

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

James Ellis, M.D.
(NPI: 1578566733; PTAN: 103i306743, 411747ZN7Q),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-636

Decision No. CR4972

Date: November 21, 2017

DECISION

Cahaba Government Benefit Administrators (Cahaba), the Medicare administrative contractor overseeing the Tennessee Medicare enrollment of Petitioner, James Ellis, M.D., and Novitas Solutions (Novitas), the Medicare administrative contractor overseeing Petitioner's Mississippi Medicare enrollment, separately revoked Petitioner's Medicare enrollment and billing privileges, effective June 29, 2009 and April 15, 2015, respectively, as a result of Petitioner's convictions for aggravated assault and his failure to report those convictions on his enrollment applications. For the reasons stated below, I affirm the revocation of Petitioner's Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner, a physician specializing in radiology, was enrolled as a supplier in the Medicare program. Petitioner first enrolled in the Medicare program in Tennessee on July 1, 1993. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1. On June 29, 2009, Petitioner was convicted of two counts of aggravated assault, both Class C

felonies pursuant to Tennessee Code Annotated. T.C.A. § 39-13-102(b).¹ CMS Ex. 11 at 5-9; *see* T.C.A. § 39-13-102(e)(1) (“Aggravated assault under subdivision (a)(1) or subsection (b) or (c) is a Class C felony.”).

On March 26, 2015, Petitioner submitted two Medicare enrollment applications via the online Provider Enrollment, Chain and Ownership System (PECOS). CMS Exs. 4, 7. Cahaba approved one application, effective April 15, 2015, and assigned Provider Transaction Access Number (PTAN) 103i306743 (herein “Tennessee PTAN”). CMS Exs. 7, 9. Novitas approved the other application, effective May 28, 2015, and assigned PTAN 411747ZN7Q (herein “Mississippi PTAN”). CMS Exs. 4, 10. The application data report for each application does not include a report of any final adverse legal actions. CMS Exs. 4, 7.

By letter dated October 12, 2016, Novitas notified Petitioner that his Medicare enrollment and billing privileges for his Mississippi PTAN would be revoked, effective April 15, 2015, and that he would be subject to a three-year re-enrollment bar, effective 30 days from the date of the letter. CMS Ex. 13. Novitas provided the following explanation in its letter:

42 CFR [§]424.535(a)(3) - Felonies

The Centers for Medicare & Medicaid Services (CMS) has been made aware of your June 29, 2009 felony conviction for Aggravated Assault in violation of Tennessee County Code § 39-13-102 by the state of Tennessee’s Criminal Circuit Court, Shelby County.

42 CFR [§]424.535(a)(4) - False or Misleading Information

On your CMS 855 enrollment application signed March 25, 2015, you verified as true that you did not have any previous adverse legal history. However, you were adjudged guilty of a felony for Aggravated Assault on June 29, 2009. A felony conviction is an adverse legal action, as define by 42 CFR [§]424.502.

CMS Ex. 13 at 1 (emphasis omitted).

By letter dated October 14, 2016, Cahaba notified Petitioner that his Medicare enrollment and billing privileges for his Tennessee PTAN would be revoked, effective June 29, 2009, and that he would be subject to a three year re-enrollment bar, effective 30 days after the postmark date of the letter. CMS Ex. 14. Cahaba provided the following explanation in its letter:

¹ According to the Tennessee Code, a Class C felony is punishable by between three and 15 years of imprisonment. T.C.A. § 40-35-111(b)(3).

42 CFR [§]424.535(a)(3) - Felonies

The Centers for Medicare & Medicaid Services (CMS) has been made aware of your June 29, 2009 felony conviction for Aggravated Assault in violation of Tennessee County Code § 39-13-102 by the state of Tennessee's Criminal Circuit Court, Shelby County.

42 CFR [§]424.535(a)(4) - False or Misleading Information

On your CMS 855 enrollment application signed March 26, 2015, you verified as true that you did not have any previous adverse legal history. However, you were adjudged guilty of a felony for Aggravated Assault on June 29, 2009. A felony conviction is an adverse legal action, as define by 42 CFR [§]424.502.

CMS Ex. 14 at 1 (emphasis omitted).

In a letter dated December 5, 2016, Petitioner requested reconsideration of Novitas' October 12, 2016, determination. CMS Ex. 15. CMS's Provider Enrollment Oversight Group (PEOG) construed Petitioner's correspondence as a request for reconsideration of the Cahaba revocation determination, as well. Petitioner, in his December 5, 2016, letter, acknowledged that he had a "felony conviction" that "stemmed from an altercation with police." CMS Ex. 15 at 1. Petitioner assigned blame to his billing company for failing to report his felony convictions, stating:

As for the misstatement on the Medicare application, as the attached letter from my billing company explains, it was completely inadvertent. The application was presented with multiple other applications. Stickers saying sign here were affixed. I relied on the expertise of the company paid to prepare the applications, to prepare them correctly; and was not as diligent as I should have been in reviewing the information on all the applications. In fact, to simplify things, many applications consisted of just a signature page for me to sign.

Although my billing company says it was unaware of my conviction at the time, advocacy letters had been provided to them by the Tennessee and Mississippi Foundations to attach to the applications, I don't understand how my conviction could have been overlooked.

CMS Ex. 15 at 2.

In two separate reconsidered determinations dated March 14, 2017, CMS's PEOG informed Petitioner that the Medicare administrative contractors had correctly revoked his enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) and (a)(4) based on his felony convictions that "CMS has determined to be detrimental to the best interests of the program and its beneficiaries" and for "false and misleading actions" in not reporting his convictions on this enrollment application. CMS Exs. 16 at 5; 17 at 4. The letters notified Petitioner that he may request further review by an administrative law judge. CMS Exs. 16 at 5; 17 at 5.

Petitioner filed a request for hearing on April 19, 2017, which the Civil Remedies Division received on April 26, 2017. On May 11, 2017, I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) directing the parties to file pre-hearing exchanges, consisting of a brief by CMS and a response brief by Petitioner, along with supporting evidence, in accordance with specific requirements and deadlines.

CMS filed a pre-hearing brief and motion for summary judgment, along with 17 exhibits (CMS Exs. 1-17). Petitioner submitted a pre-hearing brief (P. Br.) and one exhibit. (P. Ex. 1). In addition, and in response to Petitioner's motion requesting the issuance of a subpoena (P. Sub. Req.) for production of raw data and documentation involving Petitioner's enrollment applications, CMS submitted the declarations of a Cahaba employee (Benison Dec.) and a Novitas employee (Fry Dec.), each containing a copy of the contractor's file for his Tennessee and Mississippi enrollment applications. Petitioner, who is represented by counsel, did not request an opportunity to cross-examine these witnesses, nor did Petitioner request an opportunity to reply to CMS's response. In the absence of any objections, I admit CMS Exs. 1-17, P. Ex. 1, Benison Dec., and Fry Dec. into the record.

A hearing is not necessary because there is no request for cross-examination of any witnesses. Pre-Hearing Order, §§ 9-10. The record is closed, and the case is ready for a decision on the merits.²

II. Issues

Whether CMS has a legal basis to revoke Petitioner's Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(3) and (4) based on his June 29, 2009, felony convictions and report of false or misleading information on each application.

² As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS's motion for summary disposition.

III. Jurisdiction

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

IV. Findings of Fact, Conclusions of Law, and Analysis³

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, a supplier must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke a supplier’s enrollment and billing privileges for any reason stated in 42 C.F.R. § 424.535(a).

CMS may revoke a supplier’s enrollment based on the existence of a felony conviction, as set forth in 42 C.F.R. § 424.535(a)(3)(ii)(A), which currently provides:

(3) *Felonies.* (i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted (as that term is defined in 42 [C.F.R. §] 1001.2) of a Federal or State felony offense that CMS determines is detrimental to the best interests of the Medicare program and its beneficiaries.

(ii) Offenses include, but are not limited in scope or severity to—

* * *

(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.

CMS also may revoke a supplier’s Medicare enrollment and billing privileges based on the supplier providing false or misleading information in its enrollment application, as is set forth in 42 C.F.R. § 424.535(a)(4):

(4) *False or misleading information.* The provider or supplier certified as “true” misleading or false information on the enrollment application to be enrolled or maintain enrollment in the Medicare program. (Offenders may be subject to either fines or imprisonment, or both, in accordance with current law and regulations.)

³ My numbered findings of fact and conclusions of law are set forth in italics and bold font.

1. ***Cahaba and Novitas each had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) because Petitioner was convicted of two counts of felony aggravated assault on June 29, 2009.***
2. ***Each of Petitioner's two felony convictions is for a crime against a person pursuant to 42 C.F.R. § 424.535(a)(3)(ii)(A).***
3. ***An enumerated offense listed in 42 C.F.R. § 424.535(a)(3)(ii) has been determined by CMS to be per se detrimental to the best interests of the Medicare program and its beneficiaries.***

Petitioner does not dispute that he was convicted of felony aggravated assault. Petitioner argues that CMS should have considered the circumstances surrounding his felony conviction prior to revoking his Medicare billing privileges. P. Br. at 2. However, the applicable regulations do not require CMS to consider such factors prior to revocation. Rather, CMS may revoke a provider or supplier's Medicare billing privileges if the provider or supplier is, within the preceding 10 years, convicted of a felony offense that CMS has determined is detrimental to the best interests of the Medicare program and its beneficiaries. 42 C.F.R. § 424.535(a)(3). CMS has determined that the crime of aggravated assault is *per se* detrimental to the best interests of the Medicare program and its beneficiaries, and therefore, CMS need not address the specific circumstances underlying a conviction for that offense. 42 C.F.R. § 424.535(a)(3)(ii) (listing the specific offenses that CMS has determined are detrimental to the best interests of the Medicare program and its beneficiaries); *see Russell Reitz, M.D.*, DAB No. 2748 at 6 (2016) (Departmental Appeals Board (DAB) determination that a felony conviction for aggravated battery within 10 years of the date of revocation authorized CMS to revoke Dr. Reitz's Medicare enrollment and billing privileges and to impose a re-enrollment bar); *see also Central Kansas Cancer Institute*, DAB No. 2749 at 6 (DAB determination that "Dr. Reitz's April 30, 2009, conviction of a 'felony crime against a person' was sufficient to uphold the revocation of Dr. Reitz's Medicare enrollment and billing privileges . . .").

Pursuant to subsection 424.535(a)(3)(ii), CMS has explicitly determined that four categories of felony offenses are *per se* detrimental to the best interests of the Medicare program and its beneficiaries, and it has determined that one of those four categories involves "[f]elony crimes against persons, such as murder, rape, assault, and other similar crimes." 42 C.F.R. § 424.535(a)(3)(ii)(A). Aggravated assault is not only a listed example of a felony crime against a person pursuant to the regulation, but the pertinent chapter of the Tennessee Code is aptly entitled "*Offenses Against Person.*" Chapter 13, T.C.A. (emphasis added). For purposes of section 424.535(a)(3)(ii)(A), Petitioner need only have committed a felony crime against a person in the 10 years preceding the

revocation. Petitioner pleaded guilty to two counts of aggravated assault, each being a felony crime against a person, in violation of Tennessee Code Annotated § 39-13-102 on June 29, 2009. Petitioner points to no authority requiring CMS or its contractor to consider the circumstances underlying a conviction when the offense is one of the enumerated offenses that are listed in 42 C.F.R. § 424.535(a)(3)(ii) as being *per se* detrimental to the best interests of the Medicare program and its beneficiaries. Therefore, CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges based on Petitioner's felony conviction.

4. Cahaba and Novitas each had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4) because Petitioner falsely certified on his enrollment applications he had not been the subject of a final adverse legal action.⁴

Petitioner retained the services of Physician Revenue Management & Consulting, LLC (PRMC) to handle his Medicare billing and credentialing. P. Br. at 5. Petitioner, in his December 5, 2016 request for reconsideration, acknowledged that he provided a "misstatement on the Medicare application" and explained that his billing company had stated it was unaware of his conviction. CMS Ex. 15 at 2. At that time, Petitioner submitted a letter from PRMC in which it explained that "due to miscommunication between [Petitioner] and PRMC," it had marked "no" on Petitioner's application in response to the inquiry regarding whether he had a final adverse legal action. CMS Ex. 15 at 3. Petitioner explained that he relied on PRMC's expertise for the correct preparation of his enrollment applications, and he alleged that he "was not as diligent as [he] should have been in reviewing the information on all the applications." CMS Ex. 15 at 2.

Assuming, for purposes of this discussion, that Petitioner's billing and credentialing company did not correctly report his felony conviction, that does not absolve Petitioner of the responsibility to report a final adverse legal action.⁵ A provider or supplier is bound by any false or misleading information that a billing company lists on his or her enrollment application, and false or misleading information may ultimately be submitted to the Medicare administrative contractor if a provider or supplier does not personally and carefully review all sections of an enrollment application. By signing a certification

⁴ I recognize that Petitioner's felony conviction in the preceding 10 years, alone, is a sufficient basis for CMS to have revoked his Medicare enrollment and billing privileges and established a three-year bar to re-enrollment.

⁵ Petitioner does not assert that he notified the billing company of his felony convictions; rather, he states that the billing company was in possession of "advocacy letters" and these letters should have put PRMC on notice of his convictions. It is unnecessary for me to determine whether Petitioner notified his billing company of his convictions.

statement alone, in the absence of reviewing the request prompting the submission of the enrollment information, the supplier or provider adopts any false or misleading statements in the application. *See* CMS Ex. 15 at 2 (Petitioner’s report that “[i]n fact, to simplify many things, many applications consisted of just a signature page for me to sign.”). There is simply no provision under law that absolves a supplier or provider when he or she signs an enrollment application that is incorrectly prepared by another individual. Thus, even if Petitioner is correct that his billing company somehow erred in handling his applications, which I do not find, I also recognize that Petitioner signed the certification statement and thereby adopted any false or misleading information in the application.

Petitioner previously contended that his failure to provide the required information regarding his conviction was a “simple mistake” and “completely inadvertent.” CMS Ex. 15 at 2. He further argued that there was “no intent on the part of the billing company to mislead” and he had no intention to mislead CMS either. CMS Ex. 15 at 2. However, Petitioner reported in his application that he did not have a final adverse legal action. This is patently incorrect, as Petitioner has two felony convictions for aggravated assault, and therefore, his certification of the application indicated his agreement with the false and misleading statement that he had not been subject to a final adverse legal action. *See, e.g., Sandra Johnson, CRNA, DAB No. 2708 at 15 (2016)* (stating that “[b]y signing the certification statements . . . she attested to the truth, accuracy and completeness of their content as is” and that “Petitioner remained responsible for the contents of her application.”). Therefore, I find that Cahaba and Novitas each had a legal basis to revoke Petitioner’s Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4).

5. The effective date of Petitioner’s revocation is set by regulation.

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. Petitioner first enrolled in the Medicare program in Tennessee on July 1, 1993. CMS Ex. 1. Pursuant to section 424.535(g), Petitioner’s revocation for his Tennessee PTAN became effective on June 29, 2009, the date of his conviction.

Petitioner submitted his Mississippi enrollment application on March 26, 2015, which was approved with an effective date of April 15, 2015. CMS Ex. 3, 10. Petitioner’s revocation for his Mississippi PTAN became effective on April 15, 2015, the effective date of the approval of his Mississippi Medicare enrollment.

6. *The three-year length of the re-enrollment bar is not reviewable.*

The DAB has explained that “CMS’s determination regarding the duration of the re-enrollment bar is not reviewable.” *Vijendra Dave, M.D.*, DAB No. 2672 at 11 (2016). The DAB explained that “the only CMS actions subject to appeal under Part 498 are the types of initial determinations specified in section 498.3(b).” *Id.* The DAB further explained that “[t]he determinations specified in section 498.3(b) do not, under any reasonable interpretation of the regulation’s text, include CMS decisions regarding the severity of the basis for revocation or the duration of a revoked supplier’s re-enrollment bar.” *Id.* The DAB discussed that a review of the rulemaking history showed that CMS did not intend to “permit administrative appeals of the length of a re-enrollment bar.” *Id.* I have no authority to review this issue and I do not disturb the three-year re-enrollment bar.

7. *I deny Petitioner’s request for a subpoena because Petitioner has not identified any documents to be produced pursuant to 42 C.F.R. § 498.58(c)(3).*

Petitioner, through counsel, submitted a motion requesting that I issue a subpoena directing CMS to produce “all raw data and documentation that was submitted with Petitioner’s applications for Medicare enrollment on March 26, 2015.” P. Sub. Req. at 1. Petitioner also requested that I direct, by issuance of a subpoena, that CMS “provide a copy of the questions and any accompanying explanations as they appeared on the on-line application in the PECOS system at the time Petitioner’s applications were submitted on March 26, 2015.” P. Sub. Req. at 1. In support of his request, Petitioner states that Ms. Tammy Lee, “the individual who submitted Petitioner’s information into the PECOS system . . . did submit information about Petitioner’s guilty plea to the charge of aggravated assault with his applications to be a Medicare provider.”⁶

Petitioner has not submitted any evidence in support of his allegation that he reported his felony conviction when he submitted his Medicare enrollment applications. For instance, Petitioner could have produced his own copy of the enrollment applications showing that he reported this information. Or, in compliance with my Pre-Hearing Order, Petitioner could have submitted his own written direct testimony, or the written direct testimony of

⁶ Petitioner also stated that the felony conviction “may have been submitted in a category titled, “Other Significant Events” or a similar category title. There is no such category on an enrollment application. Rather, there is a clearly identified section pertaining to “FINAL ADVERSE LEGAL ACTIONS/CONVICTIONS” that unambiguously asks the applicant to report each final adverse legal action, the court/administrative body that imposed the action, and the resolution, if any. See Form CMS-855B, <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/cms855i.pdf> (last visited November 14, 2017).

Ms. Lee. *See* Pre-Hearing Order, § 8. To the contrary, Petitioner’s current allegation, raised in an unsupported argument in a brief without an evidentiary foundation, is in stark contrast to his previous posture, in which he submitted a statement signed by three PRMC officers who collectively asserted that “due to miscommunication between Dr. Ellis and PRMC, the application was incorrectly marked as “no” with respect to Dr. Ellis [sic] felony” and “there was no intention to deceive Medicare by PRMC in this matter, but the mistaken notation was simply the result of a lack of adequate communication between PRMC and our client, Dr. Ellis.” CMS Ex. 15 at 3.

Although CMS opposed Petitioner’s motion requesting a subpoena, it nonetheless provided a copy of each contractor’s records regarding both applications. Further, CMS provided a declaration from an employee of each contractor in which the employee reported that, based on a review of all available records, Petitioner did not disclose his felony convictions. Further, each contractor’s declarant explained that the respective contractor does not have access to any additional documents or raw data. Benison Dec.; Fry Dec.

According to 42 C.F.R. § 498.58(c)(3), a subpoena request must identify the “documents to be produced” and “[s]pecify the pertinent facts the party expects to establish by the witnesses or documents, and indicate why those facts could not be established without use of a subpoena.” Petitioner has not demonstrated there is a document, or any evidence, that can be produced that will establish that he reported his convictions on his enrollment applications. In fact, Petitioner has already conceded there is no such document in existence. CMS Ex. 15 at 1, 3. Further, both Novitas and Cahaba have provided enrollment records in their possession, and report there are no other available records. Benison Dec.; Fry Dec. Petitioner has not demonstrated that he reported his felony convictions on his enrollments applications and that there is documentary evidence of such that can only be obtained through the issuance of a subpoena. 42 C.F.R. § 498.58(c)(3).

I reiterate that I would sustain the revocation of Petitioner’s Medicare enrollment and billing privileges based on 42 C.F.R. § 424.535(a)(3), alone. Therefore, even if I were to find that Petitioner reported his felony convictions on his enrollment applications, it would not alter my decision upholding the revocation of Petitioner’s Medicare enrollment and billing privileges and the imposition of a three-year re-enrollment bar.

