions to deny were not exactly the same.

It is true that the issues to be resolved by the ALJ in this appeal may be narrow. First, specific issues of fact or law that have actually been already litigated and resolved between the parties may indeed be subject to preclusion under the res judicata provision of section 498.70(a).[2] Second, the Board has held that, where CMS is legally authorized to deny an enrollment application, neither an ALJ nor the Board itself is empowered to substitute for CMS or its contractor in determining <u>how</u> to exercise its discretion. *Ellefsen*, at 7, *citing Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2008) (stating that "we may not substitute our discretion for that of CMS in determining whether revocation is appropriate under all the circumstances"), *aff'd, Ahmed v. Sebelius*, 710 F. Supp.2d 167 (D. Mass. 2010); *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (explaining that "the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke [a petitioner's] Medicare billing privileges, not to substitute the ALJ's discretion about whether to revoke"). Nevertheless, a supplier is entitled to the review provided in the statute and regulations.

[2] Section 498.70(b), which the ALJ also cited, does not apply at all because Dr. Belin does indeed have an explicit statutory right to a hearing.

Dr. Belin argued to the ALJ in the present case that "notably absent from this [reconsideration decision] is any use of discretion." Pet. Pre-Hearing Br. at 2. Dr. Belin therefore raised the issue of whether discretion was recognized and properly exercised by the contractor. The Board discussed the role of the ALJ in reviewing such a claim in *Ellefsen* and the same reasoning applies on remand here.

Conclusion

For the reasons explained above, we remand this case to the ALJ for further proceedings not inconsistent with this decision.

/s/
Sheila Ann Hegy

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member