Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Jason Bellak, M.D.,	)	Date: October 30, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-421
	)	Decision No. CR1680
Centers for Medicare & Medicaid	)	
Services.	)	
	)	

DECISION

On September 8, 2005, Petitioner, Jason Bellak, M.D., was convicted of felony child abuse. Based on that conviction, the Centers for Medicare & Medicaid Services (CMS) has denied his request to enroll in the Medicare program. Petitioner appeals. The parties have agreed that this matter may be resolved on the written record, without an in-person hearing. For the reasons set forth below, I affirm CMS's determination.

Background

CMS, acting on behalf of the Secretary of Health and Human Services, "may" deny a provider's enrollment in the Medicare program if, within the preceding ten years, the provider was convicted of a felony offense that CMS "has determined to be detrimental to the best interests of the program and its beneficiaries." 42 C.F.R. § 424.530(a)(3); *see also* Social Security Act (Act) §§ 1842(h)(8) (The Secretary may refuse to enter into an agreement with a physician who has been convicted of a felony for an offense which the Secretary has determined is "detrimental to the best interests of the program or program beneficiaries") and 1866(b)(2)(D) (The Secretary may refuse to enter into an agreement after he ascertains that the provider has been convicted of a felony "which the Secretary determines is detrimental to the best interests of the program or program beneficiaries"). Offenses for which billing privileges may be revoked include felony crimes against persons, such as assault or similar crime. 42 C.F.R. § 424.530(a)(3)(i)(A).

Section 1866(j)(2) of the Act creates appeal rights for providers and suppliers where enrollment has been denied, using the procedures that apply under section 1866(h)(1) of the Act. These procedures provide for review by an Administrative Law Judge (ALJ) and the right to appeal the ALJ's decision to the Departmental Appeals Board. 42 C.F.R. Part 498.

Here, a Medicare hearing officer affirmed the Medicare contractor's denial of Petitioner's enrollment application, and Petitioner has appealed. CMS Ex. 1. I held a prehearing conference on June 7, 2007, at which the parties agreed that the matter could be decided based on written submissions, without an in-person hearing. 42 C.F.R. § 498.66; Order and Schedule for Filing Briefs and Documentary Evidence, at 1 (June 12, 2007). The parties have filed their main briefs and CMS filed a reply. CMS submits thirteen exhibits (CMS Exs. 1-13). Petitioner submits four exhibits (P. Exs. 1-4). In the absence of any objection, I admit CMS Exs. 1-13 and P. Exs. 1-4.

Discussion

> ***CMS may deny Petitioner enrollment in the Medicare program because, within the last ten years, Petitioner was convicted of felony child abuse, which is a felony detrimental to the best interests of the Medicare program.[1]***

In this case, the parties agree that on September 8, 2005, Petitioner was convicted in Wisconsin State Court of felony child abuse (recklessly causing great bodily injury to a child). CMS Ex. 8, at 23. Without question, causing great bodily injury to a child must be considered among "felony crimes against persons, such as . . . assault [or] other similar crimes." 42 C.F.R. § 424.530(a)(3)(i). Thus, under the plain language of the regulation, CMS may deny Petitioner's Medicare enrollment. I need look no further into the underlying rationale for its actions. *Abermarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir. 2000); *see also County of Los Angeles v. U.S. Dep't of Health & Human Services*, No. 96-55161, 1997 WL 257492 (9th Cir. May 14, 1997); *Wildlife Federation v. Marsh*, 721 F.2d 767, 773-774 (11th Cir. 1983); *Ass'n of American Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Alexander v. U.S. Dep't of Hous. & Urban Dev.*, 555 F.2d 166, 171 (7th Cir. 1977).

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

Petitioner nevertheless faults the manner in which CMS exercised (or failed to exercise) its discretion, arguing that CMS has adopted unduly rigid rules that mandate enrollment denials in the face of certain felony convictions, and thus, according to Petitioner, CMS effectively fails to exercise discretion in any individual case. Although CMS denies imposing any such blanket rules, I do not reach that issue. As I explained in *Daniel M. Bullock, M.D.*, DAB CR1640 (2007), I simply have no authority to interject myself into the discretionary enforcement processes of the agency component to which the discretion to act has explicitly been granted. *See Wayne E. Imber, M.D.*, DAB No. 1740 (2000); *Brier Oak Terrace Care Ctr.*, DAB No. 1798 (2001). Once I find a legal and factual basis for denying Petitioner's enrollment, I am "without jurisdiction to evaluate on any basis whatsoever the propriety of [CMS's] exercise of discretion in deciding to proceed . . . ." *Michael J. Rosen, M.D.*, DAB No. 2096 (2007), at 14 (citing *Michael J. Rosen, M.D.*, DAB CR1566 (2007)); *see also Puget Sound Behavioral Health*, DAB No. 1944 (2004), at 15-16, *aff'd County of Pierce, d/b/a Pugent Sound Behavioral Health v. Leavitt*, D.C., No. CV-04-02308-JLR (2007) (where regulation uses permissive rather than mandatory language ALJ had no authority to compel CMS to exercise its discretion).

Petitioner has also raised constitutional challenges to CMS's actions. Challenges to the constitutionality of a statute or regulation promulgated by the agency are beyond the jurisdiction of an ALJ. *Northern Montana Care Center*, DAB No. 1930, at 10 (2004).

Conclusion

Here, Petitioner admits that he was convicted of a felony child abuse. CMS may deny his Medicare enrollment based on conviction of a felony it determines is detrimental to the best interests of the program or program beneficiaries. CMS has determined that crimes against persons are detrimental to the best interests of the program or its beneficiaries. I therefore affirm the denial of Petitioner's Medicare enrollment.

/s/
Carolyn Cozad Hughes
Administrative Law Judge