

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Dr. Fady Fayad,)	Date: January 14, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-745
)	Decision No. CR1887
Centers for Medicare & Medicaid)	
Services.)	

DECISION

This case is before me on the Centers for Medicare & Medicaid Services' (CMS's) Motion for Summary Disposition. I find and conclude that the enrollment and billing privileges of Petitioner, Dr. Fady Fayad, in the Medicare program were properly revoked. Petitioner was, within the 10 years preceding his enrollment or the revalidation of his enrollment, convicted of a federal felony offense that CMS determined to be detrimental to the best interests of the Medicare program and its beneficiaries, one of the reasons for such revocation established by regulation at 42 C.F.R. § 424.535(a)(3). Accordingly, I affirm the July 22, 2008 determination of the Medicare Hearing Officer and uphold the revocation of Petitioner's Medicare provider enrollment and billing privileges.

I. Procedural History

On March 15, 2008, Wisconsin Physicians Service (WPS), the Medicare Part B Carrier for Michigan, notified Petitioner that his Medicare enrollment and billing privileges were to be revoked. WPS explained that the controlling regulation, which it inaccurately cited as 42 C.F.R. § 424.535(3), allows the revocation of a provider's Medicare enrollment and billing privileges if the provider, 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. WPS's March 15, 2008 letter did not specify or identify the felony conviction on which it relied in its decision.

Petitioner timely sought reconsideration of WPS's decision by letter of May 9, 2008, and in that letter set out details of the felony conviction Petitioner believed to be the basis of WPS's decision. According to Petitioner's letter, in 2007 he had been convicted of Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371, in the United States District Court for the Eastern District of Michigan.

On July 22, 2008, WPS affirmed its decision to revoke Petitioner's Medicare provider enrollment and billing privileges, referring in its reconsidered decision to the conviction described by Petitioner, and reciting the complete text of the regulation, 42 C.F.R. § 424.535(a)(3), which it had inaccurately cited in its March 15, 2008 initial decision.

Petitioner timely perfected this appeal by a September 19, 2008 Request for Hearing. I convened a prehearing conference with the parties by telephone on October 7, 2008, pursuant to 42 C.F.R. § 498.47. A summary of that conference appears in my Order of that date. The cycle of motion practice and briefing established by that Order closed December 15, 2008.

The evidentiary record on which I decide this case consists of 13 exhibits. CMS proffered nine exhibits, CMS Exhibits 1-9 (CMS Exs. 1-9), to which Petitioner has not objected, and they are admitted as designated. Petitioner proffered four exhibits, Petitioner's Exhibits 1-4 (P. Exs. 1-4), to which CMS has not objected, and they are admitted as designated.

II. Issue

The issue before me in this case is whether CMS, acting through WPS, the Medicare Part B carrier for Michigan, properly revoked Petitioner's Medicare Part B enrollment and billing privileges.

III. Controlling Statutes and Regulations

Section 1866(j)(1) of the Social Security Act (Act), 42 U.S.C. § 1395cc(j)(1), authorizes the Secretary of Health and Human Services (Secretary) to establish a process for the enrollment in the Medicare Part B program of providers of services and suppliers. Section 1866(j)(2) of the Act, 42 U.S.C. § 1395cc(j)(2), gives providers and suppliers appeal rights for certain determinations involving enrollment, using the procedures that apply under section 1866(h)(1)(A) of the Act, 42 U.S.C. § 1395cc(h)(1)(A). These procedures are set out at 42 C.F.R. Part 498, *et seq.*, and provide for hearings before the Administrative Law Judges (ALJs) of this forum, and for review of the resulting ALJ decisions by the Departmental Appeals Board (Board). The most recent revisions of 42

C.F.R. Part 498 relevant to these proceedings became effective August 26, 2008. 73 Fed. Reg. 36448-36463 (June 27, 2008).

In provider and supplier appeals under section 1866(j)(1) of the Act and 42 C.F.R. Part 498, CMS must make a *prima facie* showing that the provider or supplier has failed to comply substantially with federal requirements. See *MediSource Corporation*, DAB No. 2011 (2006). To prevail, the provider or supplier must overcome CMS's *prima facie* 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. 181 (6th Cir. 2005); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Center*, DAB No. 1665 (1998).

Regulations define the circumstances in which CMS may reject the application of a provider or supplier to participate in the Medicare program, or may revoke an enrollment already granted. The regulation at 42 C.F.R. § 424.535(a) provides several specific reasons for revocation, and, among those reasons, is the one at issue in this case, which allows revocation if:

(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.

42 C.F.R. § 424.535(a)(3).

IV. Findings and Conclusions

I find and conclude as follows:

1. On July 26, 2007, in the United States District Court for the Eastern District of Michigan, Petitioner, Dr. Fady Fayad, was convicted of a felony offense, a violation of 18 U.S.C. § 371, Conspiracy to Defraud the United States. P. Ex. 1; CMS Exs. 1, 2, 3.¹
2. CMS has determined the felony offense of which Petitioner was convicted to be detrimental to the best interests of the Medicare program and its beneficiaries.
3. CMS, acting through WPS, the Medicare Part B carrier for Michigan, properly revoked Petitioner's Medicare Part B enrollment and billing privileges. 42 C.F.R. § 424.535(a)(3).

V. Discussion

CMS has moved for resolution of the issue in its favor by its Motion for Summary Disposition. While FED. R. CIV. P. 56 is not directly applicable to proceedings under 42 C.F.R. Part 498, it does provide guidance for the standard of review for motions seeking summary disposition. 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. *White Lake Family Medicine, P.C.*, DAB No. 1951 (2004). In evaluating whether there is a genuine issue as to a material fact, an administrative law judge must view the facts and the inferences reasonably to be drawn from the facts in the light most favorable to the nonmoving party. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3rd. Cir. 1986); *Oklahoma Heart Hospital*, DAB No. 2183, at 9 (2008); *Brightview Care Center*, DAB No. 2132, at 9-10 (2007); *Madison Health Care, Inc.*, DAB No. 1927, at 5-7 (2004). I have employed that standard in this case.

The parties do not disagree concerning the very limited number of material facts in this case. Their disagreement lies in their views as to the materiality of certain other facts,

¹ I note that the documents from the United States District Court for the Eastern District of Michigan show Petitioner's name as "Fadi" Fayad. P. Ex. 1; CMS Exs. 2, 3. However, in Petitioner's Guilty Plea Questionnaire for that Court, Petitioner wrote that his name is "Fady" Fayad (CMS Ex. 3) and Petitioner has not disputed that he is the "Fadi" Fayad referenced in those documents.

and in their positions on the application of the law to the facts, both material and immaterial.

The material facts on which the parties agree are Petitioner's having been convicted on his plea of guilty to a single count of Conspiracy to Defraud the United States, contrary to 18 U.S.C. § 371. They agree that the conviction's venue was the United States District Court for the Eastern District of Michigan, and that the District Court's Judgment in a Criminal case was imposed on July 26, 2007. CMS Exs. 1, 2, 3; P. Ex. 1. They agree that CMS in fact made the determination that the crime was detrimental to the best interests of the Medicare program and its beneficiaries.

I have described the number of material facts in this case as "very limited." Those material facts are congruent with the two essential elements that must be proven in order to sustain a revocation on the basis here at issue. The Board has identified and explained those two essential elements with precision:

Section 1842(h) of the Act explicitly places the authority to make the determination of whether an offense is detrimental with the Secretary. The implementing regulations at section 424.535(a)(3) delegate that authority to CMS, not to the ALJ.

Furthermore, the regulations, as we have found above, embody CMS's determination that income tax evasion is an offense detrimental to the program and to its beneficiaries. CMS made this determination with regard to felony income tax evasion after a formal notice and comment rulemaking procedure. Moreover, contrary to Dr. Bussell's contentions, nothing in the regulation constrains CMS to make its determination individually on a case-by-case basis, and the administrative burden of doing so would be substantial.

The ALJ's review of CMS's revocation of Dr. Bussell's Medicare billing privileges is thus limited to whether CMS had established a legal basis for its actions. Once Dr. Bussell acknowledged that she was indeed convicted of income tax evasion, the legal basis for CMS's action was established. In other words, the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke Dr. Bussell's Medicare billing privileges, not to substitute the ALJ's discretion about whether to revoke. Michael J. Rosen, M.D., DAB No. 2096 (2007), at 14. Once the ALJ found that both elements required for revocation were present (i.e. (1) felony conviction and (2) CMS's determination that the offense is detrimental), the ALJ was obliged to uphold the revocation, as are we.

Letantia Bussell, M.D., DAB No. 2196, at 12-13 (2008). *See also Dr. Randy Barnett*, DAB CR1786 (2008).

Petitioner does not agree that WPS was correct in determining that his crime was detrimental to the program and its beneficiaries, but that argument cannot succeed here. The discretion exercised by CMS acting through WPS in making that determination is not subject to review by the ALJs of this forum:

The regulations governing denial and revocation of provider enrollment give 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, if I conclude that Petitioner was convicted of a felony within the 10 years preceding the date of his application and that CMS exercised its discretion, based on that conviction, to deny revalidation to Petitioner, I must sustain CMS's determination. *Michael J. Rosen, M.D.*, DAB No. 2096 (2007), at 14 (citing *Michael J. Rosen, M.D.*, DAB CR1566, at 11 (2007)).

* * * *

For that reason I make no decision in this case that Petitioner's conviction was of the type of felony for which the regulations specifically direct revocation of billing privileges because it is unnecessary that I do so. It is sufficient, for purposes of my decision, to find that Petitioner was convicted of a felony within the past 10 years and that CMS determined that the conviction was detrimental to the best interests of the Medicare program and its beneficiaries.

Dr. Randy Barnett, DAB CR1786, at 3-4. *See generally Puget Sound Behavioral Health*, DAB No. 1944 (2004); *Brier Oak Terrace Care Center*, DAB No. 1798 (2001); and *Wayne E. Imber, M.D.*, DAB No. 1740 (2000).

Nor does Petitioner concede that the determination was made in a constitutionally-sufficient process, or by an official and agency having legal authority to do so. He vigorously argues the opposite, and characterizes these arguments as based on constitutional questions of equal protection and due process, both substantive and procedural. But his constitutional arguments present no issues suitable for my resolution, as they lie beyond my authority to consider. *Wisteria Care Center*, DAB No. 1892 (2003); *Hermina Traeye Memorial Nursing Home*, DAB No. 1810 (2002); *Sentinel*

Medical Laboratories, Inc., DAB No. 1762 (2001). Whatever the factual matrix of his constitutional claims may be, those facts are not material to the issues over which I exercise jurisdiction.

VI. Conclusion

For the reasons set out above, I GRANT CMS's Motion for Summary Disposition. Petitioner, Dr. Fady Fayad, is not entitled to the relief he seeks in this appeal, and the revocation of Petitioner's Medicare Part B enrollment and billing privileges should be, and it is, AFFIRMED.

/s/

Richard J. Smith
Administrative Law Judge