Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Mark A. Seldes, M.D.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-776

Decision No. CR2912

Date: August 29, 2013

DECISION

On March 9, 2012, Petitioner, Mark Allan Seldes, M.D., submitted an enrollment application to First Coast Services Options, (First Coast), a contractor for the Centers for Medicare & Medicaid Services (CMS), seeking to enroll in the Medicare program as a supplier.[1] First Coast denied Petitioner's application based on his 2008 conviction by a General Court-Martial for, among other things, rape. Upon reconsideration, First Coast upheld its determination to deny Petitioner's application. Petitioner appealed, requesting a hearing to challenge the denial of his enrollment application. CMS now moves for summary judgment, which Petitioner opposes.

For the reasons explained below, I conclude that the undisputed material facts establish that CMS had the authority to deny Petitioner's enrollment application based on his rape conviction in 2008. Once CMS determined that Petitioner had been convicted of rape within the preceding 10 years — a determination that Petitioner does not dispute — CMS was within its discretionary authority to deny his enrollment application. Accordingly, I grant summary judgment in favor of CMS.

[1] A "supplier" is "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202.

I. Case Background & Procedural History

Petitioner is a physician who, after having his medical licenses briefly suspended, is now actively licensed in Virginia and Florida. CMS Exhibit (Ex.) 11, at 28-29. Before the convictions at issue in this case, Petitioner served as a physician in the United States Air Force, 80th Fighter Squadron. CMS Ex. 1, at 3. On February 1, 2008, a General Court-Martial convened at Kunsan Air Force Base, Republic of Korea, convicted Petitioner of rape, conduct unbecoming an officer and a gentleman, and adultery. CMS Ex. 1, at 3. Petitioner was sentenced to three years confinement and dismissal from the Air Force. CMS Ex. 1, at 4. As a result of his conviction, Petitioner is registered as a sex offender in Florida. CMS Ex. 7.

Petitioner sent an enrollment application to First Coast, which it received on March 13, 2012. CMS Ex. 8. Petitioner sought to enroll as a supplier and to reassign his Medicare billing privileges to Doctor Today TLC, LLC. CMS Ex. 8, at 3-6. In the section of the application requiring Petitioner to list any "Final Adverse Actions" against him, he listed the suspension of his Virginia medical license in 2008, and explained:

> License suspended. I had an extra-marital affair with a woman, not a patient or co-worker, while stationed with the military overseas. The sexual relations resulted in a felony conviction. Will meet with Virginia Board for re-instatement Feb. 2012.[2]

CMS Ex. 8, at 2. Petitioner did not specifically list his 2008 rape conviction or a June 14, 2011 administrative action by the Florida Department of Health that suspended his medical license and immediately reinstated it. CMS Ex. 8, at 2; CMS Ex. 11, at 6-8.

By notice dated April 10, 2012, First Coast denied Petitioner's application. First Coast cited 42 C.F.R. § 424.530(a)(3)(i)(A) and said that it had identified unfavorable actions "not indicated on the enrollment application." CMS Ex. 10, at 1. On April 23, 2012, Petitioner submitted a corrective action plan (CAP), which First Coast subsequently denied on October 9, 2012. CMS Exs. 11-12. In denying the CAP, First Coast cited Petitioner's 2008 rape conviction and said that his enrollment application had been "correctly denied." CMS Ex. 12, at 1.

On December 5, 2012, Petitioner requested reconsideration of the determination to deny his enrollment application. CMS Ex. 13. Petitioner pointed out his 20-year career in the military and explained that during the General Court-Martial he was not permitted an opportunity to cross-examine his accuser. CMS Ex. 13, at 1-2. He described the events

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[2] The Virginia Board of Medicine reinstated Petitioner's medical license in that state on February 27, 2012. CMS Ex. 11, at 23-27.

leading to his conviction as "unfortunate intimate relationship" that "resulted in accusations of rape, adultery, and conduct unbecoming an officer." CMS Ex. 13, at 2. He explained the steps he took to regain his medical licenses in Virginia and Florida, and provided seven letters lauding his character and professionalism. CMS Ex. 13, at 2-10. On March 12, 2013, First Coast issued a reconsidered determination that upheld the denial of Petitioner's enrollment application based on his felony conviction within the 10 years preceding his application.[3] CMS Ex. 14.

Petitioner submitted his request for hearing (RFH) on May 9, 2013, in which he argued that his felony conviction was not detrimental to the Medicare program or its beneficiaries. RFH at 2. Following my Acknowledgment and Prehearing Order dated May 15, 2013, CMS filed a motion for summary judgment with supporting brief (CMS Br.) and 15 proposed exhibits (CMS Exs. 1-15). Petitioner filed his opposition to summary judgment (P. Opp.) and incorporated CMS Exs. 1-15 rather than submit any additional proposed exhibits. Accordingly, I admit CMS Exs. 1-15 into the record.

II. Analysis

A. Issues

This case presents the following issues:

1. Whether summary judgment is appropriate; and

2. Whether 42 C.F.R. § 424.530(a)(3) authorizes CMS to deny Petitioner's Medicare enrollment application.

B. Applicable Law

The Social Security Act (Act) requires that the Secretary of United States Department of Health and Human Services (Secretary) promulgate regulations that establish the requirements to enroll providers and suppliers of services in the Medicare program. *See* Act § 1866(j), 42 U.S.C. § 1395cc(j). Those regulations are currently at 42 C.F.R. Part 424, Subpart P. The regulations state that a provider or supplier must be enrolled in the

[3] Petitioner filed his reconsideration request well beyond the 60-day deadline established by regulation, *see* 42 C.F.R. § 498.22(b)(3), but the First Coast hearing officer found the request was "timely" and issued a reconsidered determination upon that request. CMS Ex. 14, at 1. Petitioner, therefore, has a right to a hearing before an administrative law judge. 42 C.F.R. § 498.5(*l*)(2); *see Hiva Vakil, M.D.*, DAB No. 2460, at 5 (2012) ("[T]he regulations plainly require that CMS or one of its contractors must issue a 'reconsidered determination' before the affected party is entitled to request a hearing before an [administrative law judge].").

Medicare program to be reimbursed for services provided to Medicare beneficiaries. 42 C.F.R. § 424.505. To enroll, a potential provider or supplier must submit an enrollment application and meet all participation requirements. *Id.* § 424.510.

The Act gives the Secretary discretion to refuse to enter into an agreement with a potential 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 has delegated the authority to accept or deny potential provider and supplier enrollment applications to CMS. Pursuant to the Secretary's regulations, CMS may deny a potential supplier's enrollment application if the potential supplier has, in the 10 years preceding enrollment, been convicted of a felony that CMS determines is detrimental to the Medicare program and its beneficiaries. 42 C.F.R. § 424.535(a)(3). The regulation provides:

> (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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> * * *
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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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> (A) Felony crimes against persons, such as murder, rape, or assault, and other similar crimes for which the individual was convicted, including pretrial diversions.
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> * * *
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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 must notify the supplier in writing and explain the reasons for the determination and provide information regarding the supplier's right to appeal. *See* 42 C.F.R. § 498.20(a). If the supplier requests reconsideration by CMS or its contractor, then 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, as well as the right to a hearing before an administrative law judge. 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.

C. Findings of Fact & Conclusions of Law

1. *Summary judgment is appropriate*.

Summary judgment is appropriate if "the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574,587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab*., DAB No. 2300, at 3. To determine whether there are genuine issues of material fact for hearing, an ALJ must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.* When ruling on a motion for summary judgment, an ALJ may not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

Here, CMS has moved for summary judgment and provided documentary evidence establishing the material facts of the case. Petitioner has not disputed any evidence that CMS submitted — in fact, he has incorporated CMS's documentary evidence into his prehearing exchange — nor has Petitioner provided his own evidence that establishes a dispute of material fact. Nevertheless, Petitioner argues that CMS is not entitled to summary judgment because there is a dispute about whether Petitioner's rape conviction

"automatically makes him unfit" to participate in the Medicare program as well as "unique" and "mitigating circumstances which should be considered by CMS." P. Opp. at 1-2. Even accepting for purposes of summary judgment that Petitioner's underlying criminal case was "unique" and that he has established "mitigating" circumstances since his conviction, these factors are not material to whether CMS has the authority to deny his enrollment application. Moreover, whether the regulations require that CMS consider the factors that Petitioner claims are in dispute is a legal matter, not a factual dispute. Thus, I find that Petitioner has not presented any evidence or raised any factual inferences that establish a genuine dispute of material fact that would preclude summary judgment.

The only issue to be resolved in this case is a matter of law, which, as discussed below, must be decided in CMS's favor. Accordingly, summary judgment is appropriate.

2. *The undisputed facts show that a General Court-Martial convicted Petitioner on February 1, 2008, of rape, conduct unbecoming an officer and a gentleman, and adultery*.

On February 1, 2008, a General Court-Martial Order of the Department of the Air Force convicted Petitioner of rape, conduct unbecoming an officer and a gentleman, and adultery.[4] CMS Ex. 1, at 3-4. The specification for the rape charge states that Petitioner

[4] Petitioner was convicted of violating Article 120, 133, and 134 of the Uniform Code of Military Justice, codified at 10 U.S.C. §§ 920, 933, and 934. Most relevant here, section 920 states:

> (a) Rape. Any person subject to this chapter who commits a sexual act upon another person by—
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> (1) using unlawful force against that other person;
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> (2) using force causing or likely to cause death or grievous bodily harm to any person;
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> (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
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> (4) first rendering that other person unconscious; or
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> (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

"[d]id, at or near Kunsan Air Base, Republic of Korea, on or about 14 November 2006, rape [the victim]." CMS Ex. 1, at 3. Petitioner is currently a registered sex offender in Florida. CMS Ex. 7.

Petitioner does not dispute that he was convicted of rape or that he is a registered sex offender in Florida. P. Opp. at 1. Rather, he attacks the underlying proceedings that led to his conviction and characterized the situation as an "unfortunate personal relationship." CMS Ex. 13, at 2. However, this is not a proper forum to collaterally attack Petitioner's underlying conviction. *See David L. Tolliver, D.O.*, DAB CR2281, at 10 (2010) (finding no authority allowing review of whether the basis of a disqualifying conviction can be challenged in an enrollment revocation). Whether Petitioner was convicted of rape for purposes of section 424.530(a)(3) does not depend on whether the General Court-Martial was a fair proceeding or whether the underlying circumstances of the case stemmed from an "unfortunate" affair. Such arguments are for a court on direct appeal to consider and not at issue in this review of a remedial action.

3. *The applicable regulation authorizes CMS to deny Petitioner's enrollment application based on his 2008 rape conviction.*

The applicable regulation authorizes CMS to deny an enrollment application if CMS determines that the supplier "within the 10 years preceding enrollment or revalidation of enrollment" has been 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." 42 C.F.R. § 424.530(a)(3). Subsection (a)(3)(i)(A) states that, among the offenses included as being "detrimental to the best interests of the program and its beneficiaries" are "[f]elony crimes against persons, such as murder, rape, or assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions." *Id.* §424.535(a)(3)(i)(A) (emphasis added).[5]

First Coast correctly determined that Petitioner was convicted in 2008 of rape, which is an offense that the regulation expressly states is a basis for denying an enrollment

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is guilty of rape and shall be punished as a court-martial may direct.

10 U.S.C. § 920.

[5] While not applicable to this case, I note that CMS has proposed to modify section 424.530(a)(3) to eliminate the enumerated offenses in subsections (a)(3)(i)(A)-(C). *See* 78 Fed. Reg. 25,013, at 25,021-22 (Apr. 29, 2013) ("In order to allow us discretion to deny or revoke enrollment based on any felony conviction that we believe is detrimental to the Medicare program or its beneficiaries, we propose to eliminate the enumerated list of felonies and instead provide that enrollment may be denied or revoked based upon any such felony conviction.").

application. *Id.*; CMS Ex. 14, at 3. Petitioner's conviction occurred just over four years preceding his enrollment application. CMS Ex. 1, at 3-4; CMS Ex. 8. Therefore, the regulation authorized CMS and its contractor to deny Petitioner's enrollment application.

4. *CMS was within its discretionary authority to deny Petitioner's enrollment application based on his 2008 rape conviction and without consideration of other surrounding circumstances.*

With regard to the exercise of the discretionary authority to revoke a supplier's billing privileges, the Board has explained that "[o]nce CMS established [a] legal basis on which to proceed, its subsequent action to revoke was a reasonable and permissible exercise of the discretion granted to it under section 424.535(a)(3)." *Letantia Bussell, M.D.*, DAB No. 2196, at 10 (2008). The reasoning in *Bussell*, while addressing the revocation of billing privileges under section 424.535(a)(3), is equally as sound when applied to the analogous language authorizing the denial of enrollment application under section 424.530(a)(3). *Compare* 42 C.F.R. § 424.535(a)(3)(i)(A) (permitting CMS to revoke billing privileges if the supplier "within the 10 years preceding enrollment or revalidation of enrollment" was convicted of "Felony crimes against persons, such as murder, rape, assault, and other similar crimes . . .") *with* 42 C.F.R. § 424.530(a)(3)(i)(A) (permitting CMS to deny enrollment if the potential supplier "within the 10 years preceding enrollment or revalidation of enrollment" was convicted of "Felony crimes against persons, such as murder, rape, or assault, and other similar crimes . . ."); *see Ronald Paul Belin, DPM*, DAB CR2768, at 14 (2013) (applying *Bussell* holding in case that involved the denial of an enrollment application), *Edward S. Roberts, DC*, DAB CR2714, at 4 (2013). Thus, once CMS or its contractor determined that Petitioner had been convicted of rape within the 10 years preceding his enrollment application, its subsequent action to deny that application was a reasonable exercise of the discretion granted under section 424.530(a)(3).

Petitioner claims that CMS and First Coast had to consider the "unique circumstances" surrounding Petitioner's conviction, his prior military service record, and his subsequent rehabilitative actions to determine whether his particular rape conviction is detrimental to the Medicare program. P. Opp. at 2. According to Petitioner, CMS cannot deny an enrollment application based solely on the presence of a rape conviction because that would amount to nothing more than a "cursory review" of the application. P. Opp. at 1-2.

However, CMS has already determined through the rulemaking process that certain serious crimes are detrimental to the Medicare program as a matter of law, without regard to unique circumstances involved. 71 Fed. Reg. at 20,760 ("We believe it is reasonable for the Medicare program to question the ability of the individual or entity with such a history to respect the life and property of program beneficiaries."). Rape is one such crime. 42 C.F.R. § 424.535(a)(3)(i)(A); *see also* 71 Fed. Reg. at 20,760. Accordingly, once a review of Petitioner's enrollment application revealed that he was convicted in

2008 of rape, CMS could, as a matter of law, deny the application based solely on that conviction. An agency action taken in accordance with its regulatory authority is necessarily a reasonable exercise of its discretion. To the contrary, there is no rule establishing that the review of Petitioner's enrollment application must delve into a criminal case analysis or second-guess the proceedings that led to a felony conviction before CMS can determine whether the conviction is detrimental to the Medicare program.[6] Moreover, the discretionary authority in section 424.530(a)(3) relates to whether the conviction is for a crime that is detrimental to the Medicare program, not whether Petitioner's subsequent conduct shows that he is or is not a detriment to the program. 42 C.F.R. § 424.530(a)(3). His post-conviction conduct is not relevant to the exercise of CMS's discretionary authority under section 424.530(a)(3). Therefore, I find that CMS had the authority to deny Petitioner's enrollment based solely on the presence of his 2008 rape conviction and was under no obligation to consider other "unique circumstances" to reasonably exercise its discretion.

III. Conclusion

For the foregoing reasons, I affirm the decision by CMS and its contractor to deny Petitioner's enrollment application.

/s/
Joseph Grow
Administrative Law Judge

[6] The regulation states that CMS "considers the severity of the underlying offense." 42 C.F.R. § 424.530(a)(3). By establishing that felony crimes against persons such as rape are detrimental *per se* to the Medicare program, CMS has already considered such crimes to be among the most severe. *See* 71 Fed. Reg. at 20,760.