

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Terry W. Scott, M.D.,)	Date: September 27, 2007
)	
Petitioner,)	
)	
- v. -)	Docket No. C-07-416
)	Decision No. CR1663
Centers for Medicare & Medicaid)	
Services.)	
)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) as affirmed on reconsideration to revoke the provider enrollment of Petitioner, Terry W. Scott, M.D.

I. Background

Petitioner is a physician. On January 8, 2007 Petitioner was notified that CMS had determined to revoke Petitioner's provider enrollment in the Medicare program. Petitioner requested reconsideration and, on March 5, 2007, was notified that the determination to revoke his enrollment was sustained. Petitioner then requested a hearing and the case was assigned to me for a hearing and a decision.

I held a pre-hearing conference at which I established a schedule for the parties to submit proposed exhibits and briefs. Subsequently, CMS filed a brief and five proposed exhibits which it identified as CMS Ex. 1 - CMS Ex. 5. Petitioner filed a brief and six proposed exhibits which it identified as P. Ex. A - P. Ex. F. Neither party asked that I convene an

in-person hearing.* I receive CMS Ex. 1 - CMS Ex. 5 and P. Ex. A - P. Ex. F into the record.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether CMS is authorized to revoke Petitioner's enrollment in Medicare.

B. Findings of fact and conclusions of law

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

1. CMS is authorized to revoke Petitioner's Medicare enrollment as a consequence of his felony conviction.

The facts of this case are undisputed. On December 9, 1999, Petitioner pled guilty in the United States District Court for the Eastern District of California to the crime of making false statements on an income tax return. CMS Ex. 5, at 2. That crime is a federal felony offense. *Id.*

The regulatory authority for CMS's revocation determination is 42 C.F.R. § 424.535(a)(3). That section provides that CMS may revoke the Medicare enrollment of any provider or supplier who was convicted, within the preceding 10 years, of a federal or State felony offense "that CMS has determined to be detrimental to the best interests of the [Medicare] program and its beneficiaries." The regulation includes a subsection that explicitly defines:

Financial crimes, such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes for which the individual was convicted

as being crimes which CMS has determined to be detrimental to the best interests of Medicare and its beneficiaries. 42 C.F.R. § 424.535(a)(3)(i)(B).

* In its brief CMS argues that summary disposition is appropriate in this case. I find it unnecessary to address that issue inasmuch as neither party requested an in-person hearing.

The regulation gives discretion to CMS to determine when a felony conviction is detrimental to the Medicare program and its beneficiaries and I have no authority to review CMS's exercise of discretion. I may not look behind CMS's determination to revoke a provider's Medicare enrollment in order to decide whether the provider's conviction is of a crime that is detrimental to Medicare and its beneficiaries. Consequently, my authority in a case such as this one is limited to deciding whether a provider's conviction was of a felony and whether CMS exercised its discretion under the regulation to revoke that provider's enrollment. Moreover, the regulation confers explicit authority on CMS to revoke enrollment where a provider's conviction is of a financial crime, including income tax evasion.

Here, the uncontested facts plainly show that Petitioner was convicted of a felony and that CMS exercised its discretion to revoke Petitioner's provider enrollment based on that conviction. Furthermore, Petitioner's conviction was of a crime that is specifically defined as a basis for revocation. Consequently, CMS has the authority to revoke Petitioner's provider enrollment.

2. I am not empowered to hear and decide Petitioner's challenges to CMS's authority to revoke Petitioner's Medicare enrollment.

Petitioner makes two arguments to challenge CMS's determination. First, he argues that the Inspector General of the United States Department of Health and Human Services decided not to exclude Petitioner under the authority of section 1128 of the Social Security Act (Act). Petitioner characterizes the CMS determination as a "reopening" of the I.G.'s previously completed review and determination. Petitioner contends that the I.G.'s determination essentially divested CMS of any authority it might have to "reopen" the I.G.'s determination and revoke his provider enrollment inasmuch as both the I.G.'s determination not to exclude and CMS's determination to revoke were based on the same event, Petitioner's 1999 felony conviction. Second, Petitioner argues that, given the I.G.'s determination not to exclude him, any action taken against his enrollment by CMS violates the United States Constitution.

I have no authority to hear and decide these arguments. My authority in this case is limited strictly to deciding whether CMS was authorized by regulation to revoke Petitioner's provider enrollment and, as I discuss above, at Finding 1, I conclude that CMS has that authority.

However, it is apparent that Petitioner's challenge to CMS's authority ignores the reality that CMS has authority, both under the Act and regulations, to act separately from the I.G. There is nothing in the law that suggests that CMS is bound by the I.G.'s determinations or that the I.G. may limit CMS in its actions. The I.G.'s authority to

exclude a provider under certain defined circumstances is contained in section 1128 of the Act and in implementing regulations at 42 C.F.R. Part 1001. By contrast, CMS's authority to revoke a provider's enrollment is established by an entirely separate section of the Act, section 1866(j) and by regulations at 42 C.F.R. Part 424. There is no language in either section 1128 or section 1866(j) that suggests that the authority of CMS is limited by previous actions taken by the I.G.

/s/

Steven T. Kessel
Administrative Law Judge