Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ravindra Patel, M.D.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-329

Decision No. CR2171

Date: June 30, 2010

DECISION

I grant the motion of the Centers for Medicare and Medicaid Services (CMS) for summary judgment and sustain the revocation of Petitioner Ravindra Patel, M.D.'s Medicare enrollment and billing privileges, based on his conviction of a felony under 42 C.F.R. § 424.535(a) and CMS's determination barring re-enrollment for a period of three years. I also deny CMS's motion to dismiss the appeal and deny Petitioner's motion for summary judgment.

I. The Regulation

Section 424.535(a) of 42 C.F.R. authorizes CMS to "revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement" for reasons including, as relevant here:

> (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 [Medicare] 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.

Providers or suppliers who have had their billing privileges revoked "are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar," which is "a minimum of 1 year, but not greater than 3 years depending on the severity of the basis for revocation.[1] 42 C.F.R. § 424.535(c). A revocation for a felony conviction is effective "with the date of the felony conviction." 42 C.F.R. § 424.535(g).

II. Background - Undisputed Facts

The CMS contractor, Highmark Medical Services (Highmark), revoked Petitioner's Medicare billing privileges by notice dated August 10, 2009, based on his conviction, "within the 10 years preceding enrollment or revalidation of enrollment . . . of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries to continue enrollment."[2] CMS Exhibit (Ex.) 1. The notice stated that the revocation was effective March 25, 2009 and that Petitioner was barred from re-enrollment for a period of three years under 42 C.F.R. § 424.535(c). *Id.*

Petitioner sought reconsideration of the revocation and acknowledged his "March 25, 2009 conviction of conspiracy to present false claims to the Social Security Administration [SSA] in violation of Title 18 U.S.C. § 371." CMS Ex. 2, at 1. A Medicare hearing officer sustained the revocation in a decision dated November 11, 2009 that cited Petitioner's "guilty plea to a felony charge of criminal conspiracy." CMS Ex. 3. The decision also sustained the three-year re-enrollment bar. *Id.*

By letter dated January 2, 2010, Petitioner timely requested a hearing pursuant to the instructions in the reconsideration decision. This case was originally assigned to Administrative Law Judge (ALJ) Alfonso J. Montaño and was reassigned to me for

---

[1] A physician is a "supplier," which is defined in the Medicare statute to mean "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services" under the Medicare statute. 42 U.S.C. § 1395x(d).

[2] The contractor also cited as a ground for revocation Petitioner's failure "to comply with the reporting requirement specified in 42 CFR 424.516(d)(1)(ii), which pertains to the reporting of changes in adverse actions, within 30 days of the reportable event." CMS Ex. 1, at 1. Upon reconsideration, the hearing officer ruled this ground to be "irrelevant," since CMS did not rely on it; accordingly, I do not address it here. CMS Ex. 3, at 2.

hearing and decision pursuant to 42 C.F.R. § 498.44, which permits designation of a Member of the Departmental Appeals Board (Board) to hear appeals taken under Part 498. Pursuant to the briefing schedule that ALJ Montaño ordered, CMS submitted a motion to dismiss and/or for summary judgment (CMS Motion) and its exhibits 1 - 5.[3]

Petitioner responded with a motion for summary judgment (P. Motion) and exhibits 1 - 3. Petitioner's exhibits consist of: a copy of the October 21, 2008 agreement between Petitioner and the U.S. Department of Justice for Petitioner to plead guilty to conspiracy to defraud the Social Security Program (plea agreement, P. Ex. 1), which CMS submitted as its exhibit 5; 41 pages of letters in support of Petitioner (P. Ex. 2); and a letter from Petitioner's former counsel to the New Jersey Board of Medical Examiners advising them of Petitioner's entry of a guilty plea (P. Ex. 3).[4] The letters in Petitioner's exhibit 2 are not listed among the materials submitted to the Medicare hearing officer. CMS Ex. 3, at 2. However, in the absence of any objection to the admission of either party's exhibits, or any representation from CMS that Petitioner's exhibit 2 constitutes new documentary evidence, the admission of which is limited by 42 C.F.R. § 498.56(e), I admit both parties' exhibits. In any event, as I determine below, the facts Petitioner seeks to establish through its exhibit 2 are not material to the outcome of this case.

III. Issue, Findings of Fact, Conclusions of Law

A. Issue

The issue in this case is whether either party is entitled to summary judgment based on whether the undisputed facts demonstrate that the revocation of Petitioner's enrollment in Medicare was legally authorized.

B. Applicable Standard

The Board stated the standard for summary judgment as follows:

---

[3] While CMS argues that Petitioner has no right to challenge CMS's determination of the duration of the bar on re-enrollment, CMS did not explain why I should dismiss Petitioner's entire appeal and, in fact, acknowledges that Petitioner may challenge whether a regulatory basis exists to revoke his billing privileges. CMS Motion at 3-4. In light of CMS's recognition of a right to challenge whether a regulatory basis exists for revocation, I deny the motion to dismiss without further discussion.

[4] Petitioner's exhibit list misidentifies this last item as his reconsideration request.

> Summary judgment is appropriate when 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. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . 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. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc*, DAB No. 2291, at 4-5 (2009).

C. Analysis

Both parties have moved for summary judgment. Neither alleges that any material facts are in dispute, and they debate only whether those facts authorize the revocation under the applicable regulation. Additionally, Petitioner argues that if the revocation is sustained, it should have begun on October 30, 2008, the date of Petitioner's plea agreement, instead of March 25, 2009.

My findings and conclusions are in the italicized headings and subsequent discussions below.

1. CMS was authorized to revoke Petitioner's enrollment under 42 C.F.R. § 424.535(a)(3), based on his felony conviction.

CMS argues that the revocation is authorized, because Petitioner's conviction of a felony charge of conspiracy to defraud SSA falls within the regulation's category of "[f]inancial 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." 42 C.F.R. § 424.535(a)(3)(i)(B). Petitioner disagrees, on the ground that the felony charge of which he was convicted is "unrelated to the best interests of the Medicare program and its beneficiaries . . . ." P. Motion at 1. Petitioner notes that the overarching language at section 424.535(a)(3) authorizes revocation for conviction of a felony offense "that CMS has determined to be detrimental to the best interests of the [Medicare] program and its beneficiaries" and argues that CMS has not shown that it made that determination with respect to the conduct underlying Petitioner's

conviction. Petitioner argues that CMS presented no evidence that Petitioner has the "propensity to harm the Medicare program" and has not explained why his continued participation in Medicare would be harmful to the program. *Id*. at 5.

The Board has confirmed, however, that CMS is not required to determine, in each case of revocation for a felony conviction, that the specific offense of which the individual supplier was convicted is detrimental to the best interests of Medicare and its beneficiaries. Instead, the Board has held that the presence of an offense among those listed in section 424.535(a)(3)(i)(B) means that CMS has already determined that the offense "is detrimental per se to the best interests of the Medicare program and its beneficiaries." *Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008). That holding was based on the preamble to the final rule authorizing denial and revocation of enrollment for felony convictions, in which CMS stated that "[f]elonies that ***we determine to be detrimental*** to the best interests of the Medicare program or its beneficiaries include . . . financial crimes, such as extortion, embezzlement, income tax evasion, making false statements, insurance fraud, and other similar crimes . . . ." 71 Fed. Reg. 20,754, 20,768 (Apr. 21, 2006) (emphasis added).

Petitioner does not argue before me that his offense of conspiracy to defraud Social Security was not a "financial crime" or that it was not "similar" to any of the other enumerated offenses, as provided in the regulation. And, based on the undisputed facts underlying his guilty plea, I conclude that his conviction was covered under section 424.535(a)(3)(i)(B). In reaching this conclusion, I "examine[] the conduct and circumstances underlying Petitioner's offense" and consider whether the common law definition of fraud encompasses Petitioner's conduct. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 7-8 (2009), *aff'd Ahmed v. Sebelius*, __ F.Supp.2d __, 2010 WL 1852132 (D. Mass. 2010). Under common law definitions, "fraud generally requires a false statement or misrepresentation of material fact that the defendant makes with knowledge of its falsity and with the intent or purpose that it induce action or forbearance by another." *Id.* at 8-9 (citations omitted).

Those elements are present here. Petitioner pled guilty under a federal criminal statute titled "Conspiracy to commit offense or to defraud United States" that applies "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . . ." 18 U.S.C. § 371; *see* CMS Ex. 5, P. Ex. 1 (plea agreement). The one-count "Information" to which Petitioner pled guilty states that Petitioner "did knowingly and intentionally conspire and agree . . . to make and present false claims to . . . the Social Security Administration, by knowingly submitting false, fictitious and fraudulent W-2 Wage and Tax Statement forms reflecting previous earnings purportedly earned by [Petitioner's wife's], to the IRS in order to qualify for SSA benefits . . . ." CMS Ex. 4, at 3. The Information further states that Petitioner, with the assistance of another individual, "filed joint federal income tax returns on IRS Form 1040s for calendar years 2003 through

2006, which each included a false Form W-2 purportedly reflecting earnings from [Petitioner's wife's] work at ACIM [Associates in Cardiology and Internal Medicine P.A., a practice of which Petitioner was part owner] and payment of FICA [the Federal Insurance Contributions Act] withholding taxes in connection with these earnings" even though Petitioner's wife "did not perform any work for ACIM." *Id*. at 2. In his plea agreement, Petitioner agreed to the application of a sentencing factor that applies when "[t]he offense results in an intended loss of more than $200,000, but less than $400,000." CMS Ex. 5, at 7; P. Ex. 1, at 7 (plea agreement).

Petitioner's undisputed conduct of filing false tax forms with a federal agency to qualify for government benefits, along with the amount of the intended loss and the text of the criminal statute under which he pled guilty, amply demonstrate that Petitioner's criminal conviction was for a "financial crime" that was "similar" to the enumerated offense of insurance fraud. Additionally, I note the preamble's statement that "[f]elonies that we determine to be detrimental to the best interests of the Medicare program or its beneficiaries include the following . . . financial crimes, such . . . ***making false statements***, insurance fraud, and other similar crimes . . . ." 71 Fed. Reg. at 20,768. Petitioner's filing of "false, fictitious and fraudulent" tax forms as part of his criminal conduct also constitutes the making of false statements that CMS has determined is detrimental to the best interests of the Medicare program or its beneficiaries.

In reaching this conclusion, I reject Petitioner's intimations that he is in fact not guilty of the crime to which he pled. While he concedes having "pled guilty to one count . . . which charges him with conspiracy to defraud the social Security program, in violation of 18 U.S.C. 371," he nonetheless avers that the "many factors that a defendant considers when deciding whether to reach a plea," such as "the enormous potential cost of a defense along with the unknown risk or a protracted trial . . . weighed heavily in his acceptance of a plea." P. Motion at 3. I reject this argument, because CMS's revocation authority here springs from Petitioner having been "convicted, including guilty pleas and adjudicated pretrial diversions," and I see nothing in any regulation that authorizes me to ignore or look behind the fact of a conviction or guilty plea and entertain arguments that essentially amount to collateral attacks on the conviction. In this regard, the letters that Petitioner offered in his exhibit 2 as evidence that he does not pose a threat to the program or its beneficiaries do not alter the fact of his conviction for an offense covered by section 424.535(a)(3)(i)(B) and provide no basis for me to question CMS's imposing of a revocation that is authorized by that regulation.

Petitioner also does not question that he was convicted "within the 10 years preceding enrollment or revalidation of enrollment," as the regulation requires for revocation. I note that a Federal district court recently confirmed that "revalidation of enrollment" occurs "when the CMS contractor obtains information that the physician was convicted of a felony offense, at which point the contractor is 'authorized to make the determination to revoke [the physician's] enrollment and billing privileges.'" *Ahmed v. Sebelius* at *7, citing *Mikhail Strutsovskiy, M.D.*, DAB CR2109, at 8 (2010). The court noted that "the

DAB has consistently interpreted revalidation as 'a process that involves not only the submission of information by the participant, but CMS *verification* of continued eligibility for enrollment.'" *Id.*, citing *Robert F. Tzeng, M.D.*, DAB No. 2169, at 11 (2008).

For these reasons, I conclude that CMS was authorized to revoke Petitioner's enrollment under 42 C.F.R. § 424.535(a)(3) based on his felony conviction.

2. There was no error in CMS's determination of the effective date of the revocation.

Petitioner argues that the revocation should have been effective October 30, 2008, the date he entered into the plea agreement, and not March 25, 2009, as Highmark and CMS imposed.[5] *See* P. Ex. 1 (plea agreement). While Petitioner concedes that he "was not able to enter his plea until March 25, 2009," Petitioner argues that he was prepared to enter the plea in November 2008 but that "several adjournments delayed the plea hearing," and he asks that he not be "penalized for the delays inherent in our legal system." P. Motion at 6.

As Petitioner recognizes, the regulation states that a revocation based on a felony conviction "is effective with the date of . . . felony conviction . . . ." 42 C.F.R. § 424.535(g); P. Motion at 6. Petitioner concedes that his pleas were not accepted until March 25, 2009, and he has acknowledged that the revocation was based on "his ***March 25, 2009 conviction*** of conspiracy to present false claims to the Social Security Administration in violation of Title 18 U.S.C. § 371." CMS Exs. 2, at 1 (reconsideration request) (emphasis added).

Moreover, the terms of the plea agreement demonstrate that, at the time it was entered, its effectiveness was contingent on its being accepted by the sentencing judge "who may . . . reject any or all of the stipulations entered into by the parties." P. Ex. 1, at 3. It held open the possibility of additional charges being leveled against Petitioner "in the event that a guilty plea in this matter is not entered . . . ." P. Ex. 1, at 1. Petitioner cites no authority for the proposition that entry into a plea agreement that has not yet been accepted by the court hearing a criminal case constitutes a conviction under the

[5] Regarding the three-year re-enrollment bar imposed on him, Petitioner states that "it is not the length, but rather the commencement date of CMS' action that Petitioner asks the Court to review." P. Motion at 5. As I have observed in an earlier appeal, no authority exists to appeal the length of a re-enrollment bar, and the right to a hearing in these cases is limited to challenging whether CMS had authority to revoke a provider or supplier's enrollment in the Medicare program. *Emmanuel Brown, M.D. and Simeon K. Obeng, M.D.*, DAB CR 2145, at 6 (2010). As explained here, the date on which the bar begins follows from the date that the revocation was effective, which law compelled.

regulation. CMS thus committed no error of law in declining to make the revocation effective upon Petitioner's entering into the agreement instead of the date that Petitioner was actually convicted through the acceptance of the agreement by the court.

IV. Conclusion

The undisputed facts entitle CMS to summary judgment as a matter of law. I therefore grant summary judgment in favor of CMS and sustain the revocation of Petitioner's enrollment, effective March 25, 2009. I deny Petitioner's motion for summary judgment and CMS's motion to dismiss.

/s/
Leslie A. Sussan
Board Member