Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Brett Taylor, D.C.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-526

Decision No. CR4742

Date: November 23, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare enrollment and billing privileges of Brett Taylor, D.C. (Dr. Taylor or Petitioner) because Dr. Taylor was convicted, as an aggravated offender, of driving while intoxicated (DWI) and CMS determined that his conviction of that felony offense is detrimental to the best interests of the Medicare program and its beneficiaries. CMS also revoked Dr. Taylor for failing to timely report the conviction to CMS. Dr. Taylor requested a hearing before an administrative law judge (ALJ) to dispute the revocation, arguing that his felony conviction is not detrimental to the best interests of the Medicare program or its beneficiaries and that, consequently, he did not need to report the felony conviction to CMS. Based on the record in this case, I affirm CMS's revocation because CMS's case-by-case determination that Dr. Taylor's felony offense is detrimental to the best interests of the Medicare program and its beneficiaries is reasonable.

I. Background and Procedural History

In 2012, the state of Michigan licensed Dr. Taylor as a chiropractor and CMS enrolled him in the Medicare program as a supplier. CMS Exhibit (Ex.) 2 at 9; CMS Ex. 4 at 1.

In a December 9, 2015 initial determination, a CMS administrative contractor revoked Dr. Taylor's Medicare enrollment and billing privileges, effective July 25, 2013, for the following reasons:

> **42 CFR § 424.535(a)(3) – Felony Conviction**
>
> The Centers for Medicare & Medicaid Services has been made aware of your July 25, 2013 felony conviction of one count of Driving While Intoxicated - Aggravated Offender, in violation of the Missouri Code, in the 21st Judicial Circuit, St. Louis County. Based on our review, we have determined to revoke your Medicare enrollment, under the regulation a[t] 42 CFR §424.535(a)(3).
>
> **42 CFR §424.535(a)(9) – Failure to Report**
>
> Brett Taylor was adjudged guilty of a felony by the 21st Judicial Circuit, St. Louis County on July 25, 2013. Brett Taylor did not notify CMS of this adverse legal action within 30 days as required under 42 CFR §424.516.

CMS Ex. 5 at 1 (emphasis in original). The CMS administrative contractor barred Petitioner from reenrolling for three years. CMS Ex. 5 at 2.

Petitioner requested reconsideration of the revocation, filing extensive arguments and documents to support his request. CMS Ex. 1. However, on March 4, 2016, the CMS administrative contractor's hearing officer issued an unfavorable reconsidered determination. CMS Ex. 6. The hearing officer upheld the revocation on both grounds identified in the initial determination.

> According to our records on July 25, 2013, Brett Taylor was found guilty of a felony conviction of one count of Driving While Intoxicated - Aggravated Offender. The reconsideration request indicates that Dr. Taylor should not have been revoked from the Medicare program due to the specific felony conviction at issue and due to the lack of adequate notice that reporting was required.
>
> Section 3 of the CMS-855I application addresses Final Adverse Legal Action/Convictions and States "*This section captures information on final adverse legal actions, such as convictions, exclusions, revocations, and suspensions. All applicable final adverse actions* ***must*** *be reports* [sic],

> *regardless of whether any records were expunged or appeals are pending."* Furthermore 42 CFR §424.516(d)(1)(ii) states [a]ny adverse legal action must be reported within 30 days. Dr. Taylor failed to report this adverse legal action within the 30-days as required.
>
> A discretionary review of all the files, submitted with the reconsideration request, has been conducted and it has been determined that Dr. Taylor's felony conviction is detrimental to the best interest of the Medicare program and its beneficiaries.

CMS Ex. 6 at 2 (emphasis in original).

Petitioner timely requested a hearing. I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of prehearing exchanges. In accordance with the Order, CMS filed its prehearing exchange, which included a motion for summary judgment and brief (CMS Br.), and six exhibits. Petitioner filed a brief (P. Br.) and opposed summary judgment.

II. Decision on the Record

Petitioner did not object to any of CMS's proposed exhibits; therefore, I admit CMS Exs. 1-6 into the record. *See* Order ¶ 7; Civil Remedies Division Procedures § 14(e).

Neither party submitted written direct testimony for any witnesses. Therefore, there are no witnesses to be cross-examined, and I issue this decision based on the written record. Order ¶¶ 8-11; Civil Remedies Division Procedures §§ 16(b), 19(b), (d).

III. Issue

Whether CMS had a legitimate basis to revoke Dr. Taylor's Medicare enrollment and billing privileges.

IV. Jurisdiction

I have jurisdiction to hear and decide this case. *See* 42 C.F.R. §§ 498.3(b)(17), 498.5(*l*)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

V. Findings of Fact, Conclusions of Law, and Analysis

My findings of fact and conclusions of law are set forth in italics and bold font.

The Social Security Act authorizes the Secretary of Health Human Services to create regulations governing the enrollment of suppliers in the Medicare program, and to discontinue the enrollment of a physician or other 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 [Medicare] program or program beneficiaries." 42 U.S.C. § 1395u(h)(8), 1395cc(j). For Medicare program purposes, chiropractors are considered physicians and, therefore, suppliers. 42 U.S.C. § 1395x(d), (r).

Under the Secretary's regulations, CMS may revoke a supplier's Medicare enrollment and billing privileges when a supplier is: (a) convicted of a federal or state felony offense; (b) within ten years preceding enrollment or revalidation of enrollment; and (c) the felony offense is one that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. This section includes a non-exhaustive list of the types of felony offenses that CMS considers detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3)(i)(A)-(D) (2012).[1]

There are three different types of review an ALJ may have to perform when reviewing CMS's determination to revoke based on section 424.535(a)(3) depending on whether the

[1] The Secretary revised section 424.535(a)(3) effective February 3, 2015. 79 Fed. Reg. 72,500 (Dec. 5, 2014). The modifications to the text include: 1) expanding the list of individuals whose felony conviction can result in revocation of the supplier to include a supplier's manager; 2) simplifying the time frame as to when a felony conviction can be a basis for revocation from ten years preceding enrollment or revalidation of enrollment to "within the preceding 10 years"; 3) defining "convicted" based on the definition found at 42 C.F.R. § 1001.2; 4) changing the phrase "CMS has determined is detrimental to the best interests of the Medicare program and its beneficiaries" from the present perfect to the present tense; 5) and adding the second clause to the phrase "Offenses include, but are not limited in scope and severity to," which refers to a list of examples of the types of felonies that CMS considers to be detrimental to the best interests of the Medicare program and its beneficiaries. 79 Fed. Reg. at 72,532. Petitioner believes that I should apply the version of section 424.535(a)(3) in effect when Petitioner was convicted in 2013, arguing that CMS may only then revoke Petitioner if Petitioner was convicted of a felony specified in section 424.535(a)(3). P. Br. at 2-5. CMS asserts in opposition that it does not matter whether I apply the new or old version of section 424.535(a)(3) because CMS only clarified that section and did not substantively change it. CMS Br. at 15-18. I agree with Petitioner that I ought to apply the regulation in effect when Petitioner was convicted, but also agree with CMS that doing so makes no difference. CMS has never been limited to only revoking suppliers convicted of felonies listed in section 424.535(a)(3), and CMS has always been able to make a "case-specific" determination that an individual felony conviction is detrimental to the best interests of the Medicare program and its beneficiaries. *Fady Fayad, M.D.*, DAB No. 2266 at 8 (2009), *aff'd, Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

felony for which a supplier was convicted (1) is specifically listed in the regulations, (2) is similar to a crime listed in the regulations, or (3) has been determined to be detrimental to the best interests of the Medicare program and its beneficiaries through a case-by-case determination.

When a supplier is convicted of a felony specifically listed in the regulations, an ALJ applies the most deferential review standard. Such felonies are considered detrimental per se. *Letantia Bussell, M.D.*, DAB No. 2196 at 9 (2008).

When a supplier is convicted of a felony similar to the ones listed in the regulations, an ALJ must look to the circumstances surrounding the conviction to determine if the felony conviction is similar to one of the offenses listed in the regulations. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 11 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). Even if a criminal offense is not similar to one of the listed crimes in the regulations, it still may be found to be detrimental to the best interests of the Medicare program and program beneficiaries if it is one that falls into one of the four general categories of crimes listed in the regulations (i.e., felony crimes against persons, financial crimes, any felony that placed the Medicare program or its beneficiaries at immediate risk, and any felonies that would result in mandatory exclusion under section 1128(a) of the Social Security Act). *Ahmed*, DAB No. 2261 at 10, 12.

When a supplier is convicted of a felony that is neither listed in the regulations nor similar to a felony listed in the regulations, an ALJ must determine whether CMS's case-by-case determination that a felony offense is detrimental to the best interests of the program and its beneficiaries is reasonable. *See Fady Fayad, M.D.*, DAB No. 2266 at 8, 16-17 (2009), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699, 704 (E.D. Mich. 2011).

1. ***Petitioner pled guilty on July 25, 2013, to felony driving while intoxicated (DWI), as an aggravated offender, under Missouri Revised Statutes § 577.010 and a Missouri court sentenced Petitioner to seven years of incarceration, but suspended that sentence and ordered Petitioner to serve five years of probation.***

On November 6, 2010, Petitioner was charged with a class C DWI felony as an aggravated offender under Missouri Revised Statutes § 577.010. Petitioner pled guilty to that crime on July 25, 2013. A Missouri court sentenced Petitioner to seven years of incarceration, suspended that sentence, and placed Petitioner on probation for five years. The court also ordered Petitioner to undergo an alcohol evaluation, and follow any recommendations and treatment plan; not to drink alcohol, not to drive without a valid license, and to have an ignition interlock. CMS Ex. 3.

Petitioner had been convicted previously of DWI in August 1989, October 1993, June 2003, and December 2008; one of these was a felony conviction. CMS Ex. 1 at 37.

2. *CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(3) to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner was convicted of a felony offense that CMS reasonably determined to be detrimental to the best interests of the Medicare program and its beneficiaries.*

As stated above, CMS may revoke a supplier's Medicare billing privileges if the supplier is: (1) convicted of a federal or state felony offense; (2) within ten years preceding enrollment or revalidation of enrollment; and (3) the felony offense is one that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3) (2012).

In the present case, the record is clear that Petitioner was convicted of a felony on July 25, 2013. CMS Ex. 1 at 6; CMS Ex. 3. Further, that conviction necessarily took place within ten years preceding the revalidation of his enrollment since suppliers are required to revalidate enrollment at least every five years and Petitioner had been enrolled in 2012. CMS Ex. 4; 42 C.F.R. § 424.515. Therefore, the only issue in contention is whether Petitioner was convicted of a felony detrimental to the best interests of the Medicare program and its beneficiaries.

The initial and reconsidered determinations indicated that CMS was revoking Petitioner based, in part, on 42 C.F.R. § 424.535(a)(3). Both determinations identified Petitioner's conviction on July 25, 2013, as an aggravated DWI offender as the factual basis for the revocation. CMS Ex. 5 at 1; CMS Ex 6 at 2.

A revocation notice must state "[t]he reason for the revocation in sufficient detail for the provider or supplier to understand the nature of its deficiencies." 42 C.F.R. § 405.800(b)(1); *see also* 42 C.F.R. § 498.25(a) (an unfavorable reconsidered determination must "give[] the reasons for the determination" and "the conditions or requirements of the law or regulations that the affected party fails to meet."). Other than identifying the regulatory basis for its determination, the Departmental Appeals Board (DAB) has stated that "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." *Brian Ellefsen, DO*, DAB No. 2626 at 9 (2015). This reasoning applies to revocations as well. Therefore, in the present case, CMS provided Petitioner with sufficient notice of the revocation.

In evaluating the merits of CMS's revocation, I note that the DAB permits CMS to clarify its reasons for revoking under section 424.535(a)(3) during the ALJ level of appeal:

> The Board has held that a federal agency **may clarify its reasons for a challenged determination**, or assert new reasons for that determination, during the ALJ proceeding as

> long as the non-federal party has adequate notice of the reasons and a reasonable opportunity to respond during that proceeding.

Fayad, DAB No. 2266 at 10. In the present case, this means I look to CMS's brief for clarifying reasons for CMS's revocation of Petitioner. This is appropriate since Petitioner had the opportunity to file its prehearing exchange after CMS filed its brief and, to the extent necessary based on CMS's clarifying arguments, had the opportunity to respond with new evidence. 42 C.F.R. § 424.56(e)(1); Order ¶¶ 4, 6.

In its brief, CMS asserted that it determined Petitioner's felony conviction was detrimental to the best interests of the Medicare program and provided three legal bases to support this determination: 42 C.F.R. § 424.535(a)(3)(i) (2015) (a case-by case determination); 42 C.F.R. § 424.535(a)(3)(ii)(A) (2015) (conviction of a felony similar to a crime against persons such as murder, rape, assault); 42 C.F.R. § 424.535(a)(3)(ii)(C) (2015) (conviction of a felony that placed the Medicare program or its beneficiaries at immediate risk). CMS Br. at 10-14. Although CMS cited these bases under the new version of section 424.535(a)(3), as explained earlier, all of them are cognizable under the version of section 424.535(a)(3) in effect when Petitioner was convicted.

CMS asserts that DWI is a crime against the public because it puts everyone on the road at risk of injury or death. To support this, CMS cited National Highway Traffic Safety Administration (NHTSA) statistics for 2013, in which there were 10,076 fatalities involving DWI, which accounted for 31 percent of all traffic fatalities that year. According to Mothers Against Drunk Driving, in 2014, 290,000 people were injured in DWI crashes. Consistent with this, CMS notes that Petitioner was seriously injured in an accident while he was intoxicated (CMS Ex. 1 at 37). CMS further supports its determination by noting that Petitioner's crime, as a class C felony under Missouri Revised Statutes § 577.010 for multiple DWI offenses, is categorized along with DWI crimes involving the injury or death of an individual. Finally, CMS asserts that Petitioner's DWI conviction represents a lack of good judgment. CMS Br. at 11-13.

Petitioner argues in opposition to CMS's position that Petitioner was still in chiropractic school when the actual offense resulting in the 2013 conviction occurred and that no one was harmed as a result of the offense. Petitioner asserts that his felony conviction was not for a crime specifically listed in section 424.535(a)(3). Further, Petitioner states that his crime is not similar to any examples listed as crimes against persons because Missouri law provides for a category of "Offenses Against the Person," which includes the crimes listed in section 424.535(a)(3)(i)(A) (2012), and DWI is not one of them. Rather, Missouri law categorizes Petitioner's DWI offense as a public safety offense. Petitioner states that all he had to do to commit his DWI offense was to be intoxicated and drive a car, and that such a crime is not one against a person. Petitioner also argues that his felony offense is not a crime that placed the Medicare program or a Medicare beneficiary

at immediate risk of harm because the regulations only provide one example of that type of crime, involving medical malpractice, and Petitioner's DWI offense clearly is not related to providing medical services. Finally, Petitioner asserts that CMS failed to provide an explanation of its case-by-case analysis in its reconsidered determination and, therefore, there is an insufficient basis for an ALJ to uphold revocation based on such an analysis. Related to this argument, Petitioner states that, on reconsideration, the hearing officer failed to consider the facts related to Petitioner's criminal offense (including that it happened in 2010 while Petitioner was in chiropractic school), that no one was harmed as a result of the criminal conduct, and that Petitioner submitted evidence of his recovery from alcohol over the last five years, including an evaluation by a psychologist and numerous negative screenings for alcohol. P. Br. at 2, 6, 7-11, 13-17; CMS Ex. 1.

I conclude that CMS had a legitimate basis, through a case-by-case evaluation, to determine that Petitioner's felony offense is detrimental to the best interests of the Medicare program.[2] Although Petitioner is correct that the preamble to the final rule changes to section 424.535(a)(3), effective in February 2015, indicated CMS would conduct individualized reviews of the circumstances related to each criminal conviction before deciding whether to revoke suppliers, 79 Fed. Reg. at 72,510, 72,512, as stated in *Ellefsen*, it is sufficient for the reconsidered determination to provide basic information about the basis for revocation so long as CMS ultimately exercised its discretion to revoke the supplier. DAB No. 2626 at 9. The reconsidered determination in the present case is sufficient because it noted receipt of the reconsideration request, acknowledged Petitioner's arguments and evidence, and concluded, after a "discretionary review of all the files, submitted with the reconsideration request," that Petitioner's felony conviction is detrimental to the best interests of the program and its beneficiaries. CMS Ex. 6 at 2.

In its brief, CMS provides sufficient clarification of the factual grounds supporting the hearing officer's revocation as a discretionary act through a case-by-case consideration. Petitioner's class C felony DWI conviction is not only based on Petitioner's most recent DWI offense in 2010, but also due to the cumulative effect of four previous DWI convictions.[3] Petitioner has been convicted five times of DWI from 1989 to 2013. As

[2] Because I uphold CMS's determination that section 424.535(a)(3) is a basis for revocation through a case-by-case determination, I do not need to consider whether Petitioner's felony conviction is similar to the offenses listed under section 424.535(a)(3)(i)(A) or 424.535(a)(3)(i)(C).

[3] As CMS points out, a class C DWI felony offense means an individual being is a chronic offender, which is a person with four previous DWI offenses; however, the court records indicate Petitioner was an aggravated offender, which is a person with three previous DWI offenses. CMS Ex. 3; Missouri Revised Statutes §§ 577.010(2)(5)(a), 577.023(1). Regardless of this discrepancy, there is no doubt that Petitioner's conviction of a felony was based, in part, on his four previous DWI convictions.

CMS points out, Missouri Revised Statutes § 577.010(2)(5) groups Petitioner's offense along with DWI related deaths as class C felonies; therefore, it is clear that Petitioner's offense is very serious. Although Petitioner submitted with his reconsideration request numerous statements from individuals as to his sobriety in recent years and test results proving his diligent efforts not to drink alcohol anymore (CMS Ex. 1), such evidence only shows recovery for a short time when compared with Petitioner's multiple DWI offenses over the course of two decades.

My decision is guided in part by the Secretary's response to a comment from the public that felonies related to alcohol and traffic violations cannot result in revocation under section 424.535(a)(3). In rejecting that comment, the Secretary stated:

> We do not believe that felonies relating to drugs, alcohol, or traffic violations cannot be detrimental to the best interests of Medicare beneficiaries, and thus should be automatically excluded from the purview of §§ 424.530(a)(3) and 424.535(a)(3). While certain felonies carry different, potentially more severe penalties than others, each case is distinct and state law classifications of certain criminal actions can vary widely. Therefore, we must maintain the flexibility to address all potential situations.

79 Fed. Reg. at 72,510.

CMS acted legitimately to conclude that Petitioner's criminal conviction is detrimental to the Medicare program and its beneficiaries. In coming to this conclusion, I am mindful that "the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke [a supplier's] billing privileges, not to substitute the ALJ's discretion about whether to revoke." *Bussell, M.D.*, DAB No. 2196 at 13 (emphasis in original). Therefore, I must affirm this basis for revocation.

3. I do not need to decide whether CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(9) to revoke Dr. Taylor's enrollment and billing privileges.

Having concluded that CMS had a legitimate basis to revoke Petitioner based on his serious criminal DWI offense, I do not need to resolve the issue as to whether CMS could legitimately revoke Petitioner under section 424.535(a)(9) for failing to timely report his criminal conviction to CMS or a CMS administrative contractor. Although I do not have authority review the three-year reenrollment bar that CMS imposed on Petitioner, Petitioner's revocation under section 424.535(a)(3) is sufficient to justify such a bar on its own. Further, revocation based on a criminal conviction is retroactively effective as of the date of the conviction (42 C.F.R. § 424.535(g)); therefore, it is unnecessary to address 42 C.F.R. § 424.535(a)(9).

VI. Conclusion

I affirm CMS's determination to revoke Petitioner's Medicare enrollment and billing privileges.

/s/
Scott Anderson
Administrative Law Judge