

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Francis J. Cinelli, Sr., D.O.,
(PTAN: 041212, 041212XFU),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-798

Decision No. CR4807

Date: March 10, 2017

DECISION

Novitas Solutions (Novitas or “the contractor”), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, Francis J. Cinelli, Sr., D.O., effective March 20, 2015. The revocation was based on Petitioner’s felony conviction for aiding and abetting the filing of a false tax return and his failure to timely report the felony conviction. For the reasons stated below, I affirm CMS’s revocation of Petitioner’s Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner, a doctor of osteopathy, was enrolled as a supplier in the Medicare program. CMS Exhibit (Ex.) 1. By letter dated September 18, 2012, CMS notified Petitioner that it had revalidated his Medicare enrollment information. CMS Ex. 1. The September 18, 2012 letter also informed Petitioner that in order to maintain active enrollment in the

Medicare program, Petitioner needed to submit updates and changes to his enrollment information, including reporting “final adverse legal actions, including felony convictions” CMS Ex. 1 at 2.

A criminal information filed on October 10, 2014, charged that Petitioner “did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service, of a U.S. Individual Income Tax Return, Form 1040, of Francis J. Cinelli, Jr.” and that the “return was false and fraudulent as to a material matter.” CMS Ex. 8 at 1. On March 20, 2015, Petitioner entered a guilty plea and was convicted of aiding and abetting the filing of a false tax return, pursuant to 26 U.S.C. § 7206(2). CMS Ex. 8 at 37. The United States District Court for the Eastern District of Pennsylvania (District Court) imposed a sentence that included three years of probation, a \$5,000 fine, and \$95,360 in restitution. CMS Ex. 8 at 37-41.

By letter dated February 25, 2016, Novitas notified Petitioner that his Medicare enrollment and billing privileges would be revoked. CMS Ex. 2. Novitas provided the following explanation in its letter:

42 CFR §424.535(a)(3) - Felonies

The Centers for Medicare & Medicaid Services has been made aware of your March 20, 2015 felony conviction for Aiding and Abetting the Filing of a False Tax Return in violation of Title 26 United States Code § 7206(2) in the United States District Court, Eastern District of Pennsylvania. Based on our review, we have determined to revoke your Medicare enrollment, under the regulation at 42 CFR §424.535(a)(3).

42 CFR §424.535(a)(9) – Failure to Report

Francis Cinelli was adjudged guilty of Aiding and Abetting the Filing of a False Tax Return by the United States District Court, Eastern District of Pennsylvania on March 20, 2015. Francis Cinelli did not notify CMS of the final adverse legal action within 30 days, as required by 42 CFR §424.516.

CMS Ex. 2 at 1 (emphasis omitted). The effective date of the revocation was March 20, 2015, and the contractor informed Petitioner that it had established a re-enrollment bar for a period of three years, effective 30 days from the postmark date of the letter.¹ CMS Ex. 2 at 1-2.

¹ Petitioner does not reference the re-enrollment bar in his brief.

In a letter from Bangor Medical Center, dated April 7, 2016, Philip J. Cinelli, D.O., requested reconsideration of the revocation. CMS Ex. 3. In his request for reconsideration, Dr. Cinelli acknowledged that Petitioner pleaded guilty to a felony charge of aiding and abetting the filing of a false tax return and that Petitioner failed to notify the Medicare program of his guilty plea or felony conviction because he “was unaware of this requirement and believed that all reporting was done through the court system.” CMS Ex. 3 at 1. Four days later, on April 11, 2016, Petitioner, through the same counsel who represented him in the criminal proceedings and who represents him in the instant case, submitted a separate request for reconsideration in which Petitioner contended that his felony conviction is not for an offense that warrants revocation of enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3). CMS Ex. 5 at 4-11. Petitioner did not raise any arguments regarding the contractor’s determination that he did not provide timely notice of his felony conviction. CMS Ex. 5 at 4-11.

Novitas issued a reconsidered determination on June 13, 2016, at which time it informed Petitioner that his Medicare enrollment had been revoked pursuant to 42 C.F.R. § 424.535(a)(3) and (a)(9) based on having a felony conviction that “CMS has determined to be detrimental to the best interests of the program and its beneficiaries” and for his failure to report the conviction within 30 days. CMS Ex. 7 at 1-3. The letter notified Petitioner that he may request further review by an administrative law judge (ALJ). CMS Ex. 7 at 3-4.

Petitioner filed a request for hearing on July 29, 2016, which the Civil Remedies Division received on August 8, 2016. On August 12, 2016, I issued an Acknowledgment and Pre-Hearing Order (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 11 exhibits (CMS Exs. 1-11). Petitioner submitted a pre-hearing brief and opposition to CMS’s motion for summary judgment (P. Br.). In the absence of any objections, I admit CMS Exs. 1-11 into the record.

Neither party listed any witnesses. Consequently, there are no witnesses for the parties to cross-examine at a live hearing. Order ¶¶ 9-10. The record is closed, and the case is ready for a decision on the merits.²

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.

II. Issues

Whether CMS has a legal basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) and (a)(9) based on his March 20, 2015 felony conviction and failure to comply with reporting requirements.

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), 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—

* * *

(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.

42 C.F.R. § 424.535(a)(3)(ii)(B).

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

CMS also may revoke a supplier's Medicare enrollment and billing privileges based on the supplier's failure to timely report a final adverse legal action, as is set forth in 42 C.F.R. § 424.535(a)(9):

(9) *Failure to report.* The provider or supplier did not comply with the reporting requirements specified in §424.516(d)(1)(ii) and (iii) of this subpart.

Pursuant to 42 C.F.R. § 424.516(d)(1)(ii), physicians *must* report “[a]ny adverse legal action” within 30 days of the reportable event, and 42 C.F.R. § 424.502 (Definitions) lists a conviction of a felony offense as defined in section 424.535(a)(3)(i) within the last 10 years preceding enrollment, revalidation, or re-enrollment as a final adverse action.

1. ***Petitioner entered a plea of guilty, and was convicted of, the offense of aiding and abetting the filing of a false tax return, in violation of 26 U.S.C. § 7206(2), on March 20, 2015.***
2. ***Petitioner's felony conviction is for a financial crime pursuant to 42 C.F.R. § 424.535(a)(3).***
3. ***An offense listed in 42 C.F.R. § 424.535(a)(3) has been determined by CMS to be per se detrimental to the best interests of the Medicare program and its beneficiaries.***
4. ***Novitas had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges.***

Petitioner does not dispute that he was convicted of the felony of aiding and abetting the filing of a false tax return in violation of 26 U.S.C. § 7206(2), on March 20, 2015.⁴ P. Br. at 1-2. CMS may revoke a supplier's billing privileges and supplier agreement if the supplier was convicted of an enumerated felony offense in the previous 10 years. 42 C.F.R. § 424.535(a)(3)(i). Petitioner argues that 42 C.F.R. § 424.535(a)(3) is not applicable because he was not convicted of a financial crime that is contemplated by the regulation, in that “neither ‘aiding and abetting’, or ‘aiding or abetting the filing of a false

⁴ Title 18 of the United States Code indicates that an offense is considered to be a felony based on the maximum term of imprisonment, and that an offense that is punishable by more than one year of imprisonment is considered to be a felony. 18 U.S.C. § 3559(a). The maximum period of imprisonment for Petitioner's offense is three years. 26 U.S.C. § 7206.

tax return' appear in the language of the statute.”⁵ P. Br. at 4. Petitioner claims he was not convicted of “any financial crime or any ‘income tax evasion’ (as spelled out in the statutory language) of his own taxes.” P. Br. at 4.

Petitioner’s arguments are unpersuasive. Petitioner was convicted of the offense of aiding and abetting the filing of a false tax return. Financial crimes, according to section 424.535(a)(3), are crimes “*such as* extortion, embezzlement, income tax evasion 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.” Petitioner was convicted of aiding and abetting the filing of a false tax return, meaning that he “willfully aid[ed] or assist[ed] in, or procure[d], counsel[ed], or advise[d] the preparation under, or in connection with any matter arising under, the internal revenue law, of a [tax] return . . . which is fraudulent or is false as to any material matter” 26 U.S.C. § 7206(2). Aiding, assisting, procuring, counseling or advising the preparation of a false tax return is a financial crime, in that the perpetrator of the crime is assisting in the filing of a fraudulent document reporting financial information. Therefore, it is certainly a financial crime. And based on the fact that the offense involves the false or fraudulent reporting of tax return information, it is similar to income tax evasion, which is one of the crimes enumerated in section 424.535(a)(3)(ii)(B). The Departmental Appeals Board (Board) addressed a similar issue in *Stanley Beekman, D.P.M.*, stating that “CMS may revoke Medicare billing privileges under the authority of section 424.535(a)(3) based on *any* financial crime, regardless of whether the supplier’s particular financial crime is specified in the regulation’s illustrative list of financial crimes.” DAB No. 2650 at 7 (2015) (emphasis in original).

Petitioner paid his son for work performed in a vitamin store “in a manner that allowed his son to not include this income when filing his tax returns.” P. Br. at 2; CMS Ex. 8 at 58-59. Petitioner was charged with and pleaded guilty to aiding and abetting the filing of false tax returns. Specifically, Petitioner was charged as follows:

[Petitioner] did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revue Service, of a U.S. Individual Tax Return, Form 1040, of Francis J. Cinelli, Jr. [his son], charged elsewhere, for the calendar year 2008. The return was false and fraudulent as to a material matter, in that the reported wages of only \$27,000 and taxable income of only \$27,906, whereas, [Petitioner] then and there knew, he had paid [his son], approximately \$109,060 in additional unreported income during calendar year 2008, and [his son’s] true and correct taxable income was approximately \$108,566.

⁵ In referencing “the statute,” Petitioner is undoubtedly referring to the regulation found at 42 C.F.R. § 424.535(a)(3).

CMS Ex. 8 at 1.

Petitioner argues that aiding and abetting his son's filing of a false tax return is not similar to "income tax evasion" done for his own financial enrichment. P. Br. at 4. Petitioner's argument is unavailing. Nothing limits 42 C.F.R. § 424.535(a)(3)(ii)(B) to financial crimes committed for the supplier's own financial enrichment. Further, I observe that a financial crime committed for the benefit of one's son can also be of benefit to the parent, owing to the close family relationship between a parent and child. The factual basis underlying Petitioner's guilty plea, as explained by the federal prosecutor, supports that Petitioner committed a financial crime by providing his son with unreported income:

The defendant was a medical doctor and is a medical doctor in Bangor, Pennsylvania with a medical group called the Bangor Medical Center of which he's one of the owners. The defendant has a son, Francis J. Cinelli, Jr., who runs a vitamin store that I'll refer to as the vitamin store.

It's owned and it's located in the same building as the Bangor Medical Center in Bangor, Pennsylvania and beginning sometime prior to January, 2007 and continuing into 2011, the defendant structured his son's compensation for the work that was done at the vitamin store such that his son was being paid partly by payroll check, partly in the form of cash from the defendant directly, and partly in the form of cash and checks from the revenues of the vitamin store.

In addition, the defendant instructed his son to keep many of the payments from . . . customers of the vitamin store and they made payments to the son in the form of checks or cash for goods and services that were actually provided by the vitamin store.

The defendant's son deposited the checks and cash into his own personal bank account, and the take returns for the medical center showed that it was listing as expenses the vitamins and other supplies that the defendant's son was selling.

So when the defendant's son diverted from the vitamin store's – the revenues, those should have been coming into the Bangor Medical Center, but the defendant allowed his son to keep some of that money as a way of providing his son with additional income that the IRS didn't know about.

CMS Ex. 8 at 58-59.

Petitioner argues that his felony conviction was unrelated to the practice of medicine or any government or other health care program or beneficiary. Section 424.535(a)(3) does not require that a felony conviction be for a financial crime that is related to the Medicare program or a provider's or supplier's practice of medicine. In *Fady Fayad, M.D.*, the Board rejected this same argument, stating that section 424.535(a)(3) "permits CMS to revoke a supplier's billing privileges based on a 'financial crime' without requiring that the crime be related to a health care program or health care fraud." DAB No. 2266 at 15 (2009), *aff'd, Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

The law is clear that the felonies enumerated in 42 C.F.R. § 424.535(a)(3), including income tax evasion, are per se detrimental to the Medicare program. The plain language of the regulation does not require a connection between Petitioner's conviction and the Medicare program or Petitioner's medical practice in order to constitute a basis for revocation. Petitioner cites no legal authority establishing or supporting a requirement for a connection between his conviction and the Medicare program. In this case, the offense for which Petitioner was convicted is a financial crime that is similar to income tax evasion. As such, Petitioner's offense is per se detrimental to the Medicare program and its beneficiaries.

Petitioner contends that "the practical effect of the revocation is to destroy his ability to practice" and "inhibits his ability to earn a living." P. Br. at 6. Such a consideration is irrelevant to my review of whether CMS was authorized to revoke Petitioner's Medicare enrollment. As long as CMS has shown that one of the regulatory bases for revocation exists, as it has done in this case, I may not refuse to apply the regulation and must uphold the revocation. *See Stanley Beekman, D.P.M.*, DAB No. 2650 at 10 (stating that an administrative law judge and the Board must sustain a revocation "[i]f the record establishes that the regulatory elements are satisfied"); *Letantia Bussell, M.D.*, DAB No. 2196 at 13 (2008) (stating that the only issue before an ALJ and the Board in enrollment cases is whether CMS has established a "legal basis for its actions").

Petitioner also argues that "[e]quitable considerations weigh heavily in favor" of reversing the revocation of his Medicare enrollment and billing privileges. P. Br. at 6. Specifically, Petitioner contends that he is 88 years old, a World War II veteran, and is a dedicated professional who has practiced medicine for more than 50 years. To the extent that Petitioner is requesting equitable relief, I am unable to grant equitable relief. *US Ultrasound*, DAB No. 2302 at 8 (2010) ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements").

For the aforementioned reasons, I will not disturb the determination revoking Petitioner's Medicare enrollment and billing privileges based on his felony conviction.

5. *Petitioner did not inform CMS within 30 days of his March 20, 2015 felony conviction.*⁶

The regulations at 42 C.F.R. § 424.516(d)(1)(ii) require that physicians report, within 30 days, any adverse legal action to their Medicare contractor. Failure to timely report an adverse legal action subjects a physician to revocation of his or her Medicare billing privileges. 42 C.F.R. § 424.535(a)(9). Petitioner does not allege that he informed Novitas of his felony conviction within 30 days of March 20, 2015.

Petitioner cannot escape responsibility for his failure to report his conviction within 30 days of his conviction. His arguments that he believed his conviction had been reported “through government channels” and that he did not receive proper notice of his duty to report are not persuasive. P. Br. at 5. Petitioner argues that he was not given clear notice of his duty to report because the notice to report was buried in “a few lines in a seven page letter” concerning revalidation of enrollment. P. Br. at 5. CMS had no duty to give Petitioner notice that he had to report a felony conviction; Petitioner is responsible for knowing the rules pertaining to Medicare suppliers. Ignorance of the reporting requirement does not relieve Petitioner of the obligation to report an adverse legal action, as pursuant to 42 C.F.R. § 424.516(d)(1)(ii), Petitioner is obligated to timely report “[a]ny adverse legal action.” Further, correspondence from CMS, in September 2012, informed Petitioner of the requirement to timely report any final adverse legal action, to include a felony conviction. CMS Ex. 1 at 2. I conclude that Petitioner failed to notify Novitas of an adverse legal action within 30 days as required, and that this failure serves as a legitimate basis to revoke his Medicare billing privileges. 42 C.F.R. § 424.516(d)(1)(ii).

6. *The applicable regulations control the effective date of the revocation.*

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. Thus, pursuant to the controlling regulation, Petitioner’s revocation became effective on March 20, 2015, the date of his conviction.

⁶ 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. Nonetheless, I will address the second basis for revocation relied upon by Novitas.

V. Conclusion

For the reasons explained above, I affirm the revocation of Petitioner's Medicare enrollment and billing privileges, effective March 20, 2015.

_____/s/
Leslie C. Rogall
Administrative Law Judge