

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Michael Turner, CRNA
(NPI: 1336388552),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-267

Decision No. CR4898

Date: July 31, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through two administrative contractors, revoked the Medicare enrollment and billing privileges of Michael Turner, CRNA (Petitioner), because Petitioner was convicted of aggravated driving under the influence of alcohol (DUI) and both CMS administrative contractors determined that his conviction of that felony offense is detrimental to the best interests of the Medicare program and its beneficiaries. One of the CMS administrative contractors also found that Petitioner failed to disclose his felony conviction on a Medicare enrollment application. At different times, Petitioner requested hearings before an administrative law judge (ALJ) to dispute the revocation actions taken by the CMS administrative contractors, 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. I consolidated Petitioner's hearing requests because they both involve a revocation action based on the same felony conviction. Based on a review of the record as a whole, I conclude that CMS's determination that Petitioner's felony offense is detrimental to the best interests of the Medicare program and its beneficiaries is reasonable. Therefore, I affirm the revocation of Petitioner's Medicare enrollment and billing privileges.

I. Background and Procedural History

In 2009, Petitioner obtained an Advanced Practice Nursing License following his training as a Certified Registered Nurse Anesthetist (CRNA). On January 7, 2010, Petitioner pled guilty to felony aggravated DUI for driving under the influence on a suspended license. In January 2012, Petitioner moved to Indiana and obtained his Indiana nursing license and a position with St. Catherine's Hospital. Petitioner (P.) Exhibit (Ex.) 1 at 2-3.¹

In July 2012, Petitioner submitted a Form CMS-855I application for enrollment as a supplier in the Medicare program. CMS Ex. 6; P. Ex. 1 at 4. On the enrollment application, Petitioner indicated that he intended to reassign his Medicare benefits to St. Catherine's Hospital and, in response to the question as to whether he had ever been subject to any "final adverse legal action," Petitioner answered "No." CMS Ex. 6 at 9-10; P. Ex. 1 at 4. On July 10, 2012, CMS approved Petitioner's enrollment, with a retrospective billing period commencing on May 27, 2012. CMS Ex. 7. On March 30, 2015, Petitioner submitted a revalidation application in which he also responded "no" to the question if he had been subject to any "final adverse legal action." CMS Ex. 5 at 14.

In a March 15, 2016 initial determination, CMS administrative contractor Wisconsin Physician Services (WPS) revoked Petitioner's Medicare enrollment and billing privileges, effective May 27, 2012, for the following reasons:

42 CFR § 424.535(a)(3) – Felony Conviction

The Centers for Medicare & Medicaid Services (CMS) has been made aware of your January 7, 2010 felony conviction for Aggravated DUI License Suspended or Revoked, in violation of the Illinois Statute §625-5/11-501(A), in the Circuit Court of Cook County, Illinois, First Municipal District. Based on our review, we have determined to revoke your Medicare enrollment, under the regulation at 42 CFR §424.535(a)(3).

42 CFR §424.535(a)(4) – False or Misleading Information

On your Centers for Medicare & Medicaid Services 855I enrollment application submitted on March 30, 2015, you

¹ Petitioner has submitted three versions of P. Ex. 1, which is Petitioner's declaration. My reference to P. Ex. 1 in this decision is to the October 31, 2016 version. I note that Petitioner submitted another declaration with his January 10, 2017 Request for Hearing, marked as Exhibit 4, which is identical to the October 31, 2016 declaration with the exception of some additional information about Petitioner's height, weight, and consumption of food on the day he was arrested for DUI.

answered "no" in section three of the application indicating that you did not have any previous adverse legal history. However, you were adjudged guilty of a felony for Aggravated DUI License Suspended or Revoked on January 7, 2010. A felony conviction is a final adverse action, as defined by 42 CFR § 424.502.

CMS Ex. 2 at 1. WPS barred Petitioner from reenrolling for three years. CMS Ex. 2 at 2.

Petitioner requested reconsideration of the revocation, filing arguments and documents to support his request. CMS Ex. 4. However, on June 10, 2016, WPS's hearing officer issued an unfavorable reconsidered determination. CMS Ex. 3. The hearing officer upheld the revocation on both grounds identified in the initial determination. In regard to Petitioner's felony conviction, the hearing officer concluded:

A discretionary review of all the files, submitted with the reconsideration request, has been conducted and it has been determined that Michael Turner's felony conviction is detrimental to the best interest of the Medicare program and its beneficiaries.

CMS Ex. 3 at 2.

Petitioner timely requested a hearing on August 8, 2016, based on WPS's revocation. The Civil Remedies Division docketed this case under Docket Number C-16-796. I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of pre-hearing exchanges. In accordance with the Order, CMS filed its pre-hearing exchange, which included a motion for summary judgment and brief (CMS Br.), and seven proposed exhibits. CMS did not provide written direct testimony for any witnesses. Petitioner filed a brief (P. Br.) and opposed summary judgment. Petitioner also filed four proposed exhibits, which included written direct testimony from three witnesses. Subsequently, Petitioner submitted revised versions of its four proposed exhibits and added a fifth exhibit, which was written direct testimony for an additional witness. Finally, Petitioner submitted another revised version of P. Ex. 1, which is Petitioner's written direct testimony.

After receiving the parties' submissions, the Civil Remedies Division received another hearing request from Petitioner dated January 10, 2017, which it docketed under Docket Number C-17-267. Submitted with the hearing request were eight exhibits (Jan. 10, 2017 Hearing Req., Exs. 1-8), including a March 18, 2016 initial determination, issued by CMS administrative contractor National Government Services (NGS), revoking Petitioner's Medicare billing privileges based on the same facts and law as stated in WPS's March 15, 2016 initial determination to revoke, except that NGS did not

determine that Petitioner violated 42 C.F.R. § 424.535(a)(4) . Like the WPS initial determination, NGS imposed a three-year reenrollment bar. Jan. 10, 2017 Hearing Req. Ex. 2. Another exhibit was a request for reconsideration with supporting documents as well as a June 10, 2016 unfavorable reconsidered determination issued by NGS. Jan. 10, 2017 Hearing Req., Exs. 1, 3.

In the January 10, 2017 hearing request, Petitioner noted that he had difficulty receiving the reconsidered determination from NGS. Petitioner ultimately received a copy in October 2016. He requested that I find good cause to accept his hearing request. Jan. 10, 2017 Hearing Req. at 2-3.

On January 31, 2017, I issued an Acknowledgment and Consolidation Order in which I acknowledged Petitioner's January 10, 2017 hearing request and ordered the cases docketed under Docket Numbers C-16-796 and C-17-267 to be consolidated under C-17-267 because the cases involved the same facts and legal issues. Although Petitioner's January 10, 2017 hearing request and attached exhibits are essentially the same as Petitioner's brief and Petitioner's Exhibits 1-5,² I provided the parties with an opportunity to submit additional evidence or arguments they wanted me to consider. In response to my order, CMS filed a supplemental brief in which it did not oppose consolidation of the cases, but pointed out that Petitioner's January 10, 2017 hearing request was untimely even accepting that Petitioner received a copy of the reconsidered determination sometime in October 2016. CMS did not move for dismissal, but again requested that I grant summary judgment.

II. Rulings and Decision on the Record

I find good cause to accept Petitioner's untimely hearing request filed in January 2017. 42 C.F.R. § 498.40(c)(2). Two CMS administrative contractors have created parallel adjudications for the revocation of Petitioner's Medicare billing privileges. Petitioner timely complied with the deadlines to file reconsideration requests in both cases and timely filed a hearing request for ALJ review in WPS's matter, which was the first of the two initial determinations issued. However, according to Petitioner, NGS refused to mail its reconsidered determination to his counsel, which resulted in a delay in receipt of the reconsidered determination. Although Petitioner still filed his hearing request late, even accounting for NGS's delay in sending the reconsidered determination to counsel, it would be inappropriate for me to dismiss the hearing request because that would make NGS's reconsidered determination binding and render Petitioner's timely filed hearing request (to appeal WPS's determination) moot. *See* 42 C.F.R. § 498.25(b). Petitioner is not responsible for twice appealing the same revocation in order to preserve his right to

² I note that the Jan. 10, 2017 Hearing Req. Exs. 4-8 are nearly identical to P. Exs. 1-5.

ALJ review. *See* 42 C.F.R. § 498.40(a). CMS ought to have ensured that its administrative contractors coordinated this revocation action.

Petitioner did not object to any of CMS's proposed exhibits; therefore, I admit CMS Exs. 1-7 into the record. *See* Order ¶ 7; Civil Remedies Division Procedures § 14(e). CMS did not object to any of Petitioner's proposed exhibits, therefore, I admit the latest version of P. Ex. 1 (i.e., the October 31, 2016 version), the revised versions of P. Exs. 2-4, P. Ex. 5, the January 10, 2017 Hearing Req. Exs. 1-8 into the record.

CMS did not offer any witnesses and did not request to cross-examine any of Petitioner's witnesses. Therefore, a hearing is not necessary, 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 Petitioner'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.

1. Petitioner pled guilty on January 7, 2010, to felony Aggravated DUI License Suspended or Revoked under Illinois Statute § 625-5/11-501(A).

On or about February 26, 2008, in Chicago, Illinois, Petitioner went out to eat dinner and hear a concert with his wife and sister-in-law. P. Ex. 1 at 1-2; P. Ex. 2 at 1; P. Ex. 3 at 1. Over a period of six hours, Petitioner "consumed three beers." P. Ex. 1 at 2; P. Ex. 2 at 1-2; P. Ex. 3 at 1-2. Following the concert, Petitioner and his party needed to retrieve their vehicle. Petitioner testified to the following:

Due to snowy weather conditions, I decided to retrieve my sister-in-law's car, which was parked on Bishop Street in Chicago, while my wife and sister-in-law waited inside the restaurant. My sister-in-law intended to take the wheel as soon as I drove the car back to the restaurant (approximately three blocks), but police stopped me for failing to make a complete stop at a stop sign. The police checked my driver's

license and found that it was suspended due to a prior DUI misdemeanor in Illinois in 2006.

P. Ex. 1 at 2; P. Ex. 2 at 2; P. Ex. 3 at 2; *see also* P. Ex. 4. In April 2008, the Cook County State's Attorney filed an Information with the Circuit Court of Cook County, Illinois, that charged Petitioner with five counts of criminal conduct involving the offense of Aggravated DUI. CMS Ex. 2 at 9-15; P. Ex. 1 at 2. The fifth count of the Information charged Petitioner with violating Chapter 625 of the Illinois Compiled Statutes Act, 5, Section 11-501(A) based on driving a motor vehicle under the influence of alcohol when Petitioner's driving privileges were revoked for an offense related to DUI. CMS Ex. 2 at 14.

On January 7, 2010, Petitioner pled guilty to Count 5 of the Information. CMS Ex. 2 at 19; CMS Ex. 4 at 2; P. Ex. 1 at 2. An Illinois court sentenced Petitioner to 75 hours of intensive outpatient treatment, six months of aftercare outpatient counseling, and 720 hours of community service. CMS Ex. 2 at 19; CMS Ex. 4 at 2; P. Ex. 1 at 2-3.

Petitioner had been convicted previously of a misdemeanor DUI in December 2006 after which his license was suspended. CMS Ex. 4 at 2.

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.

The Social Security Act authorizes the Secretary of Health and Human Services (Secretary) 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).

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

³ The Secretary revised section 424.535(a)(3) effective February 3, 2015. 79 Fed. Reg. 72,500 (Dec. 5, 2014). The outcome in this case is the same regardless as to whether I apply the original text or the amended text of that regulation.

There are three different types of review an ALJ may have to perform when reviewing CMS's determination to revoke a supplier's Medicare enrollment and billing privileges based on section 424.535(a)(3), depending on whether the 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 decide 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).

In the present case, Petitioner concedes that he was convicted of a felony on January 7, 2010. CMS Ex. 4 at 2. Likewise, there is no dispute that Petitioner's conviction occurred within the ten years preceding both his 2012 enrollment and 2015 revalidation of enrollment application. CMS Ex. 5; CMS Ex. 7 at 1. Therefore, the only contested issue is whether Petitioner was convicted of a felony that is detrimental to the best interests of the Medicare program and its beneficiaries.

WPS's reconsidered determination indicates that CMS's revocation was based, in part, on 42 C.F.R. § 424.535(a)(3), and NGS's reconsidered determination indicates that CMS's revocation was based exclusively on 42 C.F.R. § 424.535(a)(3). CMS Ex. 2 at 1; CMS Ex. 3 at 1-2; Jan. 10, 2017 Hearing Req. Ex. 1 at 1. Both determinations identified Petitioner's conviction on January 7, 2010, for felony aggravated DUI, as the factual basis for the revocation, and both indicated that they reconsidered the initial determinations, but still upheld the revocation. CMS Ex. 3 at 2 ("A discretionary review

of all the files, submitted with the reconsideration request, has been conducted and it has been determined that [Petitioner's] felony conviction is detrimental to the best interest of the Medicare program and its beneficiaries.”); Jan. 10, 2017 Hearing Req. Ex. 1 at 1 (“Upon researching it has been found that the revocation for this provider cannot be lifted due to the felony conviction.”).

An ALJ may only uphold a revocation on the basis or bases provided in the reconsidered determination. *Neb Group of Arizona, LLC*, DAB No. 2575 at 7 (2014). 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.” 42 C.F.R. § 498.25(a). 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.” *Brian Ellefsen, DO*, DAB No. 2626 at 9 (2015). This reasoning applies to revocations as well.

As stated above, the reconsidered determinations indicate that after a review of the evidence, the revocations would be upheld because Petitioner's conviction was detrimental to the best interests of the Medicare program and its beneficiaries. CMS clarified the reasons for these determinations in its brief submitted in this case. *See Fayad*, DAB No. 2266 at 10.

In its brief, CMS asserted that it made a discretionary determination that Petitioner's felony conviction was detrimental to the best interests of the Medicare program. CMS Br. at 8. CMS also argued that Petitioner's crime is a crime against persons and a crime that placed the Medicare program and its beneficiaries in imminent danger. CMS Br. at 8. Specifically, CMS asserted that DUI is a crime against persons because it puts everyone on the road at risk of injury or death. CMS Br. at 9. To support this, CMS cited National Highway Traffic Safety Administration (NHTSA) statistics for 2013, in which there were 10,076 fatalities involving DUI, 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 DUI crashes. CMS Br. at 9. CMS refuted Petitioner's argument, in his hearing request, that his conviction for an Aggravated DUI is less serious than some of the offenses referenced in the regulation. CMS Br. at 10. Petitioner argued that his decision to drive while intoxicated was minor because he intended only to “retrieve the car parked three blocks away” and then turn the car over to his family member to drive. CMS Br. at 10. CMS contended that there is no guarantee that Petitioner would have actually permitted his family member to drive rather than continue to drive intoxicated and put the public at risk. CMS Br. at 10. Additionally, CMS stated in its brief that Petitioner's decision to drive without a valid driver's license and with a prior DUI conviction represents a lack of good judgment. CMS Br. at 10.

In opposition to CMS's position, Petitioner argued in his brief that no one was harmed or injured as a result of the offense, and thus, the DUI is not similar to any of the felonies

listed in the regulation. P. Br. at 16-17. Petitioner asserted that his felony conviction was not for a crime specifically listed in section 424.535(a)(3), such as murder, rape, or assault. P. Br. at 17. Further, Petitioner stated that his crime is not similar to any examples listed as crimes against persons because Illinois law provides for a category of “Offense Directed Against the Person,” which includes the crimes listed in section 424.535(a)(3)(i)(A) (2009), and DUI is not one of them. P. Br. at 17. Rather, Illinois law categorizes Petitioner’s DUI offense in the Illinois Vehicle Code. P. Br. at 17. Petitioner stated that all he had to do to commit his DUI offense was to be intoxicated and drive a car, and that driving intoxicated does not equate to impairment that would constitute a crime against a person. P. Br. at 18. Petitioner also argued that his felony offense is not a crime that placed the Medicare program or a Medicare beneficiary at immediate risk of harm because driving on a suspended license did not involve Petitioner’s professional CRNA services or any neglect of Medicare beneficiaries. P. Br. at 19. Finally, Petitioner asserted 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. P. Br. at 14. In his January 10, 2017 Hearing Request, Petitioner also asserted that at the time he operated his sister-in-law’s car, he was able to operate the car safely. January 10, 2017 Hearing Req. at 12. He based this argument on a declaration, from a physician, who rendered this opinion based on the amount of alcohol Petitioner allegedly consumed, the time frame in question, and Petitioner’s height and weight. January 10, 2017 Hearing Req. Ex. 8.

I conclude, however, 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. 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. In the present case, the reconsidered determination from WPS, in particular, 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. Then, in its brief, CMS provided sufficient clarification of the factual grounds supporting the reconsidered determination to show that Petitioner felony conviction was detrimental to the best interests of the Medicare program and its beneficiaries. Petitioner’s felony DUI conviction was not only based on Petitioner’s most recent DUI offense in 2010, but on his history of a previous DUI conviction and license suspension. In exercising its

discretion, CMS reasonably determined that Petitioner's 2010 conviction was more detrimental because of the previous DUI than Petitioner's offense might be in isolation.⁴

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.⁵ 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 affirm this basis for revocation.

⁴ Although Petitioner argued that he was not impaired when the police arrested him while driving his sister-in-law's car, Petitioner admitted when he pled guilty to DUI that he was in fact intoxicated. CMS Ex. 2 at 14, 19; CMS Ex. 4 at 2; P. Ex. 1 at 2.

⁵ In its brief, CMS asserted that Petitioner's felony conviction could be upheld because it fits into two of the categories of offenses specifically listed as detrimental in the regulations, i.e., the felony offense is either a crime against a person or shows that Petitioner is an imminent risk to Medicare beneficiaries. I do not need to address these arguments because CMS's brief provided a sufficient basis as to why DUI crimes, like Petitioner's offense, are detrimental to the best interests to the Medicare program without the need to categorize the offense under the examples in 42 C.F.R. § 424.535(a)(3). As the Secretary stated in the preamble to the final rule quoted above, CMS retains a flexible approach to evaluate crimes involving alcohol on an individual case basis.

3. I do not need to decide whether CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(4) to revoke Petitioner's enrollment and billing privileges.

Having concluded that CMS had a legitimate basis to revoke Petitioner based on his felony aggravated DUI offense, I do not need to resolve the issue as to whether CMS could legitimately revoke Petitioner under 42 C.F.R. § 424.535(a)(4) for providing false or misleading information in his Medicare enrollment application.

VI. Conclusion

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

/s/
Scott Anderson
Administrative Law Judge