

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Bakul Desai, M.D.,)	Date: February 10, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-76
)	Decision No. CR1899
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 Bakul Desai, M.D. CMS was authorized to do so by the provisions of 42 C.F.R. § 424.535(a)(3).

I. Background

Petitioner is a physician who participated in the Medicare program. On May 16, 2008, CMS notified Petitioner that it was revoking his billing privileges in Medicare. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

I issued a pre-hearing order which instructed the parties to file exchanges consisting of briefs and proposed exhibits including the written direct testimony of any proposed witnesses. In that Order, I advised the parties that an in-person hearing would be conducted only if a party expressed an intent to cross-examine a witness whose written direct testimony had been submitted. The parties have submitted their exchanges. Neither party requested such a hearing. Therefore, this case is now ready for a decision.

In its pre-hearing exchange, CMS submitted seven proposed exhibits which it designated as CMS Exhibit (Ex.) 1- CMS Ex. 7. Petitioner filed no proposed exhibits and did not object to my receiving any of CMS's proposed exhibits. I receive into evidence CMS Ex. 1 - CMS Ex. 7.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether CMS is authorized to revoke Petitioner's Medicare billing privileges.

B. Findings of fact and conclusions of law

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

1. CMS has discretion to revoke the Medicare billing privileges of any individual who has been convicted within the past 10 years of a felony that CMS determines to be detrimental to the best interests of Medicare and its beneficiaries.

CMS revoked Petitioner's Medicare billing privileges based on the authority of 42 C.F.R. § 424.535(a)(3). That regulation authorizes CMS to revoke any participating provider's Medicare billing privileges where that provider, within the 10 years prior to his or her enrollment or re-enrollment in Medicare, has been convicted of a federal or State felony that CMS determines to be detrimental to the best interests of Medicare and its beneficiaries.

On its face the regulation confers broad discretion on CMS to define what felonies might constitute crimes that are detrimental to Medicare and its beneficiaries. But, the regulation also provides that certain crimes are, as a matter of law, detrimental. Among those are:

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.

42 C.F.R. § 424.535(a)(3)(B).

Any determination by CMS to revoke the billing privileges of an individual who has been convicted of such a crime – with “convicted” being defined to include a guilty plea to such a crime – is clearly within CMS's discretion. I am without authority to invalidate a determination by CMS to exclude pursuant to section 424.535(a)(3)(B) if the evidence of the case establishes it to fall within the reach of the regulation.

2. The evidence establishes that Petitioner was convicted of a crime as is defined by 42 C.F.R. § 424.535(a)(3)(B). Consequently, CMS may revoke Petitioner's billing privileges.

The evidence in this case, as offered by CMS, is undisputed. On January 31, 2008, Petitioner entered into an plea agreement with the United States Attorney for the District of New Jersey in which he pled guilty to knowingly and intentionally embezzling, stealing, obtaining by fraud, and misapplying property under the custody and control of the University of Medicine and Dentistry of New Jersey. CMS Ex. 1, at 1, 6.¹ The offense to which Petitioner pled guilty is a felony under federal law. *Id.*

This evidence is, standing alone, all that is necessary to sustain CMS's authority to exclude Petitioner pursuant to 42 C.F.R. § 424.535(a)(3)(B). Petitioner pled guilty to a federal felony involving embezzlement which clearly is a financial crime.

Petitioner offers several arguments to challenge CMS's determination. I find these to be without merit.

First, Petitioner argues that he has not yet been "convicted" of a crime because no final judgment of conviction has been entered against him. However, the regulatory authority to revoke billing privileges is not contingent on a final judgment of conviction being entered against an individual who pleads guilty to a felony as is described in the regulation. The regulation makes it plain that all that is necessary is that there be a plea of guilty.

Second, Petitioner asserts that there has been no nexus established between his crime and the Medicare program. He contends that there is "not a single fact in the record that Medicare has been damaged, or potentially damaged, in any way" by his actions. Petitioner's brief at 3. However, there is nothing in the regulation that restricts CMS's authority to revoke billing privileges based on a felony conviction for a financial crime to a conviction that involves the Medicare program.²

¹ The plea agreement is dated January 28, 2008. However, Petitioner signed it on January 31. *Id.*

² Such a relationship is necessary for an exclusion to be mandated by section 1128(a)(1) of the Social Security Act. But, that is a different authority and a different category of remedy and it is not implicated here.

