

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

David B. Gomez, O.D.,
(NPI: 1174512453; PTAN: 0763312)
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-242

Decision No. CR4663

Date: July 25, 2016

DECISION

The Medicare enrollment and billing privileges of Petitioner, David B. Gomez, O.D., are revoked pursuant to 42 C.F.R. § 424.535(a)(3),¹ effective June 29, 2006.

I. Background

Palmetto GBA (Palmetto), the Medicare contractor for the Centers for Medicare and Medicaid Services (CMS), notified Petitioner by letter dated September 3, 2015, that his Medicare billing privileges were revoked effective June 29, 2006. The regulatory authority cited for the revocation was 42 C.F.R. § 424.535(a)(3) based upon Petitioner's June 29, 2006 felony conviction for distribution of cocaine. CMS Exhibit (CMS Ex.) 8. On November 12, 2015, Petitioner requested reconsideration by a contractor hearing officer. CMS Ex. 9. On January 11, 2016, the revocation was upheld on reconsideration under 42 C.F.R. § 424.535(a)(3) based upon Petitioner's felony conviction. CMS Ex. 10.

Petitioner requested a hearing before an administrative law judge (ALJ) on January 13, 2016. The case was assigned to Judge Joseph Grow on January 28, 2016. Judge Grow issued a prehearing order on January 28, 2016 (Prehearing Order). The case was

¹ Citations are to the 2014 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

reassigned to me on April 1, 2016, upon Judge Grow's departure from the Civil Remedies Division. On March 2, 2016, CMS filed a motion for summary judgment and CMS exhibits 1 through 11. Petitioner filed a response (P. Br.) without any exhibits on April 5, 2016. Petitioner has not objected to my consideration of the CMS exhibits and they are admitted.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as Palmetto. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers. Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Petitioner, a doctor of optometry, is a supplier.

The Act requires the Secretary of Health and Human Services (Secretary) to issue regulations that establish a process for the enrollment in Medicare of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations, such as revocation of enrollment and billing privileges. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a supplier such as Petitioner must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its Medicare contractor may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. In this case, CMS revoked Petitioner's Medicare enrollment and billing privileges under 42 C.F.R. § 424.535(a)(3), which provides:

(a) Reasons for revocation. CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:

* * * *

(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 program and its beneficiaries.

(i) Offenses include—

(A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.

(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.

(C) Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

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

(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. § 424.535(a)(3) (emphasis added); Act § 1866(b)(2)(D).

Section 1128(a) of the Act provides:

(a) Mandatory Exclusion.—The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

(1) Conviction of program-related crimes.—Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

(2) Conviction relating to patient abuse.—Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

(3) Felony conviction relating to health care fraud.—Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996[45], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

(4) Felony conviction relating to controlled substance.— Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996 [August 21, 1996], under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Act § 1128(a) (emphasis added) (42 U.S.C. § 1320a-7(a)).

The effective date of the revocation is controlled by 42 C.F.R. § 424.535(g). The regulation provides that when revocation is based on a felony conviction, the effective date of revocation is the date of the conviction. 42 C.F.R. § 424.535(g).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a). A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination, specifying the conditions or requirements the supplier failed to meet, and advising of the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (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. A hearing on the record, also known as an

oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate; and

Whether there was a basis for revocation of Petitioner's billing privileges.

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

My conclusions of law are in bold text followed by my findings of fact and analysis.

1. Summary judgment is appropriate.

CMS filed a motion for summary judgment. Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations at 42 C.F.R. pt. 498 that establish the procedure to be followed in adjudicating Petitioner's case do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g., Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. Pro. 56 and related cases provide useful guidance for determining whether summary judgment is appropriate.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 4 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled*

Nursing Ctr., DAB No. 2300 at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differ from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

Viewing the evidence before me in a light most favorable to Petitioner and drawing all inferences in Petitioner's favor, I conclude that there are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3) that require a hearing in this case. The issues in this case raised by Petitioner related to revocation under 42 C.F.R. § 424.535(a)(3) must be resolved against him as a matter of law. The undisputed evidence shows that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges. Accordingly, summary judgment is appropriate.

2. Petitioner was convicted of an offense for which his exclusion is required by section 1128(a)(4) of the Act (42 U.S.C. § 1320a-7(a)(4)).

3. There is a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(3)(i)(D), based on Petitioner's felony conviction.

4. The issue for hearing and decision is whether there is a basis for revocation of Petitioner's billing privileges and my jurisdiction does not extend to reviewing whether or not CMS properly exercised its discretion to revoke Petitioner's Medicare enrollment and billing privileges if I find there was a basis for such action.

5. I have no authority to review the imposition or duration of a bar to re-enrollment. 42 C.F.R. §§ 424.545, 498.5(l)(1)-(2).

a. Facts

The following facts are undisputed.

On February 2, 2006, a criminal complaint was filed in the United States District Court, Southern District of West Virginia (district court). Petitioner was charged with knowingly and intentionally distributing cocaine, a Schedule II controlled substance, on or about February 1, 2006, in violation of 21 U.S.C. § 841(a)(1). CMS Ex. 1. Petitioner pleaded guilty to the felony count of distribution of a quantity of cocaine. CMS Ex. 2 at 1. The district court entered judgment on June 29, 2006, and sentenced Petitioner to ten months incarceration; a \$100 assessment; a \$3,000 fine; and three years of supervised release after the completion of his prison term. CMS Ex. 2 at 2-6.

Petitioner's license to practice optometry in West Virginia was suspended in 2006, reinstated with conditions in 2007, and fully reinstated in 2008. Petitioner voluntarily permanently surrendered his Pennsylvania license in 2008. CMS Ex. 3; Petitioner's Request for Hearing (RFH), CMS Ex. 9.

On March 25, 2013, Petitioner submitted an online version of Form CMS-855I through CMS's internet based Medicare Provider Enrollment, Chain, and Ownership System (PECOS). RFH, CMS Ex. 4. Petitioner does not deny that he did not list his 2006 felony conviction on the CMS-855I as an adverse action.² CMS Ex. 4 at 2, 5, 6. On May 17 and 21, 2013, Palmetto informed Petitioner by email and by letter that his Medicare enrollment information had been revalidated. RFH; CMS Ex. 6. The May 21, 2013 Palmetto letter also informed Petitioner that he was required to report any final adverse legal actions, including a felony conviction. CMS Ex. 6 at 1. By letter dated September 3, 2015, Palmetto notified Petitioner that his Medicare billing privileges were revoked pursuant to 42 C.F.R. § 424.535(a)(3), effective June 29, 2006, the date of his felony conviction and that he was subject to a three year re-enrollment bar pursuant to 42 C.F.R. § 424.535(c). CMS Ex. 8. Petitioner requested reconsideration on November 12, 2015. CMS Ex. 9. His reconsideration request was denied on January 11, 2016. CMS Ex. 10.

b. Analysis

Revocation of a currently enrolled provider's or supplier's billing privileges and any corresponding provider or supplier agreement based upon conviction of a felony is authorized by 42 C.F.R. § 424.535(a)(3). The specific provision applicable in this case is 42 C.F.R. § 424.535(a)(3)(i)(D), which authorizes revocation of the Medicare enrollment of a provider or supplier subject to mandatory exclusion from federal health care

² Petitioner's failure to list his conviction as an adverse action was not cited by Palmetto as a basis for revocation.

programs pursuant to section 1128(a) of the Act. A conviction that subjects one to exclusion pursuant to section 1128(a) of the Act is detrimental to the program or its beneficiaries as a matter of law under 42 C.F.R. § 424.535(a)(3)(i)(D). The specific provision of section 1128(a) that is applicable is section 1128(a)(4), which requires that the Secretary exclude an individual or entity that is convicted of a felony offence that occurred after August 21, 1996, related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. It is undisputed that Petitioner pleaded guilty to distribution of a quantity of cocaine, a Schedule II controlled substance, and that the distribution occurred on about February 1, 2006. Therefore, Petitioner was subject to mandatory exclusion pursuant to section 1128(a)(4) of the Act due to his conviction. There is no dispute that Petitioner's conviction occurred within the ten years preceding the enrollment application he signed and submitted through PECOS on March 25, 2013. Accordingly, I conclude that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(D).

I have no authority to review the exercise of discretion by CMS or its contractor to deny or revoke enrollment where there is a basis for such action. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). The scope of my authority is limited to determining whether there is a legal basis for the denial of Petitioner's Medicare enrollment. *Id.* I have concluded that there is a basis for CMS to revoke Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(3)(i)(D).

Palmetto imposed a three-year bar to re-enrollment. Under the regulations, the re-enrollment bar after a revocation is a minimum of one year and a maximum of three years. 42 C.F.R. § 424.535(c). There is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes. Act § 1866(j)(8); 42 C.F.R. §§ 424.535(c); 424.545; 498.3(b); and 498.5. The Board has held that the duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in 42 C.F.R. § 498.3(b), and thus, is not subject to ALJ review. *Vijendra Dave*, DAB No. 2672 at 11 (2016).

Petitioner argues in his request for hearing that he is aware of the procedures for enrolling and he believes he correctly followed those procedures. RFH. Petitioner argued in his request for reconsideration that he treats many patients with Medicare and that he had practiced several years without problems until Palmetto revoked his enrollment and billing privileges. CMS Ex. 9. Petitioner states in his response to the CMS motion for summary judgment that he does not dispute the CMS statement of facts, except the CMS assertions that: he "did not disclose [his] felony conviction and filed a blank application." P. Br. There is no dispute that Petitioner filed an application through PECOS on March 25, 2013, and no final adverse actions are listed on that application.

CMS Ex. 4 at 2.³ Petitioner argues that he believed CMS already knew about his felony conviction. Petitioner argues that he did disclose his felony conviction to CMS in the application through PECOS. For purposes of summary judgment, I accept the assertion as true despite the conflict with the application information reflected in CMS Ex. 4. However, accepting the assertion as true has no effect on summary judgment or the outcome as Petitioner's enrollment is revoked not for failure to disclose the conviction in the application but because he was convicted of an offense that falls within the ambit of section 424.535(a)(3)(i)(D). Petitioner argues that he thought he was approved in 2013 when he submitted his application for revalidation. He claims that after he was approved he billed Medicare for services he provided and did not abuse the Medicare program. Petitioner states that he is trying to pay back overpayments that were for services he provided that he thought he was approved to provide. P. Br.

Petitioner's arguments provide no basis for relief. He was convicted of distribution of cocaine and that conviction is a basis for revocation of his Medicare enrollment and billing privileges. To the extent Petitioner's arguments may be construed as a 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 regulations and have no authority to declare statutes or regulations invalid. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009) (ALJ is bound by applicable laws and regulations).

III. Conclusion

For the foregoing reasons, Petitioner's Medicare enrollment and billing privileges are revoked effective June 29, 2006, the date of his felony conviction.

/s/
Keith W. Sickendick
Administrative Law Judge

³ CMS placed in evidence a blank paper CMS-855I to make it easier to understand what the application requires. CMS Ex. 5. CMS does not assert that Petitioner submitted a blank paper application.