Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Dr. Robert Kanowitz
Docket No. A-19-28
Decision No. 2942
May 23, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

We affirm the Administrative Law Judge's (ALJ) decision affirming the Centers for Medicare & Medicaid Services' (CMS) denial of Petitioner Dr. Robert Kanowitz's Medicare enrollment application on the ground that Petitioner had been convicted of felonies that CMS determined are detrimental to the best interests of the Medicare program and its beneficiaries. *Dr. Robert Kanowitz*, DAB CR5215 (2018) (ALJ Decision). Undisputed facts establish that CMS was authorized to deny Petitioner's enrollment, and Petitioner's arguments for reversal rely on regulatory provisions that are not applicable to this case and seek essentially equitable relief we are not authorized to grant.

Legal Background

A "supplier" of Medicare services must be enrolled in the Medicare program in order to receive payment for items and services covered by Medicare.[1] 42 C.F.R. § 424.505. "Enrollment" is the process that Medicare uses to establish a supplier's or provider's eligibility to submit claims for Medicare-covered services and supplies, and is governed by regulations in 42 C.F.R. Part 424, subpart P (§§ 424.500-424.570). *Id.* § 424.502 (defining enrollment).

CMS "may deny a provider's or supplier's enrollment in the Medicare program for the following reasons" including, as relevant here–

[1] A "supplier" is "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202 (defining terms as used in the Medicare program).

> (3) *Felonies*. 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.[2]
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> (i) Offenses include, but are not limited in scope or severity to—
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> * * * *
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> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the [Social Security] Act.

Id. § 424.530(a)(3)(i)(D). Section 1128(a) of the Social Security Act (Act),[3] as relevant here, requires the Secretary to exclude "from participation in any Federal health care program" any individual or entity who was convicted of one of several offenses as enumerated in section 1128(a). As relevant here, section 1128(a)(1) provides–

> (1) Conviction of program-related crimes.—Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program [e.g., Medicaid].

CMS's decision to deny or revoke a supplier's Medicare enrollment is an "initial determination" that the supplier may appeal to an ALJ under the procedures at 42 C.F.R. Part 498. 42 C.F.R. § 498.3(a)(1), (b)(17). The supplier must first request "reconsideration" of the initial determination to deny or revoke enrollment and, if dissatisfied with the reconsidered determination, may request a hearing before an ALJ. *Id*. §§ 498.5(1), 498.22, 498.40. A party dissatisfied with an ALJ's decision may request review of the decision by the Departmental Appeals Board (Board). *Id.* § 498.80.

Case Background

The following facts from the ALJ Decision and the record are not disputed. On November 22, 2010, Petitioner, a Pennsylvania podiatrist, pleaded nolo contendere in Pennsylvania state court and was convicted of two felony criminal offenses under Pennsylvania statutes: theft by deception, and submitting claims for services not

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[2] 42 C.F.R. § 1001.2 defines "convicted" to include "[a] judgment of conviction has been entered against an individual or entity by a Federal, State or local court" and "[a] Federal, State or local court has accepted a plea of guilty or *nolo contendere* by an individual or entity," among other definitions.

[3] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

rendered by the provider. ALJ Decision at 1, 3 (citing CMS Ex. 5 at 2-3); *see* P. Request for Review (RR) at 2. By amended notice dated October 16, 2012, the Inspector General of the Department of Health and Human Services (IG) excluded Petitioner from participating in federal health care programs under section 1128(a)(1) of the Act for a minimum of five years, based on Petitioner's conviction of a criminal offense related to the delivery of an item or service under a State health care program. ALJ Decision at 1, 3; CMS Ex. 6. The IG reinstated Petitioner in August 2017, and Petitioner applied for reenrollment in the Medicare program via an application filed November 22, 2017, on which he disclosed the criminal convictions and the exclusion. ALJ Decision at 1, 3; CMS Exs. 4, 7.

On March 9, 2018, the Medicare contractor denied Petitioner's application under 42 C.F.R. § 424.530(a)(3) because he had been convicted within the preceding 10 years of a felony offense that CMS determined was detrimental to the best interests of the Medicare program and its beneficiaries, and Petitioner requested reconsideration. ALJ Decision at 1-2 (citing CMS Ex. 2). On May 25, 2018, a CMS hearing officer upheld the denial under section 424.530(a)(3) in a revised reconsidered determination, on the ground that Petitioner's felony convictions were detrimental to the best interests of the Medicare program (and that the conviction for submitting claims for services not rendered by the provider was "*per se* detrimental . . . as this felony conviction resulted in a mandatory exclusion under section 1128(a) of the Act.").[4] ALJ Decision at 2; CMS Ex. 15, at 5-6.

Petitioner timely sought an ALJ hearing. CMS moved for summary judgment, Petitioner opposed CMS's motion, and each party filed proposed exhibits, which the ALJ admitted absent any objections. The ALJ did not rule on CMS's motion for summary judgment and decided the case on the written record, finding a hearing not necessary as neither party had proposed to call any witnesses. ALJ Decision at 2. The ALJ made one finding of fact/conclusion of law, that "CMS may deny Petitioner enrollment in the Medicare program because, within the last ten years, he was convicted of felonies that CMS reasonably finds detrimental to the best interests of the Medicare program and its beneficiaries." *Id*. The ALJ reasoned that, "[b]y regulation, Petitioner's felony offenses *are* detrimental to the best interests of the program and its beneficiaries" because they were "'financial crimes,' similar to insurance fraud" and also "subjected him to exclusion under section 1128(a)" of the Act. *Id*. at 4 (ALJ's emphasis).

[4] The reconsidered determination states that the IG excluded Petitioner under section 1128(a)(1) only on the basis of his conviction for submitting claims for services not rendered by the provider. CMS Ex. 15, at 4. That is not apparent from the IG's amended exclusion notice dated October 16, 2012, which does not identify the convictions and states that Petitioner was excluded under section 1128(a)(1) because "your conviction is for a criminal offense related to the delivery of an item or service under a State health care program." CMS Ex. 6, at 1.

The ALJ rejected Petitioner's comparisons of "his own criminal activity to that of others denied enrollment based on felony convictions" in other ALJ decisions, on the ground that the ALJ's review authority is "limited" to "whether the regulatory elements required for denial of enrollment under section 424.530(a) are present, and, if the record establishes that they are, I must affirm." *Id*. The ALJ thus concluded that, "[b]ecause Petitioner's convictions were among those specifically enumerated in section 424.530(a), CMS may deny his Medicare enrollment without regard to equitable or other factors" and "justifiably determined that Petitioner was convicted of felonies that are detrimental to the best interests of the Medicare program and its beneficiaries and may deny his enrollment in the Medicare program." *Id*. Petitioner then timely requested Board review of the ALJ Decision.

Standard of Review

The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *See Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html.

Discussion

1. The ALJ's conclusion that CMS was authorized to deny Petitioner's enrollment based on his felony conviction is supported by substantial evidence and is not legally erroneous.

The ALJ's (and the Board's) role in an appeal of CMS's denial or revocation of enrollment in the Medicare program is to determine whether CMS had a legal basis for its action. If it did, then we are bound to affirm the denial or revocation. We do not review CMS's exercise of discretion in determining to take the action under review. The Board has held that, "where CMS is legally authorized to deny an enrollment application, an ALJ cannot substitute his or her discretion for that of CMS (or CMS's contractor) in determining whether, under the circumstances, denial is appropriate. Nor can the Board." *Brian K. Ellefsen, DO*, DAB No. 2626, at 7 (2015); *see also Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008) (explaining that "the right to review of CMS's determination by an ALJ serves to determine whether CMS had the authority to revoke [petitioner's] Medicare billing privileges, not to substitute the ALJ's discretion about whether to revoke"); *Ronald Paul Belin, DPM*, DAB No. 2629, at 5 (2015) ("[T]he Board has held that, where CMS is legally authorized to deny an enrollment application, neither an ALJ nor the Board itself is empowered to substitute for CMS or its contractor in determining how to exercise its discretion.").

Section 424.530(a)(3)(i)(D) authorizes CMS to deny an application for enrollment in the Medicare program if, within the preceding 10 years, the applicant was convicted of a felony that would result in mandatory exclusion from Medicare and other federal health care programs under section 1128(a) of the Act. There is no dispute that Petitioner's case meets those criteria. The record exhibits the ALJ cited show, and Petitioner concedes, that, on November 22, 2010, within 10 years of both Petitioner's November 2017 enrollment application and CMS's denial, he was convicted in state court, via his nolo contendere plea (which is a conviction under 42 C.F.R. § 1001.2), of two state felony counts of theft by deception and submitting claims for services not rendered by the provider. ALJ Decision at 3; CMS Ex. 5, at 2-3; RR at 2. The record the ALJ cited further shows, and Petitioner does not dispute, that based on at least one of those convictions, the IG excluded him under section 1128(a)(1) of the Act for the mandatory minimum period of five years. ALJ Decision at 1, 3; CMS Exs. 6, 15. CMS could thus legally deny Petitioner's enrollment application under section 424.530(a)(3)(i)(D). The ALJ's decision affirming CMS's denial of Petitioner's Medicare enrollment application was thus supported by undisputed substantial evidence and contained no error of law. *See, e.g.*, *Letantia Bussell, M.D.* at 13 ("Once the ALJ found that both elements required for revocation were present . . . the ALJ was obliged to uphold the revocation, as are we.").

2. Petitioner has identified no error in the ALJ Decision affirming the enrollment denial.

Petitioner does not dispute the facts that the ALJ found in support of CMS's denial of Petitioner's enrollment application but argues that the revocation should be reversed for legal errors, equitable concerns, and prejudicial treatment by CMS.

Petitioner argues that the denial of Medicare enrollment following his exclusion from 2010 to 2017 resulted in his enrollment being effectively revoked for a period "past the 8 year mark," in violation of the regulation imposing a one-to-three-year "re-enrollment bar" following revocation. RR at 3 (citing 42 C.F.R. § 424.535(c) (imposing a one-to-three year re-enrollment bar in most cases), (g) (revocation for felony conviction begins on date of conviction); *see* 42 C.F.R. § 424.535(a)(3) (authorizing revocation for felony convictions "within the preceding 10 years," including for "[a]ny felonies that would result in mandatory exclusion under section 1128(a) of the Act"). Along these lines, Petitioner cites multiple ALJ decisions in which CMS revoked Medicare enrollments for felony convictions and imposed re-enrollment bars of from one to three years for actions Petitioner contends were more egregious than his. Petitioner argues that these cases show that CMS is treating him differently than it treated the petitioners in the cases he cited. RR at 3-4.

The provisions of section 424.535 and the ALJ cases Petitioner cites are not applicable to his appeal and do not show any error in the ALJ Decision, as they involve the ***revocation*** of existing enrollments under section 424.535, and not, as here, the ***denial*** of an application for enrollment under a different authority, section 424.530. While the former regulation imposes a re-enrollment bar of from one to three years following revocations for reasons including covered felony convictions, the latter specifically authorizes CMS to deny enrollment where the applicant has been convicted of a covered felony "within the preceding 10 years." There is no ambiguity about this language, nor any inconsistency between the two regulations.

Under the revocation regulation (§ 424.535), the end of the re-enrollment bar does not result in automatic re-enrollment and the revoked supplier or provider "must re-enroll in the Medicare program through the completion and submission of a new applicable enrollment application and applicable documentation, as a new provider or supplier, for validation by CMS." 42 C.F.R. § 424.535(d)(1). At that point, the provisions of section 424.530 apply, and they authorize CMS, within its discretion, to deny enrollment based on convictions for covered felonies within the previous 10 years.

Moreover, the revocation regulation, in parallel with the denial regulation (§ 424.530), permits CMS to revoke enrollment for conviction of a covered felony within the preceding 10 years. *Id*. § 424.535(a)(3). The two regulations thus afford the same treatment to both an applicant for enrollment (or re-enrollment following revocation), and an already-enrolled supplier or provider, by subjecting both to the possibility of not being enrolled in the Medicare program for up to 10 years following a covered felony conviction.

We also note that the language of section 424.530(a)(3) affords CMS discretion to grant enrollment earlier than 10 years after the applicant's conviction but, as the Board has observed, our (and the ALJ's) role in enrollment appeals is limited to determining whether CMS's denial or revocation of enrollment was authorized by law, and does not extend to questioning CMS's discretion or judgment in taking such action where permitted by the applicable legal provisions. *See, e.g.*, *Brian K. Ellefsen* at 7; *Letantia Bussell, M.D.* at 13; *Ronald Paul Belin, DPM* at 5 (and cases cited therein). For that reason, the IG's 2010 exclusion of Petitioner from federal health care programs based on his felony convictions, and the 2017 reinstatement, have no bearing on this appeal and do not permit us to overturn CMS's exercise of its discretion to deny his enrollment where authorized by section 424.530(a)(3). Further, "revocation under section 424.535 and exclusion under section 1128 are distinct remedial tools, each with its own set of prerequisites and consequences for the provider or supplier." *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 13 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D.

Mass. 2010); *see also Dinesh Patel, M.D.*, DAB No. 2551, at 9 (2013) (distinguishing revocation from exclusion, as two different types of administrative enforcement actions that two different Department of Health and Human Services components (IG and CMS) are responsible for carrying out pursuant to different authorities, i.e., 42 C.F.R. Parts 1001 and 1005 (IG exclusions) and 42 C.F.R. Part 424 (CMS revocation)). There is no provision in the regulations limiting CMS's authority to deny enrollment for a covered felony conviction on the ground that the IG previously excluded the applicant based on the same conviction.

Similarly, the Board is not authorized to reverse CMS's enrollment denial that, we conclude, was permitted by the applicable regulations, based on the equitable considerations Petitioner offers in favor of enrollment – his post-exclusion reinstatement by various insurance companies and the Pennsylvania Medicaid program, and his appeals to fairness. *See, e.g.*, *Patrick Brueggeman, D.P.M.*, DAB No. 2725, at 15 (2016) ("The Board has consistently held that neither it nor an ALJ has the authority to restore a supplier's billing privileges on equitable grounds.") (citing *Neb Group of Ariz. LLC*, DAB No. 2573, at 6 (2014); *Complete Home Care, Inc.*, DAB No. 2525, at 7 (2013); and *Bussell, M.D.* at 12-13 (explaining that ALJs and the Board are authorized to review only whether CMS has a legal basis to revoke billing privileges)).

Finally, Petitioner notes that the CMS official who denied Petitioner's request for reconsideration had also earlier denied the corrective action plan Petitioner filed in response to CMS's notice of its denial of Petitioner's enrollment application, and argues that this shows that CMS has acted prejudicially toward him. P. Reply at 3. This argument also provides no basis for the Board to reverse the denial of Petitioner's application for enrollment. While the Board and ALJs may review CMS's denial or revocation of enrollment to determine if it was permitted by the applicable law, we are aware of no authority that permits us to address Petitioner's concerns about how the CMS contractor handled the reconsideration, or to review procedural aspects of CMS's denial action beyond whether it was permitted by applicable law and regulations.

In this regard, the Board "has emphasized that with respect to appeals under Part 498, ALJs and the Board may only review issues specifically identified as appealable administrative actions (i.e., 'initial determinations') in section 498.3" of 42 C.F.R. *Patrick Brueggeman, D.P.M.* at 15 (citing *Mohammad Nawaz, M.D., & Mohammad Zaim, M.D., PA*, DAB No. 2687, at 15 (2016), *aff'd*, *Nawaz v. Price*, No. 4:16cv386, 2017 WL 2798230 (E.D. Tex. June 28, 2017), *aff'd*, *Shah v. Azar*, 920 F.3d 987 (5th Cir.

2019)).[5] The reviewable initial determinations include "[w]hether to deny or revoke a provider or supplier's Medicare enrollment in accordance with § 424.530 or § 424.535," and Part 498 requires that the supplier whose enrollment is denied or revoked must first receive a reconsidered determination from CMS, but nothing in the regulations authorizes the Board to look behind the reconsidered determination being appealed to review the process CMS used in ruling on a request for reconsideration. 42 C.F.R. § 498.3(b)(17), 498.5(d)-(f) (suppliers and prospective suppliers entitled to ALJ hearing on reconsidered determinations).

For these reasons, we conclude that the ALJ did not err in determining that CMS was legally authorized to deny Petitioner's enrollment under section 424.530(a)(3) based on his felony convictions, which was the only issue before the ALJ and the Board.

Conclusion

We affirm the ALJ Decision affirming CMS's denial of Petitioner's Medicare enrollment application.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Leslie A. Sussan
Presiding Board Member

[5] The Board has thus held that CMS's rejection of a corrective action plan, and its determination of the length of the re-enrollment bar following revocation under section 424.535, are not subject to review because section 498.3(b) does not identify them as appealable determinations. *Mohammad Nawaz, M.D., & Mohammad Zaim, M.D., PA* at 15.