

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Orthopedics Unlimited, LLC,
(NPI: 1649444589),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-610

Decision No. CR5010

Date: January 23, 2018

DECISION

Novitas Solutions (Novitas or “the contractor”), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, Orthopedics Unlimited, LLC, effective September 19, 2016. CMS upheld that determination in a reconsidered determination. CMS and Novitas determined that, pursuant to Medicare program regulations, Petitioner’s sole owner and managing employee had a felony conviction that was detrimental to the Medicare program and its beneficiaries, and that Petitioner had failed to timely provide notice of this conviction by updating its Medicare enrollment record. For the reasons stated below, I affirm the revocation of Petitioner’s Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner is a medical practice in Livingston, New Jersey, that was enrolled as a supplier in the Medicare program. Michael Rieber, M.D. (herein “Dr. Rieber”) is Petitioner’s sole owner and managing employee. CMS Exhibit (Ex.) 16 at 9-10. On May 23, 2016, a state

grand jury returned a true bill of indictment charging that Dr. Rieber filed false or fraudulent New Jersey gross income tax returns, in violation of N.J.S.A. § 54:52-10 (Counts One, Two and Three), and that he failed to pay state gross income tax with the intent to evade, avoid, or otherwise not make timely payment, in violation of N.J.S.A. § 54:52-9A (Count Four¹).² CMS Exs. 9, 11.

Dr. Rieber entered a pre-trial intervention (PTI) program in September 2016. CMS Ex. 11. Conditions of his participation in the PTI program included that he pay full restitution in the amount of \$250,000 to the victim, the Treasury of the State of New Jersey. CMS Ex. 11 at 2. That same month, a superior court judge granted the Attorney General's motion for dismissal of Counts One through Three of the indictment, which was based on Dr. Rieber's "agreement" regarding PTI and that Dr. Rieber "had been admitted to PTI under Count 4." CMS Ex. 12. On May 1, 2017, a New Jersey superior court judge dismissed the remaining count, Count Four, based on Dr. Rieber's participation in the PTI program.³ P. Ex. 1.

By letter dated October 28, 2016, Novitas notified Petitioner that it had revoked its Medicare enrollment and billing privileges, effective September 19, 2016, based on noncompliance with 42 C.F.R. § 424.535(a)(3) and (9). CMS Ex. 4. Novitas provided the following explanation in its letter:

¹ Count Four of the Indictment charged that, between on or about January 15, 2012 to on or about April 15, 2012, Dr. Rieber failed to pay or turn over New Jersey gross income tax for the calendar year 2011 "with the intent to evade, avoid, or otherwise not make timely payment or deposit of said taxes." CMS Ex. 9 at 5.

² Each of the four counts in the indictment is a third degree offense. CMS Exs. 9, 11. The term of imprisonment for a third degree offense "shall be between three years and five years . . ." N.J.S.A. § 2C-43-6.a(3). Therefore, the indictment charged four felony offenses. *See* 18 U.S.C. § 3559 (classifying an offense punishable by less than five years but more than one year of incarceration as a Class E felony); *see also U.S. v. Brown*, 937 F.2d 68 (2d Cir. 1991) (third degree offense is properly classified as a felony).

³ Petitioner's submission of this document did not comply with the requirements of the Civil Remedies Division Procedures (CRDP) and my Acknowledgment and Pre-Hearing Order (Pre-Hearing Order). Petitioner did not identify its exhibit with a "separate unique, and whole identifying number," did not mark the document with the case docket number and pagination, and did not submit an exhibit list. *See* CRDP, § 14; Pre-Hearing Order, §§ 4(c)(ii), 5(a)-(d). In lieu of rejecting this exhibit, I have re-designated the exhibit as Petitioner Exhibit (P. Ex.) 1.

42 CFR §424.535(a)(3) - Felonies

The Centers for Medicare & Medicaid Services has been made aware that on September 19, 2016, Michael Rieber agreed to, by order of the Superior Court of New Jersey, Mercer County, a Pretrial Intervention. Michael Rieber is a Sole Owner, Managing Employee, Authorized Official, and a 5% or more ownership interest in Orthopaedics Unlimited LLC.⁴ A pretrial intervention is considered a conviction, as defined by 42 C.F.R. § 1001.2.

42 CFR §424.535(a)(9) – Failure to Report

Michael Rieber agreed to, by order of the Superior Court of New Jersey, Mercer County, a Pretrial Intervention on September 19, 2016. Michael Rieber is a Sole Owner Managing Employee, Authorized Official, and a 5% or more ownership interest in Orthopaedics Unlimited LLC. You did not notify CMS of this adverse legal action, as required by 42 C.F.R. § 424.516.

CMS Ex. 4 at 1 (emphasis omitted). Novitas informed Petitioner that it had established a re-enrollment bar for a period of three years, effective 30 days from the postmark date of the letter. CMS Ex. 4 at 2.

On or about November 28, 2016, Petitioner submitted a request for reconsideration, along with thirteen exhibits and a signed statement of Dr. Rieber. CMS Exs. 2, 3. Dr. Rieber explained that his participation in the PTI program was not based on any of the financial crimes specifically enumerated in 42 C.F.R. § 424.535(a)(3), and that he had not been convicted of an offense that is similar to the examples listed in the regulation. CMS Ex. 2 at 7-13. Dr. Rieber argued, on behalf of Petitioner, that he was not the subject of an adverse legal action that necessitated reporting pursuant to 42 C.F.R. § 424.535(a)(9). CMS Ex. 2 at 13-15.

On February 24, 2017, CMS's Provider Enrollment & Oversight Group issued a reconsidered determination in which it upheld the revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) and (9). CMS Ex. 1. CMS determined that, for purposes of revocation, Dr. Rieber had been convicted of the felony offense of failing to pay state income tax with the intent to evade payment. CMS Ex. 1 at 7. CMS explained that, pursuant to 42 C.F.R. § 1001.2, which is referenced by section 424.535(a)(3), a person has been "convicted" if he or she "has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld." CMS Ex. 1 at 3. CMS

⁴ Petitioner refers to itself as both "Orthopaedics Unlimited" and "Orthopedics Unlimited." See CMS Ex. 2 at 1.

also determined that Petitioner “failed to report this adverse legal action as required under 42 C.F.R. § 424.516(d).” CMS Ex. 1 at 7-8.

Petitioner filed a timely request for hearing (RFH) on April 21, 2017. On May 3, 2017, I issued a Pre-Hearing Order directing the parties to file pre-hearing exchanges, consisting of a brief by CMS and a response brief by Petitioner, along with supporting evidence, in accordance with specific requirements and deadlines.

CMS filed a pre-hearing brief and motion for summary judgment, along with 16 exhibits (CMS Exs. 1-16). Petitioner submitted a pre-hearing brief and opposition to CMS’s motion for summary judgment (P. Br.), along with P. Ex. 1. As neither party has objected to any of the proposed exhibits, I admit all submitted exhibits.

Neither party has submitted the written direct testimony of any witnesses, and a hearing is therefore unnecessary for the purpose of cross-examination of witnesses. Pre-Hearing Order, §§ 8-10. The record is closed, and the case is ready for a decision on the merits.⁵

II. Issues

Whether CMS has a legal basis to revoke Petitioner’s Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(3) and (9) because its owner and managing employee has a felony conviction within the preceding 10 years and it failed to report the final adverse action within 30 days.

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis⁶

Petitioner is a “supplier” for purposes of the Medicare program. *See* 42 U.S.C. § 1395x(d); 42 C.F.R. §§ 400.202 (definition of supplier), 410.20(b)(1). In order to participate in the Medicare program, a supplier must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke a supplier’s enrollment and billing privileges for any reason stated in 42 C.F.R. § 424.535(a).

⁵ As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS’s motion for summary disposition.

⁶ My numbered findings of fact and conclusions of law are set forth in italics and bold font.

CMS may revoke a supplier's enrollment based on the existence of a felony conviction, as set forth in 42 C.F.R. § 424.535(a)(3), which currently provides:

(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 C.F.R. [§] 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.

(ii) Offenses include, but are not limited in scope or severity to—

* * *

(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.

42 C.F.R. § 424.535(a)(3)(ii)(B).

CMS also may revoke a supplier's Medicare enrollment and billing privileges based on the supplier's failure to timely report a final adverse legal action, as is set forth in 42 C.F.R. § 424.535(a)(9):

(9) *Failure to report.* The provider or supplier did not comply with the reporting requirements specified in §424.516(d)(1)(ii) and (iii) of this subpart.

Pursuant to 42 C.F.R. § 424.516(d)(1)(ii), physicians and their practice organizations *must* report “[a]ny adverse legal action” within 30 days of the reportable event, and 42 C.F.R. § 424.502 (Definitions) lists a conviction of a felony offense, as defined in section 424.535(a)(3)(i), within the last 10 years preceding enrollment, revalidation, or re-enrollment as a final adverse action.

- 1. Dr. Rieber was the sole owner and managing employee of Petitioner on September 19, 2016.***
- 2. On May 23, 2016, a grand jury returned a true bill of indictment charging that Dr. Rieber committed four felony offenses.***

3. *Dr. Rieber entered a PTI program in September 2016, and paid \$250,000 in restitution to the State of New Jersey, at which time Counts One through Three of the Indictment were dismissed.*
4. *In May 2017, the State of New Jersey dismissed Count Four of the indictment, charging that Dr. Rieber failed to pay state tax with the intent to evade payment, in violation of N.J.S.A. § 54:52-9, based on Petitioner's participation in the PTI program.*
5. *Petitioner concedes that Dr. Rieber has a conviction for purposes of the Medicare program.*
6. *Dr. Rieber's conviction is for a felony offense that was a financial crime pursuant to 42 C.F.R. § 424.535(a)(3).*
7. *An offense listed in 42 C.F.R. § 424.535(a)(3) has been determined by the Secretary to be per se detrimental to the best interests of the Medicare program and its beneficiaries.*
8. *CMS and Novitas had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges.*

While Petitioner argues that Dr. Rieber “has *not* been convicted of any criminal offense under New Jersey law,” he concedes that “[f]or the purposes of Medicare participation . . . participation in a diversionary program such as the PTI program is tantamount to a conviction under 42 C.F.R. § 1001.2 and 42 C.F.R. § 424.535(a)(3)(ii)(B).” P. Br. at 3. Therefore, based on Petitioner’s concession, Dr. Rieber has a conviction for Medicare enrollment purposes. Further, as previously discussed, the conviction is for a felony because the offense was punishable by up to five years of incarceration. N.J.S.A. § 2C-43-6.a(3)

Petitioner disputes that Dr. Rieber’s conviction is for an offense enumerated in 42 C.F.R. § 424.535(a)(3)(ii) or that it is a final adverse action. Petitioner argues that Dr. Rieber was not convicted of a financial crime that is contemplated by section 424.535(a)(3)(ii) because the particular facts underlying Dr. Rieber’s conviction do not support that he was culpable of “income tax evasion” or a similar offense and that he did not engage in “evasive conduct.” P. Br. at 3-4. Petitioner further asserts that the plain language

demonstrates that “an individual may be charged under *N.J.S.A. § 54:52-9* by ‘otherwise not mak[ing] timely payment . . . of any tax,’ absent any evasive conduct.”⁷ P. Br. at 3.

Petitioner’s arguments are unpersuasive. CMS has determined that financial crimes, “*such as* extortion, embezzlement, income tax evasion, insurance fraud and other similar crimes” warrant the revocation of enrollment. 42 C.F.R. § 424.535(a)(3)(ii)(B) (emphasis added). The words “such as” imply that the subsequent list of illustrative crimes, including crimes similar to those named in the list, are not the only set of crimes that may be considered “financial.” Likewise, the Departmental Appeals Board (DAB) addressed a similar issue in *Stanley Beekman, D.P.M.*, stating that “CMS may revoke Medicare billing privileges under the authority of section 424.535(a)(3) based on *any* financial crime, regardless of whether the supplier’s particular financial crime is specified in the regulation’s illustrative list of financial crimes.” DAB No. 2650 at 7 (2015) (emphasis in original). Petitioner’s crime need not be the crime of tax evasion, but rather, need only be a “financial crime” to render the regulation applicable. Dr. Rieber was convicted of a financial crime because he “did fail to pay, or turn over when due, any tax, fee, penalty or interest or any part thereof . . . with the intent to evade, avoid or otherwise not make timely payment or deposit of any tax, fee, penalty or interest” CMS Ex. 9 at 5-6, *citing* *N.J.S.A. § 54:52-9*. Petitioner failed to pay tax, fees, penalties or interest, *with the intent* to evade, avoid or otherwise make timely payments; Petitioner’s felony conviction is based on his *intentional* failure to make tax payments and to comply with his financial obligations to the State of New Jersey, totaling \$250,000. *N.J.S.A. § 54:52-9*. Therefore, Petitioner’s offense is certainly a “financial crime” because intentionally failing to meet one’s tax obligations *is* a financial crime.

Petitioner asserts that CMS erred in not “weigh[ing] all facts and circumstances related to the underlying offense” in its revocation decision. P. Br. at 6. Petitioner asserts that “CMS is required to act ‘judiciously and with reasonableness’ based upon ‘specific facts of each individual situation,’ taking into account the severity of the offenses, mitigating circumstances, risk to program and beneficiaries if enrollment were to continue, corrective action plans, beneficiary access to care, and any other pertinent factors.” P. Br. at 7, *citing* 71 Fed. Reg. 20,761; 79 Fed. Reg. 72,510. However, as noted above, the regulation explicitly lists four categories of felony offenses that warrant revocation of enrollment, and specifically states that offenses “include, but are not limited in scope and severity” to those specified offenses. 42 C.F.R. § 424.535(a)(3). The DAB has held that

⁷ Petitioner is correct that the statute does not require “evasive conduct,” but Petitioner otherwise understates that there is an *intent* element of this offense. *See* P. Br. at 3 (“Such conduct is distinguishable from, and certainly not tantamount to, a person merely failing to “make timely” payment of “any tax.”). Dr. Rieber paid \$250,000 in restitution to the victim, the State of New Jersey, more than four years after the date of the offense conduct charged in Count Four. P. Ex. 11 at 2. This is not a situation in which a taxpayer simply failed to make a timely tax payment.

CMS “may revoke . . . a supplier’s billing privileges based solely on a qualifying felony conviction without regard to equitable or other factors.” *Beekman*, DAB No. 2650 at 3. The DAB has also explained that CMS may revoke billing privileges “based solely on a qualifying felony conviction” it has determined in a regulation to be detrimental to the best interests of the Medicare program and its beneficiaries.” *See Fady Fayad, M.D.*, DAB No. 2266 at 15 (2009). Because Dr. Rieber committed a felony financial crime, it was unnecessary for CMS to address the specific facts and circumstances of the financial crime.

Petitioner contends that because all charges of the indictment were ultimately dismissed and Dr. Rieber maintained his medical license, the offense that was the basis for his conviction was not detrimental to the Medicare program or its beneficiaries. However, section 424.535(a)(3)(ii)(B) does not create a rebuttable presumption that an enumerated offense is detrimental to the best interest of the Medicare program and its beneficiaries. Rather, CMS’s regulations permit a revocation of enrollment in such an instance and do not require CMS to exercise discretion. 42 C.F.R. §§ 424.535(a)(3)(ii)(B) and 1001.2. CMS has determined that certain offenses, even if given lenient treatment by the criminal justice system, are nonetheless *per se* detrimental to the Medicare program and its beneficiaries.

Petitioner argues that the present case is “similarly unique” to the case of *Barry Ray, M.D.*, DAB CR3655 (2015), in which an ALJ reversed a revocation that was based on a felony conviction. RFH at 9-10. First, the *Barry Ray* decision is a non-precedential decision by a single administrative law judge and has no binding effect on the instant case. *See, e.g., Vamet Consulting & Medical Servs.*, DAB No. 2778 at (2017) (discussing that an ALJ decision is “not binding precedent on another ALJ or on the [DAB]”). Second, unlike the felony conviction in the *Barry Ray* case, Dr. Rieber’s felony offense falls squarely within section 424.535(a)(3)(ii)(B) because it involved a financial crime.⁸ The *Barry Ray* decision is not a relevant authority.

For the aforementioned reasons, CMS and Novitas had a reasonable basis to revoke Petitioner’s Medicare enrollment and billing.

⁸ In the *Barry Ray* case, the petitioner’s offense, which involved the possession of hollow point ammunition, did not fall within any of the offenses specifically enumerated in section 424.535(a)(3)(ii), and CMS had not otherwise determined the offense was detrimental to the Medicare program. *Barry Ray*, DAB CR3655 at 20-22.

9. *Petitioner did not timely inform CMS of an adverse legal action, as required by 42 C.F.R. §§ 424.516(d)(1)(ii) and 424.535(a)(9).*⁹

The regulations at 42 C.F.R. § 424.516(d)(1)(ii) require that physicians and their practice organizations report, within 30 days, any adverse legal action. The failure to timely report an adverse legal action subjects a physician and/or a practice organization to revocation of Medicare enrollment and billing privileges. 42 C.F.R. § 424.535(a)(9). Petitioner conceded that Dr. Rieber has a conviction “for purposes of Petitioner participation” (P. Br. at 3), yet it did not report Dr. Rieber’s conviction within 30 days of September 19, 2016, the date Dr. Rieber entered the PTI program.

Petitioner unpersuasively argues that because “PTI does not constitute a conviction under New Jersey law” and section 424.516(d) is ambiguous, “it was reasonable for Dr. Rieber to believe he did not have to report the event to CMS.” P. Br. at 9-10. However, CMS clearly instructs suppliers to report final adverse actions, to include felony crimes “including guilty pleas and adjudicated pre-trial versions; financial crimes, such as extortion, embezzlement, income tax evasion, insurance crimes and other similar crimes for which the individual was convicted” Form CMS-855I, <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/downloads/cms855i.pdf> (last visited January 8, 2018); see 42 C.F.R. § 424.502 (defining a final adverse action for Medicare purposes). Petitioner’s ignorance of the reporting requirement does not relieve it of the obligation to report an adverse legal action as required by 42 C.F.R. §§ 424.516(d)(1)(ii) and 424.535(a)(9), and revocation is therefore warranted.

10. *The effective date of the revocation is appropriate.*

The regulation at 42 C.F.R. § 424.535(g) states that when a revocation is based on a felony conviction, the revocation of the supplier’s billing privileges is effective as of the date of the felony conviction. Petitioner’s revocation therefore became effective on September 19, 2016, the date of Dr. Rieber’s conviction.

11. *The three-year enrollment bar is not reviewable.*

Petitioner argues that CMS improperly established a three-year re-enrollment bar. P. Br. at 10-11. Petitioner argues that “[a] three-year ban is clearly a draconian application of 42 CFR § 424.516(d) and is egregiously disproportional and incommensurate to an eleven-day failure to report.” P. Br. at 10.

⁹ I recognize that Dr. Rieber’s felony conviction in the preceding 10 years, alone, is a sufficient basis for CMS to have revoked Petitioner’s Medicare enrollment and billing privileges. Nonetheless, I will address the second basis for revocation relied upon by CMS and Novitas.

The DAB has explained that “CMS’s determination regarding the duration of the re-enrollment bar is not reviewable.” *Vijendra Dave, M.D.*, DAB No. 2672 at 11 (2016). The DAB explained that “the only CMS actions subject to appeal under Part 498 are the types of initial determinations specified in section 498.3(b).” *Id.* The DAB further explained that “[t]he determinations specified in section 498.3(b) do not, under any reasonable interpretation of the regulation’s text, include CMS decisions regarding the severity of the basis for revocation or the duration of a revoked supplier’s re-enrollment bar.” *Id.* The DAB discussed that a review of the rulemaking history showed that CMS did not intend to “permit administrative appeals of the length of a re-enrollment bar.” *Id.* Therefore, I do not disturb the three-year re-enrollment bar.

V. Conclusion

For the reasons explained above, I affirm the revocation of Petitioner’s Medicare enrollment and billing privileges.

/s/
Leslie C. Rogall
Administrative Law Judge