Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Denis Boerjan, M.D.,	)	Date: September 6, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-315
	)	Decision No. CR1643
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I conclude that the Center for Medicare & Medicaid Services (CMS) properly denied Denis Boerjan's (Petitioner's) enrollment in Medicare.

I. Background

By letter dated August 7, 2006, CMS acting through the Noridian Administrative Services, LLC (Noridian), the Medicare Part B carrier for Iowa, notified Petitioner that his request to participate in the Medicare program was denied because he did not meet the conditions of enrollment or meet the requirement to qualify as a health care supplier since he was convicted of a Federal or State felony offense that CMS had determined to be detrimental to the best interests of the program and its beneficiaries as set forth in 42 C.F.R. § 424.530(a)(3). Petitioner had a 1999 felony conviction for Criminal Sexual Conduct in the Second Degree. Petitioner requested a reconsideration-level carrier hearing. By decision dated January 17, 2007, the Medicare Hearing Officer issued an unfavorable decision which upheld the denial of a provider enrollment number to Petitioner. By letter dated March 8, 2007, Petitioner requested a hearing to appeal the unfavorable decision by the Medicare Hearing Officer.

This case was assigned to me for hearing and decision. I convened a prehearing conference in this matter on April 12, 2007. During the conference, the parties requested additional time to confer with each other to determine whether to request an in-person hearing. I granted the request for additional time and set another prehearing conference for May 17, 2007. At the May 17, 2007 prehearing conference the parties informed me that an in-person hearing would not be necessary and requested that I set a briefing schedule so that the parties could address the issues of this case.

Petitioner filed its brief (P. Br.) on June 1, 2007, along with fifteen exhibits, Petitioner Exhibits (P. Exs.) A-N. On July 5, 2007, CMS filed its brief in response (CMS Br.). On July 20, 2007, Petitioner filed its reply brief (P. Reply Br.). I admit into evidence P. Exs. A-N. I make my decision based on the applicable law and the parties' briefs and exhibits.

II. Applicable Law

Section 1842(h)(8) of the Social Security Act (Act), 42 U.S.C. § 1395u(h)(8), grants the Secretary of the Department of Health and Human Services (Secretary) discretion to refuse to enter into an agreement, or to terminate or refuse to renew an agreement, with a physician or supplier that "has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program."

Section 1866(j) of the Act requires the Secretary to "establish by regulation a process for the enrollment of providers of services and suppliers under this title," and grants "[a] provider of services or supplier whose application to enroll (or, if applicable, to renew enrollment) under this title is denied" a "hearing and judicial review of such denial under the procedures that apply under subsection (h)(1)(A)." Act, section 1866(j)(1)(A) and (2).

The regulation governing enrollment denial in the Medicare program provides:

> (a) *Reasons for denial.* CMS may deny provider's or supplier's enrollment in the Medicare program for the following reasons . . .
>
> > (3) *Felonies.* If within the 10 years preceding the enrollment or revalidation of enrollment, the provider, supplier, or any owner of the provider or supplier, 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. CMS considers the severity of the underlying offense.

> (I) Offenses include -
>
> > (A) Felony crimes against persons, such as murder, rape or assault, and other similar crimes for which the individual was convicted, including guilty pleas and adjudicated pretrial diversion.
> >
> > (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.
> >
> > (C) Any felony that placed the Medicare program or its beneficiaries at immediate risk (such as a malpractice suit that results in a conviction of criminal neglect or misconduct).
> >
> > (D) Any felonies outlined in section 1128 of the Act.

42 C.F.R. § 424.530.

The Departmental Appeals Board (Board) has held that section 1866(j)(2) of the Act gives appeal rights to suppliers. "Section 1866(j)(2) of the Social Security Act (the Act) gives suppliers appeal rights, for certain determinations involving enrollment, using the procedures that apply under section 1866(h)(1)(A) of the Act. Those procedures are at 42 C.F.R. Part 498 and provide for ALJ [Administrative Law Judge] hearings and Board review."[1] *MediSource Corporation*, DAB No. 2011, at 2 (2006).

Further, the Board has recognized the procedures and the burden of persuasion established by the Secretary in the Program Integrity Manual (PIM, Pub. 100-08) at Chapter 10, § 19:

> The Medicare Provider Integrity Manual provides: "The burden of persuasion is on the . . . supplier . . . to show that its enrollment application was incorrectly disallowed or that the revocation of its billing number was incorrect." [Citing PIM, Ch. 10, § 19.B.] This provision is consistent with the Board's conclusion in provider appeals under 42 C.F.R. Part 498 that a provider must prove substantial

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[1] A proposed rule, not yet effective, would extend to suppliers the due process procedures of 42 C.F.R. Part 498, including the right to a hearing by an ALJ. *See* 72 Fed. Reg. 9479 (March 2, 2007). CMS consents to the application of the procedures in 42 C.F.R. Part 498 to the matter before me.

> compliance by the preponderance of the evidence, once CMS has established a prima facie case that the provider was not in substantial compliance with relevant statutory or regulatory provisions.

Id. at 2-3.

III. Issue

The issue in this case is whether CMS has authority to deny enrollment to Petitioner in the Medicare program.

IV. Discussion

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

1. CMS is authorized to deny a provider's or supplier's enrollment in the Medicare program if the provider or supplier has been convicted within 10 years of a felony determined to be detrimental to the best interests of the program or its beneficiaries.

On May 15, 2006, Petitioner filed a Medicare Enrollment Application, CMS Form 8551. P. Ex. A.[2] On August 7, 2007, Noridian notified Petitioner that his request to participate in Medicare had been denied, pursuant to 42 C.F.R. § 424.530(a)(3). P. Ex. G. Petitioner admits that on May 7, 1999, he pled guilty to the charge of Second Degree Criminal Sexual Conduct before the District Court, Third Judicial District of the State of Minnesota. P. Br. at 4; P. Ex. H. The District Court accepted Petitioner's guilty plea and entered a guilty judgment against him. Petitioner was convicted of an offense as defined by section 1128(i) of the Act. The Sentencing Order established that the criminal offense was at a severity level of six on an 11 point scale under Minnesota law. *Id.* The Sentencing Order established that the criminal offense that Petitioner plead guilty to occurred from approximately from 1984 through 1988. *Id.* Petitioner was placed on probation and sentenced to participate in sex offender treatment programming, serve 90 days of work release detention in an adult detention center, and was prohibited in engaging in unsupervised contact with individuals under the age of 18. *Id.* The Court

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[2] In 1998, Petitioner's practice changed physical addresses and status from a sole proprietorship to a limited liability corporation (LLC). Petitioner, as a result of these changes, terminated his previous Medicare Provider Number and applied for a new one.

later amended the sentencing order to allow Petitioner to have professional contact in treatment of children under the age of 18 with the presence of a parent or adult staff member. P. Br. at 4.

On January 21, 1998, the Iowa Board of Chiropractic Examiners entered into a Consent Agreement/Order, prohibiting Petitioner from having professional contact with children under the age of 18 unless there was a parent or adult staff member present. P. Ex. J. On April 23, 1998, the Minnesota Board of Chiropractic Examiners entered into a Stipulation and Order requiring that Petitioner only have professional contact with children under the age of 18 if a parent or adult staff member was present, and had his license placed on probation. P. Ex. L. On May 5, 2000, the Iowa Board of Chiropractic Examiners filed a Combined Statement of Charges and Settlement Agreement and Final Order where Petitioner was ordered to continue to have professional contact with children under the age of 18 only in the presence of a parent or an adult staff member and had his license placed on probation. P. Ex. K.

Petitioner contends that his enrollment application was outside the 10 year period requiring denial since the events that were a basis of his felony conviction occurred approximately between 1984 through 1988. The evidence shows that according to the Sentencing Order, the criminal offense that Petitioner pled guilty to occurred approximately from 1984 through 1988. P. Ex. H. However, Petitioner was convicted in May of 1999. The regulation clearly states that it is the date of conviction that controls the beginning of the 10-year period. Had the Secretary chosen to make the date of the underlying offense controlling, he could have done so, but he did not. Petitioner claims that the legislative intent was to exclude any offense that was greater than 10 years old because the offense occurring "beyond the ten (10) year requirement would be dated and not an accurate or sufficient way in which to judge the alleged offender." P. Br. at 6. Petitioner does not point to any legislative history or any legislative language to advance his interpretation. I am bound to follow the Secretary's regulations that are clearly and plainly stated. The regulation is clear: it is the date of the conviction, not the date of the events that were the basis of the conviction, that control the 10-year time period in 42 C.F.R. § 424.530. The date of the conviction, 1999, is within the 10-year period from the date of the denial of Petitioner's enrollment application.

2. The regulation requires that CMS consider the severity of the underlying offense.

Petitioner claims that CMS never considered the severity of the underlying offense either in the initial denial by Noridian or during the reconsideration level hearing. P. Br. at 8. My authority to hear and decide this case is de novo. I conduct a de novo review of the facts which relate to the issue of the severity of the underlying offense when the offense is not one of the enumerated offenses mentioned in the regulations. I do not imply that

CMS has not considered the severity of the offense simply because it was silent on that issue in its denial notification to Petitioner or in the hearing officer's decision. It is important to note that the severity of the offense is not the same as mitigating or aggravating factors in exclusion cases where one of the parties is the Inspector General. I make an independent decision as to whether Petitioner's offense was a severe offense that would be detrimental to the Medicare program or its beneficiaries.

Petitioner pled guilty to Criminal Sexual Conduct in the Second Degree on a severity level of six on an 11 point scale with 11 being the most severe. Petitioner was placed on probation and sentenced to participate in sex offender treatment programming, serve 90 days of work release detention in an adult detention center, and was prohibited in engaging in unsupervised contact with individuals under the age of 18. Petitioner argues that his offense was not so severe as to warrant the denial of his participation in the Medicare program. I disagree.

Further, Petitioner argues that his offense was not related to his professional practice, the Medicare program or its beneficiaries. It is clear that whether an offense is related to a supplier's professional practice, the Medicare program or its beneficiaries is not the issue before me. The regulations clearly state that offenses include felony crimes against persons, such as murder, rape, or assault and other similar crimes, none of which are related to a supplier's professional practice, the Medicare program or its beneficiaries. 42 C.F.R. § 424.530(a)(3)(i)(A). The regulations state that CMS is concerned with "offenses that CMS has determined to be detrimental to the best interests of the program and its beneficiaries." 42 C.F.R. § 424.530(a)(3). The central question before me is whether Petitioner's inclusion in the Medicare program would be detrimental to the best interests of the Medicare program or its beneficiaries. The intent of the statute is to protect the Medicare program and its beneficiaries, not to punish prospective providers and suppliers. Even Petitioner admits that this is the intent of the statute in his brief. P. Br. at 13.

Petitioner pled guilty to the charge of Second Degree Criminal Sexual Conduct before the District Court, Third Judicial District of the State of Minnesota. The severity level assigned to this felony was six out of an 11 point scale, a mid-grade felony. This is not a minor felony. Petitioner, in his brief, sets forth his own version of the background facts. In 1984, Petitioner had an "incident" involving one of his own minor children for which he sought counseling. P. Br. at 3. Petitioner, does not go into detail about this "incident." Petitioner went to several therapists over the course of several years. *Id.* Petitioner enrolled in a sex therapy group for two years near the end of his completion of therapy with his final therapist. *Id.* In 1993, Petitioner and his wife divorced. *Id.* Divorce, child custody and child support proceedings were heated. *Id.* In 1997, after Petitioner had remarried, his first wife reported the incident for which he sought therapy to the police, along with, according to Petitioner, several other allegedly fabricated charges. *Id. at 4.*

On May 7, 1999, Petitioner pled guilty to the charge of Second Degree Criminal Sexual Conduct. The remaining charges were dismissed. *Id. at 4.* In spite of all the earlier therapy and the sex therapy group that Petitioner attended during his first marriage, Petitioner was sentenced, in part, to another sex offender treatment program after his conviction. The Sentencing Order also shows that Petitioner was placed on probation, ordered to serve 90 days of work release detention in an adult detention center, and was prohibited in engaging in unsupervised contact with individuals under the age of 18. The Court later amended the sentencing order to allow Petitioner to have professional contact in treatment of children under the age of 18 with the presence of a parent or adult staff member. P. Br. at 4.

Petitioner's version of the background facts would make it seem that there was one incident in 1984. But the Sentencing Order states that the events that were a basis of Petitioner's felony conviction occurred approximately from 1984 through 1988. The offense was a mid-grade felony sexual offense against a vulnerable child that continued for four years against Petitioner's own minor child. Petitioner was unable to honor the parent-child relationship and unable to comply with the expected conduct between a parent and his own child.

Medicare patients are usually vulnerable, elderly individuals who should not be put at the mercy of untrustworthy suppliers of medical treatment. As a chiropractor, Petitioner will have physical, perhaps intimate contact with vulnerable patients in a treatment room where the vulnerable patient is alone with Petitioner. I find that there is doubt whether Petitioner can be trusted to honor the physician-patient relationship. The Iowa and Minnesota chiropractic boards have prohibited Petitioner from treating patients under the age of 18 without a parent or adult staff member present. This prohibition is ongoing, even though the underlying events behind Petitioner's conviction happened almost 20 years ago and in spite of all the subsequent treatment and two programs with sex therapy groups. This indicates that in the professional opinion of two different states' chiropractic boards, Petitioner still requires supervision with vulnerable patients. Allowing a provider or supplier to participate in Medicare who has been convicted of a sexual offense against his own child cannot be in the best interests of the Medicare program or its beneficiaries.

V. Conclusion

I find that Petitioner was convicted within the 10-year window prior to his Medicare enrollment application of an offense that is detrimental to the Medicare program and its beneficiaries. I conclude that CMS properly denied Petitioner's enrollment in Medicare.

/s/
Alfonso J. Montano
Administrative Law Judge