Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Dr. Randy Barnett,	)	Date: May 8, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-210
	)	Decision No. CR1786
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to revoke the Medicare billing privileges of Petitioner, Randy Barnett, D.O.

I. Background

In January 2005, Petitioner, a doctor, was convicted of a felony for selling non-controlled prescription drug samples. In April 2006, Petitioner submitted an application for enrollment in the Medicare program, disclosing his 2005 conviction, and in May 2006 was approved. Petitioner then applied to participate in the Medicaid program, and the Medicaid state agency made an inquiry to the Medicare carrier about Petitioner's Medicare status in light of his conviction. On August 9, 2007, based on the January 2005 conviction, CMS revoked Petitioner's Medicare billing privileges. Petitioner appealed CMS's determination to the Medicare hearing officer, who issued a reconsideration decision upholding the revocation. Petitioner then appealed the reconsideration and the case was assigned to me for a hearing and a decision.

I held a pre-hearing conference by telephone and issued a pre-hearing order in which I directed the parties to file written exchanges including proposed exhibits and briefs. I advised the parties that they had the option to request an in-person hearing. I told them that I would grant a request for an in-person hearing based on a proffer of relevant testimony that did not duplicate an exhibit.

CMS and Petitioner both filed briefs (CMS Br. and P. Br.). CMS has submitted exhibits marked CMS Exs. 1-8, and Petitioner has submitted one exhibit marked P. Ex. 1. Neither Petitioner nor CMS requested that I convene an in-person hearing. I receive into the record CMS Ex. 1-8 and P. Ex. 1.

Section 1866(j)(2) of the Social Security Act (Act) creates appeal rights for providers and suppliers where enrollment has been denied, including the revocation of billing privileges, using the procedures that apply under section 1866(h)(1) of the Act. These procedures provide for review by an Administrative Law Judge (ALJ) and the right to appeal the ALJ's decision to the Departmental Appeals Board (Board). 42 C.F.R. Part 498, et seq.

II. Discussion

A. Issue

The issue in this case is whether CMS is authorized to revoke Petitioner's provider enrollment.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law to support my decision in this case. I set forth each Finding below as a separate heading.

> **1.** ***CMS has discretion to deny provider enrollment or revalidation to any provider or supplier who was convicted, within 10 years preceding the date of application for enrollment or revalidation, of a felony offense that CMS determines to be detrimental to the best interests of Medicare and its beneficiaries. I have no authority to question CMS's exercise of discretion in such a case.***

Sections 1842(h)(8) and 1866(b)(2)(D) of the Social Security Act (Act) authorize the Secretary of the United States Department of Health and Human Services (Secretary) to deny enrollment or re-enrollment to any provider who has been convicted of a felony offense which the Secretary determines is detrimental to the best interest of the program

or to that of program beneficiaries. The Secretary has published regulations that implement the statutory intent. Regulations governing provider enrollment or revalidation grant CMS discretion to deny enrollment or revalidation to any provider who has been convicted of a felony offense within the 10 years preceding the date of the application for enrollment or revalidation where CMS determines the offense to be "detrimental to the best interests of the program and its beneficiaries." 42 C.F.R. § 424.535(a)(3). A subsection of this regulation specifically provides that billing privileges may be revoked for offenses involving "financial crimes." 42 C.F.R. § 424.535(a)(3)(i)(B). Another subsection provides that billing privileges may be revoked for any conviction that mandates an exclusion pursuant to section 1128(a) of the Act. 42 C.F.R. § 424.535(a)(3)(i)(D)

As a general rule, and as appellate panels of the Departmental Appeals Board have repeatedly held, I have no authority to review CMS's exercise of discretion where discretion is explicitly granted to CMS by regulation. *Wayne E. Imber, M.D.*, DAB No. 1740 (2000); *Brier Oak Terrace Care Ctr.*, DAB No. 1798 (2001). Nor do I have authority to compel CMS to exercise discretion to take an action that CMS has discretionary authority not to take. *Puget Sound Behavioral Health*, DAB No. 1944 (2004), at 15-16 (where regulation uses permissive rather than mandatory language ALJ had no authority to compel CMS to exercise its discretion).

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)).

2. *Petitioner was convicted of a felony within 10 years of the date of his application for provider enrollment.*

The parties agree that in October of 2004 Petitioner entered a guilty plea agreement, and that in January of 2005 he was convicted, of a felony for selling unlawfully thousands of prescription drug samples.[1] CMS Exs. 2, 3.

3. CMS has discretion to deny enrollment to Petitioner inasmuch as he was convicted of a felony within the 10 years preceding the date of his application for enrollment.

Petitioner's conviction of a felony within 10 years of the date of his application for enrollment is sufficient to sustain CMS's determination to revoke his billing privileges. I have no authority to look behind that determination in order to decide whether CMS reasonably exercised its discretion.

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.

However, and although it is unnecessary that I make findings concerning the reasonableness of CMS's determination, there are similarities between Petitioner's conviction and the categories of felonies for which revocation is directed by the regulations and such similarities certainly would support the reasonableness of CMS's determination were reasonableness at issue. *See* 42 C.F.R. §§ 424.535(a)(3)(i)(B), 424.535(a)(3)(i)(D).

First, Petitioner's conviction is of a felony that is at least similar in character to those for exclusion is mandated by section 1128(a)(4) of the Act and for which revocation of billing privileges is directed by 42 C.F.R. § 424.535(a)(3)(i)(D). I make no finding here that Petitioner was convicted of such a felony inasmuch that the drugs he sold unlawfully

[1] The drug samples were approaching their expiration dates or were not to be dispensed by him to a pharmacist, and Petitioner received approximately $10,000 for the samples between January 2000 and April 2001. CMS Ex. 2, at 1.

were not controlled substances. However, the similar character of his conviction to the type of conviction that mandates exclusion under section 1128(a)(4) (both involve the unlawful sale of prescription medications) certainly supports CMS's rationale for finding the conviction to be detrimental to the best interests of Medicare and its beneficiaries.

Additionally, Petitioner's conviction is of a felony that is similar in character to the financial crimes for which revocation is directed by § 424.535(a)(3)(i)(B). It is similar to embezzlement or insurance fraud in that it was illegal and deceptive. It is also similar to tax evasion because Petitioner received income that he could not legally declare for tax purposes. I agree with CMS's characterization of Petitioner's crime.[2] Although it is unnecessary to categorize Petitioner's crime as a "financial crime" because CMS has the discretion pursuant to 42 C.F.R. § 424.535(a)(3) to determine whether any felony is detrimental to the best interest of the Medicare program or its beneficiaries, the similarity between Petitioner's crimes and those financial crimes for which revocation is directed by regulation certainly provides support for the reasonableness of CMS's determination.

Petitioner argues that the revocation is tantamount to an exclusion from the Medicare program, and that Congress has expressly legislated mandatory and permissive exclusions, none of which concern the crime he committed. But, Congress gave the Secretary discretion to terminate a Medicare agreement when a physician or supplier has been convicted of a felony which the Secretary determines is detrimental to the best interests of the program or its beneficiaries even where an offense does not fit exactly into a category of crimes for which exclusion is mandated or permitted by section 1128 of the Act. The Secretary also has the discretion to determine what offenses are detrimental to the best interests of the program or its beneficiaries.

Petitioner also argues that CMS necessarily determined that Petitioner's crime was not detrimental to the Medicare program when it approved his application for enrollment which was accompanied by a disclosure of his 2005 conviction. Moreover, according to Petitioner, CMS *knew* that he had been convicted of a felony when it originally agreed to enroll him as a provider and now, has unfairly changed its position by determining to revoke that which it had previously granted. The argument is essentially that CMS's prior determination estops it from making a new determination. This argument fails for two reasons. First, it is beyond my authority to look behind CMS's discretionary

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[2] In the preamble to the Part 424 regulations, the drafters emphasized their belief that "it is reasonable for the Medicare program to question the honesty and integrity of the individual or entity with such a history [of financial crimes] in providing services and claiming payment under the Medicare program." 71 Fed. Reg. at 20,760 (April 21, 2006).

decision. Second, as a general rule, estoppel does not apply to the federal government or its agencies. *See Oak Lawn Endoscopy*, DAB CR1187 (2004). Moreover, CMS may conduct revalidation reviews "off cycle." 42 C.F.R. § 424.515(d)(1). Here, following inquiries by the state Medicaid agency, CMS conducted a review and determined that Petitioner's conviction warranted revocation. CMS Ex. 8.[3]

/s/
Steven T. Kessel
Administrative Law Judge

[3] An appellate panel of the Departmental Appeals Board rejected similar arguments, albeit in a different context, concerning alleged retroactive application of a regulation. *Nandrenda M. Patel, M.D.*, DAB 1736 (2000) (agency's application of current law at time of action not retroactive application of the regulation.).