

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Robert J. Aquino, M.D.
(NPI: 1598793879),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-15

Decision No. CR4910

Date: August 4, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare enrollment and billing privileges of Robert J. Aquino, M.D. (Dr. Aquino or Petitioner) based on Dr. Aquino's felony conviction in 2012 for conspiracy to commit bribery. Petitioner requested a hearing before an administrative law judge (ALJ) with the Departmental Appeals Board (DAB) to dispute the revocation. Because Petitioner's felony conviction for conspiracy to commit bribery is a financial crime, it is detrimental to the best interests of the Medicare program and its beneficiaries. Therefore, I affirm CMS's actions.

I. Background and Procedural History

Dr. Aquino is a physician licensed in the state of New York. Petitioner Exhibit (P. Ex.) 3 at 1. He enrolled in the Medicare program as a supplier in February 2014. CMS Ex. 6 at 1; *see* 42 U.S.C. § 1395x(d) (defining a "supplier" in the Medicare program to include "a physician or other practitioner.").

In an April 29, 2016 initial determination, a CMS administrative contractor revoked Petitioner's Medicare enrollment and billing privileges, retroactive to February 6, 2014, for the following reasons:

42 CFR §424.535(a)(3) – Felony Conviction

The Centers for Medicare & Medicaid Services has been made aware of your May 1, 2012 felony conviction for Conspiracy to Commit Bribery, in violation of 18 USC §1952(a)(3) and 371, in the United States District Court, Southern District of New York.

42 CFR §424.535(a)(4) – False or Misleading Information

On your Centers for Medicare & Medicaid Services 885I enrollment application submitted on February 12, 2014, you answered “no” in section three of the application indicating that you did not have any previous adverse legal history. However, you were adjudged guilty of a felony for Conspiracy to Commit Bribery on May 1, 2012. A felony conviction is a final adverse legal action, as defined by 42 CFR §424.502.

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

Petitioner requested reconsideration of the revocation, filing arguments and documents to support his request. P. Ex. 1. In the reconsideration request, Petitioner conceded his felony conviction in 2012 for conspiracy to commit bribery. Petitioner also claims that it was neither his nor the medical faculty's intention to deceive CMS. Petitioner stated that the Medicare 855-I enrollment application had not undergone a final review before it was submitted for processing, and that if it had, the provider or the credentialing staff would have realized section three of the application was incorrect P. Ex. 1 at 4.

On July 26, 2016, a hearing officer with the CMS administrative contractor issued an unfavorable Reconsidered Determination. CMS Ex. 1. The hearing officer upheld the revocation based on Petitioner's felony conviction and his failure to disclose this felony conviction on his February 12, 2012 Medicare 855-I enrollment application. CMS Ex. 1 at 2. The hearing officer found that the effective date of revocation was set appropriately as the date of first enrollment, February 6, 2014, because the date of Petitioner's felony conviction preceded his enrollment date into the Medicare program, per 42 C.F.R. § 424.535(g). CMS Ex. 1 at 1.

Petitioner, through counsel, timely requested a hearing . Along with his hearing request, Petitioner submitted exhibits 1 through 4 (P. Exs. 1-4), two of which were affidavits. P. Exs. 2, 3. I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of prehearing exchanges. In accordance with the Order, CMS filed its prehearing exchange, which included a motion for summary judgment and brief (CMS Br.), and 12 exhibits (CMS Exs. 1-12). Petitioner filed a brief in opposition to summary judgment (P. Br.) along with two additional exhibits (P. Exs. 5, 6), one of which was an affidavit from Petitioner meant to supplement his original declaration (P. Ex. 3). P. Ex. 5.

II. Decision on the Record

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. 1-12 and P. Exs. 1-6 into the record.

My Order advised the parties that they must submit written direct testimony in the form of an affidavit or declaration 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 witnesses). CMS did not submit written direct testimony for any witnesses. Petitioner submitted written direct testimony from two witnesses. P. Exs. 2, 3, 5. However, CMS did not seek to cross-examine either witness. 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. Aquino'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).

1. ***Petitioner pled guilty to conspiracy to commit bribery, in violation of 18 U.S.C. § 371, and on May 1, 2012, the U.S. District Court for the Southern District of New York (District Court) imposed a judgment against Petitioner and sentenced him to four months of imprisonment, two years of supervised release, and a criminal monetary penalty of \$100.***

In 2004, Dr. Aquino purchased Parkway Hospital, located in Queens, New York, and became its Chief Executive Officer. Parkway Hospital was financially distressed at the time. In 2005, Parkway Hospital filed for bankruptcy and, in 2008, a New York State commission recommended that Parkway Hospital close. Despite significant unsuccessful efforts by Dr. Aquino, Parkway Hospital was to be closed in November 2008. In the summer of 2008, Dr. Aquino received a solicitation from New York State Senator Carl Kruger for a bribe. Dr. Aquino was to make payments to Adex Management Inc. (Adex), and, in return, Senator Kruger would take official action to try to keep Parkway Hospital open. Parkway Hospital paid \$60,000 to Adex in the summer of 2008. Senator Kruger was not successful in keeping Parkway Hospital open. P. Ex. 3 at 1; P. Ex. 3B at 4; P. Ex. 6 at 1-2.

On April 7, 2011, a grand jury convened by the District Court indicted Dr. Aquino and others, including Senator Kruger. CMS Ex. 9. Dr. Aquino pled guilty to Count Four of the indictment, admitting that he violated 18 U.S.C. § 371 by conspiring to violate 18 U.S.C. §§ 666(a)(1)(B) and (a)(2) [Theft or bribery concerning programs receiving Federal funds], and 18 U.S.C. § 1952(a)(3) [Travel Act]. See CMS Ex. 9 at 11-14; CMS Ex. 10 at 1; P. Ex. 6 at 1. Dr. Aquino admitted that he made payments to then New York State Senator Carl Kruger, intending to influence Senator Kruger to advocate on behalf of Parkway Hospital with an official in the New York State executive branch with oversight authority over New York hospitals to keep Parkway Hospital from closing. CMS Ex. 9 at 11-14. On May 1, 2012, the District Court entered judgment against Dr. Aquino and sentenced him to four months of imprisonment, two years of supervised release, and a criminal monetary penalty of \$100. CMS Ex. 10. Petitioner does not dispute his felony conviction for conspiracy to commit bribery. P. Br. at 5-9; P. Ex. 3 at 1, 4; P. Ex. 5 at 2.

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 offense that is similar to those offenses listed in the regulations that are detrimental to the best interests of the Medicare program and its beneficiaries.

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

There are three different types of review an ALJ may have to perform when reviewing CMS's determination to revoke based on section 424.535(a)(3) depending on whether the felony for which a supplier was convicted (1) is specifically listed in the regulations, (2) is similar to a crime listed in the regulations, or (3) has been determined to be detrimental to the best interests of the Medicare program and its beneficiaries through a case-by-case determination.² See *Barry Ray M.D.*, DAB CR3655 at 11-13 (2015) (discussing DAB cases).

When a supplier is convicted of a felony similar to the ones listed in the regulations, an ALJ must look to the circumstances surrounding the conviction to determine if the felony conviction is similar to one of the offenses listed in the regulations. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 11 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). Even if a criminal offense is not similar to one of the listed crimes in the regulations, it still may be found to be detrimental to the best interests of the Medicare program and program beneficiaries if it is one that falls into one of the four general categories of crimes listed in the regulations (i.e., felony crimes against persons, financial crimes, any felony that placed the Medicare program or its beneficiaries at immediate risk, and any felonies that would result in mandatory exclusion under section 1128(a) of the Social Security Act). *Ahmed*, DAB No. 2261 at 10, 12.

¹ The Secretary revised section 424.535(a)(3) effective February 3, 2015. 79 Fed. Reg. 72,500 (Dec. 5, 2014). The outcome in this case is the same regardless as to whether I apply the original text or the amended text of that regulation.

² Counsel for CMS asserts that CMS's determination as to whether a felony offense is detrimental to the best interests of the Medicare program and its beneficiaries is unreviewable by ALJs or the DAB. CMS Br. at 11-12. As discussed at length in *Barry Ray M.D.*, DAB CR3655 at 10-15 (2015), this position is contrary to the decisions of the DAB and directly abrogates a supplier's right to ALJ and DAB review of CMS's determination to revoke Medicare billing privileges. 42 C.F.R. §§ 424.545(a); 498.3(b)(17), 498.5(l)(2), (3); 498.20; 498.40(a); 498.80.

In the present case, Petitioner was convicted of a felony offense under federal law. CMS Ex. 10. Specifically, Petitioner's offense was conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 666(a). A violation of 18 U.S.C. § 666(a) is a felony due to the fact that the maximum term of incarceration that can be imposed is ten years. *See Bakul Desai, M.D. v. Inspector General*, DAB CR2806, at 5-6 (2013). Because a violation of 18 U.S.C. § 666(a) is a felony, a conspiracy to violate that statute under 18 U.S.C. § 371 carries a maximum term of imprisonment of five years, thus making it is also a felony. *See* 18 U.S.C. § 3559(a)(4).

Further, Petitioner was convicted of the felony offense within the preceding 10 years. Petitioner was convicted of felony conspiracy to commit bribery on May 1, 2012, and the CMS administrative contractor revoked Petitioner in an initial determination dated April 29, 2016. CMS Ex. 2; CMS Ex. 10.

Finally, Petitioner was convicted of a felony detrimental to the best interests of the Medicare program and its beneficiaries. The pertinent regulatory provision lists "financial crimes" as one of the categories of offenses considered detrimental to the Medicare program and its beneficiaries. The regulation provides that CMS may revoke a provider's or supplier's Medicare billing privileges if the provider or supplier was convicted of a felony offense involving "[f]inancial 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." 42 C.F.R. § 424.535(a)(3)(ii)(B).

The list of financial crimes under 42 C.F.R. § 424.535(a)(3)(ii)(B) is not exhaustive as is indicated by the language at the end of that subsection, "and other similar crimes," as well as the prefatory clause, "such as." 42 C.F.R. § 424.535(a)(3)(ii)(B); *see Fady Fayad, M.D.*, DAB No. 2266 at 8 (2009). "CMS may revoke Medicare billing privileges under the authority of section 424.535(a)(3) based on *any* financial crime, regardless of whether the supplier's particular financial crime is specified in the regulation's illustrative list of financial crimes." *Stanley Beekman, D.P.M.*, DAB No. 2650 at 7 (2015) (emphasis in original); *accord Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 10 (2009) ("even if Petitioner's felony offense was not similar to one of the crimes named in the regulation, CMS would not necessarily be precluded from finding that it was a financial crime.").

Based on the facts of this case, I conclude that Petitioner's crime was similar to the other financial crimes listed in the regulation. The record is clear that Petitioner's felony conviction was for conspiracy to commit bribery. Petitioner was convicted of violating 18 U.S.C. § 371 by conspiring to violate 18 U.S.C. § 666(a)(1)(B) and (a)(2) [theft or bribery concerning programs receiving Federal funds], and 18 U.S.C. § 1962(a)(3) [Travel Act]. CMS Ex. 9 at 11; CMS Ex. 10 at 1. In pleading guilty to violating this statute, Petitioner admitted the following overt acts:

18. In furtherance of the conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

- a. In or about 2008, Carl Kruger, the defendant, advocated on behalf of Parkway Hospital with an official in the New York State executive branch with oversight responsibilities for New York State hospitals.

- d. On or about June 25, 2008, Robert Aquino, the defendant, caused Parkway Hospital to pay \$20,000 to Adex.³

CMS Ex. 9 at 13-14.

Petitioner does not dispute that he was convicted of the felony of conspiracy to commit bribery. Further, the conspiracy involved bribing an elected official to improperly influence New York State to permit Parkway Hospital to remain open. It is significant that Petitioner purchased Parkway Hospital and that Petitioner considered his ownership of the hospital to be “proprietary.” P. Ex. 3 at 1. It is immaterial that the bribed official was unsuccessful and “Dr. Aquino did not ultimately gain as a result of the payments to Adex.” P. Ex. 6 at 2. Petitioner paid money to an elected official expecting that his business would remain open despite the findings of a state commission to close it. Thus, this conviction constitutes a financial crime within the meaning of section 424.535(a)(3)(ii)(B).

Accordingly, I conclude that CMS had a legitimate basis to revoke Petitioner’s Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B).

3. I do not need to decide whether CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(4) to revoke Petitioner’s enrollment and billing privileges.

Having concluded that CMS had a legitimate basis to revoke Petitioner based on his felony conviction for conspiracy to commit bribery, I do not need to resolve the issue as to whether CMS could legitimately revoke Petitioner under section 424.535(a)(4) for false or misleading information on an enrollment application. As explained below,

³ As noted previously in this decision, Petitioner’s exhibits indicate that Parkview Hospital paid Adex \$60,000; however, Petitioner was only charged with paying \$20,000.

Petitioner's felony conviction is sufficient to support the retroactive effective date of revocation and the length of the reenrollment bar that CMS imposed.

4. *The effective date of Petitioner's revocation is February 6, 2014, the date of first enrollment. 42 C.F.R. § 424.535(g).*

The regulation at 42 C.F.R. § 424.535(g) states that when a revocation is based on a felony conviction, the revocation of the supplier's billing privileges is effective as of the date of the felony conviction. If the date of the conviction precedes the date of first enrollment in the Medicare program, the effective date of revocation shall be the date of first enrollment. 42 C.F.R. § 424.535(g).

Petitioner's guilty plea and the District Court's entry of judgment are both considered to be a conviction. 42 C.F.R. § 424.535(a)(3)(i). Petitioner's date of conviction, May 1, 2012, precedes his date of first enrollment in the Medicare program, February 6, 2014. CMS Ex. 10 at 1; P. Ex. 2C at 1. Therefore, under the regulations, CMS properly set the revocation effective date as February 6, 2014, the date of Petitioner's first enrollment. P. Ex. 2C at 1.

5. *I do not have the authority to review the length of the reenrollment bar.*

CMS determined that Petitioner is barred from reenrollment for three years. *See* CMS Ex. 1 at 2. Petitioner argues that the revocation and reenrollment bar effectively exclude Dr. Aquino from the Medicare program for a total of five years, exceeding the three year bar that CMS may impose. P. Br. at 12. Additionally, Petitioner contends that the three-year reenrollment bar is inappropriate because Dr. Aquino's conviction is not detrimental to the Medicare program and the submission of an incorrect application warrants a one-year reenrollment bar. P. Br. at 12 (*citing Sandra E. Johnson, C.R.N.A., DAB No. 2708 (2014.)*).

The regulation provides a bar to reenrollment from a minimum of one year to a maximum of three years. 42 C.F.R. § 424.535(c)(1). The effective date for the reenrollment bar is 30 days after the date on the initial determination to revoke. *Id.* The length of the bar that CMS imposed on Petitioner is permissible under the regulations. Further, the DAB has concluded that CMS's decision as to the length of the reenrollment bar is not a reviewable initial determination. *Vijendra Dave, M.D., DAB No. 2672 at 10-11 (2016)*. Therefore, I cannot grant Petitioner a one-year reenrollment bar.

Although I do not have authority to review the three-year reenrollment bar that CMS imposed on Petitioner, Petitioner's revocation under section 424.535(a)(3) is sufficient to justify such a bar on its own. Petitioner bribed a state senator so that a state commission's order to close Parkway Hospital would be illegitimately retracted. Although Petitioner portrays this as a simple lapse in judgment, public corruption strikes

at the heart of the rule of law. CMS could reasonably believe a long reenrollment bar is necessary to safeguard the Medicare program.

6. *Equity does not apply in this case.*

Petitioner contends that equity demands that the revocation of Dr. Aquino's participation in the Medicare program be reversed. P. Br. at 12. Petitioner argues that CMS erred in determining that Dr. Aquino's felony conviction is detrimental to the Medicare program and its beneficiaries. P. Br. at 12. Petitioner also argues that Dr. Aquino's felony conviction is not an offense that would support a mandatory exclusion by the Office of the Inspector General. P. Br. at 12. Petitioner also explains that the revocation of Dr. Aquino's Medicare billing privileges may lead to Dr. Aquino's exclusion as a Medicaid provider. P. Br. at 13. Petitioner argues that Dr. Aquino provides a vital community service through JCAP, a not for profit outpatient/inpatient drug and alcohol rehabilitation center and Article 28 clinic. P. Br. at 13. Petitioner is the only primary care physician at JCAP, and Petitioner contends that his patients depend heavily on him and his medical services. P. Br. at 14. Petitioner contends that revoking Dr. Aquino's privileges would only punish him for the same crime twice. P. Br. at 14. Petitioner additionally notes that the New York State Department of Health determined that Dr. Aquino should be allowed to retain his medical license despite his conviction. P. Br. at 14.

All of Petitioner's arguments are either related to CMS's determination to revoke Petitioner or are equitable in nature. However, it has been long settled that CMS has discretion to revoke a supplier's billing privileges and that discretionary decision is not reviewable. *Latantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) ("the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke . . . not to substitute the ALJ's discretion about whether to revoke."). Rather, "[t]he ALJ's review of CMS's revocation . . . is thus limited to whether CMS had established a legal basis for its actions." *Id.* Further, to the extent that Petitioner requests that I provide equitable relief, I am unable to do so. *See US Ultrasound*, DAB No. 2302, at 8 (2010).

VI. Conclusion

I affirm CMS's determination to revoke Petitioner's Medicare enrollment and billing privileges.

/s/

Scott Anderson
Administrative Law Judge