

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Peter Zavell,)	Date: September 04, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-452
)	Decision No. CR2002
Centers for Medicare & Medicaid)	
Services.)	

**DECISION GRANTING SUMMARY DISPOSITION
TO THE CENTERS FOR MEDICARE & MEDICAID SERVICES**

I grant summary disposition sustaining the determination of the Centers for Medicare & Medicaid Services (CMS) to revoke the Medicare enrollment of Petitioner, Peter J. Zavell, M.D., for a period of up to three years.

I. Background

Petitioner is a physician who has participated in the Medicare program. A contractor acting on CMS's behalf advised Petitioner that his Medicare billing privileges were revoked. Petitioner requested reconsideration of this determination and reconsideration was denied. Petitioner then requested a hearing and the case was assigned to me for a hearing and a decision.

The parties exchanged pre-hearing briefs and proposed exhibits. CMS included with its pre-hearing brief a motion for summary disposition of the case. Petitioner did not reply directly to this motion in his pre-hearing brief. I afforded Petitioner the opportunity to file a supplemental reply brief addressing CMS's motion, but Petitioner declined to do so.

CMS filed eight proposed exhibits which it designated as CMS Ex. 1 – CMS Ex. 8. Petitioner filed 19 proposed exhibits which it designated as P. Ex. 1 – P. Ex. 19. I receive all of these proposed exhibits into the record of this case. However, I make no evidentiary findings in this decision based on weighing the parties' exhibits. I base my decision exclusively on the undisputed facts and the law.¹

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. CMS is authorized to revoke Petitioner's Medicare billing privileges;
2. Petitioner has a right to a hearing to challenge the duration of his billing privileges revocation; and
3. CMS is barred from revoking Petitioner's billing privileges by the terms of Petitioner's agreement to plead guilty to a federal felony

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision. I set forth each Finding below as a separate heading.

1. CMS is authorized to revoke Petitioner's Medicare billing privileges.

CMS revoked Petitioner's Medicare billing privileges pursuant to the authority granted by section 1866(j) of the Social Security Act (Act) and by implementing regulations at 42 C.F.R. § 424.535. The Act empowers the Secretary of this Department to refuse to enter into an agreement, or to terminate an agreement, with any physician or supplier who has been convicted of a felony under federal or State law of an offense which the Secretary determines to be detrimental to the best interests of the Medicare program. The implementing regulation delegates to CMS the Secretary's statutory authority to revoke billing privileges of providers and suppliers who are convicted of certain felonies. 42 C.F.R. § 424.535(a)(3). Felonies for which revocation of billing privileges may be imposed are defined to include:

¹ Petitioner also moved that I subpoena several individuals to testify at an in-person hearing. I deny that request because I grant summary disposition in favor of CMS.

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.

42 C.F.R. § 424.535(a)(3)(i)(B).

A person whose billing privileges are revoked by CMS for one of the reasons enumerated at 42 C.F.R. § 424.535, including subsection (a)(3)(i)(B), may request a hearing to challenge the determination. 42 C.F.R. § 498.3(b)(17). What may be challenged in such a hearing is whether a regulatory basis exists to revoke the provider's billing privileges. What may not be challenged is whether CMS – assuming it has the authority to revoke – properly exercised its discretion to invoke that authority in an individual case.

Thus, I may decide, as I do here, whether a provider or a supplier was convicted of or pled guilty to a felony that falls within the ambit of 42 C.F.R. § 424.535(a)(3)(i)(B). But, that is the limit of my authority. I am not authorized to decide whether CMS should exercise its authority assuming that the authority to revoke exists in a particular case. Nothing in the regulations suggest that I may look behind CMS's exercise of discretion and substitute my judgment for that of CMS in deciding whether to revoke billing privileges in the individual case where the authority to revoke is present.

CMS is authorized to revoke Petitioner's billing privileges because Petitioner pled guilty to a felony as is defined by subsection (a)(3)(i)(B). It is undisputed that Petitioner pled guilty to count two of a federal indictment which charged him with willfully making and subscribing to a false income tax return. P. Ex. 1. That crime is a felony under federal law and is a financial crime within the plain meaning of the regulation.

Petitioner contends that CMS is not authorized to revoke his billing privileges notwithstanding these undisputed facts. First, Petitioner asserts that he was never "convicted" of a felony. He argues that, under the terms of the plea agreement that he entered into with the United States Attorney, no sentencing hearing has yet occurred in his case and no final adjudication of the case will be made until he is sentenced. Petitioner's brief at 9.

The authority to revoke billing privileges is not conditioned on a final judgment being entered against an individual. The regulation specifically allows CMS to revoke billing privileges in the circumstance where an individual has entered a guilty plea or has entered into a deferred adjudication arrangement. Petitioner's guilty plea plainly satisfies the regulation's requirements.

Second, Petitioner argues that the crime to which Petitioner pled guilty – filing a false income tax return – is not one of the felonies specifically listed under 42 C.F.R. § 424.535(a)(a)(3)(i)(B) for which exclusion is authorized. Petitioner attempts to distinguish between the crime to which he pled and income tax evasion, which is specifically cited by the regulation, as a reason for arguing that the determination to revoke his billing privileges is “baseless.” Petitioner’s brief at 10.

The crime to which Petitioner pled guilty obviously falls within the regulation’s reach. The regulation authorizes CMS to revoke billing privileges whenever a provider has been convicted of “financial crimes” “such as” income tax evasion, among other things. Here, Petitioner’s plea, essentially a plea to the crime of defrauding the federal government, was self-evidently a plea of guilty to a “financial crime.” It was also a plea to a crime that is not meaningfully distinguishable from income tax evasion. In either case – whether it is tax evasion or filing a false tax return – the intent and the ultimate objective are identical, to unlawfully withhold from the federal government monies to which the government is entitled and which the government would have received but for the deception. The distinction that Petitioner seeks to make is truly a distinction without a difference.

Petitioner argues that CMS failed to make an individualized analysis of the allegedly unique facts of his case. Rather, according to Petitioner, CMS determined to revoke his billing privileges as a matter of policy based solely on the fact of his plea to a felony for which revocation is authorized. Petitioner’s brief at 11. Petitioner argues that CMS made a blanket decision to revoke the billing privileges of all providers who plead guilty to tax evasion or similar crimes without analyzing each provider’s unique situation. That, according to Petitioner, is an abuse of discretion. *Id.* at 12. Petitioner argues that there are equitable considerations here that CMS should have, but failed to, take into account. *Id.*

These are arguments which I am not authorized to address. The issue here is not whether CMS should have revoked Petitioner’s billing privileges based on the equities of his case but whether it has the authority to do so. As I have explained, I may not second-guess CMS’s judgment in this case once I have determined that CMS has the authority to revoke Petitioner’s billing privileges.

Petitioner makes a similar argument by contending that he has been treated disparately from other providers who were convicted of tax fraud. Petitioner’s brief at 12. But, whether CMS treats all similarly situated providers uniformly is simply not a relevant question. It is enough to say that CMS has the authority to revoke Petitioner’s billing privileges. That is the ambit of my hearing and decision authority.

2. Petitioner does not have a right to a hearing to challenge the duration of his billing privileges revocation.

CMS has authority to determine the duration of a provider's billing privileges revocation in any case where it has the authority to impose revocation. 42 C.F.R. § 424.535(c):

After a provider, supplier . . . has had their billing privileges revoked, they are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar is a minimum of 1 year but not greater than 3 years depending on the severity of the basis for revocation.

CMS determined to bar Petitioner from re-enrolling for a period of three years, citing this regulation as authority. Petitioner asserts that the duration of the re-enrollment bar is unfair and seeks to offer evidence as to equitable considerations which he contends mitigate in favor of a shorter re-enrollment bar in his case.

Petitioner has no right to a hearing to challenge the duration of his revocation. As I discuss above, at Finding 1, Petitioner's right to a hearing in this case is limited to challenging whether CMS has authority to revoke his billing privileges.

The regulation which establishes Petitioner's right to a hearing makes this plain. The right to a hearing is limited to challenging CMS's determination whether to revoke billing privileges. It does not extend to challenging CMS's judgment as to the duration of revocation. Thus, a provider or a supplier whose billing privileges are revoked may request a hearing only to challenge CMS's determination "[w]hether to deny or revoke" his or her enrollment. 42 C.F.R. § 498.3(b)(17).

Moreover, even if Petitioner had the right to challenge CMS's duration determination he would be barred from offering evidence as to any of the equitable considerations that he seeks to raise. The *sole* criterion that CMS may use to determine the length of the re-enrollment bar is the severity of the basis of the revocation. 42 C.F.R. § 424.535(c). In this case, the basis for the revocation is the crime to which Petitioner pled guilty and the undisputed material facts show that this was an egregious felony. Petitioner admits that, as part of his plea, he acknowledged a tax loss to the government for which he must pay restitution of \$244,784. Petitioner's brief at 6. That is a very substantial amount and a financial crime of that magnitude clearly justifies a re-enrollment bar of three years.

3. CMS is not barred from revoking Petitioner's billing privileges by the terms of Petitioner's plea agreement.

Petitioner argues that the terms of his agreement to plead guilty to a federal felony preclude CMS from revoking his Medicare billing privileges. According to Petitioner, this agreement, which he characterizes as a contract between himself and the federal government, implicitly contemplated that he would be permitted to continue to practice medicine notwithstanding his plea. Petitioner's brief at 3, 6-7. Petitioner contends that CMS's determination to revoke his billing privileges is a breach of that contract and unlawful.

It is not necessary for me to parse the language of Petitioner's plea agreement in order to decide that it has no impact on this case. Neither CMS nor the Secretary of this Department were parties to the plea agreement. Petitioner identifies nothing showing that CMS ever agreed that it would not revoke Petitioner's billing privileges. Consequently, the plea agreement has no effect on CMS's authority.²

/s/
Steven T. Kessel
Administrative Law Judge

² Ironically, Petitioner is now moving in federal court to have the plea agreement rescinded.