

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Daniel W. Bullock, M.D.,	)	Date: August 23, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-256
	)	Decision No. CR1640
Centers for Medicare & Medicaid	)	
Services.	)	

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**DECISION**

In January 2002, Petitioner, Daniel W. Bullock, M.D., was convicted of felony tax fraud. Based on that conviction, the Centers for Medicare & Medicaid Services (CMS) has revoked his Medicare billing privileges. Petitioner appeals. CMS now moves for summary judgment, arguing that no material facts are in dispute and that it is entitled to judgment as a matter of law. I agree and affirm CMS’s revocation of Petitioner’s Medicare billing privileges.

**Background**

CMS, acting on behalf of the Secretary of Health and Human Services, “may” revoke a currently enrolled provider’s Medicare billing privileges if, within the preceding 10 years, the provider was convicted of a felony offense that CMS “has determined to be detrimental to the best interests of the program and its beneficiaries.” 42 C.F.R. § 424.535(a)(3); *see also* Social Security Act (Act) §§ 1842(h)(8) (The Secretary may terminate his agreement with a participating physician who has been convicted of a felony for an offense which the Secretary has determined is “detrimental to the best interests of the program or program beneficiaries”) and 1866(b)(2)(D) (The Secretary may terminate a provider agreement after he ascertains that the provider has been convicted of a felony “which the Secretary determines is detrimental to the best interests of the program or

program beneficiaries”). Offenses for which billing privileges may be revoked include financial crimes such as tax evasion, and any crime that would result in mandatory exclusion under section 1128(a) of the Act. 42 C.F.R. § 424.535(a)(3)(i)(B) and (D).

Section 1866(j)(2) of the Act creates appeal rights for providers and suppliers where enrollment has been denied, including the revocation of billing privileges, using the procedures that apply under section 1866(h)(1) of the Act. These procedures provide for review by an Administrative Law Judge (ALJ) and the right to appeal the ALJ’s decision to the Departmental Appeals Board. 42 C.F.R. Part 498, et seq.

In this case, the parties agree that in January of 2002, Petitioner was convicted of felony tax fraud in U.S. District Court for the Eastern District of California.<sup>1</sup> CMS Ex. 3. CMS now asks for summary judgment (CMS Br.), arguing that, based on that conviction, CMS had the discretion to revoke Petitioner’s Medicare billing privileges, and CMS’s exercise of its discretion is not reviewable. Petitioner opposes (P. Br.) and argues that a hearing is necessary to consider certain relevant factors. CMS has submitted exhibits marked CMS Exs. 1-3, and Petitioner has submitted exhibits marked P. Exs. 1-4. The parties also filed Reply briefs (CMS Reply and P. Sur-reply).

### **Discussion**

***CMS may revoke Petitioner’s Medicare billing privileges because, within the last 10 years, Petitioner was convicted of tax fraud and conspiracy to commit fraud against the United States, which are felonies detrimental to the best interests of the program.***<sup>2</sup>

Summary judgment is appropriate if the affected party has either “conceded all of the material facts or proffered testimonial evidence only on facts which, even if proved, clearly would not make any substantive difference in the result.” *Michael J. Rosen, M.D.*, DAB No. 2096 (2007), at 4; *see also Big Bend Hosp. Corp. d/b/a Big Bend Medical Ctr.*, DAB No. 1814 (2002), *aff’d*, *Big Bend Hosp. Corp. v. Thompson*, No. P-02-CA-030 (W.D. Tex. Jan. 2, 2003).

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<sup>1</sup> CMS refers to the January 29, 2002 conviction, and Petitioner refers to the January 7, 2007 sentencing. CMS Ex. 1; P. Br. at 2. Petitioner was sentenced to eighteen months in prison followed by three years of supervised release. P. Ex. 1, at 10-11.

<sup>2</sup> I make this one finding of fact/conclusion of law to support my decision.

The relevant regulation provides that if a provider has been convicted of “financial crimes, such as . . . income tax evasion” within the last 10 years preceding revalidation of enrollment, CMS may revoke its Medicare billing privileges. 42 C.F.R. § 424.535(a)(3). As a matter of law, the Secretary has determined that tax fraud is among those felonies “detrimental to the best interests of the Medicare program or its beneficiaries” for which billing privileges may be revoked. *Id.*

Here, there is no dispute as to Petitioner’s January 2002 conviction of tax fraud and conspiracy to commit fraud against the United States. P. Br. at 1. Thus, under the plain language of the regulation, CMS may revoke Petitioner’s billing privileges.

Petitioner nevertheless points to language from the regulation’s preamble that provides that when revoking a provider’s billing privileges, CMS would consider certain factors (severity of the offenses, mitigating circumstances, risk to the Medicare program and beneficiaries, the possibility of corrective action plans, and beneficiary access to care). P. Request for hearing at 2; *see* 71 Fed. Reg. 20,754, 20,761. In Petitioner’s view, CMS was required to consider these factors, failed to do so, and such failure is a basis for reversal of the revocation. At the least, Petitioner argues, he is entitled to present evidence at an in-person hearing so that I may determine whether, based on those factors, his Medicare participation is “detrimental” to the program or its beneficiaries. I disagree.

Where the statutory and regulatory language is unambiguous, there is no need to look further.<sup>3</sup> *Abermarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir. 2000); *see also County of Los Angeles v. U.S. Dep’t of Health & Human Services*, No. 96-55161, 1997 WL 257492 (9th Cir. May 14, 1997); *Wildlife Federation v. Marsh*, 721 F.2d 767, 773 (5th Cir. 1983); *Ass’n of American Railroads v. Costle*, 565 F.2d 1310, 1316 (D.C. Cir. 1977); *Alexander v. U.S. Dep’t of Hous. & Urban Dev.*, 555 F.2d 166, 171 (7th Cir. 1977). Moreover, the statute and regulation explicitly afford CMS that discretion to revoke Petitioner’s billing privileges, and I have no authority to review CMS’s exercise of discretion. The Departmental Appeals Board has repeatedly declined to interject itself into the discretionary enforcement processes of components of the Department of Health and Human Services. CMS Br. at 5-6; *see Wayne E. Imber, M.D.*, DAB No. 1740 (2000);

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<sup>3</sup> Elsewhere in the preamble, drafters emphasized that income tax evasion is among the felonies that “we determine to be detrimental to the best interest of the Medicare program or its beneficiaries.” 71 Fed. Reg. at 20,760. “We believe it is reasonable for the Medicare program to question the honesty and integrity of the individual or entity with such a history [of financial crimes] in providing services and claiming payment under the Medicare program.” *Id.*

*Brier Oak Terrace Care Ctr.*, DAB No. 1798 (2001). Once I have determined that there is a legal and factual basis for revoking Petitioner’s billing privileges, I am “without jurisdiction to evaluate on any basis whatsoever the propriety of [CMS’s] exercise of discretion in deciding to proceed with the imposition of the exclusion.” *Michael J. Rosen, M.D.*, DAB No. 2096 (2007), at 14 (citing *Michael J. Rosen, M.D.*, DAB CR1566 (2007)); *see also Puget Sound Behavioral Health*, DAB No. 1944 (2004), at 15-16 (where regulation uses permissive rather than mandatory language ALJ had no authority to compel CMS to exercise its discretion).

### **Conclusion**

Here, Petitioner admits that he was convicted of a felony – tax fraud. CMS may revoke his Medicare billing number for a felony it determines to be detrimental to the best interests of the program or program beneficiaries. CMS has determined that tax fraud is detrimental to the best interests of the program or its beneficiaries. I therefore affirm the Hearing Officer’s decision.

/s/

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Carolyn Cozad Hughes  
Administrative Law Judge