Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

John Hartman, D.O.
Docket No. A-14-36
Decision No. 2564
March 24, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

John Hartman, D.O. (Petitioner) appeals the January 6, 2014 decision of the Administrative Law Judge (ALJ) in *John Hartman, D.O.*, DAB CR3056 (2014) (ALJ Decision). In that decision, the ALJ sustained a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare enrollment. For the reasons stated below, we affirm the ALJ Decision.

Legal Background

CMS may revoke a supplier's Medicare enrollment for any of the "reasons" in paragraphs (1) through (9) of the regulation at 42 C.F.R. § 424.535(a). Paragraph (3) authorizes revocation if the supplier, "within 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." 42 C.F.R. § 424.535(a)(3) (italics added). Paragraph (3) further states that the offenses CMS has determined to be detrimental to Medicare and its beneficiaries include "[f]elony 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." *Id.* § 424.535(a)(3)(i)(A) (italics added). In addition, paragraph (9) authorizes revocation if the Medicare supplier fails to comply with reporting requirements found in section 424.516(d), which requires a physician to notify CMS of "[a]ny adverse legal action" within 30 days. *Id.* §§ 424.535(a)(9), 424.516(d)(1)(ii).

A supplier whose enrollment is revoked by CMS is "barred from participating in Medicare from the effective date of the revocation until the end of the re-enrollment bar." 42 C.F.R. § 424.535(c). "The re-enrollment bar is a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation." *Id.*

Case Background

On March 6, 2013, CMS issued a determination to revoke Petitioner's Medicare enrollment, citing paragraphs (3) and (9) of section 424.535(a) as legal grounds for the revocation. CMS Ex. 1. Petitioner filed a request for reconsideration, and a CMS hearing officer upheld the revocation. CMS Ex. 3; P. Ex. 3. Petitioner then requested a hearing before the ALJ, whereupon CMS moved for summary judgment. Petitioner filed a response that urged the ALJ to deny CMS's motion but which did not assert a need for in-person testimony. Although Petitioner submitted written statements from a number of individuals who provided character references for him, CMS did not seek to cross-examine those individuals.

Finding in-person testimony unnecessary, the ALJ decided the case based on the written record. He made the following factual findings, none of which Petitioner disputes. On June 21, 2012, Petitioner pled guilty to a Missouri charge of second degree felony assault (operating a vehicle while intoxicated, thereby causing injury to another person). ALJ Decision at 3. On September 7, 2012, a state court entered a judgment of guilt based on the guilty plea. *Id.* Petitioner did not notify CMS of his guilty plea or the subsequent judgment of guilt. *Id.* at 5; *see also* CMS Ex. 1, at 1 (indicating that the CMS contractor "discovered" in March 2013 that Petitioner had pled guilty to a felony in June 2012).

The ALJ concluded that CMS had lawfully revoked Petitioner's Medicare enrollment under section 424.535(a)(3) because of his guilty plea to felony assault. ALJ Decision at 3-5. The ALJ also concluded that the revocation was lawful under section 424.535(a)(9) because of Petitioner's failure to report the guilty plea and judgment of guilt to CMS within 30 days of those events. *Id.* at 5-6. Based on these conclusions, the ALJ upheld CMS's revocation determination. *Id.* at 6.

Petitioner then filed its request for review, which repeats arguments that he made in response to CMS's motion for summary judgment.

Discussion

In his request for review, Petitioner takes issue with both of the legal grounds for revocation that the ALJ found to be valid. First, he contends that section 424.535(a)(3) is inapplicable because his June 2012 guilty plea did not result in or constitute a "conviction" under Missouri law. Request for Review (RR) at 1. Petitioner asserts that, despite the court's acceptance of his guilty plea, he was not, in fact, convicted of felony assault because he received a "suspended imposition of sentence" and because his "offense will be removed from his [state criminal] record upon successful completion of that probation." *Id.*

The ALJ correctly rejected this argument, even if it is true that Missouri law does not recognize a "conviction" as having occurred during (or as a result of) Petitioner's state criminal proceeding. For reasons the Board explained in *Lorrie Laurel, PT*, DAB No. 2524 (2013), federal law – not state law – governs whether a supplier has been "convicted" of an offense, as that term is used in section 424.535(a)(3). That regulation clearly dictates that Petitioner, having pled guilty to felony assault, "was convicted" of that crime because the regulation explicitly embraces "[f]elony crimes against persons, such as . . . assault . . . for which the individual was convicted, *including guilty pleas.*" 42 C.F.R. § 424.535(a)(3)(i)(A) ; *see also Lorrie Laurel, P.T.* at 4 (holding that a guilty plea to an offense listed in section 424.535(a)(3)(i)(B) constituted a "conviction" because the regulation "expressly authorizes CMS to revoke an individual's billing privileges based on '[f]inancial crimes . . . for which the individual was convicted, including guilty pleas'"); *Deal v. United States*, 508 U.S. 129, 131-32 (1993) ("It is certainly correct that the word *'conviction' can mean* either *the finding of guilt* or the entry of a final judgment on that finding," which "includes both the adjudication of guilt and the sentence" (italics added).).

Turning to the second ground for revocation (Petitioner's failure to report his guilty plea and judgment of guilt to Medicare), Petitioner asserts that he "was not aware" of the requirement in section 424.516(d)(1)(ii) to report "adverse legal actions," and that "given that he received a suspended imposition of sentence, [he], accurately and on the advice of defense counsel, did not believe he had been *finally* convicted." RR at 3 (italics added). Petitioner also asserts that "his criminal matter was not final until approximately thirty days after his plea" and that he had another 30 days to file an appeal. *Id.*

Petitioner's assertion that he was unaware of the applicable reporting requirement is frivolous. In general, persons "who deal with the government are expected to know the law . . . ." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984); *see also* 42 C.F.R. § 424.516(a)(2) (requiring suppliers to certify that they meet all Medicare requirements). Petitioner does not offer an excuse for his alleged ignorance of the reporting requirement, nor does he contend that section 424.516(d)(1)(ii) was so unclear or ambiguous that he was unable to determine with reasonable certainty what his legal obligations were.

Petitioner's suggestion that he was under no duty to report his guilty plea because he was not "finally" convicted ignores the text of section 424.516(d)(1)(ii), which required him to report "*any* adverse legal action," not merely one for which his appeal rights were exhausted. *See Akram A. Ismail, M.D.*, DAB No. 2429 (2011) (holding that the "plain language" of section 424.516(d)(1)(ii) required the reporting of a license suspension, even though the physician's appeal of the suspension was pending). The preamble to the

final rule which promulgated section 424.516(d)(1)(ii) confirms that the reporting requirement was intended to cover non-final, or otherwise appealable, adverse legal actions. *See* 73 Fed. Reg. 69,726, 69,778 (Nov. 19, 2008) ("While we understand that physicians and NPPs [non-physician practitioners] are afforded different appeal rights depending on the type of final adverse action, we do not believe that it is appropriate to allow physicians and NPPs to continue to furnish services to Medicare beneficiaries if their State medical license has been suspended or revoked, a Federal exclusion or debarment or Medicare revocation has been imposed, or the physician or NPP was found guilty or pled to felony conviction as described in § 424.535(a)(3)."). Regardless of any appeal rights Petitioner may have had in the criminal proceeding, his guilty plea, the subsequent judgment of guilt, and his placement on probation (a legal status that imposes significant restrictions on an individual) clearly amounted to an "adverse legal action," and Petitioner does not contend otherwise. Moreover, Petitioner's argument about the alleged lack of finality of his guilty plea does not explain why, if the time for appeal expired in August 2012 (as he seems to allege), he still had not reported the adverse legal action as of March 2013.

Next, Petitioner contends that his offense is "not detrimental" to the Medicare program, asserting:

> The injuries at issue were minimal, and there is no evidence of a direct assault on anyone. This one and only incident is not indicative of a lack of good personal judgment on Petitioner's part, and there is absolutely no evidence of poor professional judgment. . . . He is not a danger to anyone and a simple review of the facts in this case makes it clear that he is not in the same category as a rapist or murderer.

RR at 2 (citation omitted); *see also* RR at 4 (stating that he "did not deliberately assault anyone," and that "[h]e should not have to suffer the same consequences as a rapist or murderer").

This argument is foreclosed by the Medicare statute and regulations. Section 1842(h)(8) of the Social Security Act (42 U.S.C. § 1395u(h)) explicitly gives the Secretary of Health & Human Services the authority to determine whether an offense is detrimental to Medicare and its beneficiaries, and section 424.535(a)(3) has delegated this authority to CMS. *See Letantia Bussell, M.D.*, DAB No. 2196, at 12 (2006). Pursuant to a notice-and-comment rulemaking process, CMS determined in section 424.535(a)(3) that various felonies for which a conviction occurred within 10 years of enrollment or revalidation of enrollment are detrimental to Medicare and its beneficiaries *as a matter of law* – that is, without regard to the circumstances underlying a particular supplier's conviction – if the

convictions for those crimes occur within 10 years preceding enrollment or revalidation of enrollment. *See* 68 Fed. Reg. 22,064, 22,070 (April 25, 2003) (Proposed Rule) (stating that "[f]elonies that we determine to be detrimental to the best interests of the Medicare program or its beneficiaries include . . . assault and battery"); 71 Fed. Reg. 20,754, 20,768 (April 21, 2006) (Final Rule) (restating its determination that assault and battery is detrimental to Medicare and its beneficiaries); *Letantia Bussell, M.D.* at 9 (holding that "[w]hen section 424.535(a)(3) is considered in the context of [its] preamble," it is "clear" that CMS has determined that income tax evasion, a crime listed in section 424.535(a)(3)(i)(B), is "detrimental per se to the program and its beneficiaries"). Petitioner does not deny that his conviction occurred "within 10 years preceding enrollment or revalidation of enrollment." Nor does he deny that his felony offense – assault – is among those which CMS determined during the rulemaking process to be detrimental to the program. Because the regulation establishes that Petitioner's felony offense is detrimental to Medicare and its beneficiaries as a matter of law, the Board may not evaluate the circumstances of his offense, or otherwise look behind his conviction, in order to make a conflicting determination about the offense's actual or potential impact on the Medicare program (as Petitioner is evidently asking the Board to do).

Next, Petitioner contends that post-conviction "mitigating" circumstances establish that revocation was an unjustified and unnecessary sanction. RR at 3-4. He asserts, for example, that he has had "no repeat offenses"; that the Missouri Bureau of Narcotics and Dangerous Drugs and the federal Drug Enforcement Administration allowed him to retain his authority to prescribe controlled substances despite those agencies' knowledge of his guilty plea; that although his medical license was revoked on February 25, 2013 by the Missouri Board of Registration for the Healing Arts (BRHA), the license was reinstated the same day pursuant to a settlement agreement with the BRHA under which he consented to terms of probation; that he has remained licensed to practice medicine "without any limitations or restrictions on his practice" and is in full compliance with the BRNA's terms of probation, which require his participation in treatment programs and submission to "monitoring" for substance abuse; that Missouri has "rescinded the termination of [his] Medicaid provider number"; and that the 13 "letters of support" he submitted with his request for review establish that he is "a good physician who is well liked and respected by his patients and colleagues." RR at 3-4. Petitioner also suggests that the Board consider the possible impact of his revocation on Medicare beneficiaries, asserting that those individuals "will suffer in that the revocation will prevent Petitioner from taking care of his primary patient population and there is a dire need for physicians willing to do that in his practice location." RR at 4.

These allegedly mitigating factors are irrelevant in determining whether a basis for revocation pursuant to section 424.535(a) exists. Once the Board (or an ALJ) finds that the revocation was based on one of the "reasons" specified in paragraphs (1) through (9) of section 424.535(a) and that the reason cited was grounded in fact and satisfied the

applicable regulatory criteria, the Board is obligated to uphold the revocation. *Letantia Bussell, M.D.* at 13. In other words, we do not review CMS's exercise of discretion in determining whether to revoke billing privileges. The Board reviews only whether the regulatory elements necessary for CMS to exercise its revocation authority were satisfied. *Id.* (holding that the ALJ's review of CMS's revocation determination was limited to deciding whether the regulatory "elements required for revocation were present"). If the record establishes that the regulatory elements are satisfied, as they are here, we "must sustain the revocation" and "may not substitute our discretion for that of CMS in determining whether revocation is appropriate under all the circumstances." *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2009) (addressing a revocation pursuant to section 424.535(a)(3)), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010); *see also Fady Fayad, M.D.*, DAB No. 2266, at 15-17 (2006) (rejecting the argument that revocation of the physician's Medicare enrollment was unwarranted in light of various factors, including the impact of the revocation on the physician's ability to maintain a medical practice and the community's need for the physician's services), *aff'd, Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

Finally, Petitioner argues, as he did below, that the mitigating circumstances he cited are also "relevant in reviewing the harsh consequences of CMS's three-year reenrollment prohibition." RR at 3. He asserts that "*discretion* should be exercised to decrease the enrollment bar" because he "has been punished enough, and the lengthy bar kills his chances of obtaining employment as a physician, which is more harmful to his patients than prohibiting him from participating in the program." RR at 4 (italics added).

Petitioner has not presented legal argument to support his apparent view that the length of the reenrollment bar is an issue within the scope of the Board's review of a revocation determination, nor has CMS argued here that the Board may not reduce the three-year bar that CMS imposed. We need not address the reviewability of the enrollment bar here because we would in any case find the length of the bar to be reasonable. Section 424.535(c) indicates that the length of the reenrollment depends on the "severity" of the basis for revocation. Here, there is more than one ground supporting the revocation. Moreover, the bases for the revocation are severe enough to justify a bar at the high end of the allowable range (of one to three years), given Petitioner's conviction for felony assault and his subsequent failure to comply with his legal obligation to report the adverse legal action to CMS.

Conclusion

For the reasons stated above, the Board affirms the ALJ Decision in its entirety.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member