

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Kimberly Shipper, P.A.,
(PTANs: 393436YXPX, 8D9969, 8F7418, 8G1323,
8J6302, TXB114727, TXB146129, TXB147512)

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Respondent

Docket No. C-16-640

Decision No. CR4731

Date: November 9, 2016

DECISION

I sustain the determination of a Medicare contractor, as ratified by the Centers for Medicare & Medicaid Services (CMS) to revoke the Medicare enrollment of Petitioner, Kimberly Shipper, P.A.

I. Background

Petitioner requested a hearing to challenge the determination, as affirmed on reconsideration, to revoke her participation in Medicare. CMS moved for summary judgment. With its motion CMS filed nine supporting exhibits that are identified as CMS Ex. 1-CMS Ex. 9. Petitioner opposed CMS's motion and cross-moved for summary judgment. She filed 29 supporting exhibits that are identified as P. Ex. 1-P. Ex. 29. I receive the parties' exhibits into the record.

It is unnecessary that I decide whether the criteria for summary judgment are met. Neither party offered testimony, therefore, there is no need for an in-person hearing. I decide the case based on the parties' arguments and exhibits.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether CMS may revoke Petitioner's participation in Medicare.

B. Findings of Fact and Conclusions of Law

The governing regulations in this case are 42 C.F.R. §§ 424.535(a)(3) and (a)(9). Subsection (a)(3) authorizes CMS to revoke the Medicare participation of any provider or supplier for reasons that include conviction of a felony where CMS determines the conviction to be detrimental to the best interests of the Medicare program or its beneficiaries. Felonies which by definition justify revocation include:

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.

42 C.F.R. § 424.535(a)(3)(ii)(A). The regulation further defines "convicted" by referring to another regulation, 42 C.F.R. § 1001.2. That section defines "convicted" to include entry into a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

Subsection (a)(9) provides additional grounds for revocation where an individual subject to an adverse legal action – including a felony conviction – fails to report this development to a Medicare contractor within 30 days. 42 C.F.R. §§ 424.535(a)(9); 424.516(d)(1)(ii).

The facts of this case unequivocally establish grounds for revocation of Petitioner's Medicare participation pursuant to 42 C.F.R. § 424.535(a)(3). On April 16, 2013, Petitioner pled guilty to aggravated assault of a public servant, a first degree felony under Texas law. CMS Ex. 8 at 9. The conviction resulted from an incident in which Petitioner, allegedly intoxicated at the time, drove her car into a Texas State Trooper's vehicle while the officer was conducting a traffic stop. CMS Ex. 9 at 1. In exchange for her guilty plea Petitioner received an order of deferred adjudication and a sentence of ten years of community supervision. CMS Ex. 8 at 9.

Petitioner's plea falls squarely under the purview of 42 C.F.R. § 424.535(a)(3). She pled guilty to a felony and her crime was a crime against a person, consisting of aggravated assault.

Petitioner argues that she was not convicted of a crime, asserting that her deferred adjudication does not constitute a conviction under either Texas or federal law. This argument is without merit.

First, it is irrelevant whether Texas might consider a deferred adjudication, such as the one entered into by Petitioner, to be a conviction. Medicare is a federal program and its administration is not subject to the whims of States and territories' legal systems. Second, Petitioner's deferred adjudication plainly is a conviction within the meaning of *federal* law. 42 C.F.R. § 1001.2, incorporated into 42 C.F.R. § 424.535(a)(3), explicitly defines a conviction to include a deferred adjudication.

Petitioner argues, however, that the regulation's definition of "convicted" conflicts with governing federal statutes. That is an argument that the regulation is *ultra vires* a statute, an argument that I have no authority to hear and decide.

Petitioner also argues that the definition of "convicted" in 42 C.F.R. § 424.535(a)(3), incorporating 42 C.F.R. § 1001.2, was not added until December 2014, more than a year after she entered her plea in Texas court. Petitioner contends that applying this definition to her is an impermissible retroactive application of the regulation.

I disagree. The incorporation of the language of 42 C.F.R. § 1001.2 into the regulation did not add a new definition of "convicted" to the regulation. It merely clarified the regulation's intent. Indeed, the plain language of the regulation that pre-existed the additional language states explicitly that a conviction includes adjudicated pretrial diversions. 42 C.F.R. § 424.535(a)(3)(ii). Petitioner's deferred adjudication is exactly what constitutes a pretrial diversion; a guilty plea entered prior to trial in order to avoid an adjudication of guilt and a potentially harsh sentence.

The Departmental Appeals Board (Board) considered this precise question in *Lorrie Laurel PT*, DAB No. 2524 (2013). In that case, as is true here, the Petitioner pled guilty to a felony and entered into a deferred adjudication program. In a decision entered prior to the December 2014 regulatory clarification, the Board held that the issue of whether Petitioner was convicted of a felony was a matter of federal and not State law, and held additionally that a deferred adjudication was a conviction in the nature of a pretrial diversion. Thus, this case is on all fours with the *Lorrie Laurel* decision. Petitioner argues that case was

wrongly decided but she does not offer any ground on which the facts of this case are distinguishable from the Board's decision.

A basis also exists to revoke Petitioner's participation pursuant to 42 C.F.R. § 424.535(a)(9). Petitioner's duty was to report her conviction as an adverse legal action to a Medicare contractor within 30 days of the Texas court's entry of deferred adjudication on April 6, 2013. She did not do so. Indeed, on November 7, 2014, Petitioner submitted an application for revalidation of her Medicare enrollment in which she stated affirmatively that no final adverse legal actions were imposed against her. CMS Ex. 1 at 17. Petitioner's defense to this failure to report is that she was not required to do so, because she contends that her deferred adjudication is not an "adverse legal action." This assertion is incorrect. The deferred adjudication not only is a conviction of a felony in this case but it carries punitive consequences with it. Petitioner was sentenced to 10 years' community supervision, a lengthy period in which her actions will be scrutinized by appropriate authority. That is a loss of freedom of action by any definition and it renders her deferred adjudication adverse.

_____/s/_____
Steven T. Kessel
Administrative Law Judge