Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Neil Niren, M.D.,
(NPI: 1508838061 / PTANs: 022133ZJ1W, 022133),

and

Neil Niren, M.D., P.C.
(NPI: 1508261629 / PTAN: 370975)
Petitioners,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-217

Decision No. CR4892

Date: July 13, 2017

DECISION

The Medicare enrollment and billing privileges of Petitioners, Dr. Neil Niren, M.D. and Neil Niren, M.D., P.C., are revoked pursuant to 42 C.F.R. § 424.535(a)(3),[1] effective November 8, 2013 and March 10, 2014, respectively.

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[1] Citations are to the 2016 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

I. Background and Procedural History

Petitioner, Neil Niren, M.D., P.C., is the practice organization of Petitioner, Neil Niren, M.D., who is the sole owner of the practice. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1 at 9. On June 14, 2016, Novitas Solutions (Novitas), a Medicare Administrative Contractor (MAC), notified Petitioner Neil Niren, M.D. that his Medicare enrollment and billing privileges were revoked effective November 8, 2013, pursuant to 42 C.F.R. § 424.535(a)(3) and (4). Novitas imposed a re-enrollment bar of three years. CMS Ex. 1 at 72-74. Novitas also notified Petitioner Neil Niren, M.D., P.C., by letter dated June 21, 2016, that its Medicare enrollment and billing privileges were revoked effective March 10, 2014, pursuant to 42 C.F.R. § 424.535(a)(3). Novitas also imposed a re-enrollment bar of three years. CMS Ex. 70-71.

On August 9, 2016, counsel for Petitioners requested reconsideration of the initial determinations to revoke Petitioners' Medicare enrollment and billing privileges. CMS Ex. 1 at 9-16. On October 25, 2016, a CMS hearing officer upheld the revocations of Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) and (4). CMS Ex. 1 at 1-4. The CMS hearing officer does not specifically refer to Petitioner Neil Niren, M.D., P.C., or its National Provider Identifier (NPI), but it is clear from reading the entire reconsideration determination that revocation was upheld as to both Petitioners.

On December 21, 2016, Petitioners requested a hearing before an administrative law judge (ALJ). The request for hearing and supporting documents taken together indicate that the request for hearing related to both Petitioners. On December 29, 2016, the case was assigned to me for hearing and decision, and an Acknowledgment and Prehearing Order (Prehearing Order) was issued at my direction.

On January 30, 2017, CMS filed a motion for summary judgment (CMS Br.) with CMS Exs. 1 and 2. On February 25, 2017, Petitioners filed a response in opposition to the CMS motion for summary judgment (P. Br.) with no exhibits. Petitioners do not object to my consideration of CMS Exs. 1 and 2 and they are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as

Medicare Part B. Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[2] Act §§ 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Administration of the Part B program is through MACs such as Novitas. Act § 1842(a) (42 U.S.C. § 1395u(a)).

The Act requires the Secretary of Health and Human Services (the Secretary) to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review of certain enrollment determinations. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a provider or supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare eligible beneficiary.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its MAC may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. The effective date of the revocation is controlled by 42 C.F.R. § 424.535(g).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. 42 C.F.R. § 424.545(a). A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of: its reconsidered determination to the supplier; the reasons for its determination; the conditions or requirements the supplier failed to meet; and the right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act unless

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[2] Petitioners are "suppliers" under the Act and the regulations. A "supplier" furnishes services under Medicare and the term supplier applies to physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) and 1835(e) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

waived. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

The issues in this case are:

Whether summary judgment is appropriate; and

Whether there was a basis for the revocation of Petitioners' Medicare enrollment and billing privileges.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by my findings of fact and analysis.

1. Summary judgment is appropriate.

Petitioners have not waived an oral hearing or agreed to a decision on the documents. Therefore, an oral hearing is necessary, unless the CMS motion for summary judgment has merit. Summary judgment is not automatic upon request but is limited to certain specific conditions. The Secretary's regulations that establish the procedure to be followed in adjudicating Petitioner's case are at 42 C.F.R. pt. 498. The regulations do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g.*, *Illinois Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr*., DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure do not apply in administrative adjudications such as this, but the Board has accepted that Federal Rule of Civil Procedure 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of this case by my Prehearing Order dated December 29, 2016, paragraph II.G. The parties were given notice by the Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Federal Rule of Civil Procedure 56 will be applied. The parties were advised that a fact alleged and not specifically denied, may be accepted as true for purposes of ruling upon a motion for summary judgment. The parties were also advised that on summary judgment evidence is considered admissible and true unless a specific objection is made. Prehearing Order ¶ II.G.

Summary judgment is appropriate when there is no genuine dispute as to any issue of material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differs from resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided for the allocation of the burden of persuasion or the quantum of evidence in 42 C.F.R. pt. 498. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

Viewing the evidence before me in a light most favorable to Petitioners and drawing all inferences in Petitioners' favor, I conclude that there are no genuine disputes as to any material facts pertinent to revocation under 42 C.F.R. § 424.535(a)(3) that requires a hearing in this case. The issues in this case raised by Petitioners related to revocation of their Medicare enrollment and billing privileges must be resolved against them as a matter of law. The undisputed evidence shows that there was a basis for revocation of Petitioners' Medicare enrollment and billing privileges. Accordingly, summary judgment is appropriate.

2. Petitioner Neil Niren, M.D. was convicted in the United States District Court for the Western District of Pennsylvania on November 8, 2013, of filing a false tax return, which is a financial crime and

similar to income tax evasion within the meaning of 42 C.F.R. § 424.535(a)(3)(ii)(B).

3. The Secretary has determined and provided by regulation that a financial crime such as extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes, are detrimental to the Medicare program or its beneficiaries. 42 C.F.R. § 424.535(a)(3)(ii)(B).

4. Petitioner Neil Niren's conviction of filing a false tax return is a financial crime, similar to income tax evasion, and detrimental to the Medicare program or its beneficiaries within the meaning of 42 C.F.R. § 424.535(a)(3)(ii)(B).

5. Petitioner Neil Niren's conviction occurred within the ten years preceding the revalidation of his enrollment and the enrollment of his practice, Petitioner Neil Niren, M.D., P.C.

6. There is a basis for the revocation of Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) and they are revoked.

7. The Medicare enrollment and billing privileges of Neil Niren, M.D. are revoked effective November 8, 2013, the date of the felony conviction 42 C.F.R. § 424.535(g).

8. The Medicare enrollment and billing privileges of Neil Niren, M.D., P.C. are revoked effective March 10, 2014, the effective date of the first enrollment of the practice organization.

9. I have no authority to review CMS's determination to impose a three-year bar on Petitioner's Medicare re-enrollment.

a. Facts

The material facts are not disputed. On November 8, 2013, Petitioner Neil Niren, M.D. pleaded guilty to the felony offense of filing a false tax return in violation of 26 U.S.C. § 7206(1).[3] CMS Ex. 1 at 9, 17, 141; P. Br. at 1. Petitioner Neil Niren's guilty plea was

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[3] The statute provides as follows:

(Footnote continued next page.)

accepted and he was sentenced to probation for five years subject to specified conditions, a $40,000 fine, and to pay restitution of $452,002.00 to the Internal Revenue Service. CMS Ex. 1 at 17-21, 142-45. [4]

It is not disputed that on June 21, 2016, Novitas notified Petitioner Neil Niren, M.D. that his Medicare enrollment and billing privileges were being revoked pursuant to 42 C.F.R.

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(Footnote continued.)

> 7206. Fraud and false statements
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> Any person who—
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> (1) Declaration under penalties of perjury
>
> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;
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> * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(1).

[4] It is undisputed that Petitioner Neil Niren, M.D. did not disclose his conviction or that he was subject to any adverse legal actions on his revalidation application submitted April 9, 2014, through the Medicare Provider Enrollment, Chain, and Ownership System. CMS Ex.1 at 75-79, 81-86, 119-28. The conviction was also not reported by Petitioner Neil Niren, M.D., P.C., when the practice organization was first enrolled in Medicare on about March 10, 2014. CMS Ex. 1 at 9, 64, 70, 89-92, 112-14, 29-30; P. Br. Physicians and their practice organizations are required to report certain information including any adverse legal action pursuant to 42 C.F.R. § 424.516(d)(1)(ii) within 30 days. Failure to report subjects the physician and practice to revocation of enrollment and billing privileges under 42 C.F.R. § 424.535(a)(9). Novitas and CMS did not address this independent basis for action against Petitioners and it is not considered further.

§ 424.535(a)(3) and (4) effective November 8, 2013. The notice advised that the revocation was based on Petitioner Neil Niren's November 8, 2013 felony conviction for filing a false tax return in violation of 26 U.S.C. § 7206(1). Novitas imposed a three-year re-enrollment bar. CMS Ex. 1 at 72-74.

It is not disputed that Novitas also notified Petitioner Neil Niren, M.D., P.C., on June 21, 2014, that its Medicare enrollment and billing privileges were being revoked effective March 10, 2014, pursuant to 42 C.F.R. § 424.535(a)(3). Novitas cited as grounds for the revocation Petitioner Dr. Niren's felony conviction within 10 years prior to the practice organization's enrollment in Medicare, which was effective March 10, 2014. Novitas also imposed a three-year re-enrollment bar. CMS Ex. 1 at 70-71.

b. Analysis

Novitas cited 42 C.F.R. § 424.535(a)(3) as the basis for the revocation of the Medicare enrollment and billing privileges of both Petitioners. Section 424.535(a)(3) of 42 C.F.R. authorizes revocation for a qualifying felony within the ten years prior to enrollment or revalidation of enrollment. In this case, Novitas cited Petitioner Neil Niren's conviction of the felony offense of filing of a false tax return in violation of 26 U.S.C. § 7206(1) as the qualifying offense authorizing revocation pursuant to 42 C.F.R. § 424.535(a)(3). Novitas also cited 42 C.F.R. § 424.535(a)(4) as an additional basis for revocation in the case of Petitioner Dr. Niren but not his practice organization. A single basis for revocation is sufficient and I consider only 42 C.F.R. § 424.535(a)(3) as it is common to both Petitioners.

The Secretary has authorized CMS and its MACs to revoke the Medicare enrollment and billing privileges of a provider or supplier for the following reasons, among others:

> (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 CFR 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.

42 C.F.R. § 424.535(a)(3). Qualifying felonies include, but are not limited to: "[f]inancial 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).

Petitioner Neil Niren, M.D., does not dispute that on November 8, 2013, he pleaded guilty to and was convicted of the felony filing of a false tax return in violation of 26

U.S.C. § 7206(1). Petitioners do not dispute that the conviction occurred within the ten years preceding Petitioner Dr. Niren's revalidation of his Medicare enrollment in 2014 and the enrollment of his practice effective March 10, 2014. However, Petitioner argues that his conviction is not tax evasion. P. Br. at 2-5. Whether or not Petitioner Dr. Niren's offense is one that is detrimental to the best interest of the Medicare program or its beneficiaries is a question of law that does not preclude summary judgment and that I resolve against Petitioners. Although Petitioner Dr. Niren was not convicted of tax evasion punishable under 26 U.S.C. § 7201, it is undisputed that he was convicted of filing a false tax return punishable under 26 U.S.C. § 7206(1). The listing of detrimental felonies in 42 C.F.R. § 424.535(a)(3)(ii)(B) is clearly not exhaustive but specifically permits revocation for detrimental felonies similar to the crimes listed. *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 10 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). Income tax evasion is listed as an example and the regulation permits a determination that other felonies similar to tax evasion are detrimental. Petitioners do not dispute that Dr. Niren pleaded guilty to filing a false tax return in violation of 26 U.S.C. § 7206(1). By pleading guilty Petitioner Dr. Niren admitted to willfully filing a false income tax return under penalty for perjury. Considering the undisputed facts, I conclude that the felony for which Petitioner Dr. Niren was convicted is a financial crime with a direct correlation to income tax liability and is similar in many respects to income tax evasion. I conclude that, like tax evasion, filing a false tax return is detrimental to the best interests of the Medicare program and its beneficiaries. The Board has previously found that a petitioner's crime was detrimental to the Medicare program if it evidenced a lack of trustworthiness in dealings with the federal government. *Fady Fayad, M.D.*, DAB No. 2266 at 17, *aff'd*, *Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

Accordingly, I conclude that there is a basis for the revocation of Petitioners' Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3).

Petitioners assert that they were "not afforded a full and fair consideration, with CMS substituting a broad categorical determination in place of the nuanced exercise of discretion required by statute and regulation." P. Br. at 1, 5-8. Petitioners' argument has no merit at this level. Having found that there is a basis for revocation, I have no authority to review the exercise of discretion by CMS to revoke Petitioners' Medicare enrollment and billing privileges. *Dinesh Patel, M.D.*, DAB No. 2551 at 10 (2013); *Fady Fayad, M.D.*, DAB No. 2266 at 16 (2009), *aff'd*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 16-17, 19 (2009), *aff'd*, 710 F. Supp. 2d 167 (D. Mass. 2010).

Summary judgment is also appropriate as to the effective date of revocation which is controlled by 42 C.F.R. § 424.535(g):

> Effective date of revocation. Revocation becomes effective 30 days after CMS or the CMS contractor mails notice of its

> determination to the provider or supplier, except if the revocation is based on Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational. When a revocation is based on a Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational, the revocation is effective with the date of exclusion or debarment, felony conviction, license suspension or revocation or the date that CMS or its contractor determined that the provider or supplier was no longer operational.

In this case, it is undisputed that Petitioner Dr. Niren was convicted on November 8, 2013. The regulation provides that the date of his conviction is the effective date of the revocation of his Medicare enrollment and billing privileges. Petitioner Neil Niren, M.D., P.C., was not enrolled on November 8, 2013. Therefore, Novitas determined that revocation was effective the date of the practice group's enrollment effective March 10, 2014. I conclude, based on the undisputed facts, that the conviction occurred prior to but within ten years of the practice group's enrollment and that revocation as of the practice's effective date of enrollment is authorized and appropriate.

III. Conclusion

For the foregoing reasons, I conclude that there was a basis to revoke Petitioners' Medicare enrollment and billing privileges effective November 8, 2013, and March 10, 2014, respectively.

/s/
Keith W. Sickendick
Administrative Law Judge