

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Sunsites Pearce Fire District,
(PTAN: Z860372114 / NPI: 1215921812),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-1191

Decision No. CR5012

Date: January 25, 2018

DECISION

I grant summary judgment sustaining the determinations of a Medicare contractor, as affirmed on reconsideration, to revoke the Medicare participation and to decline to renew participation of Petitioner, Sunsites Pearce Fire District.

I. Background

The Centers for Medicare & Medicaid Services (CMS) moved for summary judgment, filing supporting exhibits identified as CMS Ex. 1-CMS Ex. 13. Petitioner opposed the motion and filed supporting exhibits identified as P. Ex. 1-15. These exhibits included the sworn declarations of three witnesses. CMS objected to portions of Petitioner's exhibits and requested that it be permitted to cross-examine Petitioner's witnesses in the event that I denied the motion for summary judgment.

It is unnecessary that I rule on CMS's objections inasmuch as I grant its motion for summary judgment. Nor do I receive either party's exhibits as evidence because I decide this case based on the undisputed material facts. However, I refer to some of the parties' exhibits, only for purposes of illustrating facts that are not in dispute.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue in this case is whether a Medicare contractor appropriately revoked Petitioner's Medicare participation and declined to renew its participation.

B. Findings of Fact and Conclusions of Law

There is no dispute concerning the material facts. Petitioner, a rural fire district in Arizona, operates an ambulance service. In 2013, Petitioner made Joshua Steinberg its managing employee. Mr. Steinberg was the district's interim fire chief.

On March 13, 2011, Mr. Steinberg was charged with a felony in Cochise County, Arizona. Specifically he was charged with disorderly conduct consisting of recklessly discharging a 9mm pistol in the presence of his former girlfriend. CMS Ex. 12 at 1. Mr. Steinberg elected to participate in the county's adult diversion program. *Id.* at 2-4. A court ordered that the charges against him be suspended for two years while he participated in the program. *Id.* at 10. The court dismissed the charges upon Mr. Steinberg's completion of the program. *Id.* at 13.

Petitioner did not inform CMS or its contractor of the legal actions taken against Mr. Steinberg. On May 30, 2013, it submitted an application to the contractor (CMS Form 855B) seeking to add Mr. Steinberg as its managing director. CMS Ex. 4 at 7. Petitioner did not include with this application the information required at Section 6B of the application form. This section requires applicants to certify whether managing employees and other key personnel have been subject to any "final adverse legal actions." CMS Ex. 9 at 27.

Upon reviewing the application the contractor asked Petitioner to supply the information required at Section 6B. CMS Ex. 5. On August 8, 2013, Petitioner resubmitted the Form 885B but again failed to include Section 6B with its submission. CMS Ex. 6.

The contractor again requested Petitioner to complete its application. CMS Ex. 7. On November 21, 2013, Petitioner submitted another Form 855B. On this occasion it completed Section 6B as it pertained to Mr. Steinberg. Petitioner affirmatively asserted that Mr. Steinberg had not been subjected to any adverse legal action. CMS Ex. 8 at 7.

Provider and supplier enrollment in Medicare is governed by regulations at 42 C.F.R. Part 424. A provider or supplier must be enrolled in Medicare in order to claim reimbursement for items or services that it provides to beneficiaries. In order to qualify for enrollment a provider or supplier must file an enrollment application. Every provider or supplier is obligated to submit accurate and truthful responses to all information

requests made on behalf of the Medicare program and to attest to the accuracy of any information submitted. 42 C.F.R. §§ 424.510(d)(2), (d)(3).

CMS or its delegated contractor may revoke a provider or a supplier's Medicare participation in the circumstance where a provider or a supplier certifies on its enrollment application as being true information that is misleading or is false. 42 C.F.R. § 424.535(a)(4). CMS or a contractor may also revoke participation in the circumstance where any owner or managing employee of a provider or supplier was "convicted" of a felony within the previous ten years, that CMS determines is detrimental to the best interests of Medicare and its beneficiaries. 42 C.F.R. § 424.535(a)(3). The regulation that was in effect when Petitioner retained Mr. Steinberg as its manager and when it submitted the Forms 855B that I have discussed defines felonies for which revocation may be imposed to include:

Felony crimes against persons, such as murder, rape, assault 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)(A) (2013).¹

The undisputed material facts establish grounds to revoke Petitioner's participation, pursuant to the then-extant 42 C.F.R. § 424.535(a)(3)(ii)(A) and under 42 C.F.R. § 424.535(a)(4). Grounds for revocation exist because Petitioner's manager, Mr. Steinberg was convicted of a felony within the ten years prior to his assuming the duties of manager and because Petitioner misled the contractor about Mr. Steinberg's status in failing to file Section 6B and then stating falsely that Mr. Steinberg had not been subject to an adverse legal action.

Petitioner argues that Mr. Steinberg was not convicted of a felony and therefore, it was not required to report that he was subject to an adverse legal action. Petitioner's Brief (P.Br.) at 6-7. As support for this argument Petitioner points to the modifications to 42 C.F.R. § 424.535(a)(3) adopted by the Secretary in 2015. *Id.* at 7. In 2015, the regulation added a clarification that states that a "felony offense" is "as that term is defined in 42 C.F.R. 1001.2". That latter section includes a subpart (d) that defines "convicted" of a felony offense as including the circumstance where:

an individual or an entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

¹The Secretary modified this regulation in 2015. I discuss the modified language below.

42 C.F.R. § 1001.2(d). Petitioner reasons that Mr. Steinberg was not “convicted” of a felony inasmuch as this clarifying language was not part of the regulation in 2011 when he entered into a deferred adjudication program or in 2013 when Petitioner filed its application for participation. P. Br. at 7-8. Petitioner asserts that the absence of the clarifying language can only mean that deferred adjudications such as the one that Mr. Steinberg entered were not subject to the regulation’s reach prior to 2015.² *Id.*

I disagree. The regulation in effect as of Mr. Steinberg’s conviction and when Petitioner filed the Form 855Bs that are at issue here encompassed “adjudicated pretrial diversions.” That is precisely what Mr. Steinberg entered into in 2011. He entered into a program – subject to the consent and subsequent review of a court – pursuant to which he was obligated to complete enumerated requirements in return for subsequent dismissal of the felony charge that had been made against him. That is exactly what a deferred adjudication consists of. I do not find that the addition of clarifying language to the regulation in 2015 meant that Mr. Steinberg’s deferred adjudication was excluded from the regulation’s purview prior to that date. It clarified the regulation’s reach but it did not expand it. *Kimberly Shipper, P.A., DAB No. 2804 at 10 (2017).*

Petitioner argues also that the arrangement that Mr. Steinberg entered into was not an “adjudicated” pretrial diversion. It contends that his arrangement was not “adjudicated” because he neither pled guilty to a felony nor was found to be guilty of one. P. Br. at 10-11. According to Petitioner, an “adjudicated” pretrial diversion occurs only after a court finds an individual to be guilty and then offers diversion in lieu of punishment. *Id.*

I reject that argument. Here, the court adjudicated Mr. Steinberg’s case because it accepted a formalized arrangement in lieu of a plea and also because it retained jurisdiction over the case while Mr. Steinberg complied with the requirements of his diversion. “Adjudication” in this context is synonymous with “disposition.” Moreover, in making its argument Petitioner ignores the presence of the word “pretrial” in the relevant phrase. The regulation in effect when Mr. Steinberg entered into his arrangement clearly encompassed arrangements made prior to trial in which individuals agreed to be subject to court supervision and other requirements in lieu of entering a guilty plea or facing a jury.

Petitioner also argues that the contractor wrongly determined that the charge against Mr. Steinberg was for a felony that is detrimental to the Medicare program. P. Br. at 12. But, CMS plainly has the discretion to determine what may be or may not be detrimental. Certain felony convictions are per se grounds for revocation but CMS is not limited to

² Petitioner argues also that CMS improperly seeks to apply the 2015 clarified regulation here. That is incorrect. CMS relies on the pre-2015 language to support its motion although it argues that the 2015 clarification does not expand the reach of the regulation but merely clarifies it.

revoking solely on the basis of those convictions. The regulation governing revocation based on felony convictions states that CMS has the authority to revoke based on what it determines to be detrimental. 42 C.F.R. § 424.535(a)(3). That delegates the authority to CMS to determine in individual cases what is or is not detrimental. That is a non-reviewable discretionary authority vested in CMS by the Secretary. *Letantia Bussell*, DAB No. 2196 (2008).

Petitioner also argues that its 2017 termination of Mr. Steinberg's Medicare supervisory authority effectively wiped the slate clean, requiring the contractor to reinstate Petitioner as of that date. P. Br. at 13-14. As support for this contention Petitioner cites an April 26, 2017 resolution by the fire district board that purports to separate Mr. Steinberg from all Medicare issues. P. Ex. 7 at 8. However, neither this resolution nor the supporting testimony offered by Petitioner explains precisely how this arrangement is supposed to work. *See* P. Ex. 1; P. Ex. 2; P. Ex. 12. Mr. Steinberg retains his duties as fire chief. The ambulance service is part of the district's fire department. Petitioner has provided no mechanism that separates the operation of the ambulance service and associated emergency medical services from the fire department. I find that the contractor had discretion to decline to renew given the vagueness of the resolution and the absence of an explanation as to how Mr. Steinberg would serve as fire chief but not manager of the fire department's ambulance service.

As I have stated there are two bases for revocation of Petitioner's Medicare enrollment: its misleading and false statements concerning Mr. Steinberg's status; and, its failure to inform the contractor or CMS that Mr. Steinberg had an adverse legal action against him. The former basis allows for revocation 30 days after CMS or the contractor sends notice to the provider or supplier. 42 C.F.R. § 535(g). The latter basis allows for revocation retroactive to the date of a manager's conviction. *Id.*

In this case the contractor and CMS opted to revoke Petitioner's participation retroactive to March 4, 2013. This date evidently relates to the date when the contractor first asked Petitioner to complete an application that Petitioner had filed in 2012. The contractor did not impose an earlier revocation date (for example, back to the date of Mr. Steinberg's conviction) because Mr. Steinberg wasn't associated with Petitioner at that time.

This determination to revoke retroactively is well within the contractor's and CMS's regulatory authority. Given that grounds exist, I am without authority to modify or change the revocation date. I note that in its exhibits Petitioner alleges that the retroactive revocation will cause it to experience economic harm (CMS is seeking to recoup as an overpayment payments made to Petitioner for ambulance services that it provided between the revocation date and the date when the contractor notified Petitioner

of the revocation, March 31, 2017). That is an equitable argument, which I have no authority to hear or decide. *Amber Mullins, N.P.*, DAB No. 2729 at 5-6, (2016).

_____/s/_____
Steven T. Kessel
Administrative Law Judge