Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Brian K. Ellefsen, DO
Docket No. A-15-4
Decision No. 2626
March 19, 2015

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Brian K. Ellefsen (Petitioner) appealed the decision of an Administrative Law Judge (ALJ) dated September 12, 2014. *Brian K. Ellefsen, DO*, DAB CR3368 (2014) (ALJ Decision). In that decision, the ALJ sustained the determination by the Centers for Medicare & Medicaid Services (CMS) to deny Petitioner's application to enroll in the Medicare program as a supplier. As he did before the ALJ, Petitioner argues here that CMS's contractor, Wisconsin Physicians Service (WPS), failed to recognize that it had discretion to allow him to enroll in Medicare, despite his past felony convictions. Petitioner also argues that WPS did not have the authority to act on his application, and that, in evaluating his application, CMS was required to weigh and address all of the factors that Petitioner contends establish that he should be allowed to enroll in Medicare.

As we explain below, WPS was authorized to review Petitioner's application, but it is unclear from the record whether WPS recognized and exercised the discretion afforded it under 42 C.F.R. § 424.530(a)(3) when it denied Petitioner's application. We therefore vacate the ALJ Decision and remand the matter for clarification of whether WPS actually recognized its discretion to approve Petitioner's application notwithstanding his felony convictions but decided, instead, to deny his application. We note that our decision does not require WPS to explain how or why it exercises that discretion or preclude WPS from ultimately choosing to deny Petitioner's application for enrollment based solely on his convictions.

Legal Background

Medicare is administered by CMS. CMS in turn delegates certain program functions to private contractors. *See* Social Security Act (Act) §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b).

In order to receive payment for services furnished to Medicare beneficiaries, a medical provider or supplier – the term "supplier" encompasses a physician – must be "enrolled" in Medicare.[1] 42 C.F.R. §§ 424.500, 424.505. Regulations at 42 C.F.R. § 424.530 authorize CMS to deny a provider's or supplier's application to enroll in the Medicare program for several reasons. The regulation provides, in relevant part:

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

42 C.F.R. § 424.530(a)(3)(i)(B).

<u>Factual Background</u>

The following facts are undisputed. Petitioner is a doctor of osteopathy and an orthopedic surgeon. In 2013, Petitioner applied to enroll in the Medicare program as a supplier. In his application, Petitioner disclosed that in 2010 he was convicted in federal court of three felony counts of making and subscribing false income tax returns and one felony count of conspiracy to defraud the United States. CMS Ex. 3, at 8.

---

[1] "Providers" are hospitals, nursing facilities, or other medical institutions. 42 C.F.R. § 400.202. "Suppliers" include physicians and other non-physician health care practitioners. *Id.*

By letter dated October 28, 2013, WPS denied Petitioner's enrollment application. The letter cited section 424.530(a)(3) and explained that Petitioner's application was denied based on his felony convictions. CMS Ex. 2. Petitioner requested reconsideration, arguing that he was a trustworthy individual, despite his convictions, and that allowing him to enroll in Medicare would be in the best interests of the program and its beneficiaries because he would provide needed surgical care in his community. CMS Ex. 1, at 4-6. WPS reaffirmed the denial by letter dated January 22, 2014, again citing Petitioner's convictions. *Id.* at 1-3.

Petitioner requested a hearing before an ALJ to challenge the denial, arguing that CMS, through WPS, misinterpreted section 424.530(a)(3) as requiring it to deny Petitioner's application, rather than granting it discretion to determine whether, under the facts, enrolling him was in Medicare's best interest, notwithstanding his felony convictions. Petitioner asserted that CMS failed to exercise its discretion and was required to make a fact-specific evaluation of whether to allow him to enroll. Petitioner also argued that CMS improperly delegated enrollment decision-making to WPS.

CMS moved for summary judgment, arguing that Petitioner's convictions provided an adequate factual and legal basis for the denial under section 424.530(a)(3) and that the ALJ lacked authority to consider whether CMS had abused its discretion in denying Petitioner's application for enrollment or whether the existence of mitigating factors should have precluded CMS's denial. In addition, CMS argued that WPS was authorized by statute and regulation to perform enrollment and claims-processing functions.

The ALJ granted summary judgment to CMS. The ALJ first determined that the undisputed material facts established that CMS was authorized to deny Petitioner's application pursuant to section 424.530(a)(3) based on Petitioner's 2010 felony convictions. ALJ Decision at 5. The ALJ then concluded that because denying the application was legally authorized, the act of denying the application was "a reasonable exercise of the discretion granted to CMS under 42 C.F.R. § 424.530(a)(3)." *Id.* at 6. The ALJ also determined that WPS had the authority to deny Petitioner's enrollment application on behalf of CMS and that it was not material that WPS had not addressed certain mitigating factors identified by Petitioner in its enrollment decision. *Id.*

Petitioner timely appealed the ALJ Decision to the Board. On appeal, Petitioner challenges the ALJ's conclusion that CMS's denial of Petitioner's enrollment application was a reasonable exercise of its discretionary authority under section 424.530(a)(3), again asserting that WPS did not exercise any discretion and instead misinterpreted section 424.530(a)(3) as mandating denial based on his felony convictions. Req. for Rev. (RR) at 7-9. Petitioner also reprises his contentions that only CMS, rather than WPS, had the authority to grant or deny his application, and that CMS was required to evaluate the factors that he says show that he should be allowed to enroll in Medicare. *Id.* at 9-19.

Standard of Review

We review the ALJ's grant of summary judgment *de novo*, construing the facts in the light most favorable to Petitioner and giving him the benefit of all reasonable inferences. *See Livingston Care Ctr.*, DAB No. 1871, at 5 (2003), *aff'd, Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F.3d 168, 172-73 (6th Cir. 2004). Summary judgment is appropriate when there is no genuine dispute about a fact or facts material to the outcome of the case and the moving party is entitled to judgment as a matter of law. *Id.*; *Celotex Corp. v Catrett*, 477 U.S. 317, 322-25 (1986). The party moving for summary judgment (here, CMS) has the initial burden of demonstrating that there is no genuine issue of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322-23. If the moving party carries that burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e) of the Federal Rules of Civil Procedure).[2]

Analysis

We conclude that WPS was authorized to act on Petitioner's application for enrollment. We also conclude that it is unclear from the record whether WPS recognized that it had the discretion to grant or deny Petitioner's application, despite his 2010 felony convictions for income tax evasion, and thus whether WPS actually exercised that discretion when it denied Petitioner's application. Accordingly, we vacate the ALJ Decision and remand the matter for clarification about whether WPS in fact exercised the discretion afforded by section 424.530(a)(3) when WPS denied Petitioner's enrollment application. Although we conclude that remand is warranted, we note that our conclusion is not based on any failure by WPS to expressly address in its redetermination letter particular factors that Petitioner argued established that he should be allowed to enroll in the Medicare program. Indeed, WPS was not required to explain the reasoning behind its exercise of discretion or to discuss the factors urged by Petitioner. Moreover, WPS ultimately could choose to deny Petitioner's application for enrollment based solely on his convictions. We require only that WPS consciously take the discretionary judgment called for by the regulation in determining whether to deny and not act in a mistaken belief that denial was mandated by regulation.

---

[2] Effective December 10, 2010, Rule 56 was "revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts." Committee Notes on Rules—2010 Amendment, available at http://www.law.cornell.edu/rules/frcp/rule_56. The revisions alter the language of the rule, but the "standard for granting summary judgment remains unchanged." *Id.*

1. WPS had authority to act on Petitioner's application for enrollment.

The ALJ correctly found that WPS had authority to act on Petitioner's application for enrollment. ALJ Decision at 6. Section 1842 of the Act provides that the administration of Medicare Part B, the part of Medicare under which physicians receive payment, "shall be conducted through contracts with medicare administrative contractors under section 1874A." Section 1874A(a) of the Act authorizes the Secretary of Health and Human Services (Secretary) to "enter into contracts with any eligible entity to serve as a medicare administrative contractor with respect to the performance of any or all of the functions described in" section 1874A(a)(4). The Secretary in turn delegated this authority to CMS, which then contracted with WPS on the Secretary's behalf.

The "functions" described in section 1874A(a)(4) include "[d]etermining . . . the amount of the payments required pursuant to this title to be made to providers of services, suppliers and individuals," and "[p]erforming such other functions, including . . . functions under the Medicare Integrity Program under section 1893, as are necessary to carry out the purposes of this title." Under the Act, the term "medicare administrative contractor" includes any "agency, organization, or other person with a contract under this section," without regard to whether that agency, organization, or person is private or public. Act § 1874A(a)(3)(A).

Screening and enrolling providers and suppliers in the Medicare program is a program function that is "necessary to carry out the purposes" of the Medicare program. Without participating providers and suppliers, there would be no way for Medicare beneficiaries to receive health care services. In addition, as the Board has recognized, a "primary purpose of Medicare is to promote beneficiary access to high quality medical care," and the degree to which beneficiaries enjoy such access depends in part on the "integrity and professional qualifications of health care practitioners and entities enrolled in the program." *Fady Fayad, M.D.,* DAB No. 2266, at 19 (2009). The enrollment process administered by CMS's contractors on behalf of the Secretary helps to ensure that providers and suppliers allowed into the program have the necessary integrity and qualifications.

Thus, in contracting with third parties like WPS to make Medicare enrollment decisions, CMS, as the Secretary's delegate, was acting pursuant to the authority in section 1874A(a) of the Act.[3]

2. It is unclear from the record whether WPS recognized and exercised the discretion afforded by 42 C.F.R. § 424.530(a)(3) when it denied Petitioner's application for enrollment.

The ALJ recognized that WPS had discretion to either grant or deny Petitioner's application. ALJ Decision at 6 (finding the denial of Petitioner's application "a reasonable exercise of the discretion granted to CMS under 42 C.F.R. § 424.530(a)(3)" once CMS determined that the felony convictions had occurred within the 10 years preceding Petitioner's application). The ALJ also held that he could not consider the mitigating factors alleged by Petitioner because he had "no authority to review CMS['s] discretionary determination to take an action authorized by law or direct CMS to do so." *Id*. at 5. However, the ALJ did not directly address whether, when WPS denied Petitioner's application, it recognized that it had discretion to do otherwise; thus, the ALJ did not address the principal argument made by Petitioner.

While CMS asserts that an ALJ has no authority to look behind CMS's exercise of discretion to deny a supplier's enrollment application under section 424.530(a)(3), CMS does not dispute that CMS and WPS had discretion to grant Petitioner's application despite his 2010 felony convictions for income tax evasion, a crime CMS has determined to be detrimental to the best interests of the program and its beneficiaries. CMS, however, does not directly respond to Petitioner's assertion that in this case WPS misconstrued section 424.530(a)(3) as mandating the denial of Petitioner's application for enrollment based on his felony convictions rather than as giving WPS the discretion to either deny or grant the application. Instead, CMS suggests that this is not an inquiry an ALJ may address, arguing that the "only issue to be decided in a Medicare enrollment appeal under Section 424.530 is whether CMS has established a 'legal basis for its actions.'" CMS Response Br. at 4, citing *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008).

---

[3] Even if we were to conclude that the enrollment process is not necessary to carry out the purposes of the Medicare program (which we do not), we would still find that CMS lawfully contracted with WPS and other Medicare Administrative Contractors to perform this function because the Department of Health and Human Services has retained final authority over contractor-issued enrollment decisions by subjecting them to review, when challenged, by departmental ALJs and this Board. *See* 42 C.F.R. § 424.545(a) (stating that an affected supplier may appeal an enrollment denial under 42 C.F.R. Part 498); *Nat'l Park & Conservation Assoc. v. Stanton*, 54 F.Supp.2d 7, 19 (D.D.C. 1999) (holding that a delegation by a federal agency to a private entity is lawful if the agency exercises "final reviewing authority" over the private party's policies or actions).

The ALJ and CMS are correct that where CMS is legally authorized to deny an enrollment application, an ALJ cannot substitute his or her discretion for that of CMS (or CMS's contractor) in determining whether, under the circumstances, denial is appropriate. Nor can the Board. *See, e.g., Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2008) (stating that "we may not substitute our discretion for that of CMS in determining whether revocation is appropriate under all the circumstances"); *Bussell*, DAB No. 2196, at 13 (explaining that "the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke [a petitioner's] Medicare billing privileges, not to substitute the ALJ's discretion about whether to revoke"). However, that does not mean that where, as here, a petitioner alleges that CMS or its contractor did not recognize or actually exercise discretion to grant or deny an enrollment application, ALJs and the Board have no authority to address and resolve that issue.

The federal courts have held that it is well-established that a presumption of regularity attaches to the actions of government agencies and their agents. *See, e.g., U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (noting that "a presumption of regularity attaches to the actions of Government agencies"); *U.S. v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (stating that the "presumption of regularity supports the official acts of public officers," so "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"). Thus, as a general rule, an ALJ and the Board may presume that CMS and its contractor actually exercised discretion when they denied enrollment under section 424.530(a)(3) – as opposed to taking what they thought was a mandatory action. In this particular case, however, we have concluded we cannot rely on that presumption because certain language in WPS's notice letters makes it unclear whether WPS actually recognized that it had discretion.

WPS's initial denial letter to Petitioner dated October 28, 2013 stated:

> Your application to enroll in Medicare is denied for the following reason(s):
>
> > 42 CFR §424.530(a)(3): Felonies
> >
> > Because on or about August 4, 2010, you were convicted of three felony counts of making and subscribing false income tax returns and one felony count of conspiracy to defraud the United States, we are denying your application at this time. <u>You can reapply for Medicare billing privileges on or after August 4, 2020.</u>

CMS Ex. 2, at 1 (emphasis added). The statement that Petitioner could reapply to enroll in Medicare on or after August 4, 2020, when his felony convictions would be 10 years old, implied that under section 424.530(a)(3) WPS did not have discretion to admit Petitioner into the program until that date. Yet, under the regulation, WPS would have

discretion to grant a subsequent application for enrollment, even if Petitioner submitted the application before his felony convictions were 10 years old, if WPS determined that other factors justified granting that application.

Section 498 hearing rights in provider and supplier cases are based on the reconsideration decision, not the initial determination. *See* 42 C.F.R. § 498.5(l)(2); *Orthopaedic Surgery Assoc.*, DAB No. 2594, at 7 (2014) and cases cited therein. Consequently, the language we discuss from the initial determination is not dispositive of WPS's understanding. The reconsideration decision that WPS issued on January 22, 2014 did not repeat the sentence about the timeline for reapplying. However, the reconsideration decision also did not correct the misunderstanding implicit in that sentence or otherwise clearly indicate an understanding that WPS had discretion to admit Petitioner into the program prior to August 4, 2020, despite his felony convictions. Indeed, the reconsideration letter can be read as implying that WPS had no such discretion. The letter provided, in relevant part:

> EVALUATION OF SUBMITTED DOCUMENTATION:
> According to the facts of this case on or about August 4, 2010, Brian K. Ellefsen, DO was convicted of three felony counts of making and subscribing false income tax returns and one felony count of conspiracy to defraud the United States. <u>The reconsideration request does not dispute Dr. [Ellefsen's] felony convictions; therefore, based on the regulation (which includes financial crimes) CMS has determined these offenses detrimental to the best interest of the program and its beneficiaries.</u>
>
> DECISION: <u>Brian K. Ellefsen, DO has not provided evidence to show you have fully compli[ed] with the standards for which you were denied. Therefore, we can not grant you access to the Medicare Trust Fund (by way or issuance) of a Medicare number.</u>

CMS Ex. 1, at 1-2 (emphasis added). These statements suggest an assumption on WPS's part that the only way WPS could grant Petitioner's application was if Petitioner had shown that he was not convicted of felony income tax evasion.[4]

Petitioner's appeal cites this language from the reconsideration determination as evidencing WPS's lack of recognition that it had discretion to accept his application to participate in Medicare notwithstanding his felony convictions. RR at 11-12. While we do not necessarily agree with Petitioner that the language is conclusive of this issue, we

---

[4] The letter also erroneously stated: "Revocation reason: Code of Federal Regulations (CFR) 42 § [424.]535(a)(3) Felonies" and quoted part of that regulation, rather than section 424.530(a)(3). Section 424.535(a)(3) parallels section 424.530(a)(3) but authorizes CMS to revoke a provider or supplier's enrollment in the Medicare program based on a prior felony conviction.

do find a sufficient lack of clarity in the current record about WPS's awareness to require the ALJ to address this issue and seek clarification. We therefore conclude that the matter should be remanded to clarify whether WPS actually exercised the discretion provided by section 424.530(a)(3) when it denied Petitioner's enrollment application.

Our decision in this case should not be read as requiring that CMS or its contractors use any particular language in their notices to evidence their understanding of their discretion. Nor should our decision be read as indicating that an ALJ must routinely assess a contractor's understanding of its discretion under section 424.530(a)(3). As discussed above, as a general rule, ALJs and the Board can presume such an understanding. However, where, as here, a petitioner raises a colorable question as to whether a specific reconsideration decision issued by CMS or its contractor demonstrates recognition of the discretion afforded by section 424.530, an ALJ should address that question and decide whether the record reasonably supports reliance on the presumption in that case.

3. WPS was not required to issue a decision addressing all of the factors that Petitioner contended established that he should be allowed to enroll in the Medicare program.

In arguing that WPS did not exercise discretion, Petitioner asserts that WPS erroneously failed to set forth a detailed analysis that weighed the facts and equities of his situation and explained the basis for the denial. RR at 9-18. While Petitioner cites a number of federal court cases as alleged general support for this proposition, Petitioner cites no Medicare enrollment cases, or any statute or regulation specifically applicable to this proceeding. The regulations governing this proceeding require only that an adverse reconsidered determination must specify the "reasons for the determination" and the "conditions or requirements of law or regulations that the affected party fails to meet." 42 C.F.R. § 498.25(a)(2), (3). Thus, if CMS exercises its discretion to deny a provider's or supplier's application to participate in Medicare, CMS must identify the authority that gives it that discretion, i.e., in this case, the authority in section 424.530(a)(3) to deny an application based on a felony conviction within the 10 years preceding the application. However, no regulation provides that CMS must explain its reasons for exercising its discretion to deny an application based on such a felony conviction rather than to accept it notwithstanding the conviction.

Moreover, the Board has held in a parallel context (revocation of billing privileges under section 424.535) that CMS may revoke a provider's or supplier's billing privileges based solely on a qualifying felony conviction, without regard to equitable or other factors. In *Fayad*, the Board stated that if CMS "proves that the supplier was convicted" of a qualifying felony, and that the supplier's conviction "was the basis for the challenged revocation," then the Board "must sustain the revocation, regardless of other factors, such as the scope or seriousness of the supplier's criminal conduct and the potential impact of

revocation on Medicare beneficiaries, that CMS might reasonably have weighed in exercising its discretion." DAB No. 2261, at 16 (citing *Ahmed*). Similarly, in *Bussell*, the Board rejected the petitioner's contention that the ALJ should have reviewed CMS's determination to revoke enrollment as a case-specific exercise of discretion. The Board reasoned that CMS had determined in section 424.535(a)(3) that felony income tax evasion is an offense detrimental to Medicare and Medicare beneficiaries, and that "nothing in the regulation constrains CMS to make its determination [to revoke] individually on a case-by-case basis . . . ." DAB No. 2196, at 12-13. Petitioner has not presented a reason – nor do we see any – why the same rule should not apply to the denial of billing privileges.

We also note that in *Wayne E. Imber, M.D*., DAB No. 1740, at 5 (2000), a decision upholding the Inspector General's exclusion of a supplier from the Medicare program under section 1128(b)(4) of the Act, the Board rejected an argument essentially identical to that raised by Petitioner here. There the Board stated:

> Dr. Imber apparently feels entitled to more explanation as to why the information which he furnished to the I.G. and the suggestions he made to avoid the imposition of the exclusion did not suffice to cause her to exercise her discretion in a way favorable to him. Dr. Imber has identified no requirement, however, that obliges the I.G. to spell out her thinking in each instance in which she determines to exercise her permissive exclusion authority, nor any requirement that the I.G. address any specific factors in reaching her determination.

Again, we see no reason why the same reasoning should not apply here. Thus, while we are remanding this case to the ALJ for clarification as to whether WPS recognized that its denial of Petitioner's application under section 424.530(a)(3) was an action committed to its discretion rather than one mandated by that regulation, we are not suggesting that WPS needed to specifically address the factors that Petitioner has asserted establish that allowing him to participate in the Medicare program would be in the best interests of the program and its beneficiaries or give any other explanation of the reasons underlying its exercise of discretion.

Conclusion

For the reasons discussed above, we vacate the ALJ Decision and remand the case for the ALJ to address and seek clarification, consistent with this decision, as to whether WPS actually understood and exercised its discretion under section 424.530(a)(3) when it denied Petitioner's application for enrollment.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member