Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Lorrie Laurel, PT
Docket No. A-13-66
Decision No. 2524
July 11, 2013

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Lorrie Laurel (Petitioner), a Florida-based physical therapist, appeals a March 13, 2013 decision by an Administrative Law Judge (ALJ). *Lorrie Laurel, PT*, DAB CR2724 (2013) (ALJ Decision). In that decision, the ALJ upheld the determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(3)(i)(B) based on Petitioner's 2006 guilty plea in a Florida circuit court to one count of felony grand theft. Section 424.535(a)(3)(i)(B) authorizes CMS to revoke the billing privileges of a Medicare supplier who has been convicted of a felony "financial crime" within ten years preceding her enrollment or revalidation of enrollment in Medicare.

Petitioner contends, as she did before the ALJ, that she was not convicted within the meaning of section 424.535(a)(3)(i)(B) because the Florida court withheld adjudication and she was not incarcerated or fined. Petitioner also argues that CMS improperly waited six years to revoke her billing privileges and cannot use section 424.535 to recoup prior payments. We agree with the ALJ that Petitioner was convicted within the meaning of the regulations and that CMS had the authority to revoke her billing privileges at the time it did so. We therefore affirm the ALJ Decision.

Legal Background

In order to participate in Medicare, "providers" and "suppliers" – a physical therapist is a "supplier" under Medicare law – must "enroll" in the program.[1] 42 C.F.R. § 424.500. Enrollment in Medicare confers program "billing privileges" – that is, the right to claim and receive Medicare payment for health care services provided to program beneficiaries. *Id.* §§ 424.502, 424.505.

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[1] "Providers" are hospitals, nursing facilities, or other medical institutions. 42 C.F.R. § 400.202. "Suppliers" include physicians and other health care practitioners. *Id.* (stating that, unless the context indicates otherwise, "[s]upplier means a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare").

Under certain circumstances, CMS may revoke the Medicare billing privileges of a provider or supplier. CMS's revocation authority is found in 42 C.F.R. § 424.535, which provides in relevant part as follows:

> (a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier's billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:
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> * * *
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> (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 program and its beneficiaries.
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> (i) Offenses include –
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> * * *
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> (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.

See Social Security Act (Act) §§ 1842(h)(2) (authorizing Secretary of Health & Human Services to revoke enrollment of physician or supplier convicted of a federal or state felony offense the Secretary "determines is detrimental to the best interests of the program or program beneficiaries"), 1866(b)(2)(D) (same authority for convicted provider). Revocation based on a felony conviction is effective on the date of the conviction. 42 C.F.R. § 424.535(g). After CMS revokes a provider or supplier's billing privileges, the provider or supplier cannot participate in Medicare from the effective date of the revocation until the end of the re-enrollment bar. *Id.* § 424.535(c). The re-enrollment bar must last for a minimum of one year but cannot exceed three years. *Id.*

A revocation determination by CMS or its contractor is an "initial determination" that may be appealed under the procedures found in 42 C.F.R. Part 498, subparts B-E. *See* 42 C.F.R. §§ 498.3(b)(17), 424.545(a).

Case Background[2]

Petitioner pled guilty in 2006 in a Florida circuit court to one count of second degree grand theft. In an order dated December 28, 2006 but made retroactive to November 8, 2006, the state court judge accepted Petitioner's plea but withheld adjudication of guilt. The judge sentenced Petitioner to five years' supervised probation and ordered her to perform 150 hours of public service work and to pay restitution and court costs.

By letter dated May 4, 2012, First Coast Service Options, Inc. (First Coast), a CMS Medicare Administrative Contractor, notified Petitioner that, based on her guilty plea, her Medicare billing privileges were being retroactively revoked for a three-year period starting on November 17, 2006.[3] Petitioner requested reconsideration, and First Coast upheld the revocation in a reconsidered determination dated September 10, 2012.

Petitioner appealed the reconsidered determination to the ALJ. The parties filed cross motions for summary judgment. The ALJ granted CMS's motion and denied Petitioner's, concluding that the undisputed evidence established that in the past ten years Petitioner was convicted of a felony offense detrimental to the best interests of the Medicare program and its beneficiaries, so CMS properly revoked Petitioner's Medicare billing privileges. Petitioner timely appealed the ALJ Decision to the Board.

Standard of Review

Our standard of review on a disputed issue of law is whether the ALJ decision is erroneous.[4] Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, *available at* http://www.hhs.gov/dab/divisions/ appellate/guidelines/prov.html.

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[2] Background information is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for her findings.

[3] The ALJ noted the discrepancy between the date of judgment in the state court order (December 28, 2006 made retroactive to November 8, 2006) and the date used by CMS as the starting date of the revocation (November 17, 2006), but Petitioner did not challenge CMS's date so the ALJ accepted it. ALJ Decision at 3 n.3. On appeal Petitioner does not contest the ALJ's decision to accept the later November date, so we accept it as well.

[4] Petitioner does not contend there are any genuine disputes of material fact or otherwise argue that the ALJ erred in resolving the case through summary judgment.

Analysis

1. Petitioner was convicted within the meaning of section 424.535(a)(3)(i)(B).

Petitioner contends that she is not subject to revocation under section 424.535(a)(3)(i)(B) because she was not "convicted" of a felony financial crime as a matter of Florida law. According to Petitioner, since adjudication was withheld and she was neither incarcerated nor fined, she was not convicted of grand theft under Florida law. Request for Review (RR) at 6-7.

We agree with the ALJ that the plain language of section 424.535(a)(3)(i)(B) compels the finding that, "for purposes of her Medicare participation, Petitioner Laurel was convicted of a felony, notwithstanding the provisions of state law." ALJ Decision at 4. It is undisputed that grand theft is a financial crime. It is also undisputed that, although the state court withheld adjudication of guilt and did not sentence Petitioner to incarceration or impose a fine, Petitioner pled guilty and the court accepted that plea. Petitioner's guilty plea to felony grand theft constitutes a conviction under section 424.535(a)(3)(i)(B) because that section explicitly authorizes CMS to revoke an individual's billing privileges based on "[f]inancial crimes . . . for which the individual was convicted, <u>including guilty pleas</u> . . . ."

Petitioner argues that whether she was "convicted" is a question of state law because section 424.535(a)(3) authorizes revocation where a provider or supplier was "convicted of a Federal or <u>State</u> felony offense . . . ." RR at 3. Petitioner misreads this regulation. The only reference to state law is to "a . . . State felony offense." In other words, the predicate offense for a revocation action (given a conviction) must constitute a felony under state law if not federal law. With respect to what constitutes a conviction, the regulation makes no reference to state law; for example, it does not state that revocation is authorized for a state law felony only where a provider or supplier was "convicted under state law." Moreover, section 424.535(a)(3)(i)(B) specifically defines "conviction" for the listed financial crimes (and other similar crimes) to include "guilty pleas and adjudicated pretrial diversions." Thus, far from deferring to state law to define "conviction," the federal regulation itself specifies what constitutes a conviction.

In discussing why the federal definition of "conviction" controls, the ALJ relied on the Board's decision in a case involving a supplier's exclusion from participation in federal health care programs under section 1128 of the Act. ALJ Decision at 4, citing *Henry L. Gupton*, DAB No. 2058 (2007). Petitioner argues that *Gupton* "does <u>not</u> stand for the proposition that a state law definition of 'conviction' can be substituted with a federal definition, pursuant to 42 CFR § 424.535(a)(3)" (RR at 4) (emphasis in original). Petitioner's proposition that a federal definition is being "substituted" for a state

definition is meritless for the reasons already discussed. Federal law itself defines what constitutes a "conviction" for purposes of CMS's revocation authority; it neither refers to nor defers to state law for that definition, and there is no basis for suggesting that the Secretary had any obligation to do so.

We also agree with the ALJ that the Board's reasoning in *Gupton* for why it is reasonable for federal law to control the definition of "conviction" in exclusion cases applies equally to revocations based on felony convictions. In *Gupton*, the Board explained that the "rationale for the different meanings of 'conviction' for state criminal law versus federal exclusion law purposes follows from the distinct goals involved." DAB No. 2058, at 7. While the goals of criminal law generally include punishment, rehabilitation, and deterrence, exclusions "are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc . . . ." *Id.* "In the effort to protect both beneficiaries and funds," the Board reasoned, "Congress could logically conclude that it was better to exclude providers whose involvement in the criminal system raised serious concerns about their integrity and trustworthiness, even if they were not subjected to criminal sanctions for reasons of state policy." *Id.* at 7-8.

Like exclusions, revocations are designed to protect the Medicare program and its beneficiaries. The preamble to the final rule that added section 424.535 to 42 C.F.R. makes clear that CMS sought to collect and maintain data on all current and future providers and suppliers enrolled in Medicare so it would be "better positioned to combat and reduce the number of fraudulent and abusive providers and suppliers in the Medicare program, thereby protecting the [Medicare] Trust Funds and the Medicare beneficiaries." 71 Fed. Reg. 20,754, 20,773 (2006). CMS's protective motivation is also plain from the text of section 424.535(a)(3), which gives CMS the authority to revoke the billing privileges of a provider or supplier convicted of a felony offense that "CMS has determined to be detrimental to the best interests of the program and its beneficiaries." Given this motivation, CMS could logically conclude that it did not want its revocation authority to "hinge on state criminal justice policies." *See Carolyn Westin*, DAB No. 1381, at 6 (1993) (discussing rationale for a federal definition of "conviction" in I.G. exclusions), *aff'd, Westin v. Shalala*, 845 F. Supp. 1446 (D. Kan. 1994).

We also note that even if state law controlled – which it does not – Petitioner nonetheless was "convicted" under Florida law. Florida's Criminal Punishment Code defines "conviction" as "a determination of guilt that is the result of a plea or trial, regardless of whether adjudication is withheld." Fla. Stat. § 921.0021(2). The Florida Supreme Court has concluded that section 921.0021(2) "clearly indicates that the Legislature wanted to include all determinations of guilt [in the definition of conviction] even where adjudication had been withheld." *Montgomery v. State*, 897 So.2d 1282, 1287 (2005).

Despite the language of section 921.0021(2), Petitioner asserts that in Florida, whether a defendant is "convicted" of an offense if she pled guilty and adjudication was withheld "depends on the specific law that the defendant is alleged to have violated." RR at 6. The theft statute Petitioner pled guilty to violating provides in relevant part that "[i]f the property stolen is valued at $20,000 or more but less than $100,000 . . . the offender commits grand theft in the second degree, punishable as a felony of the second degree, as provided in s. 775.082, s. 775.083, or s. 775.084." Fla. Stat. § 812.014(2)(b). Section 775.082 provides guidelines for terms of imprisonment, section 775.083 provides guidelines for the imposition of fines, and section 775.084 provides guidelines for enhanced penalties and mandatory minimum prison terms for certain repeat offenders. Petitioner contends that she did not suffer a "conviction" under Florida law because she was neither incarcerated under section 775.082 nor fined under section 775.083 (and she is not a repeat offender so section 775.084 is inapplicable). RR at 6-7.

We find no merit in this argument. The fact that section 812.014(2)(b) provides that the penalties applicable to second degree grand theft are found in sections 755.082-084 does not mean that an individual must receive one of those penalties in order to be considered convicted of second degree grand theft. Each section only provides guidelines for how an offender may be punished after he or she has been convicted. *See* Fla. Stat. §§ 775.082-084. Moreover, section 775.083 expressly provides that "[a]s used in this subsection, the term 'convicted' or 'conviction' means a determination of guilt which is the result of a trial or the entry of a plea of guilty or nolo contendere, <u>regardless of whether adjudication is withheld</u>." Fla. Stat. § 775.083(1) (emphasis added).

2. CMS timely revoked Petitioner's billing privileges.

Petitioner maintains that CMS "could have" notified her of the potential revocation of her Medicare billing privileges in late 2006 or early 2007 based on her guilty plea, so it was "simply improper" for CMS to "wait six years to revoke, thereby subjecting [her] to six years of potential overpayments." If CMS had notified her earlier of the potential revocation, she says, she could have "mitigate[d] her potential monetary liability, by ceasing her Medicare practice." RR at 9-10.

Petitioner's argument ignores the plain text of section 424.535(a)(3), which authorizes CMS to revoke a currently enrolled supplier's billing privileges if the supplier was convicted of certain felony offenses "within the 10 years preceding enrollment or revalidation of enrollment." The regulation puts no limitation on when within that 10-year period CMS may take the revocation action, and as we discusss, CMS acted well within the 10-year period in this case. The record does not specify when Petitioner first enrolled in Medicare as a supplier, when First Coast (acting on behalf of CMS) became aware of Petitioner's guilty plea, or whether First Coast was in the process of revalidating Petitioner's enrollment when it became aware of the plea. However, the Board has held that the revalidation process may be triggered when CMS or its contractor independently

acquires and reviews information relevant to a supplier's eligibility or fitness to participate in the Medicare program. *See Abul Razzaque Ahmed, M.D.*, DAB No. 2261, at 15-17 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010); *Robert F. Tzeng, M.D.*, DAB No. 2169, at 10-12 (2008). Thus, even if CMS learned about Petitioner's guilty plea at the earliest possible moment – when it was entered in December 2006 – and began its revalidation process at that time, CMS was well within the 10-year limitation period when it acted to revoke Petitioner's billing privileges in May 2012. Indeed, Petitioner's own argument that CMS revoked her billing privileges "approximately six years after [her] plea agreement" (RR at 9), effectively concedes as much.

We also note that, as the ALJ observed, Petitioner "can hardly claim that the Medicare contractor failed to act expeditiously" when she failed to produce any evidence that she ever reported her conviction to First Coast, much less that she reported it within 30 days, as required by the regulations. ALJ Decision at 6, citing 42 C.F.R. § 424.516(d) (requiring nonphysician practitioners to report specified events, including "[a]ny adverse legal action," to their Medicare contractors within 30 days).

Petitioner further contends that the timing of CMS's revocation impermissibly makes section 424.535(a)(3) a "retrospective recoupment provision." RR at 9-10. She argues that "Medicare courts typically distinguish between 'Conditions of Participation' and 'Conditions of Payment.'" *Id.* at 8. According to Petitioner, noncompliance with a "condition of participation" is "remedied by denial of an application for participation, or revocation of current active provider status," while noncompliance with a "condition of payment" is "remedied by the denial of a claim for reimbursement, or recoupment of reimbursement previously paid." *Id.* Petitioner argues that section 424.535 provides for revocation of a provider or supplier's Medicare enrollment "due to noncompliance with Medicare 'Conditions of Participation,'" so it "should not be used for *de facto* 'Conditions of Payment' remedies." *Id.*

The cases cited by Petitioner that draw a distinction between "conditions of participation" and "conditions of payment" involve *qui tam* suits under the False Claims Act (FCA) premised on the submission to the government of an allegedly false certification of compliance with a statutory or regulatory requirement. *See U.S. ex rel. Conner v. Salina Regional Health Ctr., Inc.*, 542 F.3d 1211 (10th Cir. 2008); *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001). The courts in those cases distinguished between conditions of participation and payment because such false claims constitute violations of the FCA only if the certification was a condition of governmental payment. But even if the distinction between conditions of participation and payment was not necessarily limited to the FCA context, it would not be applicable here. ALJs and the Board are authorized to review only whether CMS had a legal basis to revoke Petitioner's Medicare billing privileges, not CMS's exercise of discretion to do. *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008). Having no authority to review CMS's exercise of discretion, it

follows that we have no authority to consider factors, such as retroactive payment consequences, that CMS might decide to take into consideration when exercising its discretion.

Conclusion

For the reasons explained above, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member