

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cornelius M. Donohue, DPM
(PTANs: 000295YY5Y, 000295GJX, 000295),
(NPI: 1417014887)

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-339

Decision No. CR4986

Date: December 13, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its Medicare administrative contractor, revoked the Medicare enrollment and billing privileges of Cornelius M. Donohue, DPM (Dr. Donohue or Petitioner) pursuant to 42 C.F.R. § 424.535(a)(3) because, within the preceding ten years, Dr. Donohue was convicted of a felony that CMS determined was detrimental to the interests of the Medicare program and its beneficiaries. Dr. Donohue does not deny that he was convicted of a felony, but contends that, because CMS did not sufficiently consider the facts surrounding his conviction or his conduct following his conviction, CMS should not be permitted to revoke his enrollment. For the reasons explained below, I conclude that CMS had a legal basis to revoke Dr. Donohue's Medicare enrollment and billing privileges. Accordingly, I affirm the revocation.

I. Background

The following facts are undisputed. Dr. Donohue is a podiatrist, licensed in Pennsylvania, who was enrolled as a supplier of Medicare services. CMS Exhibit (Ex.) 9 at 3.

On October 26, 2006, Dr. Donohue pled guilty, in the United States District Court for the Eastern District of Pennsylvania, to one count of obstruction of a federal audit in violation of 18 U.S.C. § 1516. CMS Ex. 9 at 36. The court adjudicated him guilty and sentenced him to three years' probation and to pay a fine of \$10,000, among other things. CMS Ex. 9 at 37, 39. The information to which Dr. Donohue pled guilty charged that, in the course of an audit of his Medicare billings by a CMS contractor, he "created and back-dated approximately 35 false, fictitious and fraudulent patient treatment records and physicians' orders to support the thousands of dollars of Medicare billings" he had submitted. CMS Ex. 9 at 26. Concurrently with his guilty plea, Dr. Donohue executed a civil settlement agreement with the U.S. Attorney to "settle claims asserted by the United States under the common law theories of fraudulent misrepresentation, payment by mistake, unjust enrichment, and fraud." CMS Ex. 9 at 41, 42-52. Under the terms of this agreement, Dr. Donohue was required to pay a total of \$136,275.92. CMS Ex. 9 at 43. Dr. Donohue complied with his obligations under the civil settlement agreement.

On February 16, 2011, Dr. Donohue submitted an application to Highmark Medicare Services (since renamed Novitas Solutions), a Medicare administrative contractor, to revalidate his Medicare enrollment. CMS Ex. 9. As part of that application, Dr. Donohue disclosed the conviction described above. *Id.* Dr. Donohue's revalidation application was approved. On January 31, 2014, Dr. Donohue submitted a request to Novitas to change his business name. CMS Ex. 7. Dr. Donohue disclosed his conviction on the change request, as well, and it was approved. CMS Exs. 4, 7.

In a letter dated June 30, 2016, Novitas informed Dr. Donohue that his Medicare billing privileges were being revoked effective October 26, 2006, pursuant to 42 C.F.R. § 424.535(a)(3), based on Dr. Donohue's felony conviction for obstructing a federal audit. In addition, Novitas informed Dr. Donohue that he was subject to a re-enrollment bar of three years. CMS Ex. 3 at 1, 2.

In a letter dated August 29, 2016, Petitioner, through counsel, requested reconsideration. CMS Ex. 2. By letter dated December 5, 2016, CMS, through its Provider Enrollment & Oversight Group, issued an unfavorable reconsidered determination. CMS Ex. 1. In the reconsidered determination, CMS expressly found that Dr. Donohue's conviction was for an offense detrimental to the Medicare program and its beneficiaries:

Dr. Donohue's felony conviction under 18 U.S. Code § 1516, for Obstruction of [a] Federal Audit was due to his creation of fraudulent and

false medical records, which he submitted as true and complete to HGSAdministrators, a private insurance carrier contracted by the Health Care Financial [sic] Administration, during a federal audit. . . . The facts underlying the felony conviction, the creation of false and fraudulent medical records during the context of a federal audit, call into question Dr. Donohue's trustworthiness and veracity. Payment under the Medicare program is made for claims submitted in a manner that relies upon the trustworthiness of our Medicare partners. Therefore, Dr. Donohue's continued enrollment in the Medicare program may place Trust Funds at risk. It necessarily follows that placing Trust Funds at risk is a detriment to beneficiaries.

CMS Ex. 1 at 3-4.

Petitioner requested a hearing and the case was assigned to me. I issued an Acknowledgement and Pre-Hearing Order (Order) dated February 13, 2017, which directed each party to file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Order ¶¶ 4-5. The Order also explained that the parties should submit written direct testimony for any witnesses in lieu of in-person direct testimony. Order ¶ 8. Finally, the Order explained that a hearing would only be necessary for the purpose of cross-examination of witnesses. Order ¶ 10. In response to the Order, CMS filed a motion for summary judgment and brief (CMS Br.) and nine proposed exhibits (CMS Exs. 1-9). Petitioner, through counsel, filed a brief opposing summary judgment (P. Br.). Petitioner offered four exhibits, which he labeled "A" through "D" (P. Ex. A-D). Petitioner did not object to CMS's proposed exhibits; nor did CMS object to Petitioner's exhibits. *See* Order ¶ 7. Therefore, in the absence of objection, I admit into the record CMS Exs. 1-9 and P. Exs. A-D.

In its motion for summary judgment, CMS argues that there are no material facts in dispute that would require a hearing. CMS Br. at 5. Petitioner opposes CMS's motion and requests to present the testimony of four witnesses at a hearing. P. Br. at 2. However, Petitioner did not offer the written direct testimony of the proposed witnesses as required by paragraph 8 of my Order. Moreover, as explained more fully below, even if Petitioner had proffered the witnesses' written direct testimony, I would conclude that the testimony is not material to any issue before me. For these reasons, I find that there is no dispute as to any material fact and CMS is entitled to judgment as a matter of law; I therefore grant CMS's motion for summary judgment.

II. Issues

The issues in this case are:

Whether summary judgment is appropriate; and

Whether CMS had a legal basis to revoke Dr. Donohue's Medicare enrollment and billing privileges because, during the preceding ten years, Dr. Donohue was convicted of a felony offense that CMS determined is detrimental to the best interests of the Medicare program and its beneficiaries.

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Discussion

A. Statutory and Regulatory Framework

As a physician, Dr. Donohue is a "supplier" for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(3). In order to participate in the Medicare program as a supplier, individuals and entities must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke the enrollment and billing privileges of a supplier for any reason stated in 42 C.F.R. § 424.535. When CMS revokes a supplier's Medicare billing privileges, CMS establishes a reenrollment bar for a period ranging from one to three years. 42 C.F.R. § 424.535(c). Generally, a revocation becomes effective 30 days after CMS mails the initial determination revoking Medicare billing privileges, but if the revocation is based on a felony conviction, the revocation is effective with the date of the conviction. 42 C.F.R. § 424.535(g).

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

1. Summary judgment is appropriate because there is no dispute as to any material fact.¹

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.*

¹ My findings of fact and conclusions of law appear as numbered headings in bold italic type.

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 (citations omitted). 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.*

There is no genuine dispute as to any material fact in this case. Petitioner acknowledges that he was convicted of the felony offense of obstructing a federal audit. P. Br. at 1, 5. Petitioner admits the conviction occurred within ten years of Novitas’ initial determination to revoke his Medicare billing privileges. P. Br. at 5. Further, Petitioner does not contend that the felony of which he was convicted is not detrimental to Medicare or its beneficiaries. These are the sole material facts on which the revocation action depends. Petitioner interposes the following arguments: 1) that CMS did not properly exercise its discretion in determining that the felony of which Dr. Donohue was convicted was detrimental to Medicare or its beneficiaries; 2) that Dr. Donohue’s settlement agreement with the United States Attorney bars CMS from revoking Dr. Donohue’s Medicare enrollment and billing privileges; and 3) that revocation of Dr. Donohue’s Medicare enrollment and billing privileges amounts to an excessive fine. However, these arguments raise purely legal issues which are properly addressed on summary judgment. Further, although Petitioner has proposed witnesses, he has not identified any material fact he proposes to prove through their testimony. Therefore, I conclude that there are no material facts in dispute that prevent me from ruling on CMS’s motion for summary judgment. Because I conclude Petitioner’s arguments are without merit, I grant CMS’s motion over Petitioner’s objection.

2. CMS had a legal basis to revoke Dr. Donohue’s Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) because, within the ten years prior to revocation, Dr. Donohue was convicted of a felony offense that CMS determined to be detrimental to the best interests of the Medicare program and its beneficiaries.

CMS may revoke a supplier’s enrollment in the Medicare program if, within the preceding ten years, the supplier was convicted of a felony offense that CMS “has determined to be detrimental to the best interests of the program and its beneficiaries.” 42 C.F.R. § 424.535(a)(3)(i); *see also* Social Security Act (Act) §§ 1842(h)(8) (authorizing the Secretary of Health and Human Services (Secretary) to deny enrollment to a supplier that has been convicted of a felony offense that the Secretary has determined is “detrimental to the best interests of the program or program beneficiaries”) and 1866(b)(2)(D) (authorizing the Secretary to deny or terminate enrollment after he ascertains that a supplier has been convicted of a felony that he “determines is

detrimental to the best interests of the program or program beneficiaries”). Offenses for which billing privileges may be revoked include—but are not limited to—felony crimes against persons, such as murder, rape, assault, and similar crimes; financial crimes such as extortion, embezzlement, income tax evasion, insurance fraud, and similar crimes; felonies that place the Medicare program or its beneficiaries at immediate risk (such as convictions for criminal neglect or misconduct); and felonies that would result in mandatory exclusion under section 1128 of the Act. 42 C.F.R. § 424.535(a)(3)(ii)(A)-(D).

In promulgating 42 C.F.R. § 424.535(a)(3), CMS determined that the enumerated crimes are detrimental per se to Medicare.² See *Letantia Bussell, M.D.*, DAB No. 2196 at 9 (2008). Accordingly, if Dr. Donohue’s conviction for obstruction of a federal audit is for a financial crime similar to insurance fraud, CMS is authorized to revoke his Medicare enrollment and billing privileges. See *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 7 (2009), *aff’d, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass 2010). Moreover, even if Dr. Donohue’s conviction is for a crime not deemed similar to insurance fraud, CMS is authorized to determine, on a case-by-case basis, that a particular felony conviction is detrimental to Medicare and its beneficiaries and therefore supports revocation. See, e.g., *Saeed A. Bajwa, M.D.*, DAB No. 2799 at 8, 10-11 (2017) (42 C.F.R. § 424.535(a)(3)(i) authorizes CMS to determine what felony convictions are a basis for revocation; CMS is not limited to the felonies enumerated as examples).

In the present case, CMS argues that it properly revoked Dr. Donohue’s Medicare enrollment and billing privileges because Dr. Donohue’s conviction for obstruction of a Medicare audit should be regarded as similar to insurance fraud, thus authorizing revocation under 42 C.F.R. § 424.535(a)(3)(ii)(B). CMS Br. at 8. CMS argues further that Dr. Donohue’s conviction reflects unfavorably on Dr. Donohue’s honesty and trustworthiness and is therefore detrimental to the Medicare program and its beneficiaries. *Id.*

I agree with CMS that Dr. Donohue’s conviction for obstructing a Medicare audit is similar to insurance fraud and, as such, is detrimental per se to Medicare and its beneficiaries. The criminal information charging Dr. Donohue with obstruction of a federal audit describes Medicare as a federally funded health insurance program that provides health benefits to

² Effective February 3, 2015, CMS modified 42 C.F.R. § 424.535(a)(3). 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014). In the prior version of the regulation, the enumerated felonies regarded as per se detrimental to Medicare appeared in subsection 424.535(a)(3)(i). However, the descriptions of the enumerated felonies are unchanged. Thus, prior decisions of Departmental Appeals Board (DAB) administrative law judges and appellate panels interpreting 42 C.F.R. § 424.535(a)(3)(i)(A)-(D) are relevant in interpreting the current provision at 42 C.F.R. § 424.535(a)(3)(ii)(A)-(D).

elderly and disabled beneficiaries. CMS Ex. 9 at 24. The information describes how a CMS contractor audited Dr. Donohue's Medicare claims and concluded that Dr. Donohue had been overpaid because he could not produce documentation to verify that he had rendered services to certain beneficiaries. CMS Ex. 9 at 26. According to the information, in response to the overpayment determination, Dr. Donohue, "[k]nowing that he did not possess accurate, complete and truthful patient records to confirm his claimed . . . Medicare billings . . . created and back-dated approximately 35 false, fictitious and fraudulent patient treatment records and physicians' orders to support the thousands of dollars of Medicare billings which [he] previously submitted on behalf of these patients." *Id.* Dr. Donohue pled guilty to the conduct charged in the information. CMS Ex. 9 at 36. I therefore find it undisputed that Dr. Donohue fabricated documents which he submitted to a CMS contractor to justify his claims for reimbursement from Medicare. That is, Dr. Donohue knew that his claims would not qualify for Medicare reimbursement absent proper documentation; therefore, he fabricated documents in an attempt to avoid liability for the Medicare overpayment assessed against him. In so doing, Dr. Donohue used fraudulent means in an attempt to retain insurance reimbursements to which he was not entitled. Such conduct is sufficiently similar to insurance fraud to be regarded as a financial crime described in 42 C.F.R. § 424.535(a)(3)(ii)(B). This conclusion is reinforced by the *Ahmed* decision, in which an appellate panel of the DAB endorsed the view that a conviction for obstructing a federal investigation by creating and submitting backdated documents that misstated patients' medical conditions was similar to insurance fraud. DAB No. 2261 at 8-10.

But, even if I were to conclude that Dr. Donohue's conviction for obstructing a Medicare audit is not similar to insurance fraud, I would nevertheless conclude that CMS properly determined that the conviction was for a felony that CMS determined is detrimental to the Medicare program and its beneficiaries. In this case, it is apparent that CMS exercised its discretion, pursuant to 42 C.F.R. § 424.535(a)(3)(i), to determine that a felony conviction not listed in 42 C.F.R. § 424.535(a)(3)(ii) is detrimental to the Medicare program and its beneficiaries and, accordingly, warrants revocation. *See Bajwa*, DAB No. 2799 at 8, 10-11. If I am satisfied that CMS exercised its discretion under 42 C.F.R. § 424.535(a)(3)(i), I may not substitute my own determination as to whether a given felony is detrimental to the Medicare program and its beneficiaries for that of CMS. *See Brian K. Ellefsen, DO*, DAB No. 2626 at 7 (2015). The record before me amply demonstrates that CMS exercised its discretion. CMS itself issued the reconsidered determination in which it expressly found that Dr. Donohue's conviction is detrimental to the Medicare program and its beneficiaries because the conviction calls into question whether Dr. Donohue can be trusted to submit truthful claims to Medicare. CMS Ex. 1 at 4.

Petitioner argues that CMS did not make a proper determination to revoke Dr. Donohue's Medicare enrollment and billing privileges because it did not articulate a complete analysis of the individual facts of Dr. Donohue's case. P. Br. at 5-11. Petitioner argues that the decision in *Subramanya K. Prasad, M.D.*, DAB CR4522 (2016), compels CMS to engage in a detailed analysis of a supplier's conduct before denying or revoking billing privileges. *See*

P. Br. at 6-8. Petitioner misreads the decision. In *Prasad*, the administrative law judge found the denial of Medicare billing privileges improper because the contractor did not clearly articulate a finding that the supplier's conviction was detrimental to the best interests of the Medicare program and its beneficiaries. DAB CR4522 at 12-13. Contrary to Petitioner's characterization, *Prasad* is entirely consistent with appellate decisions of the DAB which hold that, so long as it is clear that CMS has exercised its discretionary authority and reached a conclusion that a particular felony is detrimental to Medicare, it is not required to articulate a detailed analysis of its decision making process. For example, in *Ellefsen*, the panel stated:

The regulations governing this proceeding require only that an adverse reconsidered determination must specify the "reasons for the determination" and the "conditions or requirements of law or regulations that the affected party fails to meet." 42 C.F.R. § 498.25(a)(2), (3). Thus, if CMS exercises its discretion to deny a provider's or supplier's application to participate in Medicare, CMS must identify the authority that gives it that discretion, i.e., in this case, the authority in section 424.530(a)(3) to deny an application based on a felony conviction within the 10 years preceding the application. 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.

DAB No. 2626 at 9; *see also Ahmed*, DAB No. 2261 at 17-18 (CMS or its contractor is authorized to revoke a supplier's billing privileges based solely on its determination that the supplier was convicted of a felony that is detrimental to Medicare and its beneficiaries without expressly considering factors mentioned in the preamble to the regulations). Here, CMS's reconsidered determination makes it abundantly clear that it exercised its authority to determine that Dr. Donohue's Medicare billing privileges should be revoked because he was convicted of a felony that is detrimental to Medicare and its beneficiaries, as authorized under 42 C.F.R. § 424.535(a)(3)(i).

In summary, whether or not Dr. Donohue's conviction was for a felony financial crime similar to insurance fraud, CMS acted within the scope of its authority to determine that Dr. Donohue was convicted of a felony detrimental to the best interests of the Medicare program and its beneficiaries. Moreover, as discussed in the following sections of this decision, nothing in Dr. Donohue's civil settlement agreement with the United States Attorney impinges on CMS's authority to revoke his Medicare enrollment and billing privileges.

3. Petitioner's agreement with the United States Attorney to settle his civil liability for submitting false documents does not limit CMS's authority to revoke his Medicare enrollment and billing privileges.

At about the same time that Dr. Donohue pled guilty to obstructing a federal audit, as described above, he also entered into a civil settlement agreement with the United States Attorney. *See* CMS Ex. 9 at 41-52. Petitioner argues that the terms of the settlement agreement preclude CMS from revoking Dr. Donohue's Medicare enrollment and billing privileges. P. Br. at 11. This argument misreads the settlement agreement to such an extent that it borders on disingenuous.

By its terms, the settlement agreement releases Dr. Donohue from liability for "any civil or administrative monetary claim the United States has or may have under the common law theories of payment by mistake, unjust enrichment, and fraud" arising from the conduct for which Dr. Donohue was convicted. CMS Ex. 9 at 45 (underscore added). The settlement agreement explicitly excludes "any administrative liability" of Dr. Donohue. CMS Ex. 9 at 45-46. The language of the settlement agreement makes plain that the agreement addresses only the claims of the United States for money damages and leaves CMS and other agencies free to pursue administrative action against Dr. Donohue. The settlement agreement specifically cites, as an example, the Department of Health and Human Services' (HHS') authority to exclude Dr. Donohue from participation in Medicare and state health care programs. CMS Ex. 9 at 46. Revocation of Dr. Donohue's Medicare billing privileges is analogous to exclusion from the program, since both administrative remedies prevent Dr. Donohue from receiving Medicare reimbursement because he engaged in conduct that demonstrates he poses a risk to the Medicare trust fund or to Medicare beneficiaries. If the settlement agreement permits HHS to exclude Dr. Donohue, there is no reason to assume it does not likewise permit CMS to revoke Dr. Donohue's billing privileges. I therefore conclude that Dr. Donohue's civil settlement with the United States Attorney does not restrict CMS's authority to revoke Dr. Donohue's Medicare enrollment and billing privileges.

4. In entering the civil settlement agreement, Petitioner expressly waived the right to assert that the Excessive Fines Clause of the Constitution bars CMS's action here.

Paragraph III.F of the civil settlement agreement described above provides as follows:

Cornelius M. Donohue, III, DPM waives and shall not assert any defenses he may have to any criminal prosecution or administrative action relating to the conduct set forth in Preamble Paragraph 2 [i.e. submitting false documents to support his Medicare claims], which defenses may be based in whole or in part on a contention that, under the Double Jeopardy Clause

in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative proceeding.

CMS Ex. 9 at 47-48. As is apparent from the quoted language, when he signed the settlement agreement, Dr. Donohue explicitly waived the defense that his repayment under the settlement agreement bars further administrative action because such action would represent an excessive fine. Yet, in spite of having signed the agreement, including the waiver provision, Petitioner argues precisely that in this proceeding. P. Br. at 11-13. I will not entertain an argument that Petitioner raises here in contravention of the waiver to which he agreed.³

5. Petitioner's arguments in equity are not a basis to reverse the revocation of Dr. Donohue's Medicare enrollment and billing privileges.

Finally, Petitioner argues that revocation of Dr. Donohue's Medicare billing privileges "has dramatically and unfairly impacted Dr. Donohue's ability to earn a living and provide for his family." P. Br. at 13. I construe this as an argument that revocation of Dr. Donohue's Medicare enrollment and billing privileges is inequitable under the circumstances presented. However, CMS's discretionary act to revoke a provider or supplier is not subject to review based on equity or mitigating circumstances. *Bussell*, DAB No. 2196 at 13. Rather, "the right to review of CMS's determination by an [administrative law judge] serves to determine whether CMS has the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the [administrative law judge's] discretion about whether to revoke." *Id.* (emphasis omitted). Once CMS establishes a legal basis on which to proceed with a revocation, then the CMS determination to revoke becomes a permissible exercise of discretion, which I am not permitted to review. *See id.* at 10; *see also Ahmed*, DAB No. 2261 at 19 (if CMS establishes the regulatory elements necessary for revocation, an administrative law judge may not substitute his or her "discretion for that of CMS in determining whether revocation is appropriate under all the circumstances") (citation omitted).

³ Even were I to disregard Petitioner's waiver of any defense based on the Excessive Fines Clause, I would find the clause inapplicable here, as CMS's administrative action does not involve imposing a fine. Instead, by revoking Dr. Donohue's Medicare enrollment and billing privileges, CMS has exercised its discretion to decline to do business with Dr. Donohue. While that decision undoubtedly has financial consequences, it is not a fine, nor even a civil money penalty.

V. Conclusion

For the reasons stated, I affirm CMS's revocation of Dr. Donohue's Medicare enrollment and billing privileges.

/s/
Leslie A. Weyn
Administrative Law Judge