Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Brian K. Ellefsen, DO,
(NPI: 1871694760),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-810

Decision No. CR3368

Date: September 12, 2014

DECISION

Petitioner, Brian K. Ellefsen, DO, filed a request for hearing to challenge the denial of his enrollment in the Medicare program. I find that the undisputed material facts establish that the Centers for Medicare & Medicaid Services (CMS) had the authority to deny Petitioner's enrollment application, pursuant to 42 C.F.R. § 424.530(a)(3), based on Petitioner's prior convictions. Therefore, I grant summary judgment in favor of CMS and sustain the reconsideration determination upholding Petitioner's enrollment denial.

I. Background

Petitioner applied for enrollment in the Medicare program as a supplier[1] by submitting forms CMS 855-I and CMS 855-R, both dated August 6, 2013. CMS Exs. 3; 4. In his enrollment application, Petitioner disclosed that he was convicted of four felonies within the prior 10 years. CMS Ex. 3, at 3, 8; *see also* CMS Ex. 4, at 11. Wisconsin Physicians Services Insurance Corporation (WPS), an administrative contractor acting on behalf of CMS, advised Petitioner by letter dated October 28, 2013, that it was denying Petitioner's enrollment application because of his August 4, 2010 felony convictions. CMS Ex. 2.

[1] A "supplier" is "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202.

The letter informed Petitioner that he could request reconsideration from WPS within 60 days from the date of the letter. CMS Ex. 2, at 1. Petitioner filed a request for reconsideration on November 4, 2013. CMS Ex. 1, at 4-6. On January 22, 2014, WPS issued its reconsidered decision upholding the denial of Petitioner's enrollment application based on Petitioner's felony convictions in 2010.[2] CMS Ex. 1, at 1-3. The reconsidered decision advised Petitioner that if he was dissatisfied with the decision he could request review by an administrative law judge (ALJ). CMS Ex. 1, at 2.

On March 20, 2014, Petitioner filed a timely request for a hearing. The case was assigned to me on March 26, 2014 for hearing and decision, and I issued an Acknowledgment and Pre-Hearing Order (Order). In response to my Order, CMS filed a motion for summary judgment and brief (CMS Br.) accompanied by five exhibits (CMS Exs. 1-5). Petitioner filed his response (P. Br.) and incorporated CMS Exs. 1-5 along with three of his own exhibits (P. Exs. 1-3). In the absence of objection, I admit CMS Exs. 1-5 and P. Exs. 1-3 into the record.

II. Applicable Law

The Social Security Act (Act) requires that the Secretary of United States Department of Health and Human Services (Secretary) promulgate regulations that establish the requirements to enroll providers and suppliers of services in the Medicare program. *See* Act § 1866(j), 42 U.S.C. § 1395cc(j). Those regulations are currently at 42 C.F.R. Part 424, Subpart P. A provider or supplier must be enrolled in the Medicare program to be reimbursed for services provided to Medicare beneficiaries. 42 C.F.R. § 424.505. To enroll, a potential provider or supplier must submit an enrollment application and meet all participation requirements. 42 C.F.R. § 424.510.

The Act gives the Secretary discretion to refuse to enter into an agreement with a potential 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 program

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[2] The reconsidered determination erroneously referred to Petitioner's denial of enrollment as a revocation under 42 C.F.R. § 424.535(a)(3), rather than section 424.530(a)(3), which governs denials of enrollment. The October 28, 2013 initial determination letter correctly cited to section 424.530(a)(3) as did CMS's pre-hearing brief. Consequently, Petitioner had proper notice as to the basis of the denial. Petitioner neither argued prejudice due to this inaccuracy, nor do I find any. *See Green Hills Enterprises, LLC*, DAB No. 2199, at 8 (2008)("The Board has consistently held that after an administrative appeal has commenced, a federal agency may assert and rely on new or alternative grounds for the challenged action or determination as long as the non-federal party has notice of and a reasonable opportunity to respond to the asserted new grounds during the administrative proceeding.").

or program beneficiaries." Act § 1842(h)(8), 42 U.S.C. § 1395u(h)(8). The Secretary has delegated the authority to accept or deny potential provider and supplier enrollment applications to CMS. Pursuant to the Secretary's regulations, CMS may deny a potential supplier's enrollment application if the potential supplier has, in the 10 years preceding enrollment, been convicted of a felony that CMS determines is detrimental to the Medicare program and its beneficiaries. 42 C.F.R. § 424.530(a)(3). The regulation provides:

> (a) *Reasons for denial*. CMS may deny a provider's or supplier's enrollment in the Medicare program for the following reasons:
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> * * * *
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> (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.
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> (i) Offenses include —
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> (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.
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> * * * *
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> (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.

42 C.F.R. § 424.530(a)(3).

When a supplier's enrollment application is denied, the CMS contractor must notify the supplier in writing and explain the reasons for the determination and provide information regarding the supplier's right to appeal. *See* 42 C.F.R. § 498.20(a). If the supplier requests reconsideration by CMS or its contractor, then CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination and specifying the conditions or requirements the supplier failed to meet, as well as the right to a hearing before an ALJ. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has a right to request a hearing

by an ALJ and further review by the Departmental Appeals Board (Board). Act § 1866(j)(8), 42 U.S.C. § 1395cc(j)(8); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5.

III. Discussion

A. Issues

1. Whether summary judgment is appropriate; and

2. Whether CMS was authorized to deny Petitioner's Medicare enrollment application.

B. Findings of Fact and Conclusions of Law

1. *Summary judgment in favor of CMS is appropriate.*

Summary judgment is appropriate if "the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial."' *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact − a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab.*, DAB No. 2300, at 3. To determine whether there are genuine issues of material fact for hearing, an ALJ must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.* As discussed more specifically below, this case presents no genuine disputes of material fact and therefore may be decided as a matter of law.

Here, CMS has moved for summary judgment and provided documentary evidence establishing the material facts of the case. Petitioner has not disputed any evidence that CMS submitted and also incorporated CMS's documentary evidence in his pre-hearing exchange. Petitioner argues that WPS abused its discretion in denying Petitioner's enrollment application by: erroneously construing the regulation at 42 C.F.R. § 424.530(a)(3) as mandating denial of the enrollment application, failing to weigh factors that support Petitioner's enrollment in Medicare, and failing to take into consideration "mitigating" factors related to Petitioner's convictions. P. Br. at 1-2, 5-15. Whether CMS or its contractor must consider these factors is a legal matter, not a factual dispute. Therefore, I find that Petitioner has not presented any evidence or raised any

factual inferences that establish a genuine dispute of material fact that would preclude summary judgment.

2. CMS was authorized to deny Petitioner's Medicare enrollment application based on his 2010 felony convictions.

It is undisputed that on August 4, 2010, Petitioner was found guilty in the United States District Court for the Western District of Missouri of three felony counts of making and subscribing false income tax returns and one felony count of conspiracy to defraud the United States. CMS Exs. 3, at 8; 4, at 11; P. Br. at 1.

CMS may deny an enrollment application if it determines that the supplier, "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 program and its beneficiaries." 42 C.F.R. § 424.530(a)(3). Among the offenses specifically included as being "detrimental to the best interests of the program and its beneficiaries" are "[f]inancial crimes, such as . . . income tax evasion . . . and other similar crimes for which the individual was convicted . . . ." 42 C.F.R. § 424.530 (a)(3)(i)(B); *see also* 71 Fed. Reg. 20,754, 20,760 (Apr. 21, 2006) (specifically listing "income tax evasion" as a felony that is detrimental to the best interests of the Medicare program or its beneficiaries.). Therefore, contrary to Petitioner's assertion, CMS may rely on a conviction of income tax evasion as a per se detriment to the best interests of the program. *See* P. Br. at 9 n.6. Further, Petitioner's convictions occurred just over four years preceding his enrollment application. Therefore, the regulation clearly authorized CMS or its contractor to deny Petitioner's application.

Petitioner claims that in determining his denial, WPS erroneously viewed the regulation to deny a supplier's enrollment as mandatory rather than discretionary and that WPS failed to consider certain factors that would result in cost savings to the Medicare program. P. Br. at 2, 3. Petitioner maintains that WPS performed a cursory review of his request for reconsideration and, without explanation, summarily denied his enrollment without providing a reasoned decision that contained its analysis. P. Br. at 5, 10, 16. According to Petitioner, the factors WPS should have considered include the needs of the medically underserved community Petitioner serves, that Petitioner's "cutting edge orthopedic" surgical procedures result in a cost savings to the Medicare program, that the sentencing judge reduced his prison sentence from 14 years to 22 months, and that his conviction did not involve wrongdoing in regards to either patient care or billing. P. Br. at 2 n.2, 8, 15, 16; *see* CMS Ex. 3, at 8.

However, I cannot consider these factors or direct CMS to consider them because CMS properly denied Petitioner's enrollment, and I have no authority to review CMS discretionary determination to take an action authorized by law or direct CMS to do so. *Letantia Bussell*, DAB No. 2196 (2008), at 12-13 (explaining that the Act explicitly

places the authority to make the determination of whether an offense is detrimental with the Secretary who has delegated that authority to CMS, and the ALJ's authority is limited to whether CMS established a legal basis for its actions). Once CMS or its contractor determined that Petitioner had been convicted of felony income tax evasion and felony conspiracy to defraud the United States, and that the convictions occurred within the 10 years preceding Petitioner's enrollment application, its subsequent action to deny that application was a reasonable exercise of the discretion granted to CMS under 42 C.F.R. § 424.530(a)(3).

Petitioner's assertion that, as a third-party contractor, WPS does not have the proper authority to deny its enrollment is incorrect. P. Br. at 3, 14-15. The Secretary has general authority to prescribe regulations for the efficient operation of the Medicare program, including the authority to enter into contracts with contractors such as WPS to administer the program. Act § 1874A, 42 U.S.C. § 1395kk-1; 42 C.F.R. Part 421. Medicare contractors have been delegated authority to deny a provider or supplier's Medicare enrollment as well as authority to reconsider the initial determination to deny enrollment. 73 Fed. Reg. 20,754, 20,756 (Apr. 21, 2006); 42 C.F.R. § 498.22(a).

Petitioner asks that I either reverse the reconsidered decision or remand this case to CMS for it to exercise its discretion and weigh specific mitigating factors presented by Petitioner. P. Br. at 2. However, based on the undisputed facts, Petitioner is not entitled to prevail, even if the contractor did not provide an in-depth explanation of its analysis and how it weighed each of the factors Petitioner presented. Consequently, my remanding the case to allow CMS to present a more thorough determination would unnecessarily prolong these proceedings and would require the parties to expend additional time and resources to achieve the same result.

IV. Conclusion

For the reasons set forth above, I sustain WPS's reconsidered determination to deny Petitioner's enrollment as a supplier in the Medicare program. Within ten years preceding his enrollment application, Petitioner was convicted of felony offenses that CMS relied upon as detrimental to the best interests of the Medicare program and its beneficiaries. Accordingly, WPS properly denied Petitioner's August 2013 Medicare enrollment application.

/s/
Joseph Grow
Administrative Law Judge