Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Donna J. Mitchell,	)	Date: September 26, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-489
	)	Decision No. CR1662
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS), as was affirmed on reconsideration, to deny the request of Petitioner, Donna J. Mitchell, to participate in the Medicare program.

I. Background

In July 2006 Petitioner, a nurse practitioner, applied to participate in the Medicare program. CMS determined to deny the application. Petitioner requested reconsideration and reconsideration was denied on March 30, 2007. She then requested a hearing and the case was assigned to me for a hearing and a decision.

I held a pre-hearing conference by telephone and issued a pre-hearing order in which I directed the parties to file written exchanges including proposed exhibits and briefs. I advised them that either had the option to request a hearing in person. I told the parties that I would grant a request for an in-person hearing based on a proffer of relevant testimony that did not duplicate an exhibit.

CMS filed a brief and 11 proposed exhibits which it identified as CMS Ex. 1 - CMS Ex. 11. Petitioner filed a letter and one proposed exhibit, an April 11, 2007 letter signed by Scott T. Hedges, M.D., which she did not identify with an exhibit number but which I identify as P. Ex. 1. Neither Petitioner nor CMS requested that I convene an in-person hearing.[1] I receive into the record CMS Ex. 1 - CMS Ex. 11 and P. Ex. 1.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether CMS is authorized to deny Petitioner's application for provider enrollment.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law to support my decision in this case. I set forth each Finding below as a separate heading.

1. CMS has discretion to deny provider enrollment or revalidation to any provider or supplier who was convicted, within the 10 years preceding the date of application for enrollment or revalidation, of a felony offense that CMS determines to be detrimental to the best interests of Medicare and its beneficiaries. I have no authority to question CMS's exercise of discretion in such a case.

Regulations governing enrollment or revalidation by a provider or a supplier grant CMS discretionary authority to deny enrollment or revalidation to any provider or supplier who has been convicted of a felony offense within the 10 years preceding the date of application for enrollment or revalidation where CMS determines the offense to be detrimental to the best interests of Medicare and its beneficiaries. 42 C.F.R. § 424.530(a)(3). A subsection of this regulation specifically defines a felony conviction falling within those described in section 1128 of the Social Security Act (Act) as a basis for denial of provider enrollment or revalidation. 42 C.F.R. § 424.530(a)(3)(i)(D).

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[1] CMS styled its brief as a motion for summary disposition. I find it unnecessary to decide whether the criteria for summary disposition are present in this case inasmuch as neither party has requested that I receive evidence in person.

On its face the regulation gives CMS the discretion to determine which convictions will be the basis for denying enrollment or revalidation. I have no authority to look behind CMS's exercise of discretion and to substitute my judgment for that of CMS. I cannot, on my own, decide whether an offense is detrimental to the best interest of Medicare and its beneficiaries. Therefore, I must sustain CMS's determination (and the reconsideration determination) if I conclude that Petitioner was convicted of a felony within the 10 years preceding the date of her application and CMS exercised its discretion, based on that conviction, to deny enrollment to Petitioner.

2. Petitioner was convicted of a felony within 10 years of the date of her application for provider enrollment.

There is no dispute that on December 7, 1999 Petitioner entered a guilty plea to three criminal charges that had been filed against her by the State of Kentucky. CMS Ex. 2, at 1. Her convictions included convictions on two counts for making a false statement regarding a prescription and a conviction on one count of forgery of a prescription. *Id.* Under Kentucky law, these crimes all were felonies as of the date of Petitioner's conviction. Ky. Rev. Stat. Ann. § 218A.140 (1990), as amended by 2007 Ky Acts Ch. 124 (SB 88); Ky. Rev. Stat. Ann. § 218A.282 (1998).

Petitioner's convictions were not only of felonies but they included a conviction for a felony that is described at section 1128(a)(4) of the Act. This section mandates exclusion from Medicare and other federally financed health care programs of any individual who is convicted of a felony occurring after August 21, 1996 "relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." Act, section 1128(a)(4). Petitioner admits that in 1999 she wrote a prescription for Ritalin for a patient and signed a physician's name to the prescription. CMS Ex. 5, at 1. Ritalin is a Schedule II controlled substance. CMS Ex. 3, at 1; CMS Ex. 5, at 1.

3. CMS has discretion to deny enrollment to Petitioner inasmuch as she was convicted of a felony within the 10 years preceding the date of her application for enrollment.

The fact that Petitioner was convicted of felonies within 10 years of the date of her application for enrollment is, on its face, sufficient to sustain CMS's determination to deny her enrollment application. As I discuss above, at Finding 1, I have no authority to question CMS's exercise of discretion to deny Petitioner enrollment if, in fact, Petitioner was convicted of a felony or felonies within the 10 years preceding the date of her application and CMS exercises its discretion, based on the conviction, to deny Petitioner enrollment.

Moreover, Petitioner was convicted not only of a felony but of a felony that is described specifically at 42 C.F.R. 424.530(a)(3)(i)(D) as being one for which CMS will deny enrollment if the conviction for that felony was entered within the 10 years preceding the application for enrollment. Consequently, CMS not only had the broad discretion to deny Petitioner's application based on her felony conviction but it could also do so based on explicit regulatory authority.

Petitioner argues that her conviction was a consequence of poor judgment on her part, motivated by her good faith desire to serve her patients. She avers that she was not attempting to commit fraud or to make a misrepresentation when she signed prescriptions without authority but, rather, was simply trying to get necessary medication to a patient. I have no reason to doubt Petitioner's sincerity and good faith. Her argument is sympathetic. However, I must sustain CMS's determination here because it – and not I – has the discretionary authority to deny Petitioner provider enrollment as a consequence of her conviction.

/s/
Steven T. Kessel
Administrative Law Judge