

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Evan J. Leonard, P.A.  
(NPI: 1558765875),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-298

Decision No. CR4913

Date: August 9, 2017

**DECISION**

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the Medicare enrollment and billing privileges of Evan J. Leonard, P.A. (Petitioner), based on Petitioner's 2007 conviction for felony battery and for Petitioner's failure to inform CMS of that conviction in his enrollment application. Because a felony conviction for battery is considered detrimental to the best interests of the Medicare program and its beneficiaries, I must affirm CMS's decision.

**I. Background and Procedural History**

Petitioner was enrolled in the Medicare program as a physician assistant. *See* CMS Exhibit (Ex.) 6 at 3. For Medicare program purposes, a physician assistant is a "supplier." *See* 42 U.S.C. § 1395x(d) (defining a "supplier" to include "a physician or other practitioner."); 42 C.F.R. § 498.2 (defining "supplier" as a "[p]hysician or other practitioner such as physician assistant.").

In an August 15, 2016 initial determination, a CMS administrative contractor revoked Petitioner's Medicare enrollment and billing privileges, retroactive to October 27, 2014, for the following reasons:

**42 CFR §424.535(a)(3) – Felonies**

The Centers for Medicare & Medicaid Services (CMS) has been made aware of your February 6, 2007 felony conviction for Felony Battery, in violation of Florida Statute §794.011, in the Circuit Court in and for Hillsborough County, State of Florida Criminal Division (Felony).

**42 CFR §424.535(a)(4) – False or Misleading Information**

On your Centers for Medicare & Medicaid Services 885I enrollment application submitted on October 29, 2014, you did not disclose any final adverse legal action in section 3 of your application. However, you were adjudged guilty of Felony Battery, in violation of Florida Statute § 794.011 on February 6, 2007. A felony conviction is a final adverse action, as defined by 42 CFR § 424.502.

CMS Ex. 1 at 1 (emphasis in original). The CMS administrative contractor barred Petitioner from reenrolling in the Medicare program for three years. CMS Ex. 1 at 2.

Petitioner requested reconsideration of the revocation, filing arguments and documents to support his request. CMS Ex. 3. In the reconsideration request, Petitioner conceded that he was convicted of felony battery and that his failure to disclose the felony conviction was a clerical oversight. CMS Ex. 3 at 1. A CMS hearing officer upheld the revocation based upon 42 C.F.R. § 424.535(a)(3) and (4) because Petitioner's February 6, 2007 felony conviction was within the preceding 10 years and because Petitioner did not disclose his felony in three separate CMS-885I applications. Reconsidered Determination (Recon. Det.)<sup>1</sup> at 3-4.

Petitioner timely requested a hearing to dispute the revocation. On February 6, 2017, I issued an Acknowledgment and Pre-Hearing Order (Order) establishing deadlines for the submission of prehearing exchanges. Although Petitioner's submission deadline was later than CMS's, Petitioner filed his brief (P. Br.) and eight exhibits (P. Exs. 1-8) first. CMS then filed its prehearing exchange, which included a motion for summary judgment

---

<sup>1</sup> CMS did not file a copy of the reconsidered determination as an exhibit. However, it is in the record because Petitioner provided a copy of it with his hearing request.

and brief (CMS Br.) and seven exhibits (CMS Exs. 1-7). Finally, Petitioner filed a response opposing CMS's motion for summary judgment (P. Response).

## **II. Decision on the Record**

Petitioner did not object to any of CMS's proposed exhibits. Therefore, I admit CMS Exhibits 1-7 into the record.

CMS objected to Petitioner's Exhibits 1 and 2, claiming that Petitioner does not have good cause for failing to submit the evidence earlier. CMS Br. at 5. Petitioner responded to this objection indicating that Petitioner's Exhibit 1 did not exist at the time of the reconsideration request and Petitioner's Exhibit 2 was not located until after CMS issued the reconsidered determination. P. Response at 1. Based on Petitioner's response, I conclude that there is good cause to admit Petitioner's Exhibits 1 and 2. 42 C.F.R. § 498.56(e); *see* Civil Remedies Division Procedures (CRDP) § 14(e); *see also* Order, ¶ 6. Therefore, I admit Petitioner's Exhibits 1-8 into the record.

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8-10; CRDP §§ 16(b), 19(b); *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823 at 8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). Neither CMS nor Petitioner submitted written direct testimony. Consequently, I will not hold an in-person hearing in this matter, and I issue this decision based on the written record. Order ¶¶ 8-11; CRDP § 19(d).

## **III. Issue**

Whether CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges.

## **IV. Jurisdiction**

I have jurisdiction to hear and decide this case. *See* 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

## **V. Findings of Fact, Conclusions of Law, and Analysis**

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

The Social Security Act authorizes the Secretary of Health and Human Services ("Secretary") to create regulations governing the enrollment of suppliers in the Medicare

program, and to discontinue the enrollment of a physician or other 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 [Medicare] program or program beneficiaries.” 42 U.S.C. §§ 1395u(h)(8), 1395cc(j).

***1. On February 6, 2007, the Circuit Court in and for Hillsborough County adjudged Petitioner guilty of felony battery in violation of Florida Statute § 784.041.***

On February 6, 2007, the Hillsborough County Circuit Court convicted Petitioner of felony battery under Florida Statute § 784.041.<sup>2</sup> CMS Ex. 4 at 2-3. Petitioner does not dispute his conviction for felony battery. P. Br. at 1-2; P. Ex. 3 at 1. Further, Petitioner disclosed the felony battery conviction in 2016 on a Medicare enrollment application. CMS Ex. 3 at 15.

***2. CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(3) to revoke Petitioner’s Medicare enrollment and billing privileges because Petitioner was convicted of a felony offense that is similar to the offenses listed in the regulations.***

Under the Secretary’s regulations, CMS may revoke a supplier’s Medicare billing privileges if the supplier is: (1) convicted of a federal or state felony offense; (2) within the preceding ten years; and (3) the felony offense is one that CMS determines to be detrimental to the best interests of the program and its beneficiaries. 42 C.F.R. § 424.535(a)(3).<sup>3</sup> “Offenses include, but are not limited in scope or severity to . . . [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.” 42 C.F.R. § 424.535(a)(3)(ii)(A) (emphasis added). The phrase “such as” indicates that the listed crimes are non-exclusive examples of crimes against persons.

---

<sup>2</sup> In both the initial and reconsidered determinations in this case, CMS correctly stated that Petitioner was convicted of felony battery, but erroneously cited the statute for felony sexual battery, Florida Statute § 794.011. CMS Ex. 1 at 1; Recon. Det. at 3. The citation for felony battery is § 784.041, which is the crime that Petitioner was in fact convicted of violating. CMS Ex. 4 at 3. Because CMS correctly identified Petitioner’s crime as felony battery and Petitioner did not raise this error as an issue, I do not consider CMS’s incorrect citation to § 794.011 as significant.

<sup>3</sup> The Secretary revised section 424.535(a)(3) effective February 3, 2015. 79 Fed. Reg. 72,500 (Dec. 5, 2014). The outcome in this case is the same regardless as to whether I apply the original text or the amended text of that regulation.

The record establishes that Petitioner was convicted of felony battery. CMS Ex. 4 at 3. Felony battery is the actual and intentional touching or striking *of another person* against the will of the other and causing great bodily harm. Florida Statute § 784.041 (emphasis added). It is, by definition, a felony crime against a person. *See Russell L. Reitz, M.D.*, DAB CR4566 at 8 (2016), *aff'd*, DAB No. 2748 (2016); *see also* 71 Fed. Reg. 20,754, 20,768 (April 21, 2006) (Final Rule) (specifying that battery is a crime against a person that is detrimental to the best interests of the Medicare program and its beneficiaries). Petitioner has therefore been convicted of a felony crime against a person.

Petitioner appears to challenge the validity of CMS's revocation by explaining that the events that led to the conviction occurred in February of 2006 and were not within the preceding 10 years. *See* P. Response at 1-2; *see also* CMS Ex. 3 at 32. The fact that the appeal process has extended past the ten-year anniversary of Petitioner's conviction is irrelevant. The regulatory language specifies that when the date of the felony *conviction* occurs within the preceding 10 years, CMS may revoke a supplier's enrollment based on that felony conviction. 42 C.F.R. § 424.535(a)(3)(i). Petitioner was convicted on February 6, 2007, CMS Ex. 4 at 3, and the notice of revocation was dated August 15, 2016, CMS Ex. 1 at 1. CMS issued its initial determination to revoke Petitioner's enrollment and Medicare billing privileges within 10 years of Petitioner's felony conviction.

***3. I do not need to decide whether CMS had a legitimate basis under 42 C.F.R. § 424.535(a)(4) to revoke Petitioner's enrollment and billing privileges.***

Having concluded that CMS had a legitimate basis to revoke Petitioner's enrollment based on his felony battery conviction, I do not need to resolve the issue as to whether CMS could also revoke Petitioner's enrollment under section 424.535(a)(4) for making false or misleading statements on his Medicare application. It is unnecessary for me to do so because the revocation and the effective date for revocation are sufficiently supported by the basis for revocation under 42 C.F.R. § 424.535(a)(3).

***4. I do not have the authority to review CMS's exercise of discretion, and Petitioner's other arguments are unavailing.***

Petitioner "does not argue the right of CMS to revoke the [P]etitioner's privileges but rather offers an explanation of events and why they should not lead to revoking Medicare privileges." P. Response at 1. Based on Petitioner's past disclosures of his felony conviction, Petitioner argues that CMS's discretion to revoke his participation in Medicare was not proper because Petitioner had previously disclosed his felony conviction and because his employer made a clerical error. P. Br. at 1.

However, it has been long settled that CMS has discretion to revoke a supplier's billing privileges and that discretionary decision is not reviewable. *Letantia Bussell, M.D.*, DAB

No. 2196 at 13 (2008) (“the right to review of CMS’s determination by an ALJ serves to determine whether CMS had the authority to revoke . . . not to substitute the ALJ’s discretion about whether to revoke.”). Rather, “[t]he ALJ’s review of CMS’s revocation . . . is thus limited to whether CMS had established a legal basis for its actions.” *Id.* Further, to the extent that Petitioner requests that I provide equitable relief, I am unable to do so. *See US Ultrasound*, DAB No. 2302 at 8 (2010).

## **VI. Conclusion**

I affirm CMS’s determination to revoke Petitioner’s Medicare enrollment and billing privileges.

\_\_\_\_\_/s/  
Scott Anderson  
Administrative Law Judge