

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Robert Carter,)	
(CCN: 18-3900), (CCN: 18-3908),)	Date: February 25, 2008
(CCN: 18-3879), (CCN: 18-3872),)	
(CCN: 18-3873),)	
)	
Petitioner,)	
)	
- v.-)	Docket No. C-07-759
)	Decision No. CR1739
Centers for Medicare & Medicaid)	
Services.)	

DECISION

The Medicare billing privileges of the following rural health clinics owned by Petitioner, Robert Carter, are revoked and any related supplier agreements are terminated effective August 23, 2007: Corbin Family Practice Group (CCN: 18-3900); Crab Orchard Family Practice Clinic (CCN: 18-3908); Knox County Family Practice Clinic (CCN: 18-3879); Manchester Family Practice Clinic (CCN: 18-3872); and Williamsburg Family Practice Clinic (CCN: 18-3873).

I. Background

Riverbend Government Benefits Administrator (Riverbend), a fiscal intermediary acting on behalf of the Centers for Medicare & Medicaid Services (CMS), notified Petitioner¹ by letters dated July 25, 2007, that the Medicare billing privileges of the above-named

¹ Although the letters to Petitioner refer twice to a “Robert Clark” rather than “Robert Carter,” it is clear from the context of the letters, and it is not disputed, that the letters were intended to refer to and were intended for Petitioner. CMS exhibit (CMS Ex.) 1.

clinics were revoked effective August 23, 2007.² CMS Ex. 1. Riverbend informed Petitioner that revocation was based upon information it received that Petitioner was convicted of felony offenses in the Commonwealth of Kentucky that involved the conversion of Habitat for Humanity funds totaling \$30,000 to his own use, and that he had been sentenced to confinement for 15 years.

Petitioner requested a hearing on September 18, 2007. On November 8, 2007, I convened a prehearing conference, the substance of which is memorialized in my Order dated November 9, 2007. During the conference the parties waived an in-person hearing and agreed that the case could be decided based on the submission of written briefs accompanied by documentary evidence.

CMS filed a brief (CMS Br.), accompanied by five exhibits (CMS Exs. 1-5). Petitioner filed a response (P. Br.), but did not submit any documentary evidence with the response. CMS filed a reply (CMS Reply). By letter dated January 30, 2008, Petitioner filed an Order from the Kentucky Court of Appeals based on his motion for a belated appeal. I am marking this document as P. Ex. 1 and admitting it. No objection has been made to the admission as evidence or my consideration of CMS Exs. 1-5 and they are admitted.

II. Discussion

A. Applicable Law

Section 1866(j)(1)(A) of the Act directs the Secretary to establish regulations for the enrollment of providers of services and suppliers under Medicare. Section 1866(j)(2) extends to suppliers the right to hearing and judicial review of a denial or refusal to renew the supplier's enrollment in Medicare.

² Riverbend also advised in its letter that revocation of the billing privileges for the various rural health clinics also terminated their Medicare provider agreements. However, rural health clinics are suppliers not providers. Social Security Act (Act), section 1861(u); 42 C.F.R. §§ 400.202, 498.2; CMS Pub. 100-08, Chapter 10, section 12.1.13. CMS guidance to its contractors explains that rural health clinics are certified suppliers that have supplier agreements with CMS similar to agreements executed by providers. Chapter 10, section 12.1.13; *see also*, Act, section 1861(aa)(2). Petitioner's supplier agreements as rural health clinics are at CMS Ex. 4.

The Secretary's regulations provide that CMS may revoke the Medicare billing privileges of a provider or supplier who has, within the past 10 years preceding enrollment or revalidation of enrollment, been convicted of a felony offense that CMS has determined to be detrimental to the best interests of the Medicare program and its beneficiaries, including financial crimes. 42 C.F.R. § 424.535(a) and (a)(3). The regulation specifies that conviction includes guilty pleas and adjudicated pretrial diversions, and does not require that a conviction be "final." 42 C.F.R. § 424.535(a)(3)(B).

B. Issue

The only issue in this case is whether CMS had a basis upon which to revoke the Medicare billing privileges of the clinics owned by Petitioner, and to terminate their supplier agreements.

C. Findings of Fact

1. After a jury trial in the 34th Judicial Circuit, Whitley Circuit Court, Division I, Commonwealth of Kentucky, Petitioner was found guilty of 15 counts of theft by failing to make required dispositions of property (converting \$30,000 in funds from Habitat for Humanity to his own use), and he was found guilty, pursuant to his plea, of one count of persistent felony offender. CMS Ex. 2; Petitioner's Hearing Request, Appeal Brief (P. H.R.) at 1.
2. Petitioner received a 15-year sentence, with a five-year enhancement for his guilty plea to the persistent felony offender count, his sentence on all counts to be served consecutively. CMS Ex. 2; P. H.R. at 1-2.
3. Petitioner did not timely appeal his conviction. P. H.R. at 2; CMS Ex. 3.
4. Petitioner filed a motion for belated appeal of his criminal conviction in the Kentucky Court of Appeals. The Court of Appeals remanded the case to the Whitley Circuit Court for an evidentiary hearing to determine whether Petitioner waived his right to appeal. P. H.R. at 2; CMS Ex. 3; P. Ex. 1.
5. By letters dated July 25, 2007, Riverbend, on behalf of CMS, notified Petitioner that the Medicare billing privileges for five rural health clinics he owned were revoked based on his felony convictions and their supplier agreements terminated effective August 23, 2007. CMS Ex. 1.
6. Petitioner timely requested a hearing.

D. Conclusions of Law

1. CMS may revoke the billing privileges of a Medicare provider or supplier if the provider, supplier, or owner of the provider or supplier is convicted of a federal or state felony offense that CMS determines to be detrimental to the best interests of the program and its beneficiaries (including financial crimes), but not if the conviction was more than 10 years preceding enrollment or revalidation of enrollment. 42 C.F.R. § 424.535(a)(3).

2. CMS may revoke the billing privileges of a Medicare provider or supplier if the owner of the provider or supplier is convicted of a felony offense that CMS determines to be detrimental to the best interests of the Medicare program and its beneficiaries, while the provider or supplier is currently enrolled in the Medicare program.

3. Petitioner's crime, converting \$30,000 in funds from Habitat for Humanity for his own use, constitutes a financial crime.

4. CMS was authorized to revoke the billing privileges of clinics owned by Petitioner, upon determining that the felony financial offense for which he was convicted was detrimental to the best interests of the Medicare program and its beneficiaries.

5. Petitioner's Medicare billing privileges for five rural health care clinics were properly revoked and their supplier agreements terminated.

E. Analysis

CMS revoked Petitioner's rural health clinics' billing privileges because Petitioner, the owner of the clinics, was convicted of felonies involving financial crimes. CMS's regulations authorize CMS to revoke a provider or supplier's billing privileges if the owner of the provider or supplier has been convicted of a felony involving a financial crime. Thus, CMS was authorized to revoke Petitioner's clinics' Medicare billing privileges and to terminate their supplier agreements.

Petitioner argues that his Medicare billing privileges should not have been revoked because his conviction has not become final; because it was not clear from the notice letters to Petitioner for each clinic the reason CMS was revoking his clinics' billing privileges; and he urges me to stay the revocation pending the transfer of the clinics to new owners. Petitioner's arguments are unavailing.

1. Petitioner's conviction is a sufficient basis for the revocation of his clinics' billing privileges and supplier agreements.

CMS correctly notes that Petitioner does not have an appeal of his conviction pending at this time because he did not timely appeal his conviction. Instead, Petitioner admits he failed to file a timely appeal, he moved for leave to file an appeal out of time, and the Kentucky Court of Appeals has remanded his case to the trial court for hearing, before deciding whether an appeal should proceed. CMS Ex. 3; P. H.R. at 2; P. Ex. 1. When CMS notified Petitioner of the revocation of his billing privileges, it was after expiration of the 30 days Kentucky allows for appeals of convictions and Petitioner's conviction was effectively final. Kentucky Rules of Criminal Procedure, Rule 12.04. Although the Kentucky Court of Appeals may ultimately find that Petitioner's appeal should be accepted out of time it has not done so and Petitioner does not currently have an appeal pending, only the motion. Thus, I find Petitioner's conviction is, in fact and law, final.

Moreover, I note that the regulation applicable does not specify that a conviction be "final" to be a basis for revocation of billing privileges. Section 424.535(a)(3)(B) of 42 C.F.R. only refers to crimes of which one has been "convicted, including guilty pleas and adjudicated pretrial diversions." Also, "conviction" has been defined for purposes of exclusion from the Medicare program to include instances where a judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether an appeal is pending. Act, section 1128(i)(1). Petitioner has pointed to no authority that requires that appeals from criminal convictions be complete before the conviction may be a basis to exclude one from participating in Medicare or to withdraw their billing privileges. The purpose of exclusion and the revocation of billing privileges is the protection of the Medicare program, including both the public fisc and the beneficiaries, and protection should not be denied due to the pendency of an appeal.

2. Petitioner received adequate notice.

Petitioner argues in his hearing request that the CMS notice letters do not state which of the 10 reasons for revocation set forth at CMS Pub., 100-08, Chapter 10, section 13.2, CMS is relying on to revoke the billing privileges of his clinics. Although the contractor refers to the CMS administrative policy document in the notice letters, the permissible grounds for revocation are set forth at 42 C.F.R. § 424.535(a).³ Petitioner is correct that

³ Petitioner also argues that CMS Pub. 100-08, Chapter 10, section 13.2 was not effective until July 2, 2007, and that it is being applied retroactively. Petitioner argues that retroactive application of a regulation is impermissible. P. H.R. at 7-8. CMS Pub. 100-08 is not a regulation, it is not binding as law as a properly promulgated regulation

the contractor does not specifically cite which of the 10 grounds for revocation listed in the regulation or the CMS policy the contractor relies upon for revocation. However, the contractor does describe in detail the conduct that is the basis for the revocation.

Despite the contractor's oversight in drafting, the notices are sufficiently specific for Petitioner to recognize that Reason 6 from the CMS Pub., 100-08, Chapter 10, section 13.2 and 42 C.F.R. § 424.535(a)(3), is applicable. Reason 6 authorizes revocation based on an owner's felony offense which CMS determines to be detrimental to the best interests of the program and its beneficiaries where the felony is within the 10 years preceding enrollment or revalidation of enrollment. Petitioner argues that Reason 6 should not be applied in his case because his 2007 conviction was not within the 10 years preceding enrollment given that his newest clinic was incorporated in October 2002. P. H.R. at 5. I disagree. Petitioner misreads the regulation and urges a nonsensical construction. The regulation prevents CMS or its authorized contractor from denying enrollment or revoking billing privileges based upon a conviction that occurred more than 10 years prior to enrollment or revalidation of enrollment. 71 Fed. Reg. 20,754, 20,766 (Apr. 21, 2006). The regulation does not prevent CMS or its contractor from revoking privileges for convictions that occur while one is enrolled as a provider or supplier in Medicare. The notices to Petitioner are clear that the revocations were due to Petitioner's felony conviction which occurred while Petitioner was enrolled in Medicare. The provision of the regulation which establishes the 10-year limitation is not applicable in Petitioner's case. Even though the contractor does not cite the specific policy manual or regulatory provision applicable in this case, the basis for the revocation is clear. Furthermore, Petitioner was certainly on notice to request a hearing.

3. Reversal of revocation based upon transfer of ownership is no longer available.

Pursuant to 42 C.F.R. § 424.535(d), revocation of the billing privileges of a provider or supplier may be reversed when the basis for revocation was the adverse activity of an owner or other individual specified in the regulation, and the provider or supplier terminates its relationship with that individual and gives notice that it has terminated its business relationship with that individual, and it does so within 30 days of the revocation notification.

would be, rather it is policy guidance to the Medicare contractors who administer the program on behalf of CMS and participants. The controlling law is the Act and the Secretary's regulations at 42 C.F.R. Part 424, specifically 42 C.F.R. § 424.535(a)(3) in this case. There is no problem with retroactive application of the regulation in this case, as it was effective June 20, 2006. 71 Fed. Reg. 20,754 (Apr. 21, 2006).

In this case, there is no question that Petitioner received the revocation notices dated July 25, 2007. According to his September 18, 2007 request for hearing, he was in the process of transferring ownership. P. H.R. at 9-10. In his reply to the CMS brief that he filed on January 8, 2008, Petitioner admits that he was still trying to transfer ownership. Petitioner acknowledged in his brief that the transfer had not occurred within 30 days of the notice of revocation, but he nevertheless argues that he should be given more time to effect the transfer. P. Br. at 3. The regulation grants CMS the discretion to reverse a revocation, but only if it receives notice that the relationship between the provider or supplier and the tainted individual is terminated within 30 days of the notice of the revocation. The regulation grants CMS no discretion to extend the period as Petitioner suggests. Accordingly, I conclude that reversal of the revocation based upon Petitioner transferring his ownership in the clinics is no longer available in this case.

III. Conclusion

There is a basis for the revocation of the billing privileges of the five clinics referred to herein that were owned by Petitioner.

/s/

Keith W. Sickendick
Administrative Law Judge