Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Robert F. Tzeng, M.D.,	)	
	)	Date: September 27, 2007
Petitioner,	)	
	)	
- v.-	)	Docket No. C-07-324
	)	Decision No. CR1665
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I affirm the determination of the Medicare Part B Hearing Officer (Hearing Officer) to uphold the revocation by the Medicare Part B Carrier, National Heritage Insurance Company (NHIC or Medicare Carrier) of Petitioner's Medicare provider identification number (PIN) effective February 17, 2007. I find the Hearing Officer correctly determined that Petitioner was convicted within the past 10 years of a felony that the Centers for Medicare & Medicaid Services (CMS) has determined to be detrimental to the best interests of the Medicare program.

I. Applicable Law and Regulations

Section 1842(h)(8) of the Social Security Act (Act), grants the Secretary of the Department of Health and Human Services (Secretary), discretion to "refuse to enter into an agreement . . . or . . . terminate or refuse to renew such agreement" with a physician or supplier that "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 program or program beneficiaries."

Section 1866(b)(2)(D) of the Act provides that upon reasonable notice to a provider, the Secretary may, at his discretion, terminate a provider's agreement after it has been "ascertained that the provider 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 program or program beneficiaries."

CMS may revoke the Medicare billing privileges of a provider or supplier who has, within the past 10 years preceding enrollment or revalidation of enrollment, been convicted of a felony that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries. 42 C.F.R. §§ 424.535(a) and 424.535(a)(3).

CMS has determined that a felony conviction for income tax evasion is detrimental to the best interests of the Medicare program and its beneficiaries. 42 C.F.R. § 424.535 (a)(3)(i)(B).

Section 1866(j)(2) of the Act, 42 U.S.C § 1395cc(j)(2), gives providers and suppliers the right to appeal certain determinations involving enrollment, including the revocation of billing privileges, using the procedures that apply under section 1866(h)(1)(A) of the Act. These procedures are set out at 42 C.F.R. Part 498, *et. seq*., and provide for hearings by Administrative Law Judges (ALJs) and review of ALJ decisions by the Departmental Appeals Board (Board).

In provider appeals under 42 C.F.R. Part 498, the Board has determined that CMS must make a *prima facie* case that an entity has failed to comply substantially with federal requirements. *See MediSource Corporation*, DAB No. 2011 (2006). "*Prima facie"* means that the evidence is "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted." *Rosalyn L. Olian,* DAB CR1472, at 2 (2006), *quoting Black's Law Dictionary* 1228 (8th ed. 2004); *see also Hillman Rehabilitation Center*, DAB No. 1611, at 8 (1997), *aff'd, Hillman Rehabilitation Ctr. v. U.S. Dep't. of Health and Human Services,* No. 98-3789 (GEB) (D.N.J. May 13, 1999). To prevail, the entity must overcome CMS's showing by a preponderance of the evidence. *Batavia Nursing and Convalescent Center,* DAB No. 1904 (2004), *aff'd, Batavia Nursing and Convalescent Center v. Thompson,* 129 Fed. Appx.187 (6th Cir. 2005); *Emerald Oaks,* DAB No. 1800 (2001); *Cross Creek Health Care Center,* DAB No. 1665 (1998).

II. Summary Judgment

On May 21, 2007, CMS submitted a motion for summary judgment and brief (CMS Br.) accompanied by three exhibits, identified as CMS Exs. 1-3. I received CMS's exhibits into evidence without objection. Petitioner submitted a response brief (P. Br.)

accompanied by one exhibit, identified as P. Ex. 1, on June 21, 2007. I received this exhibit into evidence without objection. CMS submitted a reply brief (CMS Reply), on July 5, 2007.

Summary judgment is generally appropriate when the record reveals that no genuine dispute exists as to any material fact and the undisputed facts clearly demonstrate that one party is entitled to judgment as a matter of law. *Residence at Kensington Place,* DAB No. 1963 (2005); *White Lake Family Medicine, P.C.,* DAB No. 1951 (2004). Here, the parties do not disagree concerning the material facts of the case. Their disagreement lies in the application of the law to the facts. A dispute between the parties over the correct conclusion to be drawn from undisputed facts is not an impediment to the entry of summary judgment, and in truth may be understood as the precise procedural context in which summary disposition is most appropriate. In fact, during a prehearing conference held on April 19, 2007, the parties agreed that an in-person hearing was not necessary, and that a decision may be issued based on the written submissions of the parties.

III. Undisputed Material Facts

1. Petitioner was convicted in United States District Court for the Central District of California on February 4, 1998, of one count of a violation of 26 U.S.C. § 7201, income tax evasion, a felony.

2. By letter dated January 18, 2007, Petitioner was notified by the NHIC that, based on his felony conviction, his Medicare Provider Identification Number (PIN) would be revoked effective February 17, 2007.

3. On January 21, 2007, Petitioner timely requested an on-the-record reconsideration of the revocation.

4. The Hearing Officer upheld the revocation and issued a decision on March 9, 2007.

5. On March 20, 2007, Petitioner timely filed a request for a hearing before an ALJ of the Civil Remedies Division, Departmental Appeals Board.

6. Petitioner is a medical doctor licensed to practice medicine in the State of California, and was a physician with Medicare billing privileges pursuant to PIN A39498.

IV. Issues

A. Whether there is a basis for the Medicare Carrier's revocation of Petitioner's PIN, and

B. Whether CMS's regulation that allows for the revocation of Medicare billing privileges of a provider or supplier who has, within the past 10 years, been convicted of a felony that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries, may be applied to Petitioner.

V. Findings of Fact, Conclusions of Law, and Discussion

A. The Carrier had a basis for the revocation of Petitioner's PIN.

Section 1842(h)(8) of the Act provides that "[t]he Secretary may refuse to enter into an agreement with a physician or supplier . . . or may terminate or refuse to renew such agreement" with a physician or supplier that "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 program or program beneficiaries." Pursuant to this statutory provision, the Secretary promulgated new regulations, effective June 20, 2006, which revised the Medicare provider and supplier enrollment requirements that affected all providers that billed the Medicare program and desired to maintain Medicare billing privileges. Requirements for Providers and Suppliers To Establish and Maintain Medicare Enrollment, 71 Fed. Reg. 20,754 (April 21, 2006). These new rules consolidated various Medicare regulations that were dispersed throughout the Code of Federal Regulations and grouped them in a new Subpart, Subpart P, 42 C.F.R. § 424.500, *et. seq*. The purpose of the new regulatory amendments is to ensure that all Medicare providers and suppliers are qualified to provide healthcare services and to prevent unqualified, fraudulent, or excluded providers from providing Medicare covered items and services. Thus, all providers and suppliers, including those enrolled in the Medicare program at the time of the effective date of the amendments, were required to either complete and submit an enrollment application or revalidate their existing enrollment information. *See* 42 C.F.R. § 424.500.

42 C.F.R. §§ 424.535(a) and 424.535(a)(3) provide that CMS may revoke the Medicare billing privileges of a provider or supplier who has, within the 10 years preceding enrollment or revalidation of enrollment, been convicted of a felony that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries.

CMS has determined that a felony conviction for income tax evasion is detrimental to the best interests of the Medicare program and its beneficiaries. 42 C.F.R. § 424.535 (a)(3)(i)(B).

Petitioner was convicted of an income tax evasion felony in United States District Court for the Central District of California on February 4, 1998.

By letter dated January 18, 2007, and pursuant to the regulatory amendments that became effective June 20, 2006, Petitioner was notified by the Medicare Carrier that his PIN would be revoked effective February 17, 2007.

I find that the Medicare Carrier had a basis for the revocation of Petitioner's PIN.

B. CMS's regulation that allows for the revocation of Medicare billing privileges of a provider or supplier who has, within the past 10 years, been convicted of a felony that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries, may be applied to Petitioner.

Petitioner contends that the revocation of his Medicare billing privileges based on a 1998 felony conviction constitutes an impermissible retroactive application of the regulation. P. Br. at 3-7. Specifically, he argues that a provision is found to be retroactive when it " 'takes away or impairs vested rights acquired under existing laws, *or* creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .' " P. Br. at 4 (quoting *INS v. St. Cyr,* 533 U.S. 289, 321 (2001)) (citations omitted); *Kankamalage v. INS*, 335 F.3d 858, 862 (9th Cir. 2003) (emphasis added). Petitioner adds that "the decision as to whether a retroactive effect exists should be informed by familiar considerations of fair notice, reasonable reliance, and settled expectations." P. Br. at 4-5 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994); *St. Cyr* at 321.)

Whereas CMS argues that Petitioner's challenge goes to the validity of the regulation (CMS Br. at 5), Petitioner maintains that its challenge is not to the validity of the regulation, but rather to the application of the regulation to his conviction. P. Br. at 3 n.1. Of course, the reason why the Medicare Carrier applied the regulation to Petitioner is because he was convicted of a felony within the past 10 years preceding enrollment or revalidation of enrollment, a felony that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries, i.e., income tax evasion. Consequently, the language content of the regulation is essential to Petitioner's argument.

In order for me to conclude that the regulation should not apply to Petitioner, I would have to find that CMS exceeded its delegated legislative authority to promulgate regulations. That is something that is beyond the scope of the matters upon which I am empowered to rule.

Notwithstanding the above, Petitioner's retroactivity argument is misplaced.

Although Petitioner concedes that statutory authority to terminate a provider agreement had existed for some time prior to the promulgation of the regulation here under consideration,[1] he contends that no regulation or statute had previously established that income tax evasion should be included in the list of felonies that could result in the loss of billing privileges. Thus, Petitioner, citing the retroactivity analysis of *Landgraf*, posits that the test to determine whether or not a statute or regulation has an impermissible retroactive effect rests on two considerations. First, it must be determined whether or not a statute or regulation clearly expresses that it is to be applied retroactively. Secondly, argues Petitioner, it must be determined whether the statute or regulation in question "'attaches new legal consequences to events completed before its enactment.'" P. Br. at 4 (quoting *Landgraf* at 270).

The regulation at 42 C.F.R. § 424.535(a)(3)(i)(B) implements the statutory provision at section 1842(h)(8) of the Act. Section 1842(h)(8) of the Act was enacted as part of the Balanced Budget Act of 1997, which predates Petitioner's 1998 felony conviction. Section 1842(h)(8) of the Act grants the Secretary discretion to refuse to enter into an agreement, or to terminate or refuse to renew an agreement, with a physician or supplier that "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 program or program beneficiaries." Because Section 1842(h)(8) was already in effect at the time of Petitioner's 1998 felony conviction, it has therefore not been applied retroactively. It is not relevant to Petitioner's appeal that the Secretary established in 2006 that income tax evasion is an offense that is detrimental to the best interests of the Medicare program or program beneficiaries.

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[1] Section 1842(h)(8) of the Act was enacted as part of the Balanced Budget Act of 1997.

It has been established that a Medicare provider agreement is subject to change or modification, and bestows upon a participating physician a privilege, and not a vested or proprietary right. The law and regulations are clear that CMS may suspend, revoke, or modify the agreement as is necessary for the benefit of the Medicare program and its beneficiaries.

In *Cervoni v. Sec'y of Health, Educ. and Welfare,* 581 F.2d 1010 (1st Cir. 1978), a physician brought suit seeking judicial review of an administrative determination by the Secretary of Health, Education and Welfare rejecting his claim that his services as a hospital-based pathologist should be reimbursed under Part B of the Medicare Act for physicians' services, rather than under Part A for hospital services.

In its holding, the U.S. Court of Appeals for the first Circuit held that:

> The Medicare Part B program is nothing more than a governmental insurance program for the aged. As such the real parties in interest are the beneficiaries; physicians are parties in interest only as assignees of the beneficiaries.
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> ***
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> [P]hysicians do not have a protectable property interest in their continuing eligibility to bill for reimbursement under Part B. If services rendered by a physician are disentitled from Part B eligibility, the physician can either not perform the services or bill the patient directly.
>
> ***
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> The mere fact that, at the start of Medicare, Dr. Cervoni was paid under Part B did not create a valid expectation that he could continue to be reimbursed under Part B. Since reimbursement through Part B was a creature of the Medicare statute and regulations, the regulations and interpretations of them could be expected to be modified by Congress or by HEW. As stated by the Supreme Court:
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> To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which

> it demands. It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and has since retained, a clause expressly reserving to it "(t)he right to alter, amend, or repeal any provision" of the Act. § 1104, 49 Stat. 648, 42 U.S.C. § 1304. (citation omitted) *Flemming v. Nestor*, 363 U.S. 603, 610-11, 80 S.Ct. 1367, 1372-74, 4 L.Ed.2d 1435 (1960).

Cervoni, 581 F.2d at 1018-19.

It is, therefore, transparent that the interests of participating physicians are not the overarching concern of the Medicare program and its regulations. The record does not reflect the particulars of Petitioner's tax evasion conviction, but he engaged in a financial crime, and under 42 C.F.R. §§ 424.535(a) and 424.535(a)(3), this is a sufficient basis for CMS to conclude that such conduct would make him untrustworthy, and would place Medicare funds at risk. This is particularly disturbing because tax evaders who are reimbursed by the federal government place an added burden on the average American taxpayer, who would have to pay more taxes to make up for the shortfall.

In view of the foregoing, I find that the Medicare Carrier properly applied the regulations to revoke Petitioner's Medicare billing privileges.

VI. Conclusion

Having determined that, as a matter of law, Petitioner is without a right to the relief he seeks, I affirm the determination of the Hearing Officer to uphold the revocation by the Medicare Carrier of Petitioner's Medicare PIN.

/s/
José A. Anglada
Administrative Law Judge