Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ronald Paul Belin, DPM,

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-64

Decision No. CR2768

Date: April 26, 2013

DECISION

The Medicare enrollment application of Petitioner, Ronald Paul Belin, DPM, was properly denied pursuant to 42 C.F.R. § 424.530(a)(3).

I. Background

Petitioner, a podiatrist licensed in Florida and Iowa, filed an application to enroll as a supplier in the Medicare program in June 2012. Centers for Medicare and Medicaid Services (CMS) Exhibit (Ex.) 12. Wisconsin Physicians Services (WPS), the CMS contractor, notified Petitioner by letter dated July 11, 2012, that his Medicare enrollment application was denied. The notice letter advised Petitioner that the denial was based on his March 20, 2007 felony conviction and was pursuant to 42 C.F.R. § 424.530(a)(3). The notice letter further advised Petitioner that he could file a corrective action plan within 30 calendar days of the date of the notice and that he could also request reconsideration of the determination to deny his Medicare enrollment application. CMS Ex. 3; Petitioner's Exhibit (P. Ex.) 14. Petitioner requested reconsideration of the initial determination to deny his enrollment application by letter dated July 23, 2012. CMS Ex. 4. A hearing officer issued a reconsideration decision on September 7, 2012, upholding the denial of Petitioner's enrollment application based on his March 20, 2007 felony conviction for obtaining a controlled substance by fraud. CMS Ex. 1. The September 7,

2012 reconsideration decision incorrectly cites 42 C.F.R. § 424.535(a)(3)(i)(B) as the basis for denial of enrollment. But, 42 C.F.R. § 424.535(a) clearly applies to the revocation of Medicare billing privileges for enrolled Medicare suppliers and Petitioner was not enrolled at the time. The reconsideration decision should have cited 42 C.F.R. § 424.530(a)(3) as the notice of initial determination did. CMS Ex. 3; P. Ex. 14. Both regulations authorize CMS or its contractor to deny enrollment (42 C.F.R. § 424.530(a)(3)) or revoke enrollment (42 C.F.R. § 424.535(a)(3)) based on a felony conviction detrimental to the best interests of the program or beneficiaries within the ten years preceding enrollment or revalidation of enrollment.

On October 16, 2012, Petitioner requested a hearing (RFH) before an administrative law judge (ALJ) with exhibits attached. On November 2, 2012, the case was assigned to me for hearing and decision and an Acknowledgement and Prehearing Order (Prehearing Order) was issued at my direction. On November 8, 2012, Petitioner filed a "Motion for Clarification of the Acknowledgment and Prehearing Order" and on November 9, 2012, CMS filed an opposition to the motion for clarification with three exhibits.[1] On November 13, 2012, Petitioner filed a reply to the CMS opposition. On November 30, 2012, I issued a ruling on Petitioner's motion for clarification.

On November 28, 2012, CMS filed a prehearing exchange including "Respondent's Prehearing Brief, Motion for Summary Judgment and Brief in Support" (CMS Br.) and CMS Exs. 1 through 12. On December 28, 2012, Petitioner filed a prehearing exchange including "Petitioner's Resistance to Respondent's Motion for Summary Judgment and Prehearing Brief" (P. Br.), and P. Exs. 1 through 15. Petitioner also filed on December 28, 2012, "Petitioner's Motion for Inclusion of Additional Evidence for Good Cause Shown" with two attachments marked as P. Ex. A and P. Ex. B.[2] On January 14, 2013, CMS filed a reply brief (CMS Reply). CMS objected to the admission of all of

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[1] The exhibits were marked as CMS Exs. 1, 2, and 3. CMS subsequently exchanged its proposed exhibits on November 28, 2012, with different documents labeled CMS Exs. 1, 2, and 3. The documents CMS filed with its opposition to the motion for clarification are not admitted as evidence as those documents duplicate the proposed exhibits that CMS exchanged marked as CMS Exs. 3, 4, and 1, respectively, which are admitted.

[2] P. Ex. A is a list of Petitioner's exhibits. P. Ex. B is a list of Petitioner's witnesses. P. Exs. A and B are not admitted as evidence as they are not relevant to the decision on the merits but are only offered on the procedural issue.

Petitioner's proposed exhibits, with the exception of P. Ex. 14 and P. Ex. 15,[3] on the grounds that the documents are not relevant, the documents were not submitted to the hearing officer in the initial determination or reconsideration process, good cause has not been shown to justify admission of the documents, and the documents are not marked in compliance with the CRDP.[4]

No objection has been made to my consideration of CMS Exs. 1 through 12 and they are admitted as evidence. P. Exs. 14 and 15 are also admitted, although these exhibits duplicate CMS Exs. 3 and 4. I determine that good cause exists for the submission of certain documentary evidence for the first time at the ALJ level and P. Exs. 6, 12, and 13 are admitted and considered but only to the extent that they are relevant to the limited issues before me as discussed hereafter. P. Exs. 1-5 and 7-11 are not relevant and are not admitted as evidence because they do not make a fact of consequence to the determination of the case more or less probable than it would be without the evidence.[5] *E.g.*, Fed. R. Evid. 401.

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

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[3] Copies of the documents marked as P. Ex. 14 and P. Ex. 15 were also offered as evidence by CMS, marked as CMS Ex. 3 and CMS Ex. 4.

[4] Petitioner's exhibits as originally submitted were not marked in accordance with my November 2, 2012 Prehearing Order and the Civil Remedies Division Procedures (CRDP). Petitioner corrected the error by filing properly marked exhibits on January 18, 2013.

[5] Petitioner's Honorable Discharge from the Navy, his education, his licensure status, his registration to dispense controlled substances, and the fact he was accepted to participate in Medicaid are not at issue in this matter.

services and suppliers.[6] Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Petitioner is a physician and as such is a supplier under the Act.

The Act requires the Secretary (the Secretary) of Health and Human Services (HHS) to issue regulations that establish a process for the enrollment in Medicare of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations, including revocation of enrollment and billing privileges. Act § 1866(j) (42 U.S.C. § 1395cc(j)).

Pursuant to 42 C.F.R. § 424.505, a supplier must be enrolled in the Medicare program to be reimbursed for services provided to Medicare beneficiaries. The Medicare program authorizes Medicare Part B payments for services provided by physicians. 42 C.F.R. § 410.20. Qualified physician services are reimbursed by Medicare, subject to some limitations. Act §§ 1832(a), 1861(s)(1) (42 U.S.C. §§ 1395k(a), 1395x(s)(1)). "Physician's services" means professional services performed by physicians, including surgery, consultation, and home, office, and institutional calls (with certain exceptions). Act § 1861(q) (42 U.S.C. § 1395x(q)). The term "physician" includes a doctor of podiatric medicine, but only with respect to functions he is legally authorized to perform as such by the state in which he performs them. Act § 1861(r) (42 U.S.C. § 1395(x)(r)); 42 C.F.R. § 410.20(b)(3).

Section 1842(h)(8) of the Act (42 U.S.C. § 1395u(h)(8)) gives the Secretary 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 has delegated the authority to accept or deny enrollment applications to CMS. Pursuant to the Secretary's regulations, CMS may deny a supplier's enrollment application if the supplier is not in compliance with Medicare enrollment requirements. 42 C.F.R. § 424.530(a)(1). CMS may also deny a supplier's enrollment based upon conviction of certain felonies. The regulation provides:

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[6] A "supplier" furnishes services under Medicare and includes 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.

> (a) *Reasons for denial*. CMS may deny a provider's or supplier's enrollment in the Medicare program for the following reasons . . .
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> (3) *Felonies.* If within the 10 years preceding enrollment or revalidation of enrollment, the provider, supplier, or any owner of the provider or supplier, 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. CMS considers the severity of the underlying offense.
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> (i) Offenses include ─
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> *** * * ***
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> (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.
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> (D) Any felonies outlined in section 1128 of the Act.
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> (ii) Denials based on felony convictions are for a period to be determined by the Secretary, but not less than 10 years from the date of conviction if the individual has been convicted on one previous occasion for one or more offenses.

42 C.F.R. § 424.530(a)(3).

A supplier's enrollment is considered denied when a supplier is determined to be "ineligible to receive Medicare billing privileges for Medicare-covered items or services provided to Medicare beneficiaries" for one or more of the reasons listed in 42 C.F.R. § 424.530. 42 C.F.R. § 424.502. When a supplier's enrollment application is denied, the CMS contractor notifies the supplier in writing and explains the reasons for the determination and provides information regarding the supplier's right to appeal. 42 C.F.R. § 498.20(a). The 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, 748-51 (6th Cir. 2004).

B. Issue

Whether there was a basis for denial of Petitioner's application to enroll as a Medicare supplier.

C. 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.

CMS requested summary judgment. Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations that establish the procedure to be followed in adjudicating Petitioner's case are at 42 C.F.R. Part 498. 42 C.F.R. § 424.545(a)(1). The regulations do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. Part 498. *See, e.g., Ill. Knights Templar Home*, DAB No. 2274, at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628, at 3 (1997). The Board recognizes that the Federal Rules of Civil Procedure (Fed. R. Civ. Pro.) do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. Pro. 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of the proceedings and made available to the parties in the litigation of this case by my Prehearing Order dated November 2, 2012. The parties were given notice by the Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Fed. R. Civ. Pro. 56 will be applied.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/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 and/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 Hospital 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 and 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. Part 498. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. Part 498. *Batavia Nursing and Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

The material facts in this case, as discussed hereafter, are not disputed and there is no genuine dispute as to any material fact that requires a trial. The facts relating to Petitioner's adjudication and guilty plea in a Florida state court in October 2006 are not disputed. Petitioner's allegations that other facts are material and in dispute (P. Br. at 24-26) incorrectly characterize legal issues as factual disputes or the alleged disputed facts are not material to the resolution of this case. The issues in this case that require resolution are issues of law related to the interpretation and application of the regulations that govern enrollment in the Medicare program to the undisputed facts of this case. I have assumed all pertinent facts alleged by Petitioner as true, drawn all inferences in favor of Petitioner, and resolve this case as a matter of law against Petitioner. Accordingly, summary judgment is appropriate in this case.

Petitioner provides some history leading up to this case in his RFH and its supporting exhibits and in his prehearing brief. I accept Petitioner's rendition as true for purposes of summary judgment. RFH at 3-6, 14; P. Br. at 1-4.

Petitioner relates that he joined the U.S. Navy in 1986 and received an honorable discharge in November 1993. He graduated from the University of North Florida in

December 1996 with a Bachelor of Science in Biology and a Chemistry Minor. In May 2003, he received a Doctor of Podiatric Medicine from the College of Podiatric Medicine and Surgery at Des Moines University. He completed his residency program in primary podiatric medicine at Temple University School of Medicine. In June 2006, Petitioner completed a two-year podiatric surgical residency program at the West Houston Medical Center in Houston, Texas.

On October 4, 2006, Petitioner pled guilty pursuant to a plea agreement in the Circuit Court of the Fourth Judicial Circuit, Clay County, Florida, to one count of obtaining a controlled substance by fraud and he received a deferred adjudication of guilt, 18 months probation, court costs, a fine of $370, and a requirement to attend drug court successfully for the plea to be withdrawn and the sentence vacated.

Petitioner was notified by the HHS Inspector General (I.G.) by letter dated February 28, 2007, that he was being excluded from Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(4) of the Act (42 U.S.C. § 1320a-7(a)(4)) based on his felony conviction which was related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Mr. Sowinski, of the HHS I.G. Health Care Program Exclusions Office, advised Petitioner by letter dated April 2, 2012, that Petitioner's eligibility to participate in Medicare was reinstated following expiration of the five year exclusion pursuant to section 1128(a)(4) of the Act based on his conviction. Mr. Sowinski advised Petitioner to consult with the Medicare carrier to determine his participation options. The U.S. Office of Personnel Management (OPM) debarment, which was effective on May 14, 2007, was lifted effective April 2, 2012, based upon the I.G.'s reinstatement of Petitioner's eligibility. Petitioner advises me that he has retained his license to practice podiatric medicine in Florida since 2009, and that he obtained his Iowa license in 2010. Petitioner states he co-published articles regarding podiatric medicine and surgery; he completed a two-year foot and ankle trauma fellowship in Des Moines, Iowa; he is a member of the Iowa Podiatric Scientific Committee for the Iowa Podiatric Medical Society; and he has full-time employment as a foot and ankle surgeon subject to his enrollment in Medicare. On June 6, 2012, Iowa Medicaid accepted Petitioner's application to enroll; on July 25, 2012 he received his Iowa controlled substance license; and on August 14, 2012, he received his DEA controlled substance license.

2. Petitioner had sufficient notice of the basis for the denial of his enrollment and was not prejudiced by the errors in the July 11, 2012 initial denial letter and the September 7, 2012 reconsideration decision.

The first issue to be resolved is whether or not Petitioner had adequate notice of the basis for the denial of his application to enroll in Medicare. Petitioner argues in his prehearing brief that CMS is not entitled to summary judgment because the July 11, 2012 letter notifying Petitioner of the initial denial of his application and the September 7, 2012

reconsideration decision failed to properly notify him of the reasons for the denial of his enrollment application and prejudiced his ability to submit a corrective action plan. P. Br. at 8-15.

The WPS July 11, 2012 initial denial letter advised Petitioner that he was denied pursuant to 42 C.F.R. § 424.530(a)(3) based on a felony conviction on March 20, 2007. The notice advised him of his right to submit a corrective action plan and to request reconsideration. CMS Ex. 3 at 1; P. Ex. 14. The WPS September 7, 2012 letter advising Petitioner of the reconsideration decision upholding the denial, advised Petitioner that the denial of enrollment was pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B) based on Petitioner's March 20, 2007 conviction of a felony offense of obtaining a controlled substance by fraud. The letter advised Petitioner of his right to request ALJ review within 60 days. CMS Ex. 1.

Pursuant to the Act, Petitioner is entitled to reasonable notice. Act §§ 1866(h)(1), (j)(2). I construe the requirement for reasonable notice to include reasonable notice of both the bases for the denial of Petitioner's enrollment and Petitioner's right to administrative and judicial review. No specific notice requirements are set forth in 42 C.F.R. Part 424. The procedures applicable to administrative review are those set forth in 42 C.F.R. Part 498. 42 C.F.R. § 424.545(a). Pursuant to 42 C.F.R. § 498.20(a), CMS or its contractor is required to mail a notice of initial determination to an affected party that states the bases or reasons for the determination; the effect of the determination; and the right to request reconsideration, if applicable, or a hearing. Pursuant to 42 C.F.R. § 498.25(a), CMS or its contractor is required to mail a notice of the reconsideration decision to an affected party; the notice must give the reasons for the determination; the notice must state the specific conditions or requirements of law or regulations that were violated; and the notice must advise the affected party of its right to a hearing. Even after an administrative appeal process has commenced, a federal agency may assert and rely on new or alternative grounds for the challenged action or determination as long as the non-federal party has notice of, and a reasonable opportunity to respond to, the asserted new grounds during the administrative proceeding. *Green Hills Enters., LLC*, DAB No. 2199 (2008); s*ee also Abercrombie v. Clarke*, 920 F.2d 1351, 1360 (7th Cir. 1990), *cert. denied*, 520 U.S. 809 (1991) (holding that defects in formal notice may be cured during the course of an administrative proceeding, and due process is satisfied as long as the party is reasonably apprised of, and given opportunity to address, the issues in controversy); *St. Anthony Hosp. v. Sec'y, Dep't of Health and Human Servs.*, 309 F.3d 680, 708 (10th Cir. 2002) ("To establish a due process violation [in an administrative proceeding], an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice."). Thus, it is necessary to consider whether any error in the notices or new theory advanced by CMS caused Petitioner prejudice by depriving Petitioner of an adequate opportunity to respond and due process. *Union Hospital Inc.*, DAB No. 2463, at 8 (2012); *Fady Fayad, M.D.*, DAB No. 2266, at 10-11 (2009); *Green Hills Enters., LLC*, DAB No. 2199, at 8.

Petitioner filed his RFH on October 16, 2012, well within 60 days of the September 7, 2012 notice of the decision on reconsideration and there is no dispute that I have jurisdiction. The issues raised by Petitioner in his RFH are that the reconsideration decision does not reflect that more than five years have passed since March 20, 2007 and that Petitioner is again eligible to enroll in Medicare. Petitioner argues that the reconsideration decision does not consider all of Petitioner's professional activities since 2007. Petitioner asserts that the reconsideration decision does not consider that; Petitioner's application to enroll in the Iowa Medicaid program was granted on June 6, 2012; on July 25, 2012, Petitioner was granted an Iowa controlled substance license; and on August 14, 2012, the U.S. Drug Enforcement Administration (DEA) granted Petitioner a controlled substance license. Petitioner also asserts that he was advised by letter dated April 2, 2012 from the HHS I.G. that his request for reinstatement of his eligibility to participate in Medicare was approved. RFH at 2-3. Petitioner states that he filed the request for hearing as is his right pursuant to 42 C.F.R. § 498.5(a). RFH at 2. Petitioner notes in his RFH that WPS referred to a wrong date for his conviction,[7] March 20, 2007[8] rather than October 4, 2006, in both the initial determination and the reconsideration decision. RFH at 7. Petitioner also points out that the reconsideration decision citation to 42 C.F.R. § 424.535(a)(3)(i)(B) is in error as he was not enrolled in Medicare and, therefore, his enrollment was not being revoked. Petitioner specifically states that the applicable regulation is 42 C.F.R. § 424.530, which establishes the authorized bases for denial of enrollment in Medicare. RFH at 13. Petitioner does not assert in his RFH that either the notice of the initial denial or reconsidered decision were so defective as to deprive him of adequate notice of the basis for his exclusion or notice of his rights to request reconsideration or ALJ review.

Petitioner's RFH clearly shows that he had sufficient notice of the basis for the denial of his enrollment in the Medicare program. Petitioner's July 23, 2012 letter to WPS in response to the initial denial of his enrollment application states that Petitioner "received a letter informing me I was denied Medicare participation due to a conviction in 2006." CMS Ex. 4. Although the initial determination letter contained an error regarding the year of Petitioner's conviction, Petitioner understood the initial denial letter referred to his conviction for obtaining a controlled substance by fraud and Petitioner has not offered any evidence that he had another conviction that would cause confusion. Petitioner also

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[7] A deferred adjudication is a conviction within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)).

[8] March 20, 2007, was the effective day of Petitioner's exclusion by the I.G. pursuant to section 1128(a)(4) of the Act. CMS Ex. 5; RFH Ex. H.

recognized in his RFH that the citation to 42 C.F.R. § 424.535(a)(3)(i)(B), a section pertaining to the revocation of Medicare billing privileges of enrolled suppliers, was in error. Petitioner's request for a hearing clearly shows that he was aware that this matter is a denial of Medicare enrollment and subject to 42 C.F.R. § 424.530. I conclude that Petitioner received adequate notice of the basis for his denial of Medicare enrollment based on a felony conviction and his right to subsequent review, which right he has exercised. The notices of initial denial and reconsideration were in error in particular facts stated, and in a regulatory citation, but I conclude that the WPS errors did not prejudice Petitioner or in any sense impair his ability to seek my review. Petitioner has suffered no prejudice as he has had adequate opportunity to fully address the issues and respond to the CMS theories regarding the propriety of the denial of Petitioner's Medicare enrollment application in this proceeding.[9]

3. Petitioner was convicted of a felony offense within the ten years preceding his application that CMS has determined to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.530(a)(3).

4. Petitioner was convicted of a felony offense listed in section 1128 of the Act. 42 C.F.R. § 424.530(a)(3)(i)(D).

5. Petitioner was convicted of a felony offense that was similar to a financial crime within the meaning of 42 C.F.R. § 424.530(a)(3)(i)(B).

6. There was a proper basis for denial of Petitioner's Medicare enrollment application pursuant to 42 C.F.R. § 424.530(a)(3).

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[9] It has become a too frequent occurrence for Medicare contractors to issue initial denial and reconsideration determinations, which through neglect or lack of diligence, contain errors similar to those of which Petitioner complains. Errors in such important documents reduces public confidence that the process is being fairly and competently administered; may result in confusion that could be prejudicial to an enrolled or prospective provider or supplier in another case; and clearly results in more work for counsel for CMS, petitioners, and the administrative judiciary. CMS is encouraged to ensure prompt corrective action is taken to reduce such potential prejudicial errors. CMS is advised that but for the clarity of Petitioner's request for hearing, remand may have been appropriate in this case to ensure that correct notices were issued by CMS or its contractor to avoid prejudice to Petitioner.

There is no dispute that on October 4, 2006, Petitioner pled guilty pursuant to a plea agreement in the Circuit Court of the Fourth Judicial Circuit, Clay County, Florida, to one count of obtaining a controlled substance by fraud and he received a deferred adjudication of guilt, 18 months probation, court costs, a fine of $370, and a requirement to attend drug court successfully for the plea to be withdrawn and the sentence vacated. Petitioner was notified by the HHS I.G. by letter dated February 28, 2007, that he was being excluded from Medicare, Medicaid, and all federal health care programs for five years pursuant to section 1128(a)(4) of the Act (42 U.S.C. § 1320a-7(a)(4)) based on his felony conviction which was related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. RFH at 4-5; P. Br. at 2. As a matter of law, Petitioner's deferred adjudication in Florida was a conviction within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). There is no dispute that Petitioner completed the five year exclusion period and was determined by the HHS I.G. to be eligible for reinstatement and OPM lifted its debarment of Petitioner.

Congress requires that the Secretary exclude from participation in any federal health care program:

> Any individual or entity that has been convicted for an offense which occurred after [August 21, 1996], under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Act § 1128(a)(4) (42 U.S.C. § 1320a-7(a)(4)). The minimum period of exclusion authorized by Congress is five years. Act § 1128(c)(3)(B). There is no dispute that it was pursuant to this authority that Petitioner was excluded from participation for the minimum period of five years by the HHS I.G., effective March 20, 2007.

Congress also granted the Secretary discretion to refuse to enter into an agreement or to terminate or refuse to renew an agreement with a 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." Act § 1842(h)(8) (42 U.S.C. § 1395u(h)(8)). The Secretary delegated to CMS the authority to deny enrollment to a prospective provider or supplier if the provider or supplier or an owner of the provider or supplier has been convicted of a federal or state felony that CMS has determined detrimental to the best interest of the program and its beneficiaries within ten years prior to enrollment or revalidation of enrollment. 42 C.F.R. § 424.530(a)(3). The regulations set forth a nonexclusive list of offenses, such as felony crimes against persons, financial crimes, any felony that places Medicare or its beneficiaries at immediate risk, or any felony specified in section 1128 of the Act. 42 C.F.R. § 424.530(a)(3)(i). The period during which a felony conviction may be a basis for denial is a matter within the discretion of the Secretary, except the period is not less than

ten years from the date of the conviction if there is a previous conviction. 42 C.F.R. § 424.530(a)(3)(ii).

The WPS July 11, 2012 initial denial letter advised Petitioner that he was denied pursuant to 42 C.F.R. § 424.530(a)(3) based on his felony conviction. The initial denial did not characterize Petitioner's felony offense by identifying a particular subsection of section 424.530(a)(3). Before me, CMS argues that both 42 C.F.R. § 424.530(a)(3)(B), which lists financial or similar crimes, and 42 C.F.R. § 424.530(a)(3)(D), which incorporates all felonies listed in section 1128 of the Act, are applicable in this case. The fact that the notice letter did not specify which subsection applied did not unduly prejudice Petitioner, as Petitioner was given notice that 42 C.F.R. § 424.530(a)(3) was the basis for denial and Petitioner was on notice that WPS and CMS determined that his felony conviction was a detrimental offense. I conclude that Petitioner's offense qualifies as a felony listed in section 1128 of the Act and as a crime similar to a financial crime, though I need find only one applicable.

The fact that Petitioner's conviction in October 2006 was within the ten years preceding his application is undisputed. The fact that Petitioner's conviction for a felony offense is listed in section 1128 of the Act is indisputable, particularly in light of the fact that the HHS I.G. excluded Petitioner for five years for the conviction pursuant to section 1128(a)(4) of the Act. Accordingly, CMS had a basis pursuant to 42 C.F.R. § 424.530(a)(3)(D) to deny Petitioner's application to enroll in Medicare.

CMS nevertheless persists in its theory that Petitioner's offense fits within the definition of financial or similar crimes under 42 C.F.R. § 424.530(a)(3)(B), which is a separate albeit unnecessary basis for denial of enrollment in this case. The CMS position has merit but requires a more careful review of Petitioner's conviction and the regulatory history to discern the merit.

It is necessary to clarify the scope of my review based on the facts of this particular case before analyzing whether Petitioner was convicted of a felony crime that was a financial or similar crime within the meaning of 42 C.F.R. § 424.530(a)(3)(B). CMS argues that I do not have jurisdiction to review the CMS determination that Petitioner's offense was a financial crime as that determination is a matter given to the discretion of CMS. CMS Br. at 6-7. CMS is in error. CMS cannot deprive a party of meaningful review by the simple incantation of "discretion." Congress provided for review by an ALJ, the Board, and the courts, and the Secretary has implemented regulations recognizing the right to review. While as an ALJ I have no authority to declare the Secretary's regulations invalid, I certainly have the authority to determine whether the regulations are applied consistently with the Constitution, the statutes, and the Secretary's intent and policies. Similarly, when CMS makes a determination that an offense triggers the regulation authorizing CMS to deny access to the program, by either denial or revocation, that determination is subject to review consistent with the intent of Congress and the

Secretary to provide such review. According to the decision of an appellate panel of the Board in *Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008), the Secretary determined that the felonies specifically listed in section 42 C.F.R. § 424.535(a)(3)(i) are detrimental per se to the best interests of the Medicare program and its beneficiaries. Therefore, when CMS denies enrollment or revokes enrollment based on conviction for a specific offense listed in the regulation, the regulation establishes that the offense is detrimental per se; and ALJ review is limited to whether or not the evidence establishes that a conviction occurred, and the CMS decision to exercise its discretion to deny or revoke program enrollment is not reviewed. The Board's analysis and conclusion are equally applicable and valid for the list of felonies found in 42 C.F.R. § 424.530(a)(3)(i). However, in a case where the felony of which a current or prospective provider or supplier is convicted is not specifically listed in the regulation, i.e. a "similar crime" under 42 C.F.R. § 424.530(a)(3)(i)(B), the Secretary has not declared that the unnamed offense is per se detrimental and a de novo review extends to two issues: whether there was a felony conviction and whether the felony is similar to the financial crimes listed that are per se detrimental. If de novo review results in conclusions that a felony conviction occurred and the conviction is similar to one of the per se detrimental crimes, then the conclusion is that CMS had a basis to deny or revoke enrollment and the CMS decision to exercise its discretion to deny program access is not subject to further review and must be upheld. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 18 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). CMS also persists with an incorrect argument that Petitioner cannot advance new issues or arguments before me, i.e. issues or arguments not raised on reconsideration. CMS Br. at 10. As I explained in my November 30, 2012 ruling on Petitioner's motion for clarification, 42 C.F.R. § 498.56(e) and its regulatory history show that the drafters intended to limit a provider's or supplier's ability to introduce new "documentary evidence" before the ALJ absent a showing of good cause. The regulation does not limit a provider's or supplier's right to raise and argue issues such as the interpretation or application of the law to the facts or my authority to consider such issues. Accordingly, I do not find jurisdiction nearly so limited as CMS advocates.

It is necessary to consider the undisputed facts of the felony offense of which Petitioner was convicted in October 2006, to determine whether or not it is a crime similar to the financial crimes listed in 42 C.F.R. § 424.530(a)(3)(i)(B) which are per se detrimental. As the Board stated in *Ahmed:*

> [E]ven 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. Financial crimes, the regulation states, are crimes "<u>such as</u> extortion, embezzlement, income tax fraud, insurance fraud and other similar crimes" (emphasis added). The words "such as" imply that the subsequent list of

> illustrative crimes, including crimes similar to those named in the list, are not the only set of crimes that may be considered "financial."

Ahmed, DAB No. 2261, at 10.

Petitioner was charged in Florida with obtaining or attempting to obtain a controlled substance by fraud. The one-count information alleged that between about July 26, 2006 and August 15, 2006, in Clay County, Florida, he unlawfully acquired or obtained or attempted to obtain possession of Oxycontin, by misrepresentation, fraud, forgery, deception, or subterfuge in violation of section 893.13(7)(a)9 of the Florida Statutes.[10] CMS Ex. 7. Petitioner's plea agreement and the "Order of Probation" from the Circuit Court of Clay County, Florida, shows that he pled guilty as charged with no exceptions or substitutions. CMS Exs. 8, 9. On July 26, 2007, Petitioner entered a settlement agreement with the Florida Department of Health that provided for the Florida Board of Podiatric Medicine to suspend Petitioner's license to practice podiatric medicine to an indefinite future date when Petitioner demonstrated to the Board that he could safely practice podiatric medicine. The settlement agreement also required that Petitioner pay a $10,000 fine and costs. CMS Ex. 10 at 2-3. The purpose of the settlement agreement was to resolve an administrative complaint against Petitioner. The settlement agreement provided that Petitioner neither admitted nor denied the factual allegations of the complaint. CMS Ex. 10 at 1-2. The administrative complaint alleged in three counts that Petitioner used other physicians' prescription pads to write prescriptions for Oxycontin; he forged the physicians' signatures on the prescription pads; then used the prescriptions to obtain Oxycontin from pharmacies; and he was convicted by the Circuit Court of Clay County of one-count of an information based on his misconduct. CMS Ex. 10 at 12-14. The settlement was accepted by the Florida Board of Podiatric Medicine on August 10, 2007. CMS Ex. 11.[11] Petitioner does not dispute before me that his license was

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[10] The Florida statute makes it a third-degree felony to "acquire or obtain, or attempt to acquire or obtain, possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." Fla. Stat. § 893.13(7)(a)9 and (d).

[11] CMS asserts in its brief that Petitioner failed to disclose in his application that he was convicted in the Circuit Court of Clay County, Florida, in October 2006 and that his license was suspended by the Florida Board of Podiatric Medicine in August 2007. CMS Br. at 2, n.1; CMS Ex. 2. However, WPS and CMS did not deny the application on this basis and CMS did not request a remand for agency consideration and notice of this possible additional basis for denial of enrollment. Therefore, this possible basis for denial of enrollment is not considered further.

suspended based on his conviction and the terms of the settlement with the Florida Board, but simply states that he has "successfully retained his license to practice in Florida since 2009." P. Br. at 3.

Of course, Petitioner argues that his drug offense was not a financial or similar crime within the meaning of 42 C.F.R. § 424.530(a)(3)(i)(B). P. Br. at 15-19. CMS argues that it was a proper exercise of discretion to determine that Petitioner was convicted of an offense detrimental to the best interests of the program and its beneficiaries. CMS argues that the reconsideration decision characterization of Petitioner's offense as a financial crime is consistent with the intent of the drafters of the regulation citing to the regulatory history which states:

> Felonies that we determine to be detrimental to the best interests of the Medicare program or its beneficiaries include the following:
>
> * * * *
>
> Within the last 10 years preceding enrollment or revalidation of enrollment, financial crimes, such as extortion, embezzlement, income tax evasion, making false statements, insurance fraud and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions. **We believe it is reasonable for the Medicare program to question the honesty and integrity of the individual or entity with such a history** in providing services and claiming payment under the Medicare program.

71 Fed. Reg. 20,754, 20,768 (April 21, 2006) (emphasis added). CMS Br. at 5.

I agree with Petitioner that at first blush his criminal offense does not look like a financial crime like embezzlement or income tax evasion. However, the fact that Petitioner obtained or attempted to obtain the Oxycontin by using a false prescription is certainly similar to an offense of larceny by trick or fraud or deception, as there is no dispute that a pharmacist could not lawfully dispense Oxycontin, even to Petitioner, without a prescription. *Black's Law Dictionary* 897 (18th ed. 2004). Petitioner's crime is also a crime similar to extortion, which is generally defined as "[t]he act or practice of obtaining something or compelling some action by illegal means, as by force or coercion." *Black's Law Dictionary* 623 (18th ed. 2004). While the undisputed evidence does not show that Petitioner used force, the undisputed evidence shows that he used a prescription pad obtained illegally, forged a signature illegally, and then presented the prescription causing and effectively coercing, in its broadest sense, a pharmacist to dispense Oxycontin. Petitioner's crime is also similar to the offense of insurance fraud. Insurance fraud is generally described as "[f]raud committed against an insurer, as when an insured

lies on a policy application or fabricates a claim." *Black's Law Dictionary* 687 (18th ed. 2004). There is no evidence that Petitioner submitted a false policy application or a fabricated claim to an insurer, but the evidence shows that he used an illegally obtained prescription pad, forged a signature, and then presented that forged document to a pharmacist to cause the pharmacist to dispense Oxycontin. Petitioner's felony crime is similar to financial crimes in general, as Petitioner used his access or position to obtain the prescription pad of another physician, he forged a signature to a prescription, and he used the false prescription to obtain drugs illegally. According to the regulatory history for 42 C.F.R. § 424.530(a)(3)(i)(B) set forth above, the drafters were concerned about examining the honesty and integrity of individuals or entities convicted of financial and similar crimes. In this case, Petitioner's crime was similar to the crimes that CMS has found to be per se detrimental and Petitioner's crime reflects adversely upon his honesty and integrity. I conclude that CMS had an additional basis under 42 C.F.R. § 424.530(a)(3) to deny Petitioner's enrollment.

Accordingly, I conclude based on undisputed facts that CMS was authorized under section 424.530(a)(3) to deny Petitioner's Medicare enrollment application.

7. CMS's denial of Petitioner's enrollment application was not arbitrary and capricious.

8. No equitable relief is available to Petitioner.

Petitioner argues that the denial of his enrollment application was arbitrary and capricious and CMS failed to properly exercise its discretion in determining the appropriate exclusionary period. Petitioner contends that: (1) more than five years have passed since Petitioner's conviction in October 2006, and Petitioner's five-year exclusion by the HHS I.G. from all federal health programs pursuant to section 1128(a)(4) of the Act has expired, and he has been declared by the I.G. to be eligible for reinstatement or to enroll; (2) CMS has not considered all the programs and activities Petitioner has completed and Petitioner's service to the community since 2006; and (3) CMS abused its discretion in determining that Petitioner's 2006 conviction was detrimental to the best interests of the Medicare program and denying Petitioner Medicare enrollment for ten years on that basis. P. Brief at 19-24.

Petitioner does not admit to the distinction between CMS's authority to deny a supplier Medicare enrollment under section 1842(h)(8) of the Act (42 U.S.C. § 1395u(h)(8)) and 42 C.F.R. § 424.530 and the I.G.'s Congressional mandate to exclude from Medicare and state health care programs convicted individuals or entities under section 1128(a) of the Act. In this case the I.G. excluded Petitioner for the mandatory minimum five years pursuant to section 1128(a)(4) of the Act based upon his felony drug conviction. CMS, the gatekeeper to Medicare, denied Petitioner's Medicare application to enroll as a supplier so that he could submit claims for reimbursement for services delivered to

Medicare eligible beneficiaries. The CMS contractor denied the application because Petitioner was convicted of a felony that CMS considers detrimental to the program and the conviction was within the ten years preceding the date of his application. The Act and the regulations clearly grant CMS the authority and discretion to make the decision made in this case. Contrary to Petitioner's characterization, the CMS action was not an extension of Petitioner's exclusion to ten years. Rather, CMS determined within the scope of its delegated authority that it is not yet time to trust Petitioner to participate in Medicare. Petitioner may reapply as provided by 42 C.F.R. § 424.530(b). The Act and regulations do not require that CMS consider evidence other than the nature of Petitioner's conviction and the severity of the underlying offense in determining whether to deny enrollment. 42 C.F.R. § 424.530(a)(3). There is no legal requirement for CMS to consider Petitioner's activities or accomplishments, personal or professional, between his conviction and his application to enroll. There is also no requirement that CMS consider that Petitioner was excluded for some period by the HHS I.G., unless of course the period of exclusion continues when an enrollment application is filed, which would prevent CMS from enrolling the individual or entity. The facts that the I.G. exclusion expired and the I.G. advised Petitioner that he was no longer barred by the I.G. from applying and that OPM lifted the debarment, does not relieve the Secretary and CMS from statutory and regulatory duties to ensure that Petitioner meets enrollment requirements. Petitioner presents no legal authority showing that CMS is bound to permit Petitioner's participation in Medicare simply because Petitioner's period of exclusion from all federal health programs has expired and Petitioner's eligibility has been reinstated by the I.G., and I am aware of no such legal authority. I conclude that all of Petitioner's objections and arguments are without merit. To the extent that Petitioner's arguments may be construed as a request for some equitable relief, I have no such authority. *US Ultrasound*, DAB No. 2302, at 8 (2010) ("Neither 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, Petitioner's Medicare enrollment application was properly denied.

/s/
Keith W. Sickendick
Administrative Law Judge