Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Stephen F. Bell, M.D.,
(NPI: 1821037433),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-817

Decision Number: CR3371

Date: September 12, 2014

DECISION

Petitioner, Stephen F. Bell, M.D., filed a request for hearing to challenge the denial of his enrollment in the Medicare program as a Medicare supplier. [1] 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) because of his prior conviction. Therefore, I grant CMS's motion for summary judgment and sustain the reconsideration determination upholding the denial of Petitioner's enrollment.

I. Case Background & Procedural History

The following facts are undisputed. At the time Petitioner applied for enrollment in Medicare, Petitioner was a physician located in Thomaston, Georgia. CMS Exhibit (Ex.). 1, at 12. On or about May 6, 2013, Petitioner submitted an enrollment application to Cahaba Government Benefits Administration (Cahaba), a Medicare contractor. CMS Ex. 1. In his application, Petitioner disclosed that he had been convicted of a felony on March 17, 2009, specifically that he pleaded guilty in the Superior Court of Monroe

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

County, Georgia, to "Vehicular Homicide, 1st degree, Serious Injury by Vehicle, and DUI" (driving under the influence). CMS Ex. 1, at 4, 18. Petitioner's conviction was based on a March 19, 2008 incident where, under the influence of alcohol and controlled substances, he passed out behind the wheel of his car causing a head-on collision. CMS Ex. 1, at 4, 17. As a result, the driver of another car was killed and a passenger injured. CMS Ex. 1, at 17. Based on his felony conviction, Petitioner was incarcerated for two years. CMS Ex. 1, at 18.

On June 14, 2013, Cahaba notified Petitioner that it was denying his enrollment application pursuant to 42 C.F.R. § 424.530(a)(3) based on his felony conviction within 10 years of applying to enroll in Medicare. CMS Ex. 2. On July 31, 2013, Petitioner requested reconsideration of Cahaba's denial of his enrollment application, but he did not dispute the date or details of the felony conviction on which his enrollment application was denied. Instead, Petitioner argued that the regulatory provision under which CMS denied his enrollment application is permissive and does not require the denial of his application. In support of enrollment, Petitioner stated he provides excellent care to his patients and that he intended to practice medicine in "health professional shortage areas and/or medically underserved areas/populations." Petitioner (P.) Ex. 1, at 15-16.

CMS's Center for Program Integrity (CPI) issued a reconsidered determination in August 2013. It is not disputed that Petitioner did not receive that determination because of mailing issues. CPI issued a new reconsidered determination on February 4, 2014, which superseded the August determination and still was unfavorable to Petitioner. It is the February 4, 2014 determination which controls in this case.[2] CMS Ex. 4. The reconsidered determination states in pertinent part:

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[2] Petitioner complains that CMS's February 4, 2014 reconsidered determination includes erroneous information (as did the August 2013 reconsidered determination). Most importantly, the February 4, 2014 reconsideration determination erroneously referred to Petitioner's denial of enrollment as a revocation under 42 C.F.R. § 424.535(a)(3), rather than as a denial of enrollment under 42 C.F.R. § 424.530(a)(3). However, the June 14, 2013 Cahaba denial of enrollment letter cited to section 424.530(a)(3), as did CMS's briefing before me. I find Petitioner received adequate notice and cannot establish that he was prejudiced by inadequacies in the February 4, 2014 determination because he received sufficient notice to tailor his arguments and evidence to the matter of his felony conviction in March 2009, which CMS cited as the basis for its action. Moreover, assuming any prejudice existed, it has been cured by affording Petitioner review before me. *Dinesh Patel, M.D.*, DAB No. 2551, at 7-8 (2013); *Fady Fayad, M.D.*, DAB No. 2266, at 10-11 (2009); *Green Hills Enterprises, LLC,* DAB No. 2199, at 8 (2008); *Ronald Paul Belin, DPM*, DAB CR2768, at 10 (2013) (finding lack of prejudice where a reconsidered determination erroneously referred to enrollment revocation under section 424.535 rather than section 424.530 governing denials of enrollment).

> **EVALUATION OF SUBMITTED DOCUMENTATION:** The submitted documentation has been reviewed and we do agree that Stephen F. Bell did not receive conflicting correspondence from Cahaba GBA and CMS. The final decision to revoke Stephen F. Bell Medicare billing privileges is upheld.
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> **DECISION:** All of the documentation in the file for this case has been reviewed and the decision has been made in accordance with Medicare guidelines. Specifically, based on the adverse event mentioned above. Stephen F. Bell has provided no new evidence to disprove the felony from March 2009 which shows that you have not fully complied with the standards for which you were revoked. Therefore we cannot grant you access to the Medicare Trust Fund (by way or issuance) of a Medicare number.

The documents that Cahaba asserts it reviewed consisted of: "Revocation letter of Cahaba GBA; Reconsideration for Provider; Statement from Provider; License and Certification; Letters of support from: Dr. Sumner, Dr. Lynn, Dr. Busbee; HRSA Underserved area report; Physician profile and Quarterly report from Ga. Professional Health Program; Continued Medical Education; Orders from Georgia Composite Medical Board." CMS Ex. 4.

Petitioner submitted his request for hearing by an administrative law judge (ALJ) on March 21, 2014. The case was assigned to me for hearing and decision, and I issued an Acknowledgment and Prehearing Order dated March 26, 2014. CMS filed a motion for summary judgment with supporting brief (CMS Br.) and four proposed exhibits (CMS Exs. 1-4). Petitioner filed his opposition to summary judgment (P. Br.) and one proposed exhibit (P. Ex. 1). Petitioner later filed a request to admit new evidence, attaching one other proposed exhibit (P. Ex. 2). In the absence of objection, I admit CMS Exs. 1-4 and P. Exs. 1 and 2 into the record.

II. Applicable Law

The Social Security Act (Act) requires that the Secretary of the 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. 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 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 supplier enrollment applications to CMS. 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 specifically 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 —
>
> (A) Felony crimes against persons, such as murder, rape, or assault, 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).

A supplier's enrollment is considered denied when a supplier is determined to be "ineligible to receive Medicare billing privileges for Medicare-covered items or services provided to Medicare beneficiaries" for one or more of the reasons listed in 42 C.F.R. § 424.530. *See* 42 C.F.R. § 424.502. 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 administrative law judge. 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 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 42 C.F.R. § 424.530(a)(3) authorizes CMS to deny Petitioner's Medicare enrollment application.

B. Findings of Fact & 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 nonmoving party, drawing all reasonable inferences in that party's favor. *Id.* When ruling on a motion for summary judgment, an ALJ may not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

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, nor has Petitioner provided his own evidence that establishes a dispute of material fact. Nevertheless, Petitioner argues that CMS is not entitled to summary judgment because CMS failed to exercise its discretion, versus coming to a cursory

conclusion, in denying Petitioner's enrollment application and also that CMS erroneously construed the regulation at 42 C.F.R. § 424.530(a)(3) as mandating denial of the enrollment application. These are disputes of law, not of fact. Thus, 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 2009 felony conviction for vehicular homicide.

CMS may deny a Medicare 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). Such offenses include, as noted in Cahaba's June 14, 2013 denial of Petitioner's enrollment application, "[f]elony crimes against persons, such as murder, rape, or assault, 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)(A).

Cahaba determined that Petitioner was convicted of first-degree vehicular homicide on March 17, 2009. CMS Ex. 1, at 4, 17-18. Petitioner caused the death of another individual while he was under the influence of alcohol and controlled substances by passing out while driving and crashing head-on into another car. CMS Ex. 1, at 17. The nature of Petitioner's conviction was sufficiently similar to the felony crimes against persons, which are listed in section 424.530(a)(3)(i)(A) as detrimental to Medicare's interests considering they are all crimes resulting in death or serious injury.

Petitioner does not dispute that he was convicted of vehicular homicide within 10 years of his enrollment application. Nor does Petitioner argue that CMS is authorized to deny enrollment to an applicant who has been convicted of a felony that CMS determines to be detrimental to Medicare and its beneficiaries within 10 years of filing an enrollment application. Instead, Petitioner argues that CMS is required to exercise its discretion and make a choice regarding whether a particular felony conviction warrants a denial of enrollment. Petitioner argues that here CMS's determinations "bear all the hallmarks of a rubber stamp, as there is no evidence that Cahaba or CMS exercised any discretion in denying Dr. Bell's application." P. Br. at 5.

Petitioner notes specifically that CMS's reconsidered determinations of August 2013 and February 2014 contained errors (misstated facts and reasoning not related to his case), which show that CMS did not carefully review the record and exercise its discretion on reconsideration. Petitioner asserts that if CMS had properly exercised its discretion it would have understood that Petitioner is no threat to Medicare or its beneficiaries and

would have enrolled him. In support of his argument, Petitioner states, among other things, he now holds an unrestricted medical license, he is Board Certified in Pediatrics and in Internal Medicine, he has taken full responsibility for his actions, he has been sober for six years and receives therapy and medication management, he has accepted an employment position in a medically underserved area, he has been approved as a provider by Medicaid, WellCare, and third party payors, and he has never put his patients in harm's way or attempted to hide or conceal the issues surrounding his 2009 guilty plea. Petitioner also asserts he gives a presentation to first-year medical students on the dangers of substance abuse in the medical profession. P. Hearing Request; P. Br.

Petitioner further argues that CMS construes 42 C.F.R. § 424.530(a)(3) as mandating denial by referring to it as a "bar" to Medicare enrollment. Petitioner argues instead that the regulation is permissive ("CMS **may** deny a provider's or supplier's enrollment") and does not require denial of enrollment. Petitioner asserts that it is well-settled that an agency's failure to exercise its own discretion when mandated to do so by existing valid regulations constitutes a denial of due process. CMS Br. at 7 -8 (and decisions cited therein).

Petitioner's arguments with regard to his rehabilitation are laudable, but unavailing here, as is his argument that by using the word "bar" CMS is assuming that it is precluded from reviewing the circumstances of his conviction and subsequent conduct. As I discussed in *Mark A. Seldes, M.D.*, DAB CR2912, at 8-9 (2013), with regard to CMS's exercise of its discretionary authority to revoke a supplier's billing privileges, the Board has explained that "[o]nce CMS establishe[s] [a] legal basis on which to proceed, its subsequent action to revoke [i]s a reasonable and permissible exercise of the discretion granted to it under section 424.535(a)(3)." *Letantia Bussell, M.D.*, DAB No. 2196, at 10 (2008). The reasoning in Bussell, while addressing the revocation of billing privileges under section 424.535(a)(3), is equally as sound when applied to the analogous language authorizing the denial of an enrollment application under section 424.530(a)(3). *Compare* 42 C.F.R. § 424.535(a)(3)(i)(A) (permitting CMS to revoke billing privileges if the supplier "within the 10 years preceding enrollment or revalidation of enrollment" was convicted of "[f]elony crimes against persons, such as murder, rape, assault, and other similar crimes . . . ") *with* 42 C.F.R. § 424.530(a)(3)(i)(A) (permitting CMS to deny enrollment if the potential supplier "within 10 years preceding enrollment or revalidation of enrollment" [i]s convicted of "[f]elony crimes against persons, such as murder, rape, or assault, and other similar crimes . . ."); *see Ronald Paul Belin, DPM*, DAB CR2768, at 14 (applying *Bussell* holding in case that involved the denial of an enrollment application).

CMS has determined through the rulemaking process that certain serious crimes are detrimental to the Medicare program as a matter of law, without regard to the circumstances surrounding the conviction. 68 Fed. Reg. 22,064, 22,070 (proposed April 25, 2003) ("[w]e believe it is reasonable for the Medicare program to question the ability of the individual or entity with such a history to respect the life and property of program

beneficiaries."); 71 Fed. Reg. at 20,754, 20,760 (April 21, 2006). Here vehicular homicide is a "similar crime' to those listed considering the serious and deadly harm the Petitioner inflicted. *See* 42 C.F.R. § 424.535(a)(3)(i)(A). Accordingly, once a review of Petitioner's enrollment application revealed that he was convicted in 2009 of vehicular homicide, CMS could, as a matter of law, deny the application based solely on that conviction.

There is no requirement establishing that the review of a petitioner's enrollment application must delve into a criminal case or second-guess the proceedings that led to the felony conviction before CMS can determine whether the conviction is detrimental to the Medicare program. There is also no rule requiring CMS to look at a petitioner's conduct subsequent to his or her conviction. The discretionary authority in section 424.530(a)(3) relates to whether the conviction is for a crime that is detrimental to the Medicare program, not to whether Petitioner's subsequent conduct shows that he is or is not a detriment to the program. 42 C.F.R. § 424.530(a)(3). In this case, once CMS determined that Petitioner had been convicted of vehicular homicide within the 10 years preceding his enrollment application, its subsequent action to deny that application was a reasonable exercise of its discretion granted under section 424.530(a)(3).

IV. Conclusion

I sustain Cahaba's reconsidered determination to deny Petitioner's enrollment as a supplier in the Medicare program. Within the 10 years preceding his enrollment application, Petitioner had been convicted of a felony offense that CMS determined to be detrimental to the best interests of the Medicare program and its beneficiaries, and Cahaba properly denied his May 2013 enrollment application.

/s/
Joseph Grow
Administrative Law Judge