

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Stanley Beekman, D.P.M.
Docket No. A-15-48
Decision No. 2650
August 11, 2015

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Stanley Beekman, D.P.M. (Petitioner) appeals a decision by an Administrative Law Judge (ALJ) that sustained the determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B). *Stanley Beekman, D.P.M.*, DAB CR3532 (2014) (ALJ Decision). That regulation authorizes CMS to revoke a physician's Medicare billing privileges if a physician has been convicted, within 10 years preceding enrollment or revalidation of enrollment, of a felony "financial crime" that CMS has deemed to be "detrimental to the best interests of the Medicare program and its beneficiaries." CMS revoked Petitioner's Medicare billing privileges under this regulation based on his guilty plea to and conviction of felony offenses for conspiring to commit bank fraud, mail fraud, wire fraud, and making false statements to influence a bank to make a loan. CMS also imposed an overpayment assessment of \$52,126.08 and a three-year re-enrollment bar.

The ALJ found there was no genuine dispute of material fact and granted summary judgment in favor of CMS. The ALJ concluded that CMS has deemed all financial crimes to be detrimental to the Medicare program and its beneficiaries under the plain language of the regulation. The ALJ further concluded that CMS was authorized to revoke Petitioner's Medicare billing privileges under the regulation because, as Petitioner conceded, his felony conviction involved a "financial crime," and occurred within 10 years of his application for revalidation of his Medicare billing privileges.

The ALJ rejected Petitioner's argument that the regulation was inapplicable because his conviction was not related to his practice of medicine or his patients. The ALJ also concluded that he lacked the legal authority to review either CMS's overpayment assessment or Petitioner's three-year re-enrollment bar.

For the reasons discussed below, we affirm the ALJ Decision.

Applicable Law

The Medicare program provides health insurance benefits to persons 65 years and older and to certain disabled persons. Social Security Act (Act)¹ Act § 1811. Medicare is administered by CMS, which in turn delegates certain program functions to private insurance companies or contractors that function as CMS's agents in administering the program – in this case, CGS Administrators, LLC (CGS). *See* Act §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b).

In order to participate in Medicare, “providers” and “suppliers” must enroll in the program.² 42 C.F.R. § 424.500. “Enrollment” in Medicare confers program “billing privileges” – that is, the right to claim and receive Medicare payment for health care services provided to program beneficiaries. *Id.* at §§ 424.502, 424.505.

Section 1842(h)(8) of the Act gives the Secretary of Health and Human Services discretion to refuse to enter into an agreement or to terminate or refuse to renew an agreement with a physician or supplier who “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.”

The Secretary delegated the authority to revoke enrollment and billing privileges to CMS by regulation. *See* 42 C.F.R. § 424.535; *Letantia Bussell, M.D.*, DAB No. 2196, at 12 (2008). CMS's authority to revoke enrollment and billing privileges under certain circumstances is set forth in section 424.535, which provides in relevant part as follows:

- (a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier's billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:

* * *

¹ The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssactoc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

² “Providers” are hospitals, nursing facilities, or other medical institutions. 42 C.F.R. § 400.202. “Suppliers” include physicians and other non-physician health care practitioners. *Id.* (stating that, unless the context indicates otherwise, “[s]upplier means a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare”).

- (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 –

* * *

- (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.

In *Brian K. Ellefsen, D.O.*, the Board applied to a section 424.530(a)(3) revocation its holding in section 424.535 cases “that CMS may revoke a provider’s or supplier’s billing privileges based solely on a qualifying felony conviction, without regard to equitable or other factors.” DAB No. 2626, at 9 (2015), citing *Fady Fayad, M.D.*, DAB No. 2266, at 16 (2009), *aff’d, Fayad v. Sebelius*, 803 F.Supp.2d 699 (E.D. Mich. 2011), citing *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 16-17, 19 (2009), *aff’d, Ahmed v. Sebelius*, 710 F. Supp.2d 167 (D. Mass. 2010).

When a revocation is based on a felony conviction, the revocation is effective on the date of the conviction. 42 C.F.R. § 424.535(g). If a physician fails to comply with the reporting requirements of 42 C.F.R. § 424.516(d)(1)(ii), the physician “is assessed an overpayment back to the date of the final adverse action[.]” 42 C.F.R. § 424.565. After a provider’s or supplier’s billing privileges have been revoked, it is “barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar.” 42 C.F.R. § 424.535(c). A re-enrollment bar lasts “a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation.” *Id.*

A revocation determination by CMS or its contractor is an “initial determination” for which the provider or supplier may seek reconsideration and, if dissatisfied with the reconsidered determination, may appeal to an ALJ. The right to appeal is from the reconsidered decision, not the initial determination. 42 C.F.R. § 498.5(l)(2); *see also Neb Group of Arizona*, DAB No. 2573, at 7 (2014) and *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572, at 5 (2014). A hearing request is governed by the procedures found in 42 C.F.R. Part 498, subpart D.

Factual Background³

On March 9, 2011, the United States Attorney for the Northern District of Ohio filed an information charging Petitioner with conspiracy to submit false information and documents, bank fraud, mail fraud, and wire fraud. CMS Exhibit (Ex.) 1. The information alleged that Petitioner:

[U]nlawfully, willfully, and knowingly did conspire, confederate and agree . . . to violate the laws of the United States, to wit: submission of false information and documents to a bank in applying for a loan, in violation of Title 18 United States Code, Section 1014; bank fraud, in violation of Title 18, United States Code, Section 1344; mail fraud, in violation of Title 18, United States Code, Section 1341; and wire fraud, in violation of Title 18, United States Code, Section 1343.

CMS Ex. 1, at 1-2.

Petitioner entered a guilty plea on April 6, 2011, to count one of the information for conspiring to commit bank fraud, mail fraud, wire fraud and making false statements to a bank in applying for a loan. CMS Ex. 2, at 6. On May 14, 2013, the United States District Court for the Northern District of Ohio (District Court) entered a criminal judgment against Petitioner, sentenced him to five years of probation, and ordered him to pay \$976,533 in restitution. CMS Exs. 2, at 4; 3, at 2-4.

In a letter dated February 18, 2014, CGS notified Petitioner that it was revoking his Medicare billing privileges effective May 23, 2013 and imposing a three-year re-enrollment bar. CMS Ex. 7, at 1-2. CGS also assessed an overpayment of \$52,126.08 under 42 C.F.R. § 424.565 based on Petitioner's failure to report a final adverse action within 30 days as required. *Id.* at 2. Based upon Petitioner's felony conviction for a financial crime, CGS's notice letter cited section 424.535(a)(3) as one of the legal grounds to revoke Petitioner's Medicare billing privileges. *Id.* at 1. The letter also cited 42 C.F.R. § 424.535(a)(1) as an independent basis for the revocation based the suspension of his license to practice medicine in the State of Ohio. *Id.* The letter also cited 42 C.F.R. § 424.535(a)(9) as another independent legal ground for the revocation based upon Petitioner's failure to report his "license suspension / felony conviction" within 30 days of the reportable event. *Id.*

³ The factual information in this section, unless otherwise indicated, is drawn from undisputed findings of fact in the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

Petitioner sought reconsideration of this initial determination in a letter dated April 2, 2014. CMS Ex. 8. In a letter dated May 21, 2014, CGS denied Petitioner's request for reconsideration and upheld the revocation based on the three regulatory provisions cited above, as well as the three-year re-enrollment bar. CMS Ex. 11, at 2.

Petitioner timely requested a hearing before an ALJ. Based on the undisputed facts regarding Petitioner's felony conviction, CMS moved for summary judgment. Petitioner subsequently filed a cross-motion for summary judgment, arguing that CMS's revocation and overpayment assessment were improper as a matter of law.

ALJ Decision

The ALJ concluded that summary judgment was appropriate because the material facts were undisputed, and the only issue that needed to be resolved was a matter of law. ALJ Decision at 4. The ALJ granted CMS's motion for summary judgment, effectively denying Petitioner's cross-motion for summary judgment. *Id.* Petitioner had conceded that his felony criminal offense was a financial crime and that it occurred within 10 years of his application for revalidation of his Medicare billing privileges. *Id.* at 4, 6. The ALJ concluded that Petitioner's felony conviction, perpetrated to enrich himself and causing a significant monetary loss to several banks, plainly constituted a "financial crime" within the meaning of section 424.535(a)(3)(i)(B). *Id.* at 5-6, citing CMS Exs. 1, at 6; 3, at 4. The ALJ further concluded that "CMS has deemed not only the four named offenses to be detrimental, but it has deemed *all* financial crimes, including the four named offenses *and other similar offenses*, to be detrimental to the Medicare program and its beneficiaries." *Id.* at 7 (emphasis in original). Because Petitioner's felony conviction plainly constituted a financial crime under the regulation, the ALJ concluded there was a legal basis for CMS to revoke Petitioner's Medicare enrollment and billing privileges under the regulation.⁴ *Id.* at 4-7.

In addition, the ALJ concluded that CMS's revocation of Petitioner's Medicare billing privileges was authorized on a separate legal basis under the regulation. The ALJ determined that Petitioner's felony conviction was "similar" to "insurance fraud" which is one of the four felony offenses specifically listed in the regulation that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries under section 424.535(a)(3)(i)(B). *Id.* at 6-7.

Finally, the ALJ concluded that he had no authority to review Petitioner's arguments that CMS improperly assessed an overpayment (based on not timely reporting his conviction), did not provide him with sufficient notice when it imposed the assessment, imposed sanctions that are disproportionate to his offense, and failed to take into consideration

⁴ Based on this conclusion, the ALJ did not address whether CMS was also authorized to revoke Petitioner's Medicare billing privileges under sections 424.535(a)(1) and (a)(9). ALJ Decision at 4 n.1.

certain equitable factors. *Id.* at 7-8. After citing the limits of his review authority, the ALJ concluded, in particular, that he “d[id] not have the ability to consider retroactive payment consequences that CMS takes into consideration when exercising its discretion.” *Id.* at 8. The ALJ further concluded he did not have any legal authority to review or reverse a re-enrollment bar. *Id.* The ALJ also concluded that he had no authority to consider any equitable factors in determining whether CMS was authorized to revoke Petitioner’s Medicare billing privileges under section 424.535(a)(3). *Id.*

In summary, the ALJ concluded that CMS was authorized under section 424.535(a)(3)(i)(B) to revoke Petitioner’s Medicare enrollment and billing privileges and sustained the revocation. *Id.*

Standard of Review

The Board has adopted the following standard of review for ALJ summary judgment decisions:

Whether summary judgment is appropriate is a legal issue that we address de novo. Summary judgment is appropriate if there are no genuine disputes of fact material to the result. In reviewing whether there is a genuine dispute of material fact, we view proffered evidence in the light most favorable to the non-moving party. The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous.

Dinesh Patel, M.D., DAB No. 2551, at 5 (2013) (internal citations omitted).

Analysis

- A. *The ALJ correctly concluded that CMS was authorized to revoke Petitioner’s Medicare billing privileges because his felony conviction was a financial crime within the plain meaning of section 424.535(a)(3).*

Section 424.535(a)(3) provides that CMS may revoke a supplier’s billing privileges if two conditions are satisfied: (1) the supplier was convicted of a felony offense that CMS has determined to be detrimental to the best interests of Medicare and its beneficiaries; and (2) the conviction occurred within 10 years preceding the supplier’s enrollment or revalidation of enrollment in Medicare. The ALJ concluded that both conditions were

satisfied in Petitioner's case and, therefore, CMS was justified in revoking his billing privileges.⁵ ALJ Decision at 4-6. Based on the undisputed facts, the ALJ correctly concluded that Petitioner's billing privileges had been properly revoked.

In his Request for Review of the ALJ Decision (RR), Petitioner argues, as relevant here, that the ALJ erred in granting summary judgment in favor of CMS on two grounds.⁶ RR at 1-2, 5-7. First, Petitioner contends that section 424.535(a)(3) is inapplicable because his conviction was "*wholly unrelated* to the practice of medicine or his patients[.]" RR at 2; *id.* at 6 (emphasis in original). Second, Petitioner argues that CMS's revocation was improper because his conviction was not one of the specifically enumerated offenses listed in section 424.535(a)(3). He further argues that his felony conviction was not "similar" to "insurance fraud" (one of the examples in the regulation of financial crimes deemed to be detrimental to the interests of the Medicare program and its beneficiaries). RR at 5-6. These arguments are without merit, and the ALJ correctly rejected them.

Regarding Petitioner's first argument, CMS may revoke Medicare billing privileges under the authority of section 424.535(a)(3) based on *any* financial crime, regardless of whether the supplier's particular financial crime is specified in the regulation's illustrative list of financial crimes. *Ahmed* at 10 ("even if Petitioner's felony offense was not similar to one of the crimes named in the regulation, CMS would not necessarily be precluded from finding that it was a financial crime."); *see also Fayad* at 8 ("section 424.535(a)(3)(i) is reasonably read as setting out a non-exhaustive list of crimes that may constitute a basis for revocation."). Similarly, in *Lorrie Laurel*, DAB No. 2524, at 4-5 (2013), the Board concluded that "Petitioner's guilty plea to felony grand theft constitutes a conviction under section 424.535(a)(3)(i)(B) because that section explicitly authorizes CMS to revoke an individual's billing privileges based on '[f]inancial crimes . . . for which the individual was convicted, *including guilty pleas. . .*'" (emphasis added by DAB No. 2524). The ALJ thus correctly concluded that under the plain language of the regulation, "CMS has deemed not only the four named offenses to be detrimental, but it has deemed all financial crimes, including the four named offenses *and other similar offenses*, to be detrimental to the Medicare program and its beneficiaries." ALJ Decision at 7 (emphasis in original).

⁵ Petitioner did not contest the ALJ's conclusion that Petitioner's guilty plea occurred within the 10 years preceding the revalidation of his Medicare enrollment. ALJ Decision at 5. Petitioner submitted CMS Form 8551 on December 19, 2012, in order to revalidate his Medicare enrollment. CMS Ex. 4, at 27. CGS acknowledged receiving Petitioner's enrollment application on February 20, 2013. CMS Ex. 5, at 1-2. Because Petitioner pled guilty to a felony offense on April 6, 2011, it is evident that his guilty plea fell within the 10 years preceding his revalidation. ALJ Decision at 4.

⁶ Petitioner does not challenge the ALJ's conclusion that summary judgment is appropriate because "there is no genuine issue of disputed material fact[]" and that the only issue needed to be resolved in this case is a matter of law. *See* ALJ Decision at 3-4.

Here, Petitioner concedes that he pled guilty to a federal felony offense in April of 2011. RR at 4. The District Court accepted Petitioner's plea on April 6, 2011, and entered a criminal judgment against him on May 23, 2013. CMS Ex. 2, at 3, 6. It is undisputed that Petitioner pled guilty to conspiracy to commit bank fraud, making false statements to influence a bank to make a loan, mail fraud, and wire fraud, all in violation of federal law. *See* CMS Exs. 1-3.

On their face, conspiring to commit bank fraud and using false statements to obtain a bank loan are crimes that are financial at their heart, with elements of seeking money using criminal devices. The circumstances of the crimes to which Petitioner pled further make clear that all the charges arose from financial misconduct, in short lying to the bank in order to obtain loans by criminal means. For example, Petitioner admitted that he sought to "become financially independent" by participating in a conspiracy involving a "large and complex mortgage fraud scheme, orchestrated by an 'economic predator.'" CMS Ex. 8, at 1-2, 3, 8. Petitioner also stated that he acted as a "straw buyer" by executing three loan applications to banks that contained false information in order to secure mortgage loans of \$540,000, \$612,000, and \$364,533. *Id.* at 1, 2, 8; CMS Ex. 1, at 2-4, 6. Petitioner "inflated [his] income, bank account balances, and assets" on the mortgage loan applications "to assure his loan approval." CMS Ex. 1, at 5. In addition, Petitioner falsely asserted that he would be personally responsible for mortgage payments and that the properties in question would serve as his second residences. *Id.* at 2-5. Petitioner's felony conduct caused a total loss of \$976,533 to the banks, and the District Court ordered him to make restitution in that amount. CMS Exs. 1, at 6; 3, at 4.

Based on the financial nature of the crimes and the recited facts underlying them, the ALJ correctly concluded that "Petitioner's felony conviction, perpetrated to enrich himself and causing a significant monetary loss, plainly constitutes a 'financial crime' within the meaning of section 424.535(a)(3)(i)(B)." ALJ Decision at 5-6. Indeed, Petitioner does not challenge the ALJ's conclusion that "Petitioner also concedes that his offense was a 'financial crime.'" *See* RR at 4 (stating that Petitioner's "probation officer will protect Dr. Beekman from falling prey to *another financial crime.*") (emphasis added); ALJ Decision at 6, citing P. Br. (Petitioner's Combined Counter-Motion And Memorandum of Law in Support of Summary Judgment, Opposition To CMS's Motion For Summary Judgment, and Pre-Hearing Brief) at 4 (same language that was used in RR at 4).

The ALJ also properly rejected Petitioner's second argument that, because his criminal offense was not related to the practice of medicine, Medicare, or his patients, it is not detrimental to Medicare and its beneficiaries and, therefore, CMS's revocation was improper. RR at 3, 6. There is nothing in the plain language of section 424.535(a)(3) that requires a felony conviction to be for a financial crime that is related to the Medicare program or a provider's or supplier's practice of medicine. In *Fayad*, the Board squarely rejected this same argument, stating that "section 424.535(a)(3)(i)(B) permits CMS to revoke a supplier's billing privileges based on a 'financial crime' without requiring that

the crime be related to a health care program or health care fraud.” *Fayad* at 15; *see also*, *John Hartman D.O.*, DAB No. 2564, at 5 (2014) (where Petitioner’s felony offense is, under the regulation, “detrimental to Medicare and its beneficiaries as a matter of law,” the Board “may not evaluate the circumstances of his offense, or otherwise look behind his conviction, in order to make a conflicting determination about the offense’s actual or potential impact on the Medicare program[.]”).

Finally, we observe the ALJ separately concluded that CMS properly exercised its revocation authority because Petitioner’s felony offense was “similar” to the crime of “insurance fraud” that is listed in section 424.535(a)(3). ALJ Decision at 6-7. As discussed above, CMS’s determination that Petitioner committed a financial crime is, in and of itself, legally sufficient to sustain CMS’s revocation under the regulation. However, the ALJ’s further conclusion that Petitioner’s felony offense was also “similar” to “insurance fraud” is not erroneous and provides an additional basis for affirmance of the revocation.

Accordingly, the ALJ correctly concluded that CMS was authorized to revoke Petitioner’s Medicare billing privileges because his felony conviction was a “financial crime” within the plain meaning of section 424.535(a)(3).

B. *The ALJ correctly concluded that he did not have any legal authority under the regulations to review CMS’s imposition of the overpayment assessment.*⁷

Petitioner next argues that CMS improperly levied a \$52,126.08 overpayment assessment based on the date of his conviction under section 424.565 and that the ALJ erred in upholding this assessment. RR at 10. In support of this argument, Petitioner contends that “[r]etroactive application of the overpayment assessment to the date of conviction is improper here because [he] did not receive notice that his conviction for a crime not listed in 42 C.F.R. § 424.535(a)(3) was considered a reportable event” until “CMS notified him that it had revoked his billing privilege[s].” *Id.* He further contends that, even if CMS properly imposed the overpayment assessment, it should have been calculated from February 18, 2014, the date that Petitioner became aware of CMS’s determination to revoke his billing privileges and impose the assessment. *Id.* at 11. Petitioner also contends that CMS’s imposition of the overpayment assessment was improper because CMS did not have a proper basis to revoke his billing privileges in the first place. *Id.*

⁷ On appeal to us, Petitioner does not challenge the ALJ’s affirmance of the three-year re-enrollment bar imposed by CMS. *See* ALJ Decision at 8.

Petitioner is incorrect in his assertion that the ALJ upheld the overpayment assessment. The ALJ instead concluded that the issues Petitioner raised about the assessment (as well as the re-enrollment bar) were outside his review authority and that Petitioner had cited no authority permitting him to reverse either the re-enrollment bar or the assessment. ALJ Decision at 8. We find no error in the ALJ’s conclusion. The ALJ’s authority in Medicare enrollment determination cases is limited to reviewing the reconsidered determination by CMS to deny (section 424.530) or revoke (section 424.535) a provider’s or supplier’s Medicare enrollment. Section 498.5(1)(2); *Neb Group of Arizona, LLC*, DAB No. 2573, at 7. There is a separate administrative appeals process for the review of overpayment determinations. *See* 42 C.F.R. Part 405, subpart I. In revocation cases, the Board has held, consistent with the plain language of the regulation, that such review is specifically limited to whether there was a legal basis for CMS to revoke a provider’s or supplier’s Medicare billing privileges. *Letantia Bussell*, at 12-13 (ALJ’s review of CMS’s revocation determination was limited to deciding whether the regulatory “elements required for revocation were present”). If the record establishes that the regulatory elements are satisfied, as they are here, the ALJ and the Board “must sustain the revocation” *Fayad* at 16, citing *Ahmed* at 16-17, 19.

Accordingly, the ALJ did not err in declining to reach issues outside the scope of his review authority, including the issue of whether CMS was authorized to assess an overpayment based on Petitioner not timely reporting his conviction.

Conclusion

For all of the foregoing reasons, we affirm the ALJ Decision.

_____/s/
Sheila Ann Hegy

_____/s/
Leslie A. Sussan

_____/s/
Stephen M. Godek
Presiding Board Member