

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Horace Bledsoe, M.D.

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2325

Decision No. CR4563

Date: March 30, 2016

**DECISION**

Palmetto GBA, an administrative contractor for the Centers for Medicare & Medicaid Services (CMS) revoked the Medicare enrollment and billing privileges of Horace Bledsoe, M.D., Petitioner, on the basis of a felony conviction. Palmetto GBA affirmed the revocation in a reconsidered determination. Petitioner appealed. CMS now moves for summary judgment. I find that the material facts surrounding Petitioner's conviction are undisputed and that CMS had a basis for the revocation. Therefore, I grant summary judgment in favor of CMS.

**I. Case Background and Procedural History**

Petitioner is a physician licensed to practice medicine in South Carolina. CMS Exhibit (Ex.) 7 at 1. On July 22, 2009, a grand jury indicted Petitioner and a co-defendant on three counts of acquiring and obtaining testosterone, a Schedule III controlled substance, by misrepresentation, fraud, deception and subterfuge, on or about October 2, 2008, December 26, 2008 and February 4, 2009, in violation of 21 U.S.C. § 843(a)(3). CMS Ex. 4 at 5-6. On October 15, 2009, before the U.S. District Court for the District of South Carolina, Petitioner pled guilty to Count 1 of the Indictment, Obtaining Testosterone by Fraud, a felony offense, in violation of 21 U.S.C. § 843(a)(3). CMS Br. at 2; P. Response at 1; *see also* CMS Ex. 4 at 1, 5. On December 17, 2009, the District Court entered

judgment of conviction against Petitioner based on his guilty plea, dismissed Counts 2 and 3, assessed Petitioner \$100, and sentenced him to probation for three years. CMS Ex. 4 at 1-4.

On January 10, 2010, Petitioner submitted a CMS-855B application to enroll his company, Bledsoe Family Medicine, LLC in the Medicare program as a single specialty clinic family practice. CMS Ex. 5 at 3, 7. Petitioner was required to report his felony offense on this application because he is an owner of the practice and the conviction occurred within the last 10 years. Yet, the application CMS presents does not show Petitioner did so. *Id.* at 6 (showing Petitioner checked “No” to final adverse action history under section 3 of the CMS-855B he submitted), 9 (showing Petitioner checked “No” to final adverse history under section 5 of the CMS-855B he submitted). Petitioner signed the CMS-855B enrollment application as the authorized official, certifying that the information was “true, correct, and complete.” *Id.* at 11.

Petitioner then submitted a CMS-855R application to reassign his benefits to Bledsoe Family Medicine, LLC on February 17, 2010. CMS acknowledges that with the CMS-855R submission, Petitioner’s attorney attached a letter stating that Petitioner had been convicted of a felony offense related to fraudulently obtaining and administering testosterone on himself, a medical assistant, and several patients. CMS Br. at 2; P. response at 7-8; P. Ex. 17.

By letter dated July 22, 2010, Palmetto GBA approved Bledsoe Family Medicine, LLC’s enrollment application in the Medicare program, effective January 18, 2010. CMS Ex. 3 at 4-5.

On October 1, 2010, Petitioner filed a CMS-855I application to report a change in address for his practice, Bledsoe Family Medicine, LLC. CMS Ex. 6 at 5. However, Petitioner did not disclose his 2009 felony conviction on the CMS-855I application. *Id.* at 4 (checking “No” for final adverse history including conviction). Petitioner signed the certification statement in section 15 of the application on October 1, 2010. *Id.* at 8.

On January 22, 2015, Palmetto GBA notified Petitioner that his Medicare billing privileges were being revoked effective October 15, 2009. The letter also advised Petitioner that a three-year re-enrollment bar was being imposed. CMS Ex. 2. The notice letter cited 42 C.F.R. § 424.535(a)(3) as the basis for the revocation and 42 C.F.R. § 424.535(c) as the basis for the re-enrollment bar. *Id.* Specifically, the notice letter stated that due to Petitioner’s felony conviction, his Medicare privileges were being revoked. *Id.* The letter also stated that Petitioner was listed as a “5% or more owner and as an authorized official of Bledsoe Family Medicine.” *Id.*

Petitioner requested reconsideration, and on March 3, 2015, the CMS Center for Program Integrity, Provider Enrollment Operations Group, upheld the revocation based on 42

C.F.R. § 424.535(a)(3), stating that “the reason for revocation is for the existence of the guilty plea and there is no evidence to correct this deficiency.” CMS Ex. 1 at 1-2.

Petitioner timely requested a hearing (RFH) before an Administrative Law Judge (ALJ). The case was assigned to me for hearing and decision and I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) to the parties. In accordance with the terms of the Pre-Hearing Order, CMS submitted its motion for summary judgment and supporting brief (CMS Br.), and CMS Exs. 1-7. After reviewing CMS’s exchange, Petitioner filed a response opposing the CMS motion for summary judgment (P. Response), and P. Exs. 1- 20. Absent objections, I enter all proposed exhibits into the record.

## **II. Discussion**

### **A. Issues**

1. Whether summary judgment is appropriate; and
2. Whether CMS had a legal basis to revoke Petitioner’s Medicare enrollment and billing privileges.

### **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.*

Here, CMS moved for summary judgment and provided documentary evidence that sufficiently establishes the material facts of the case. CMS Br. at 1; CMS Exs. 1-7.

CMS proffered documentary evidence showing Petitioner pled guilty to and was convicted of a felony that CMS has determined is detrimental to the best interests of the Medicare program and its beneficiaries. CMS Ex. 4.

Petitioner does not dispute that he pled guilty to the felony offense of acquiring and obtaining testosterone, a Schedule III controlled substance, by misrepresentation, fraud, deception and subterfuge. *See* RFH at 2; P. Response at 1. Petitioner claims there are material issues in dispute that would preclude summary judgment, mainly that CMS had actual knowledge of Petitioner's conviction in March 2010 when it approved Petitioner to participate in the Medicare program, and CMS nonetheless allowed Petitioner to bill Medicare for services rendered from July 18, 2010 through January 22, 2015 before revoking Petitioner's enrollment based on the felony conviction, retroactive to October 15, 2009. According to Petitioner, CMS's actions were arbitrary, capricious, unreasonable and an abuse of CMS's discretion. P. Response at 1-6. However, I find Petitioner's arguments do not raise any genuine issue of disputed material fact that I may address. The only issue I need to resolve in this case is a matter of law, which as discussed below, I must decide in CMS's favor.

***2. Petitioner does not dispute that he pled guilty to a felony offense for obtaining testosterone by fraud, and his conviction was within ten years of his filing of a CMS-855B Medicare enrollment application.***

Petitioner does not dispute that he pled guilty to a felony charge in October 2009, and on December 17, 2009, the U.S. District Court for the District of South Carolina entered judgment of conviction against Petitioner based on his guilty plea of Obtaining Testosterone by Fraud in violation of 21 U.S.C. § 843(a)(3). *See* CMS Ex. 4 at 1-4. Petitioner also does not dispute that his guilty plea and conviction occurred within the 10 years preceding his filing of the CMS-855B Medicare enrollment form. Petitioner submitted a CMS-855B enrollment application on January 10, 2010 in order to enroll Bledsoe Family Medicine, LLC, owned in part or whole by Petitioner, in the Medicare program. CMS Ex. 5 at 3, 7. Because Petitioner was convicted of a felony offense on December 17, 2009, and sought enrollment for Bledsoe Family Medicine, LLC on January 10, 2010, his guilty plea fell within the 10 years preceding his submission of the Medicare enrollment application.

***3. CMS was authorized to revoke Petitioner's enrollment under 42 C.F.R. § 424.535(a)(3).***

CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for several enumerated reasons, including:

(3) Felonies. The provider, supplier, or any owner of the provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted 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.

(i) Offenses include—

\* \* \*

(D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

42 C.F.R. § 424.535(a)(3)(i)(D); *see also* Social Security Act (Act) § 1842(h)(8) (authorizing the Secretary of Health and Human Services to revoke the enrollment of a physician or supplier convicted of a federal or state felony offense the Secretary “determines is detrimental to the best interests of the program or program beneficiaries”). After CMS revokes provider or supplier billing privileges, the provider or supplier cannot participate in Medicare from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar must last for a minimum of one year but cannot exceed three years. 42 C.F.R. § 424.535(c).

The regulation at 42 C.F.R. § 424.535(a)(3)(i) gives examples of certain offenses CMS has already determined to be detrimental to the Medicare program. Any offense that would result in mandatory exclusion under section 1128(a) of the Act is one such example. 42 C.F.R. § 424.535(a)(3)(i)(D). It is well settled that felony convictions related to the unlawful prescription or dispensing of a controlled substance justify mandatory exclusion pursuant to section 1128(a)(4) of the Act. Petitioner’s conviction for Obtaining Testosterone by Fraud is a type of an offense that falls squarely within the scope of an 1128(a)(4) mandatory exclusion. *See, e.g., Nenice Marie Andrews*, DAB No. 2656 (2015), *Shaikh M. Hasan, M.D.*, DAB No. 2648 (2015). Therefore, CMS had already determined that Petitioner’s offense is detrimental to the Medicare program and its beneficiaries. Because Petitioner’s conviction was within 10 years preceding enrollment, CMS was authorized to revoke Petitioner’s enrollment under section 424.535(a)(3), effective the date of his conviction. 42 C.F.R. § 424.535(g).

Petitioner argues that CMS took five years to exercise its discretionary authority to revoke Petitioner’s billing privileges. P. Response at 4. Petitioner argues that in the interim, even though CMS had full knowledge of Petitioner’s 2009 felony conviction, CMS allowed Petitioner to provide services to Medicare beneficiaries and then bill Medicare for these services. *Id.* Petitioner argues that CMS’s delay in exercising its discretionary authority to revoke Petitioner’s billing privileges retroactive to 2009 has resulted in a considerable overpayment for Petitioner. *Id.* at 3. Petitioner argues that

CMS's actions are "unconscionable and inequitable," and an abuse of CMS's discretionary authority. *Id.* at 5-6. Petitioner argues that Medicare is demanding recoupment in excess of three hundred thousand dollars, that CMS's actions are in violation of the Fifth Amendment, and that CMS should be equitably estopped. *Id.* at 6-9.

However, my review authority is limited to reviewing initial determinations "to deny or revoke a provider or supplier's Medicare enrollment in accordance with . . . § 424.535." 42 C.F.R. § 498.3(b)(17). I may only review whether CMS has established a legal basis for its determination to revoke Petitioner's enrollment. *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008) (concluding that an ALJ review of revocation of enrollment for felony offenses under section 1842(h) of the Act is "limited to whether CMS had established a legal basis for its actions."). Recoupment of payments to providers and suppliers and the collection and compromise of overpayments is regulated by 42 C.F.R. pt. 405, subpt. C. Review of alleged overpayments is not a matter within my jurisdiction. Review of alleged overpayments and their collection is governed by 42 C.F.R. pt. 405 subpts. H and I. I also do not have the ability to consider retroactive payment consequences that CMS takes into consideration when exercising its discretion. *Lorrie Laurel*, DAB No. 2524, at 7-8 (2013).

Where CMS proves that Petitioner was convicted of an offense applicable to 42 C.F.R. § 424.535(a)(3)(i)(D), I must sustain the revocation. I must do so "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." *Fady Fayad, M.D.*, DAB No. 2266, at 16 (2009), *aff'd*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

As for Petitioner's request for equitable relief, I have no authority to grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements."). I am also required to follow the Act and

