Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Edward S. Roberts, DC,[1]
(NPI: 1780671925),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-45

Decision No. CR2714

Date: March 5, 2013

DECISION

Palmetto GBA (Palmetto), an administrative contractor acting on behalf of the Centers for Medicare and Medicaid Services (CMS), denied Petitioner's request to enroll in the Medicare program. This determination was based on Petitioner's guilty plea to the felony of engaging in lewd and lascivious acts with a child less than 14 years of age. Petitioner appealed. For the reasons stated below, I affirm Palmetto's determination.

I. Background and Procedural History

On March 30, 2011, Petitioner, Edward S. Roberts, DC, pled guilty to the felony of engaging in lewd and lascivious acts with a child under the age of 14, in violation of section 288(A) of the California Penal Code. CMS Exhibits (Exs.) 1; 3, at 1. Petitioner

[1] This case was originally captioned without indicating Petitioner's doctor of chiropractic degree. I am amending the caption in this case to include reference to that degree in conformance with the standard practice of the Civil Remedies Division. *See, e.g.*, *Dawn Sea Kahrs, DC*, DAB CR2528 (2012).

entered the guilty plea in the Superior Court of the State of California in and for the County of Shasta.[2] CMS Ex. 1.

On December 15, 2011, Palmetto informed Petitioner that it was retroactively revoking his Medicare Provider Transaction Number (PTAN) under 42 C.F.R. § 424.535(a)(3), as a result of his felony conviction, and 42 C.F.R. § 424.535(a)(9), for failing to report the conviction to Palmetto.[3] CMS Ex. 2, at 1. The letter informed Petitioner of his right to request reconsideration within 60 calendar days of the postmark date. CMS Ex. 2.

In a January 3, 2012 letter, Petitioner acknowledged Palmetto's revocation of his billing privileges, disputed that he was convicted, and indicated that he was unaware that he needed to report a "conviction" that was going to be removed from his record or a restriction on his chiropractor license that had not been finalized. CMS Ex. 4. Petitioner also submitted a supplementary application for enrollment (Form CMS-855I) to formally inform Palmetto of a change of information related to an adverse action/conviction. CMS Ex. 4. Apparently interpreting Petitioner's Form CMS-855I as an application for enrollment, on February 28, 2012, Palmetto notified Petitioner that his application had been denied under 42 C.F.R. § 424.530(a)(3) due to Petitioner's felony conviction. CMS Ex. 5, at 1. The letter informed Petitioner that he could either submit a corrective action plan within 30 days from the date of the letter or he could exercise his right to request reconsideration within 60 days from the date of the letter. CMS Ex. 5, at 1.

On April 25, 2012, Petitioner filed a timely request for reconsideration of Palmetto's February 28, 2012 determination. CMS Ex. 6, at 1-2. Petitioner's basis for his reconsideration request was that his guilty plea, which included a conditional mechanism for dismissal of the charges upon Petitioner's completion of a treatment program, is not the same as a conviction. CMS Ex. 6, at 1; CMS Ex. 4, at 11. On July 24, 2012, Palmetto's reconsidered determination upheld the denial of Petitioner's enrollment application based on a felony conviction. CMS Ex. 7, at 1. The letter notified Petitioner that he may request final review by an administrative law judge. CMS Ex. 7, at 2.

On September 21, 2012, Petitioner filed a timely request for a hearing (RFH). In response to my October 23, 2012 Acknowledgment and Pre-Hearing Order (Order), CMS filed a Pre-Hearing Brief and Motion for Summary Judgment and seven exhibits (CMS Exs. 1-7). Petitioner did not submit a response brief, but filed two exhibits (P. Exs. 1-2).

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[2] Petitioner signed a Stipulation in Resolution of Interim Suspension Request on May 23, 2011, which delineates the specific conditions of his plea agreement.

[3] Palmetto mistakenly stated the date of revocation as March 20, 2011, in its initial determination to revoke Petitioner. However, as CMS counsel in this case noted, the revocation actually is effective from March 30, 2011. CMS Pre-Hearing Brief and Motion for Summary Judgment at 2.

In the absence of an objection from either party, I admit CMS Exs. 1-7 and P. Exs. 1-2 into the record. Further, because neither party provided a list of proposed witnesses or written direct testimony, I will decide this matter based on the written record. Order ¶ 12.

II. Discussion

A. Issue

Whether CMS had a legitimate basis for denying Petitioner's enrollment under 42 C.F.R. § 424.530(a)(3) based on his felony guilty plea.[4]

B. Findings of Fact, Conclusions of Law, and Analysis[5]

Petitioner is a supplier for purposes of the Medicare program. 42 C.F.R. §§ 410.20(b)(5), 410.21, 498.2. In order to participate in the Medicare program as a supplier, individuals

[4] A determination by CMS to deny a supplier enrollment or to revoke a supplier's enrollment in the Medicare program is an appealable "initial determination." 42 C.F.R. § 498.3(b)(17). A supplier may request reconsideration of an initial determination denying enrollment or revoking enrollment. 42 C.F.R. §§ 498.5(l)(1), 498.22(a). To do so, a supplier must file a request for reconsideration with CMS within 60 days from receipt of the initial determination and must state in the request the issues or the findings of fact with which the supplier disagrees and the reasons for the disagreement. 42 C.F.R. § 498.22(b)-(c). Although a supplier who is "dissatisfied with a reconsidered determination . . . is entitled to a hearing before an [administrative law judge]," 42 C.F.R. § 498.5(l)(2), an initial determination is "binding" unless it is first reconsidered. *See* 42 C.F.R. § 498.20(b)(1). Therefore, if a supplier does not receive a reconsidered determination from CMS, then that provider does not have a right to a hearing before an administrative law judge. *Denise Hardy*, DAB No. 2464, at 4-5 (2012); *Hiva Vakil*, DAB No. 2460, at 4-5 (2012); *see also Better Health Ambulance*, DAB No. 2475, at 4 (2012). Therefore, I do not have jurisdiction to review the December 15, 2011 initial determination to revoke Petitioner's enrollment because Palmetto did not render a reconsidered determination of that action. Because Palmetto rendered a reconsidered determination on its initial determination to deny enrollment and Petitioner filed a request for hearing from that determination, I have jurisdiction to review that reconsidered determination. CMS Ex. 7. Thus, I will decide whether Palmetto had a legitimate basis to deny Petitioner's application under 42 C.F.R. § 424.530(a)(3) rather than revoke his enrollment under 42 C.F.R. § 424.535(a)(3). It should be noted that these provisions are essentially identical and the result in this case would be the same regardless as to which regulatory provision I applied.

[5] My findings of fact and conclusions of law are set forth in italics and bold font.

must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may deny enrollment for any reason stated in 42 C.F.R. § 424.530.

1. Petitioner pled guilty to the felony of committing lewd and lascivious acts with a child within 10 years of the date of his application for provider enrollment.

Neither party disputes that Petitioner entered into a plea agreement and pled guilty on May 23, 2011, to one of four charged counts of lewd or lascivious acts with a child under 14 years, a felony under the California Penal Code. CMS Exs. 1, 3, at 1; 4, at 10; Cal.Pen.Code § 288A (2010). Petitioner's application for enrollment was received by Palmetto on January 13, 2012. CMS Exs. 4, 2-9, 5, at 1. Therefore, I find that Petitioner pled guilty to that felony and entered into a plea agreement within 10 years of his application for enrollment.

2. Petitioner's guilty plea and plea agreement constitutes a conviction of a felony under 42 C.F.R. § 424.530(a)(3), which provides a legal basis for Palmetto to deny enrollment in the Medicare program.

Petitioner contends that the denial of his enrollment is unjustified because he was never convicted of a felony, only pled guilty to a felony, and that the guilty plea was later withdrawn after he fulfilled the terms of his plea agreement. RFH at 1; CMS Ex. 4, at 1, 10; 6, at 3; P. Exs. 1, at 3; 2. However, Petitioner's argument fails. The regulations contemplate this scenario and provide that a guilty plea/plea arrangement is a sufficient basis to deny his application for enrollment. *See* 42 C.F.R. § 424.530(a)(3)(i)(A). The pertinent regulatory provision provides the following basis for the denial of an enrollment application:

> (3) *Felonies.* If within the 10 years preceding 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 diversions.

42 C.F.R. § 424.530(a)(3).

Because Petitioner entered into a plea agreement that included both a guilty plea and an adjudicated pretrial diversion arrangement, Petitioner is considered "convicted" of a felony. Further, a review of the offense that Petitioner pled guilty to is one that is a felony "against persons," similar to assault or rape. *Id*. Section 288(A) of the California Penal Code describes the crime of lewd or lascivious acts as:

> any person who willfully and lewdly commits any lewd or lascivious act…upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child…

Cal.Pen.Code § 288(A)(a).

The element in this offense of touching in a sexual nature means that conviction of this crime is per se considered detrimental to the best interests of the program. 42 C.F.R. § 424.530(a)(3)(i)(A). I do not have the authority to exercise discretion when CMS has shown that Petitioner has been convicted of a felony that is specifically enumerated in the regulations as being detrimental to the best interests of the program. *See Letantia Bussell*, DAB No. 2196, at 10, 13 (2008). Because I find that CMS has made such a showing, I must affirm its determination to deny Petitioner's enrollment application.

III. Conclusion

For the reasons explained above, I affirm CMS's determination to deny Petitioner's enrollment as a supplier in the Medicare program.

/s/
Scott Anderson
Administrative Law Judge