

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

John Hartman, D.O.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1076

Date: January 15, 2014

ORDER

On January 6, 2014, I issued Decision No. CR3056 in this matter. By this Order, I correct the typographical error in that decision that listed the year of issuance as 2013 rather than 2014. Therefore, January 6, 2013 is replaced with January 6, 2014. There are no other changes.

IT IS SO ORDERED.

/s/
Scott Anderson
Administrative Law Judge

Department of Health and Human Services

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Docket No. C-13-1076

Decision No. CR3056

Date: January 6, 2013

DECISION

Wisconsin Physicians Service Insurance Corporation (WPS), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, John Hartman, D.O., effective June 21, 2012, for noncompliance with enrollment requirements, conviction of a felony offense, and failure to report an adverse legal action. Petitioner appealed. For the reasons stated below, I affirm WPS's determination.

I. Background and Procedural History

Petitioner was enrolled as a supplier in the Medicare program and granted Medicare bill privileges under Provider Transaction Number (PTAN) 001012050. On June 21, 2012, Petitioner entered a guilty plea to Assault 2nd Degree-Operate Vehicle While Intoxicated Resulting in Injury pursuant to Missouri Statute § 565.060, a class C felony. Specifically, Petitioner "was driving a car which collided with another car causing injuries. [Petitioner] was intoxicated at the time of this occurrence." P. Ex. 1, at 3.

On March 6, 2013, WPS informed Petitioner it discovered that Petitioner pled guilty to a felony and that his license to practice in Missouri had been revoked as a result on

February 25, 2013, by the State Board of Registration for the Healing Arts (State Board). CMS Ex. 1; CMS Ex. 2. Thus, WPS informed Petitioner that it was revoking his Medicare billing privileges effective June 21, 2012. WPS also found that Petitioner failed to report his June 21, 2012 conviction, an adverse legal action, to WPS within 30 days of its occurrence. The letter informed Petitioner of his right to request reconsideration within 60 calendar days of the postmark date.

On March 21, 2013, Petitioner filed a timely request for reconsideration of WPS's revocation. CMS Ex. 3. Petitioner contended that while his license was revoked on February 25, 2013, it was reinstated that same day (albeit subject to a ten-year probation under the terms set forth in the settlement agreement between Petitioner and the State Board). P. Ex. 1. Further, Petitioner contended that while he pleaded guilty on June 21, 2012 to a felony, Assault 2nd Degree – Operate Vehicle While Intoxicated Resulting In Injury, he received a suspended sentence. Petitioner asserts that under Missouri law a suspended sentence does not constitute a "conviction," and that he was placed on probation and expects that the offense will be removed from his record upon successful completion of his probation. CMS Ex. 3, at 2.

On May 28, 2013, WPS's reconsidered determination upheld the revocation of Petitioner's Medicare enrollment and billing privileges based on his guilty plea and also for his failure to report any adverse legal action to WPS. CMS Ex. 4. The letter notified Petitioner that he may request final review by an administrative law judge. CMS Ex. 4.

On July 19, 2013, Petitioner filed a timely request for a hearing (RFH). In response to my July 29, 2013 Acknowledgment and Pre-Hearing Order (Order), CMS filed a Pre-Hearing Brief and Motion for Summary Judgment together with four exhibits (CMS Exs. 1-4). Petitioner filed a brief (P. Br.) together with three exhibits (P. Exs. 1-3).

II. Decision on the Record

I admit without objection all of the parties' exhibits into the record.

CMS did not submit a list of proposed witnesses or written direct testimony for any witnesses. Petitioner submitted written statements from a number of individuals who provided character references for Petitioner; however, CMS did not seek to cross-examine these individuals. P. Ex. 2. Therefore, an in-person hearing is not necessary and I decide this case based on the written record. Order, ¶¶ 8-10.

III. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. §§ 424.535(a)(3) (conviction of a felony that is detrimental to the Medicare program and its beneficiaries) and 424.535(a)(9) (failure to comply with

reporting requirements). I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(1)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis¹

As a physician, Petitioner is a supplier for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of *Supplier*), 410.20(b)(1). In order to participate in the Medicare program as a supplier, individuals must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke enrollment and billing privileges for any reason stated in 42 C.F.R. § 424.535.

- 1. Petitioner pled guilty to the felony charge of assault in the second degree and the court entered a judgment finding Petitioner guilty of that offense, and Petitioner did not inform CMS of the plea or judgment.***

The following facts are undisputed. Petitioner pled guilty to the felony charge of assault in the second degree and did not inform CMS or WPS of this plea. Specifically, Petitioner “was driving a car which collided with another car causing injuries. [Petitioner] was intoxicated at the time of this occurrence.” P. Ex. 1, at 3. Petitioner was charged under Missouri Statute § 565.060, a class C felony. CMS Ex. 2, at 2. On or about June 21, 2012, Petitioner entered a guilty plea in the 20th Judicial Circuit, Franklin County, Missouri, Case No. 10AB-CR02038 to the charge of Assault 2nd Degree – Operate Vehicle While Intoxicated Resulting in Injury.” CMS Ex. 2, at 2. On or about September 7, 2012, the court entered a judgment finding Petitioner guilty of the charged offense. CMS Ex. 2, at 2.

- 2. There is a legal basis for WPS to revoke Petitioner’s Medicare billing privileges based on Petitioner’s felony conviction for assault, which is detrimental per se to the Medicare program and its beneficiaries under 42 C.F.R. § 424.535(a)(3).***

Petitioner contends that his crime is not one contemplated to be detrimental to the best interests of the Medicare program and its beneficiaries. RFH at 2; P. Br. at 4. Petitioner also argues that he was not “convicted” under Missouri law because he received a suspended sentence, probation, and will eventually have the offense removed from his record if he successfully completes probation. RFH at 2; P. Br. at 1-2. Petitioner’s arguments fail.

¹ My numbered findings of fact and conclusions of law are set forth in italics and bold font.

The applicable regulations contemplate this situation and provide that a guilty plea to a felony crime of assault is a sufficient basis for revoking a currently enrolled supplier's Medicare billing privileges. 42 C.F.R. § 424.535(a)(3)(i)(A). That regulation provides:

(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.

(i) Offenses include—

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.

42 C.F.R. § 424.535(a)(3).

This regulation expressly deems a felony conviction for assault as detrimental per se to the Medicare program and its beneficiaries. *See Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008).² Therefore, I am precluded from further inquiry as to whether Petitioner's offense is detrimental to Medicare program and its beneficiaries.³

Further, the regulation expressly deems that a guilty plea to felony assault is a conviction, regardless as to whether the guilty plea is considered to be a conviction under applicable state law. *See Lorrie Laurel, PT*, DAB No. 2524, at 4 (2012). Petitioner admits he pled guilty to assault in the second degree.

Finally, Petitioner does not dispute that his conviction occurred within ten years of his enrollment or revalidation of enrollment.

² Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

³ Even if the regulations did not direct me to conclude that Petitioner's assault offense is detrimental per se to the Medicare program and its beneficiaries, I would independently make this conclusion based on the facts of this case. Driving a motor vehicle when intoxicated is a threat to public safety and Petitioner's conduct resulted in injury to another person. The State Board concluded that Petitioner's offense was a crime involving moral turpitude. CMS Ex. 2, at 2; P. Ex. 1, at 3. I agree. Medicare program beneficiaries deserve to receive care from physicians who exercise good judgment, both professionally and personally.

Based on the evidence of record, I conclude that Petitioner has been convicted of a felony, within 10 years preceding his enrollment or revalidation of his enrollment, which is detrimental per se to the best interests of the Medicare program. Therefore, CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges.

3. *There is a legitimate basis for WPS to revoke Petitioner's Medicare billing privileges based on Petitioner's failure to timely notify CMS or WPS of his guilty plea to felony assault charges.*

The regulations at 42 C.F.R. § 424.516(d)(1)(ii) require that physicians report, within 30 days, any adverse legal action to their Medicare contractor. Failure to timely report subjects a physician to revocation of Medicare billing privileges. 42 C.F.R. § 424.535(a)(9).

Petitioner does not dispute that he did not inform WPS of his guilty plea to the assault charge.⁴ Petitioner asserts that he did not know of the reporting requirement. RFH at 2. Further, Petitioner argues that even if he did know of the requirement, he would not have believed he needed to report his guilty plea to assault charges because under state law, he was not actually convicted of the crime. RFH at 2.

Petitioner cannot escape responsibility for his failure to report his guilty plea, and the state court's judgment following that plea, to WPS by arguing that he did not know that he needed to report that action. Petitioner is responsible for knowing the rules pertaining to Medicare suppliers. As stated in another case, "Petitioner's pleas of ignorance [to the reporting requirement] are no defense. The regulation places the burden upon the Medicare participant to report '[a]ny adverse legal action.' 42 C.F.R. § 424.516(d)(1)(ii). There are no exceptions to the requirement to report." *Phyllis Barson, M.D.*, DAB CR2510, at 7 (2012).

Further, as I concluded above, the regulations deem a plea of guilty to certain felony offenses as convictions. 42 C.F.R. § 424.535(a)(3)(i)(A),(B). Even if Petitioner is eligible at some time in the future to have his record cleared of the assault offense to which he pled guilty, his guilty plea and the court's judgment of guilt against Petitioner to the charges of assault in the second degree certainly represent a legal action that was adverse to him. Section 424.516(d)(1)(ii) requires him to report any adverse legal action, even if it is not a final adverse action. *Akram A. Ismail*, DAB No. 2429, at 10-11 (2011). Therefore, I conclude that Petitioner failed to notify WPS of an adverse legal action within 30 days as required, and that this failure serves as a legitimate basis to revoke his Medicare billing privileges.

⁴ WPS notified Petitioner on March 6, 2013 that it was revoking his billing privileges because it "discovered" that he "pled guilty to a felony on 06/12/2012." CMS Ex. 1.

4. The applicable regulations control the effective date of the revocation.

The regulation at 42 C.F.R. § 424.535(g) states that when a revocation is based on a felony conviction, the revocation of the supplier's billing privileges is effective as of the date of the felony conviction. Since Petitioner's guilty plea is considered a conviction under the regulations, his revocation became effective on June 21, 2012, the date of his guilty plea.

V. Conclusion

For the reasons explained above, I affirm CMS's determination to revoke Petitioner's enrollment as a supplier in the Medicare program.

/s/
Scott Anderson
Administrative Law Judge