Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Arvind Ahuja, M.D.,
(NPI: 1801857297/PTAN: 000102980)

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-92

Decision No. CR3207

Date: April 21, 2014

DECISION

The Medicare enrollment and billing privileges of Petitioner, Arvind Ahuja, M.D., were properly revoked pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B),[1] effective February 8, 2013.

I. Procedural History and Jurisdiction

Wisconsin Physicians Service Insurance Corporation (WPS), the Medicare administrative contractor for the Centers for Medicare & Medicaid Services (CMS), notified Petitioner by letter dated April 15, 2013, that Petitioner's Medicare enrollment was revoked effective February 8, 2013 due to Petitioner's felony conviction for filing false income tax returns. CMS Exhibit (CMS Ex.) 2. The WPS letter stated that WPS was establishing a reenrollment bar of one year pursuant to 42 C.F.R. § 424.535(c). But, the letter also stated that Petitioner could "not participate in the Medicare program again until 2/8/2016, one year from the effective date of this revocation." CMS Ex. 2 at 1.

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[1] Citations are to the annual revision of the Code of Federal Regulations (C.F.R.) in effect at the time of the pertinent agency action, unless otherwise indicated.

On June 10, 2013, Petitioner requested reconsideration of the initial decision revoking Petitioner's Medicare enrollment. Request for Hearing Exhibit C (RFH Ex. C). On August 8, 2013, the WPS contractor hearing officer issued a reconsideration decision in which he concluded that revocation of Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B) was correct based on Petitioner's February 8, 2013 guilty plea to filing a false income tax return. The hearing officer also concluded that a three year bar to Medicare reenrollment was appropriate. CMS Ex. 3.

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated October 4, 2013, with exhibits A, B, C, D, and E. The case was assigned to me for hearing and decision on October 24, 2013, and an Acknowledgment and Prehearing Order (Prehearing Order) was issued at my direction. No issue has been raised as to the timeliness of Petitioner's request for hearing and neither party alleges that I lack jurisdiction to decide this matter.

On November 22, 2013, CMS filed a prehearing brief and motion for summary judgment (CMS Br.) with CMS Exs. 1 through 5.[2] On December 23, 2013, Petitioner filed a response to CMS's motion for summary judgment (P. Br.) with Petitioner's exhibits (P. Exs.) F and G. On January 21, 2014, CMS filed a reply brief. The parties have not objected to my consideration of CMS Exs. 1 through 5and they are admitted. Petitioner did not offer RFH Exs. A, B, C, D, and E as part of the exchange required by the Prehearing Order ¶ II.D.2. However, out of an abundance of caution to minimize prejudice to Petitioner, I have reviewed the exhibits submitted with the request for hearing for admissibility as substantive evidence on the merits in addition to P. Exs F and G. RFH Ex. A is a copy of the August 8, 2013 WPS letter announcing the reconsideration decision, it is relevant and admitted though cumulative of CMS Ex. 3. RFH Ex. B is a copy of the CMS 855I form Petitioner signed and dated March 5, 2013, which is relevant and admitted though cumulative of CMS Ex. 1. RFH Ex. C is a copy of

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[2] CMS failed to assemble and mark its exhibits as directed by the Prehearing Order ¶ II.D.1. Petitioner also failed to mark his exhibits in accordance with the Prehearing Order ¶ II.D.2 and failed to submit a list of exhibits. Neither party complied with the requirements of 42 C.F.R. § 498.17(a) and section 5 of the Civil Remedies Division Procedures (CRDP) to include a certificate of service with filings. I will not delay a decision in this case simply to impose sanctions or otherwise compel counsel to comply with procedural regulations, the CRDP, and my Prehearing Order. However, counsel for the parties are admonished to read and comply with the regulations, the Prehearing Order, and the CRDP in every case.

Petitioner's June 10, 2013 request for reconsideration, which is relevant and admitted. RFH Ex. D is a collection of letters and statements to the District Court Judge who handled Petitioner's criminal case or to Petitioner's counsel from various supporters and former patients, which are not admitted as evidence as none are relevant to any issue properly before me. RFH Ex. E is a copy of Petitioner's sentencing submission in the federal district court, which is relevant and admitted as evidence. P. Ex. F, a copy of Petitioner's response to the government sentencing memorandum in the district court, is relevant and admitted. P. Ex. G, a letter from a former patient, is not admitted as it is not relevant to any issue that I may decide.[3]

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as WPS. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[4] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Petitioner, a physician, is a supplier.

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[3] CMS could appropriately complain that Petitioner's failure to comply with the Prehearing Order and my failure to strictly enforce the Prehearing Order deprives CMS of the opportunity to challenge the exhibits attached to the RFH. I find no prejudice to CMS based on the disposition of this case and the fact that I specifically considered each exhibit for admissibility.

[4] A "supplier" furnishes services under Medicare. The term supplier applies to physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) and 1835(e) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

The Act requires the Secretary of Health and Human Services (the Secretary) to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS may revoke an enrolled provider's or supplier's Medicare billing privileges and any provider or supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. Pursuant to 42 C.F.R. § 424.535(a)(3), if a supplier is convicted of a federal or state felony that CMS has determined is detrimental to the program or its beneficiaries, CMS may revoke the supplier's billing privileges. Act § 1866(b)(2)(D) (42 U.S.C. § 1395cc(b)(2)(D)). The regulation specifies that the conviction must have: (1) been for a felony; (2) been by a state or federal court; (3) occurred within the 10 years preceding enrollment or revalidation of enrollment in Medicare; and (4) been for an offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3). Offenses listed in the regulation that CMS has found detrimental to the program or its beneficiaries, include financial crimes such as income tax evasion, insurance fraud, and similar crimes. 42 C.F.R. § 424.535(a)(3)(i)(B).

After a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from reenrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c). A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination and specifying the conditions or requirements the supplier failed to meet, and the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has a right to request a hearing by an ALJ and further review by the Departmental Appeals Board (Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-751 (6th Cir. 2004). The provider or supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate; and

Whether there was a basis for the revocation of Petitioner's billing privileges and Medicare enrollment.

E. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold text followed by my findings of fact and analysis.

1. Summary judgment is appropriate.

A provider or supplier denied enrollment in Medicare or whose enrollment has been revoked has a right to a hearing and judicial review pursuant to section 1866(h)(1) and (j) of the Act and 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. Act §§ 205(b), 1866 (h)(1) and (j)(8); *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing, but must do so affirmatively in writing. 42 C.F.R. § 498.66. In this case, Petitioner has not waived the right to oral hearing or otherwise consented to decision based only upon the documentary evidence or pleadings. Accordingly, disposition on the written record alone is not permissible, unless the CMS motion for summary judgment has merit.

Summary judgment is not automatic upon request but is limited to certain specific conditions. The procedures established by 42 C.F.R. pt. 498 do not include a summary judgment procedure. However, appellate panels of the Board have long recognized the availability of summary judgment in cases subject to 42 C.F.R. pt. 498, and the Board's interpretative rule has been recognized by the federal courts. *See, e.g.*, *Crestview*, 373 F.3d at 749-50. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of this case by my Prehearing Order.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication or the moving party is entitled to judgment as a matter of 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. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459, at 4 (2012) (and cases cited therein); *Experts Are*

Us, Inc., DAB No. 2452, at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differs from resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the parties' evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347, at 5 (2010). The Secretary has not provided for the allocation of the burden of persuasion or the quantum of evidence in 42 C.F.R. pt. 498. The Board, however, has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

Viewing the evidence properly before me in a light most favorable to Petitioner and drawing all inferences in Petitioner's favor, I conclude that there are no genuine disputes as to any material facts in this case. The issues that Petitioner raises must be resolved against him as a matter of law. As discussed in more detail hereafter, there is no dispute that Petitioner was convicted of financial crimes on August 22, 2012, and the undisputed evidence shows that there is a basis for the revocation of Petitioner's Medicare billing privileges. Accordingly, I conclude that summary judgment is appropriate.

2. The Secretary has determined and provided by regulation that financial crimes such as income tax evasion or similar crimes are detrimental to the Medicare program or its beneficiaries. 42 C.F.R. § 424.535(a)(3)(i)(B).

3. Petitioner was convicted of filing a false income tax return and failure to file reports of foreign bank and financial accounts, which are financial crimes within the meaning of 42 C.F.R. § 424.535(a)(3)(i)(B).

4. There is a basis for revocation of Petitioner's enrollment in Medicare and his billing privileges.

5. The issue for hearing and decision is whether there is a basis for revocation of Petitioner's billing privileges and jurisdiction does not extend to review of whether CMS properly exercised its discretion to revoke Petitioner's Medicare enrollment and billing privileges.

6. There is no authority to review CMS's determination to impose a three year bar on Medicare reenrollment.

7. Petitioner's enrollment in Medicare and his billing privileges were properly revoked effective February 8, 2013.

a. Facts

In his request for hearing, Petitioner states that he was convicted of two offenses in the U.S. District Court for the Eastern District of Wisconsin on February 13, 2008. RFH at 7. In his brief, Petitioner states that he was convicted by a jury on August 22, 2012, in the Eastern District of Wisconsin of one count for filing a false income tax return and one count of failure to file reports of foreign bank and financial accounts, in violation of 26 U.S.C. § 7206(1) and 31 U.S.C. §§ 5314, 5322. P. Br. at 2-3. Petitioner stated in the CMS 855I form that he signed and dated March 5, 2013, that judgments of guilty were entered against him on February 8, 2013, on a charge of filing a false tax return and a charge of failure to report a foreign bank and financial accounts. CMS Ex. 1 at 15, 39; RFH Ex. B at 15, 39. However, a copy of the "Judgment In A Criminal Case" in the U.S. District Court, Eastern District of Wisconsin, shows that judgment was actually imposed on February 1, 2013, based on findings of guilty by a jury on August 22, 2012, of one count of filing a false income tax return in violation of 26 U.S.C. § 7206(1) and one count of failure to report foreign bank and financial accounts in violation of 31 U.S.C. § 5314 and 5322. CMS Ex. 1 at 18; RFH Ex. B at 18. The records of the federal district court also show that Petitioner was sentenced on February 1, 2013, to two concurrent sentences of three years of probation, six months of house detention, a $350,000 fine and a $200 assessment. Petitioner's confusion about when judgment was imposed appears to be due to the fact that the judge executed the "Judgment In a Criminal Case" form on February 6, 2013. CMS Ex. 1 at 18-22; CMS. Ex. 5; RFH Ex. B at 18-22; P. Br. at 3. The records of the federal district court, copies of which were submitted by both parties, are the best evidence of Petitioner's conviction and sentence.

Petitioner submitted a CMS 855I form, a Medicare enrollment application, on March 8, 2013 that he signed and dated on March 5, 2013, which disclosed his felony conviction. RFH Ex. B; CMS Ex. 1; P. Br. at 3. Petitioner does not dispute that he was convicted of felonies. Petitioner does not dispute that his conviction on August 22, 2012, occurred within ten years of his submission of an application for enrollment or revalidation of enrollment in Medicare. CMS Ex. 1.

WPS notified Petitioner by letter dated April 15, 2013, that his enrollment in Medicare and billing privileges were revoked effective February 8, 2013. CMS Ex. 2. February 8, 2013, is the date Petitioner reported that he was convicted in the CMS 855I form he dated and signed March 5, 2013. CMS Ex. 1; RFH Ex. B. The April 15, 2013, WPS letter stated that WPS was imposing a one-year reenrollment ban, but the letter specifically stated that Petitioner could not reenroll until February 8, 2016, three years from the date of revocation. CMS Ex. 2 at 1. On reconsideration the hearing officer did not specifically address or change the effective date of revocation. The hearing officer did specifically state that a three-year bar to reenrollment was imposed and that Petitioner could not reenroll again until February 8, 2016. CMS Ex. 3 at 2.

b. Analysis

i. There is a basis for revocation effective February 8, 2013.

The revocation in this case was based upon 42 C.F.R. § 424.535(a)(3)(i)(B), which provides:

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

There is no dispute that Petitioner was convicted by a jury in the U.S. District Court, Eastern District of Wisconsin on August 22, 2012 of one felony count of filing a false

income tax return and one felony count of failure to file reports of foreign bank and financial accounts. Petitioner was sentenced on February 1, 2013. There is no dispute Petitioner was convicted within ten year of filing an enrollment or revalidation application. Accordingly, the elements of 42 C.F.R. § 424.535(a)(3)(i)(B) are satisfied and there is a basis for CMS to revoke Petitioner's Medicare enrollment and billing privileges.

The effective date of revocation of Medicare enrollment and billing privileges, when revocation is based on a felony conviction, is the date of the felony conviction. 42 C.F.R. § 424.535(g). Although Petitioner was convicted by a jury on August 22, 2012, I will not disturb the revocation effective date of February 8, 2013, selected by WPS. Pursuant to 42 C.F.R. § 424.535(d), the bar to reenrollment runs from the effective date of revocation.

In his request for hearing, Petitioner argued that the offenses of which he was convicted had no connection to "his medical practice, medical billings, or Medicare and Medicaid, but concerned interest income earned on certificates of deposit held at HSBC in India." RFH at 2. Petitioner did not advance this argument in his brief. The law is clear that the felonies enumerated in 42 C.F.R. § 424.535(a)(3)(i)(B), including tax evasion, are per se detrimental to the Medicare program. The plain language of the regulation requires no nexus or connection between Petitioner's conviction and the Medicare program or Petitioner's medical practice in order to constitute a basis for revocation. Petitioner cites no legal authority establishing or supporting a nexus requirement. In this case, the offenses of which Petitioner was convicted are akin or similar to, if not, directly related to income tax evasion and are per se detrimental to Medicare and its beneficiaries. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 7-8, 12 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010); *Robert F. Tzeng, M.D.*, DAB No. 2169 at 11 n.15 (2008).

> ii. I have no authority to review the exercise of discretion by CMS to revoke Petitioner's enrollment and billing privileges having concluded that there is a basis for revocation or the determination regarding the period of the reenrollment bar.

Petitioner argues that the CMS contractor abused its discretion by deciding to revoke Petitioner's enrollment and billing privileges and by imposing a three-year bar to reenrollment, by taking into account circumstances beyond Petitioner's conviction and "otherwise improperly taking into account inaccurate and facially incorrect information when it imposed the revocation period." P. Br. at 1-2, 6-8. Petitioner argues that the CMS contractor did not consider mitigating factors and properly evaluate the underlying

conduct of Petitioner's related to his criminal conduct. RFH at 8- 9; P. Br. at 8-10. Petitioner also argues that the revocation of his Medicare billing privileges would adversely affect Medicare beneficiaries in southeast Wisconsin and northern Illinois, due to the small number of trained neurosurgeons in the area. RFH at 2-7; P. Br. at 9-10.

Petitioner cites no provision of the Act or the regulations that requires CMS or its contractors to consider mitigating or other factors, or to specifically analyze Petitioner's criminal conduct when deciding whether or not to revoke enrollment and billing privileges or when determining the period of the bar to reenrollment. The Act and regulations do not require that CMS consider evidence other than the nature of Petitioner's conviction in determining whether to revoke enrollment. Act § 1866(j)(8); 42 C.F.R. § 424.535(a)(3).

There is a basis for revocation of Petitioner's billing privileges in this case and my jurisdiction does not extend to review of whether CMS or its contractor properly exercised their discretion when deciding to proceed with revocation. I have no authority to review the exercise of discretion by CMS to revoke where there is a basis for revocation. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 19.

The regulation provides for a bar to reenrollment from a minimum of one year to a maximum of three years. 42 C.F.R. § 424.535(c). Petitioner cites no authority to support that he has a right to review of the CMS or contractor determination as to the period of the reenrollment bar. There is no statutory or regulatory language recognizing or establishing a right to review of the duration of the reenrollment bar CMS imposes, or whether or not it is reasonable. Act § 1866(j)(8); 42 C.F.R. §§ 424.535(c); 424.545; 498.3(b); and 498.5. The length of the reenrollment bar CMS imposes is not a determination subject to review by an administrative law judge and only the determination to revoke is reviewable. 42 C.F.R. §§ 424.545(a) (right to appeal revocation but no mention of right to review of duration of bar to reenrollment); 498.3(b)(17) (revocation is an initial determination subject to ALJ review but duration of reenrollment bar not mentioned). Moreover, even I were to review the duration of Petitioner's Medicare reenrollment bar, I would conclude that Petitioner's conviction is certainly consistent with a three-year bar on Medicare reenrollment due to the serious nature of the offenses of which he was convicted and the sentence imposed.

Finally, I have no authority to fashion or grant equitable relief. *US Ultrasound*, DAB No. 2302, at 8 (2010), ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.")

III. Conclusion

For the foregoing reasons, I conclude that Petitioner's Medicare enrollment and billing privileges were properly revoked effective February 8, 2013.

/s/
Keith W. Sickendick
Administrative Law Judge