

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Brenda Lee Jackson,
(NPI: 1205225349),
(PTAN: KA1856005; KA1857005),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-874

Decision No. CR4794

Date: February 17, 2017

DECISION

I sustain the determination of a Medicare contractor, as directed by the Centers for Medicare & Medicaid Services (CMS), and as affirmed on reconsideration, to revoke the Medicare billing privileges of Petitioner, Brenda Lee Jackson, NP.

I. Background

CMS moved for summary judgment in this case, relying on a brief and exhibits that it identified as CMS Ex. 1-CMS Ex. 5. Petitioner opposed the motion. Through her attorney she filed a brief plus exhibits that she identified as P. Ex. A and P. Ex. 1-P. Ex. 4. P. Ex. A consists of Petitioner's written direct testimony plus attachments (these attachments were also filed separately as the aforementioned P. Exs. 1-4).

I receive the parties' exhibits into the record. It is unnecessary that I decide whether the criteria for granting summary judgment are met here. CMS offered no witness testimony and it has not requested to cross-examine Petitioner. Consequently, no purpose would be served by convening an in-person hearing. I decide the case based on the parties' written exchanges.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue is whether a basis exists to revoke Petitioner's Medicare billing privileges.

B. Findings of Fact and Conclusions of Law

I find that there are three bases for revoking Petitioner's billing privileges. Any of these grounds, standing alone, suffices to sustain the revocation determination.

First, Petitioner was convicted of a felony within the past 10 years that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries. 42 C.F.R. § 424.535(a)(3).¹ In 2010, Petitioner was convicted of a felony offense in Kansas of driving while under the influence of alcohol or drugs. CMS Ex. 1; CMS Ex. 3 at 2.

The regulation contains a list of examples of felony convictions that qualify for revocation. A felony conviction for driving while under the influence of alcohol or drugs is not one of the listed examples. However, the examples, which consist of crimes that merit revocation as a matter of law, do not preclude the possibility that other convictions may also qualify as grounds for revocation. CMS has discretion to determine, on a case-by-case basis, whether a particular felony conviction – even if it is for a crime that is not one of the listed examples in 42 C.F.R. § 424.535(a)(3) – justifies revocation of billing privileges. *Fady Fayad, M.D.*, DAB No. 2266 at 8 (2009), *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011). CMS, in its discretion, determined that Petitioner's felony conviction fell within the reach of 42 C.F.R. § 424.535(a)(3). That exercise of discretion is well within CMS's authority.

Second, Petitioner provided false and misleading information on Medicare enrollment applications. 42 C.F.R. § 424.535(a)(4). Petitioner answered "no" on Medicare enrollment applications for Kansas and Missouri to questions that asked whether she had experienced an adverse legal action within the past 10 years, despite having been convicted of felony driving while under the influence during that period. CMS Ex. 5 at 15, 50.

¹ The Secretary of Health and Human Services revised 42 C.F.R. § 424.535(a)(3) effective February 3, 2015. 79 Fed. Reg. 72,500 (Dec. 5, 2014). I find that CMS has the authority to exclude Petitioner under either version of the regulation and that it makes no difference in this case which version is applied.

Third, Petitioner failed to report an adverse legal action – her felony conviction – within 30 days as is required by 42 C.F.R. § 424.516(d)(1)(ii). Her failure to report is grounds for revocation of her Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(9).

In her affidavit Petitioner asserts that her denials of having been subject to any adverse legal action and her failure to report her conviction were inadvertent. She contends that she simply failed to recognize the legal significance of her conviction. That is no justification, either for her denials of being subject to an adverse action, or for her failure to report that action within 30 days. As a Medicare participant, Petitioner was charged with understanding the reporting requirements and with answering the questions on her Medicare applications honestly and accurately. Furthermore, I find that Petitioner’s assertion of an innocent error on her part is not credible. She was convicted of a *felony* offense, a serious crime under Kansas law. Her conviction, for the violation of Kan. Stat. Ann. § 8-1567(g) (2001), was her fourth conviction for driving while under the influence.² See P. Ex. 2 at 5. I find it unbelievable that Petitioner would not comprehend the legal significance of her conviction.

Petitioner also argues that CMS did not offer any facts justifying the determination to revoke Petitioner’s billing privileges. I do not understand that argument. Petitioner’s conviction is a matter of record as are her false answers on her Medicare enrollment forms and her failure to notify CMS of the adverse legal action taken against her.

/s/
Steven T. Kessel
Administrative Law Judge

² Petitioner’s conviction was for “Driving Under the Influence of Alcohol or Drugs 4th or Subsequent,” which, under Kansas law, means a fourth or subsequent conviction for that offense.