Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dinesh Patel, M.D.,

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-724

Decision No. CR2838

Date: June 20, 2013

DECISION

This case is before me on the Centers for Medicare & Medicaid Services' (CMS's) Motion for Summary Disposition. I find and conclude that the enrollment and billing privileges of Petitioner, Dr. Dinesh Patel, in the Medicare program were properly revoked. Petitioner was, within the 10 years preceding his enrollment or the revalidation of his enrollment, convicted of a federal felony offense that CMS determined to be detrimental to the best interests of the Medicare program and its beneficiaries, one of the reasons for such revocation established by regulation at 42 C.F.R. § 424.535(a)(3). Therefore, I sustain CMS's determination and conclude that CMS had the authority to revoke Petitioner's billing privileges.

I. Procedural History

On October 5, 2012, Novitas Solutions, Inc. (Novitas), a Medicare contractor, notified Petitioner that his Medicare enrollment and billing privileges were being revoked. Novitas explained that the controlling regulation, 42 C.F.R. § 424.535(a)(3), allows the revocation of a supplier's Medicare enrollment and billing privileges if the 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. Novitas' October 5, 2012 letter identified the felony conviction on which it relied for its determination as Petitioner's September 20, 2012 plea of guilty to participating in a cash-for-patients plan with a diagnostic facility in Orange, New Jersey. CMS Ex. 6.

Petitioner timely sought reconsideration of Novitas' determination. On March 12, 2013, a reconsideration decision affirmed Novitas' determination to revoke Petitioner's Medicare provider enrollment and billing privileges. The reconsideration decision based its determination upon Petitioner's plea of guilty to one count of a violation of the federal healthcare anti-kickback statute in September 2012. CMS Ex. 7.

Petitioner timely perfected this appeal by an April 30, 2013 Request for Hearing. My May 2, 2013 Acknowledgment and Initial Docketing Order allows for motion practice. On May 22, 2013, CMS filed a Motion for Summary Judgment (CMS Br.) and proffered nine exhibits, CMS Exhibits 1-9 (CMS Exs. 1-9), to which Petitioner has not objected, and they are admitted as designated. On June 11, 2013, Petitioner filed an Opposition to CMS's Motion for Summary Judgment (P. Answer Br.). Petitioner did not proffer any exhibits for my consideration. The cycle of motion practice and briefing closed on June 11, 2013.

II. Issue

The issue before me in this case is whether CMS, acting through Novitas, properly revoked Petitioner's Medicare Part B enrollment and billing privileges.

III. Controlling Statutes and Regulations

Section 1866(j)(1) of the Social Security Act (Act), 42 U.S.C. § 1395cc(j)(1), authorizes the Secretary of Health and Human Services (Secretary) to establish a process for the enrollment in the Medicare Part B program of providers of services and suppliers. Section 1866(j)(2) of the Act, 42 U.S.C. § 1395cc(j)(2), gives providers and suppliers appeal rights for certain determinations involving enrollment, using the procedures that apply under section 1866(h)(1)(A) of the Act, 42 U.S.C. § 1395cc(h)(1)(A). These procedures are set out at 42 C.F.R. Part 498 and provide for hearings before the Administrative Law Judges (ALJs) of this forum, and for review of the resulting ALJ decisions by the Departmental Appeals Board (Board).

In provider and supplier appeals under section 1866(j)(1) of the Act and 42 C.F.R. Part 498, CMS must make a *prima facie* showing that the provider or supplier has failed to comply substantially with federal requirements. *See MediSource Corporation*, DAB No. 2011 (2006). To prevail, the provider or supplier must overcome CMS's *prima facie* showing by a preponderance of the evidence. *Batavia Nursing and Convalescent Center,*

DAB No. 1904 (2004), *aff'd, Batavia Nursing and Convalescent Center v. Thompson,* 129 Fed. Appx. 181 (6th Cir. 2005); *Emerald Oaks,* DAB No. 1800 (2001); *Cross Creek Health Care Center,* DAB No. 1665 (1998).

Regulations define the circumstances in which CMS may reject the application of a provider or supplier to participate in the Medicare program, or may revoke an enrollment already granted. The regulation at 42 C.F.R. § 424.535(a) provides several specific reasons for revocation, and, among those reasons, is the one at issue in this case, which allows revocation if:

> (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.
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> (i) Offenses include —
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> (A) Felony crimes against persons, such as murder, rape, assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversions.
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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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> (C) Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
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> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

42 C.F.R. § 424.535(a)(3).

IV. Findings and Conclusions

I find and conclude as follows:

1. On September 20, 2012, in the United States District Court for the District of New Jersey, Petitioner pleaded guilty to a felony offense, a violation of 42 U.S.C. § 1320a-7b(b)(1)(A), Anti-Kickback statute. CMS Exs. 1, 2, 4, 9.

2. CMS has determined the felony offense of which Petitioner was convicted to be detrimental to the best interests of the Medicare program and its beneficiaries.

3. CMS, acting through Novitas, properly revoked Petitioner's Medicare Part B enrollment and billing privileges. 42 C.F.R. § 424.535(a)(3).

V. Discussion

CMS has moved for resolution of the issue in its favor by its Motion for Summary Disposition. While Rule 56 of the Federal Rules of Civil Procedure is not directly applicable to proceedings under 42 C.F.R. Part 498, it does provide guidance for the standard of review for motions seeking summary disposition. Summary judgment is generally appropriate when the record reveals that no genuine dispute exists as to any material fact and the undisputed facts clearly demonstrate that one party is entitled to judgment as a matter of law. *White Lake Family Medicine, P.C.,* DAB No. 1951 (2004). In evaluating whether there is a genuine issue as to a material fact, an administrative law judge must view the facts and the inferences reasonably to be drawn from the facts in the light most favorable to the nonmoving party. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3rd. Cir. 1986); *Oklahoma Heart Hospital*, DAB No. 2183, at 9 (2008); *Brightview Care Center*, DAB No. 2132, at 9-10 (2007); *Madison Health Care, Inc*., DAB No. 1927, at 57 (2004). I have employed that standard in this case. The parties do not disagree concerning the very limited number of material facts in this case.

The material facts on which the parties agree are Petitioner's having been convicted on his plea of guilty to a single count of violation of the Anti-Kickback statute, contrary to 42 U.S.C. § 1320a-7b(b)(1)(A) in the United States District Court for the District of New Jersey on September 20, 2012. CMS Exs. 1, 2, 4, 9; P. Answer Br. at 3. On April 9, 2013, Petitioner was sentenced to three months of imprisonment, two years of supervised release, fined $30,000 and ordered to forfeit $7,600 to the United States. CMS, Ex, 1, at 1, 2, 3, 6, 7; CMS Ex. 8. On September 24, 2012, Novitas revoked Petitioner's and his practice group's billing privileges and imposed a three-year re-enrollment bar. CMS Ex. 6.

The two essential elements that must be proven in order to sustain a revocation under 42 C.F.R. § 424.535(a)(3) are (1) whether a 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 and (2) whether CMS has determined that offense to be detrimental to the best interests of the program and its beneficiaries. Section 1842(h) of the Act explicitly places the authority to make the determination of whether an offense is detrimental with the Secretary. The implementing

regulations at section 424.535(a)(3) delegate that authority to CMS, not to the ALJ. *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008). My review of CMS's revocation of Petitioner's Medicare billing privileges is thus limited to whether CMS had established a legal basis for its actions. Here, Petitioner acknowledges that he was indeed convicted of a federal felony in violation of the Anti-Kickback statute within 10 years of a revalidation of his enrollment. P. Answer at 3.

The regulation at 42 C.F.R. § 424.535(a)(3)(i) gives examples of certain offenses already determined by CMS to be detrimental to the Medicare program. Any offense that would result in mandatory exclusion under section 1128(a)(1) of the Social Security Act is one such example. 42 C.F.R. § 424.535(a)(3)(i)(D). It is well settled that felony convictions of the Anti-Kickback statute justifies mandatory exclusion pursuant to section 1128(a)(1) of the Social Security Act. *Dan Anderson*, DAB CR855 (2002) (citing *Jitrendra C. Shah, M.D.*, DAB CR720 (2000); *Farhad Mohebban, M.D.*, DAB CR686 (2000); *Muhammad R. Chaudhry*, DAB CR 326(1994); *Asadolla Amrollahifa, Ph.D*, DAB CR238 (1992); *Niranjana B. Parikh, M.D. et al.* DAB No. 1334(1992); *Boris Lipovsky, M.D.*, DAB CR208 (1992); *aff'd*, DAB No. 1363 (1992); *Arthur V. Brown, M.D.*, DAB CR226 (1992); *John Tolentino, M.D.*, DAB CR180 (1992). Therefore, CMS has determined that Petitioner's offense is detrimental to the Medicare program and its beneficiaries.

Both essential elements have been established by CMS. Consequently, the legal basis for CMS's action is established. I may not substitute my discretion about whether to revoke in place of CMS' discretion. *Michael J. Rosen, M.D.*, DAB No. 2096, at 14 (2007). Once I find that both elements required for revocation are present (*i.e.*, (1) felony conviction and (2) CMS's determination that the offense is detrimental), I am obliged to uphold the revocation.

Petitioner does not agree that Novitas was correct in determining that his crime was detrimental to the program and its beneficiaries, but that argument cannot succeed here. The discretion exercised by CMS acting through Novitas in making that determination is not subject to review by the ALJs of this forum:

> 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, at 14 (2007) (citing *Michael J. Rosen, M.D.*, DAB CR1566, at 11 (2007)).
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> 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.

Dr. Randy Barnett, DAB CR1786, at 3-4 (2008). *See generally Puget Sound Behavioral Health*, DAB No. 1944 (2004); *Brier Oak Terrace Care Center*, DAB No. 1798 (2001); and *Wayne E. Imber, M.D.*, DAB No. 1740 (2000).

Petitioner argues that "one must conclude that Dr. Patel's revocation was based on a financial crime identified in 42 C.F.R. § 424.535(a)(3)(B)." Petitioner arrives at this conclusion because "CMS imposed a three (3) year re-enrollment bar, [and consequently] CMS did not rely on the mandatory exclusion provision of 42 C.F.R. § 424.535(a)(3)(D) in determining to revoke Dr. Patel's Medicare billing privileges. . . . [because had it done so] it would have been required by statute to exclude Dr. Patel for a minimum of five (5) years, which is clearly not the case at hand." P. Answer Br. at 2-3. Petitioner's argument stems from his mistaken attempt to conflate the statutory provisions governing exclusions and the regulatory provisions governing revocations. The Inspector General derives its authority to exclude a petitioner under section 1128 of the Social Security Act (Act). An exclusion of participation applies to Medicare, Medicaid and all other federal health care programs. The length of exclusions can vary depending on the basis of the exclusion. However, CMS revoked Petitioner's billing privileges under 42 C.F.R. Part 424. Unlike the Inspector General's authority to exclude, regulatory provisions governing revocations are limited to Medicare billing and the re-enrollment bar is a minimum of one year but not more than three years, depending on the severity of the basis for the revocation. 42 C.F.R. § 424.535(c). It is CMS's, not an ALJ's, discretion to determine the length of the re-enrollment bar that it imposes. I have no authority to disturb CMS's exercise of its discretion. The right to a hearing is not extended to challenging CMS's judgment as to the duration of a revocation, where it falls clearly within the regulation. *Emmanuel Brown, M.D. and Simeon K. Obeng, M.D.*, DAB CR2145 (2010); 42 C.F.R. §§ 424.535(c), 498.3(b)(17). Petitioner should note that a revocation of billing privileges does not preclude exclusion under 1128(a)(1) of the Act. *Gregory J. Salko, M.D.,* DAB NO. 2437, at 7 (2012). Additionally, even if I were to accept Petitioner's argument that his exclusion was based on a financial crime identified in 42 C.F.R. § 424.535(a)(3)(i)(B), this argument would be unavailing. Any offense under section 424.535(a)(3)(i)(B) would be another

example of an offense that CMS has already determined to be detrimental of the Medicare program and it would still be within CMS's discretion to impose a re-enrollment bar of a minimum of one year but not more than three years.

In addition, Petitioner asserts that there are mitigating factors that should be considered. P. Answer Br. at 4-6. Petitioner claims that: he has provided vital medical services to the underserved and the elderly; there was no evidence of patient harm or abuse in his offense; he has paid back all the monies he illegally received; he has already been punished for his actions; and that a fellow physician received an exclusion period of one year. Under section 424.535(a)(3), CMS "may" (in its discretion) revoke the billing privileges of a supplier that was convicted, within the prescribed ten-year period, of a felony crime that CMS has determined to be detrimental to the best interests of Medicare and its beneficiaries. If CMS proves that the supplier was convicted of such a crime, and that the supplier's conviction was the basis for the challenged revocation, then the ALJ and the Board must sustain the revocation, regardless of other factors, such as the scope or seriousness of the supplier's criminal conduct and the potential impact of revocation on Medicare beneficiaries, that CMS might reasonably have weighed in exercising its discretion. *Abdul Razzaque Ahmed*, DAB No. 2261, at 16-18 (2009).

VI. Conclusion

For the reasons set out above, I GRANT CMS's Motion for Summary Disposition. Petitioner, Dr. Dinesh Patel, is not entitled to the relief he seeks in this appeal, and the revocation of Petitioner's Medicare Part B enrollment and billing privileges should be, and it is, AFFIRMED.

/s/
Richard J. Smith
Administrative Law Judge