

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Russell McDow, M.D.,
(PTAN: 004683L19; NPI: 1780678391),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-283

Decision No. CR4591

Date: April 25, 2016

DECISION

I sustain the determination of a Medicare contractor, as ratified by the Centers for Medicare & Medicaid Services (CMS), to revoke the Medicare billing privileges of Petitioner, Russell McDow, M.D. CMS is authorized to revoke Petitioner's Medicare billing privileges by section 1842(h)(8) of the Social Security Act (Act) and by 42 C.F.R. § 424.535(a)(3). I do not have the authority to overturn CMS's exercise of discretion under the Act and the implementing regulation.

I. Background

Petitioner requested a hearing in order to challenge the determination, as affirmed on reconsideration, to revoke his Medicare billing privileges. CMS moved for summary judgment. Petitioner opposed the motion. With its motion CMS filed eight proposed exhibits, identified as CMS Ex. 1-CMS Ex. 8. Petitioner filed six proposed exhibits, which I identify as P. Ex. 1-P. Ex. 6, in opposition to the motion. I receive both parties' proposed exhibits into the record.

Although CMS styled its motion as a motion for summary judgment it is unnecessary that I decide whether the criteria for summary judgment are met here. First, CMS offered no witnesses on its behalf. Petitioner offered himself as a witness but he failed to comply with my pre-hearing order directing that he offer his proposed testimony as an affidavit or sworn declaration. My pre-hearing order explicitly barred him from offering testimony that was not presented as an affidavit or declaration. Moreover, even if I were to allow him to testify, he has not proposed any testimony that relates to any fact that is material to the outcome of this case. As I discuss in more detail below, the gravamen of Petitioner's argument is that CMS should not have exercised its discretion to revoke Petitioner's Medicare billing privileges. As I explain, CMS's exercise of discretion is not an issue that I have the authority to address.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether CMS has discretion to revoke Petitioner's Medicare billing privileges.

B. Findings of Fact and Conclusions of Law

Section 1842(h)(8) of the Act authorizes the Secretary of Health and Human Services and her delegate, CMS, to terminate or to refuse to review a Medicare enrollment agreement with a physician or a supplier of Medicare services who "has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interest of the [Medicare] program." Regulations implement the statutory language at 42 C.F.R. § 424.535(a)(3). The regulation provides that CMS may revoke a Medicare provider or supplier's billing privileges for reasons that include:

(3) Felonies.

(i) The provider, supplier, or any owner or managing employee of the provider or supplier was, within the preceding 10 years, convicted . . . 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 –

[. . .]

(D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

There is no dispute that Petitioner was convicted of a felony in United States District Court, Eastern District of Virginia, within 10 years of the date of the revocation of his billing privileges (July 20, 2015). On June 20, 2006, Petitioner was convicted of the felony offense of obtaining hydrocodone, a controlled substance, by fraud, forgery, deception or subterfuge, in violation of 21 U.S.C. § 843(a)(3). CMS Ex. 2 at 1-2. That conviction is for a criminal offense that is related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance within the meaning of section 1128(a)(4) of the Act, and it is a basis for a mandatory exclusion under that section.

CMS plainly is authorized to revoke Petitioner's billing privileges, either under the broad language of the Act and 42 C.F.R. § 424.535(a)(3) or under the more specific language of 42 C.F.R. § 424.535(a)(3)(ii)(D). Petitioner concedes that he was convicted of a felony within 10 years of the revocation determination. Moreover, the felony consisted of unlawfully obtaining hydrocodone (a controlled substance) by fraud, forgery, deception or subterfuge, a crime of moral turpitude that is precisely the sort of offense for which the Act and implementing regulation authorize revocation. Furthermore, Petitioner's crime mandates exclusion pursuant to section 1128(a)(4) of the Act and is thus defined specifically as a crime for which revocation is authorized pursuant to 42 C.F.R. § 424.535(a)(3)(ii)(D).

Petitioner raises several arguments in opposition to CMS's motion. I find these to be without merit.

First and foremost, Petitioner concedes that CMS has discretionary authority to revoke Petitioner's billing privileges but he asserts that CMS exercised that authority inappropriately in this case. Petitioner contends that he committed his offense at a remote point in time – now more than a decade ago – and that he not only has paid the price for his crime but that he has been fully rehabilitated. He describes in detail his rehabilitation process and argues that he is now a valued member of both his local medical community and the community in general. Petitioner argues that revoking his billing privileges is a hollow exercise of authority by CMS that would hurt him unnecessarily and his community as well.

I do not have the authority to address these arguments. At bottom, they attack CMS's right to exercise its discretion consistent with the provisions of law. Whether Petitioner makes a compelling equitable case or whether I might agree with CMS's exercise of discretion or not is irrelevant. CMS has the authority to revoke Petitioner's billing privileges because he was convicted of a felony within 10 years of the date of its contractor's determination and I have no authority to question that exercise of discretion. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 17, 19 (2009).

