Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Shekhar S. Desai,
(PTAN: 12128),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-33

Decision No. CR2356

Date: April 12, 2011

DECISION

I grant the motion of the Centers for Medicare and Medicaid Services (CMS) for summary judgment and sustain the revocation of Petitioner Shekhar S. Desai, M.D.'s Medicare enrollment and billing privileges based on his guilty plea to a felony under 42 C.F.R. § 424.535(a)(3).

I. Background

The United States Attorney for the District of New Jersey filed an information and charged Petitioner with felony conspiracy to commit wire fraud. CMS Ex. 4. The information alleges that Petitioner:

> [D]id knowingly and intentionally conspire and agree with others to commit an offense against the United States, that is, to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises. . . and for the purposes of executing such scheme an artifice, to transmit

> and cause to be transmitted by means of wire communications in interstate commerce certain writings, signs, signals, pictures, and sounds, contrary to Title 18, United States Code 1343.

Id. at 3-4.

On March 5, 2010, Petitioner entered a guilty plea to one count of felony conspiracy to commit wire fraud from the information. CMS Ex. 6. On October 25, 2010, Petitioner was sentenced to five years probation, six months home confinement, and 520 hours of community service. *Id.* Petitioner was also ordered to pay a $30,000 fine and $96,000 in restitution. *Id.* at 6-7.

First Coast Service Options (First Coast), a Medicare contractor, revoked Petitioner's Medicare billing privileges effective March 5, 2010, by notice letter dated March 26, 2010. CMS Ex. 1. The notice letter cited 42 C.F.R. § 424.535 and stated that Petitioner's billing privileges were revoked because of his March 5, 2010 guilty plea to conspiracy to commit wire fraud. *Id.* The revocation notice stated that Petitioner had thirty days to submit a corrective action plan ("CAP") showing compliance with Medicare requirements and also informed Petitioner that he could request reconsideration within sixty days. *Id.* Petitioner submitted a CAP by letter dated April 22, 2010. CMS Ex. 2. Petitioner also submitted a Request for Reconsideration dated May 25, 2010. *Id.* at 22. On June 28, 2010, a Senior Appeal Analyst from First Coast denied Petitioner's request for reconsideration and upheld the revocation based on 42 C.F.R. § 424.535. CMS Ex. 3.

On October 14, 2010, Petitioner filed a request for an Administrative Law Judge (ALJ) hearing (HR). An Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) was sent to the parties on October 26, 2010. In accordance with the terms of the Pre-Hearing Order, on November 24, 2010, CMS submitted its Motion for Summary Judgment and supporting brief (CMS Br.), and six proposed exhibits (CMS Exs. 1-6). On January 1, 2011, Petitioner submitted its Opposition to CMS's Motion for Summary Judgment and supporting brief (P. Br.), and eight proposed exhibits (P. Exs. 1-8). On January 18, 2011, CMS submitted a reply brief (CMS Reply) along with an attachment. In the CMS Reply, CMS objected to P. Exs. 1, 3, 4, 6, 7, and 8. CMS argues these exhibits constitute new evidence under 42 C.F.R. § 498.56(e),which must be excluded at the ALJ level, and the new evidence is not relevant. CMS Reply at 4-5. On January 28, 2011, Petitioner submitted a Response to CMS's Reply (P. Response) along with two attachments.

Section 498.56(e) limits the admission of new documentary evidence, and a party must show good cause for submitting evidence for the first time at the ALJ level. Petitioner's additional evidence includes an addendum to his affidavit submitted at the reconsideration level, a decision of the Florida Board of Medicine, and various affidavits and letters (P. Exs. 1, 3, 4, 6, 7, and 8). These documents are all dated after the June 28, 2010 reconsideration decision and are being submitted for the first time at the ALJ level.

Petitioner has not argued that good cause exists to submit this new evidence. I do not find that good cause exists for the admission of P. Exs. 1, 3, 4, 6, 7, and 8 and exclude this evidence pursuant to 42 C.F.R. § 498.56(e). Furthermore, both parties submitted additional documents as attachments to their respective reply briefs, but they did not mark these documents as exhibits pursuant to my Pre-Hearing Order and the Civil Remedies Division Procedures. Thus, I exclude these attachments as evidence in this proceeding. In any event, as I determine below, the parties' reply attachments and P. Exs. 1, 3, 4, 6, 7, and 8 are not material to the outcome of this case. In the absence of objection, I admit CMS Exs. 1-6, P. Ex. 2, and P. Ex. 5.

II. Applicable Law

Section 424.535(a) of 42 C.F.R. authorizes CMS to "revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement" for reasons including, as relevant here:

> (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 [Medicare] program and its beneficiaries.
>
> (i) Offenses include—
>
> * * * *
>
> (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.

III. Issue, Findings of Fact, Conclusions of Law

A. Issue

The issue in this case is whether CMS had a legitimate basis to revoke Petitioner's enrollment and billing privileges in Medicare.

B. Applicable Standard

The Departmental Appeals Board (Board) stated the standard for summary judgment:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The ALJ's role in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc*, DAB No. 2291, at 5 (2009).

C. Analysis

My findings and conclusions are in the italicized headings and subsequent discussions below.

1. CMS was authorized to revoke Petitioner's enrollment under 42 C.F.R. § 424.535(a)(3) based on his felony conviction.

CMS argues that Petitioner's revocation was authorized, and CMS is entitled to summary judgment because Petitioner pled guilty to a felony charge of conspiracy to commit wire fraud. CMS contends this charge falls within the regulation's category of "[f]inancial 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." 42 C.F.R. § 424.535(a)(3)(i)(B). In his brief, Petitioner argues that CMS did not properly exercise its authority to revoke Petitioner's Medicare billing privileges because "[t]he financial felonies that are not enumerated in 42 C.F.R. § 424.535(a)(3) have not been found to be *per se* detrimental to the Medicare program and CMS/[First Coast] made no reasonable determination to that effect." P. Br. at 8. Petitioner also contends that First Coast "did not properly exercise its authority to revoke Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(3) because it made no reasonable determination that Petitioner's conduct was detrimental to the Medicare program." P. Br. at 16. Thus, Petitioner argues that CMS is not entitled to summary judgment as a matter of law.

It is undisputed that Petitioner pled guilty "to a one-count Information, which charges that he conspired to commit wire fraud, contrary to Title 18, United States Code, Section 1343, in violation of Title 18, United States Code, Section 371." CMS Ex. 5, at 1. The relevant federal criminal statute provides, "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . . " 18 U.S.C. § 371. It is also undisputed that Petitioner pled guilty to charges stemming from "conspiring with others to engage in a scheme whereby [Petitioner] received payments for services that he did not perform, but were nevertheless fraudulently invoiced . . ." and that Petitioner paid restitution in the amount of $96,000. CMS Ex. 5, at 1; P. Br. at 5.

I note that both the March 26, 2010 revocation notice letter and the June 28, 2010 reconsideration decision mistakenly identified 42 C.F.R. § 424.535 (a)(1)(b) as the basis for Petitioner's revocation, even though CMS based its articulated rationale on Petitioner's guilty plea and quoted the language of 42 C.F.R. § 424.535(a)(3)(i)(B). However, the Board has consistently held that, after an administrative appeal has commenced, a federal agency may assert and rely on new or alternative grounds for the challenged action or determination as long as the non-federal party has notice of, and a reasonable opportunity to respond to, the asserted new grounds during the administrative proceeding. *See Green Hills Enters.*, LLC, DAB No. 2199 (2008); *see also Abercrombie v. Clarke*, 920 F.2d 1351, 1360 (7th Cir. 1990), *cert. denied*, 520 U.S. 809 (1991) (holding that defects in formal notice may be cured during the course of an administrative proceeding, and due process is satisfied as long as the party is reasonably apprised of, and given opportunity to address, the issues in controversy). It is evident that CMS chose to revoke Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(3)(i)(B), and I find that Petitioner was provided notice and a reasonable opportunity to respond to the grounds for Petitioner's revocation in the instant appeal.

An ALJ's proper role under Section 424.535(a)(3) is to determine whether CMS had sufficient legal grounds for a revocation determination. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 7 (2009), *aff'd Ahmed v. Sebelius*, 710 F.Supp.2d 167 (D. Mass. 2010). The Board has clearly stated that CMS is not required to determine, in each case of revocation for a felony conviction, that the specific offense of which the individual supplier was convicted is detrimental to the best interests of Medicare and its beneficiaries. Instead, the Board has held that the presence of an offense among those listed in section 424.535(a)(3)(i)(B) means that CMS has already determined that the offense "is detrimental per se to the best interests of the Medicare program and its beneficiaries." *Letantia Bussell, M.D.*, DAB No. 2196, at 9 (2008). That holding was based on the preamble to the final rule authorizing denial and revocation of enrollment for felony convictions, in which CMS stated that "[f]elonies that ***we determine to be detrimental*** to the best interests of the Medicare program or its beneficiaries include . . . financial crimes, such as extortion, embezzlement, income tax evasion, making false

statements, insurance fraud, and other similar crimes . . . ." 71 *Fed. Reg.* 20,754; 20,768 (Apr. 21, 2006) (emphasis added).

CMS could reasonably determine that Petitioner's undisputed conduct of conspiring to commit wire fraud through the submission of fraudulent invoices constitutes a felony offense within the category of "financial crime" that is "similar" to the enumerated offenses of embezzlement and insurance fraud. Based on the undisputed facts underlying his guilty plea, I conclude that Petitioner's guilty plea was covered under section 424.535(a)(3)(i)(B). In reaching this conclusion, I "examine . . . the conduct and circumstances underlying Petitioner's offense." *Ahmed,* DAB No. 2261, at 7-8. Additionally, the Board stated in *Ahmed:*

> [E]ven if Petitioner's felony offense was not similar to one of the crimes named in the regulation, CMS would not necessarily be precluded from finding that it was a financial crime. Financial crimes, the regulation states, are crimes "<u>such as</u> extortion, embezzlement, income tax fraud, insurance fraud and other similar crimes" (emphasis added). The words "such as" imply that the subsequent list of illustrative crimes, including crimes similar to those named in the list, are not the only set of crimes that may be considered "financial."

Id. at 10.

Petitioner also argues that I should reverse the revocation of his Medicare billing privileges because he is "an excellent joint replacement surgeon," and "it would be . . . arbitrary and unreasonable . . . to revoke Petitioner's Medicare billing privileges and end his medical career without an appropriate determination of whether, in fairness, his conduct constitutes an actual detriment to the Medicare program." P. Reply at 3-4. However, I have no authority to grant the equitable relief Petitioner seeks. As discussed above, my review is limited to whether CMS has established a legal basis for its determination to revoke Petitioner's Medicare billing privileges. It is well-established that statute and regulations bind ALJs. *Sentinel Med. Labs., Inc.*, DAB No. 1762, at 9 (2001). Where a regulation speaks clearly on its face and applies to the question before me, I am bound to follow it. *See US Ultrasound*, DAB No. 2302, at 8 (2010).

Therefore, I conclude based on undisputed facts that CMS was authorized under section 424.535(a)(3)(i)(B) to revoke Petitioner's Medicare billing privileges and that I am required to sustain CMS's determination.

2. Petitioner's Corrective Action Plan is not reviewable in this forum

Petitioner also argues that First Coast never determined whether Petitioner's Corrective Action Plan should be accepted. However, I cannot address this issue, as CMS's decision

whether or not to reinstate a supplier based on a CAP is not an initial determination and not reviewable by an ALJ. 42 C.F.R. § 405.874(e).

The Board recently addressed the issue of an opportunity to correct through a CAP and explained how it is distinct from the contractor reconsideration process:

> After the initial notice of revocation, the supplier has two tracks to seek to avoid revocation and may elect to pursue either or both concurrently. [Medicare Program Integrity Manual (MPIM)], Ch. 10, § 19.A. The supplier, within 60 days, may request "reconsideration" of whether the basis for revocation is erroneous or, within 30 days, it may submit a CAP to demonstrate that it has corrected that basis. If the contractor accepts the CAP, it notifies the supplier, and any reconsideration request is withdrawn. If the contractor denies the CAP, the reconsideration process may proceed to a hearing before a hearing officer, who reviews "the Medicare contractor's reason for imposing a . . . revocation at the time it issued the action . . . ." *Id.* An unfavorable hearing officer decision is appealable to an ALJ, who reviews the basis for the revocation. *Id.* No provision is made for an appeal of the contractor's decision not to reinstate based on the CAP. *Id.* The hearing officer conducting the reconsideration (and the ALJ on appeal of the hearing officer decision) are limited to reviewing the basis for revocation set out in the initial notice, not the merits of any contractor decision that corrective action under a CAP was unacceptable.

DMS Imaging, Inc., DAB No. 2313, at 7-8 (2010) (footnote omitted).

Thus, the contractor's CAP evaluation is not an initial determination and not appealable. However, CMS's reconsideration decision arises from the contractor's initial determination to revoke Petitioner's Medicare billing privileges and is appealable through the administrative process, including the present review. *Emmanuel Brown M.D. and Simeon Obeng M.D.*, DAB CR2145, at 6-8 (2010).

IV. Conclusion

The undisputed facts entitle CMS to summary judgment as a matter of law. I therefore grant summary judgment in favor of CMS and sustain the revocation of Petitioner's Medicare billing privileges.

/s/
Joseph Grow
Administrative Law Judge