Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dennis McGinty, PT
(NPI: 1982706024 / PTAN: 8F20723),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-69

Decision No. CR4841

Date: May 8, 2017

DECISION

The Medicare enrollment and billing privileges of Petitioner, Dennis McGinty, PT, are revoked pursuant to 42 C.F.R. § 424.535(a)(4).[1] The effective date of revocation is June 19, 2016, 30 days from the date of the May 20, 2016 notice of initial determination to revoke. 42 C.F.R. § 424.535(g).

I. Procedural History and Jurisdiction

On May 20, 2016, Novitas Solutions (Novitas), a Medicare administrative contractor, notified Petitioner of its initial determination to revoke Petitioner's Medicare enrollment and billing privileges effective June 18, 2016, and to impose a three-year re-enrollment bar. Novitas cited 42 C.F.R. § 424.535(a)(4) as authority for the revocation. CMS Exhibit (Ex.) 5.

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[1] Citations are to the 2015 revision of the Code of Federal Regulation (C.F.R.), except as otherwise stated.

Petitioner's request for reconsideration was received by Novitas on July 18, 2016. CMS Ex. 4. A Novitas hearing officer issued a reconsidered determination on August 29, 2016. The hearing officer upheld the revocation of Petitioner's Medicare enrollment and billing privileges. The hearing officer found that Petitioner failed to report a March 22, 2005 felony conviction in Texas as a final adverse action when Petitioner filed his revalidation application on March 24, 2014. The hearing officer concluded that the failure to report the felony conviction was a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(4) because the failure to report the conviction constituted false or misleading information on the application. CMS Ex. 3.

Petitioner requested a hearing before an administrative law judge (ALJ) on October 27, 2016 (RFH). The case was assigned to me and an Acknowledgement and Prehearing Order (Prehearing Order) was issued on November 7, 2016. There is no dispute that Petitioner's request for hearing was timely, and I have jurisdiction.

CMS filed a motion for summary judgment and prehearing brief on December 7, 2016, (CMS Br.) with CMS exhibits 1 through 7. On January 5, 2017, Petitioner filed a response to the CMS motion and a cross-motion for summary judgment (P. Br.) and Petitioner's exhibits (P. Exs.) 1 through 32. CMS filed a reply brief on January 23, 2017 (CMS Reply). The parties did not object to my consideration of the offered evidence and CMS Exs. 1 through 7 and P. Exs. 1 through 32 are admitted as evidence.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as Novitas. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[2] Act §§ 1835(a) (42 U.S.C. § 1395n(a)), 1842(h)(1) (42 U.S.C.

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[2] A "supplier" furnishes services under Medicare and includes physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) (42 U.S.C. § 1395f(g)) and 1835(e) (42 U.S.C. § 1395n(e)) of the Act. Act § 1861(u) (42 U.S.C.

Continued next page.

§ 1395u(h)(1)). Petitioner, a physical therapist, is a supplier. Act § 1861(p) (42 U.S.C. § 1395x(p)); 42 C.F.R. §§ 410.3(a)(1), 410.10(m), 410.60.

The Act requires that the Secretary of Health and Human Services (Secretary) issue regulations to establish a process for enrolling providers and suppliers in Medicare, including the requirement to provide the right to a hearing and judicial review of certain enrollment determinations, such as revocation of enrollment and billing privileges. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, suppliers such as Petitioner must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare-eligible beneficiary.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its Medicare contractor may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. Pursuant to 42 C.F.R. § 424.535(a)(4), CMS may revoke a supplier's enrollment and billing privileges if CMS determines the "supplier certified as 'true' misleading or false information on the enrollment application to be enrolled or maintain enrollment in the Medicare program." Generally, when CMS revokes a supplier's Medicare billing privileges for not complying with enrollment requirements, the revocation is effective 30 days after CMS or its contractor mails notice of its determination to the supplier. 42 C.F.R. § 424.535(g). After a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination, specifying the conditions or requirements the supplier failed to meet, and advising the supplier of its right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5(*l*)(2). CMS is also granted the right to request ALJ review of a reconsidered determination with which it is dissatisfied. 42 C.F.R.

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Footnote continued.

§ 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

§ 498.5(*l*)(2). A hearing on the record, also known as an oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-51 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

B. Issues

Whether summary judgment is appropriate; and

Whether there was a basis for the revocation of Petitioner's billing privileges and Medicare enrollment.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent undisputed facts and analysis.

1. Summary judgment is appropriate.

A provider or supplier denied enrollment in Medicare or whose enrollment has been revoked has a right to a hearing and judicial review pursuant to section 1866(h)(1) and (j) of the Act and 42 C.F.R. §§ 498.3(b)(1), (5), (6), (8), (15), (17); 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. Act §§ 205(b), 1866(h)(1) and (j)(8) (42 U.S.C. §§ 405(b), 1395cc(h)(1) and (j)(8)); *Crestview*, 373 F.3d at 748-51. A party may waive appearance at an oral hearing, but must do so affirmatively in writing. 42 C.F.R. § 498.66. Petitioner has not filed a written waiver of the right to appear and present evidence. Because Petitioner has not waived the right to oral hearing, disposition on the written record alone is not permissible unless summary judgment is appropriate in favor of either party.

Summary judgment is not automatic upon request, but is limited to certain specific conditions. The Secretary's regulations at 42 C.F.R. pt. 498 that establish the procedure to be followed in adjudicating Petitioner's case do not establish a summary judgment procedure or recognize such a procedure. However, the Board has long accepted that summary judgment is an acceptable procedural device in cases adjudicated pursuant to 42 C.F.R. pt. 498. *See, e.g.*, *Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009); *Garden City Med. Clinic*, DAB No. 1763 (2001); *Everett Rehab. & Med. Ctr.*, DAB No. 1628 at 3 (1997). The Board also has recognized that the Federal Rules of Civil Procedure do not apply in administrative adjudications such as this, but the Board has accepted that Fed. R. Civ. Pro. 56 and related cases provide useful guidance for determining whether summary judgment is appropriate. Furthermore, a summary judgment procedure was adopted as a matter of judicial economy within my authority to regulate the course of proceedings and made available to the parties in the litigation of

this case by my Prehearing Order, ¶¶ II.D. and G. The parties were given notice by my Prehearing Order that summary judgment is an available procedural device and that the law as it has developed related to Fed. R. Civ. Pro. 56 will be applied.

Summary judgment is appropriate when there is no genuine dispute as to any material fact for adjudication and/or the moving party is entitled to judgment as a matter of law. In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. The party requesting summary judgment bears the burden of showing that there are no genuine issues of material fact for trial and/or that it is entitled to judgment as a matter of law. Generally, the non-movant may not defeat an adequately supported summary judgment motion by relying upon the denials in its pleadings or briefs but must furnish evidence of a dispute concerning a material fact, i.e., a fact that would affect the outcome of the case if proven. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 4 (2012) (and cases cited therein); *Experts Are Us, Inc.*, DAB No. 2452 at 4 (2012) (and cases cited therein); *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010) (and cases cited therein); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The standard for deciding a case on summary judgment and an ALJ's decision-making in deciding a summary judgment motion differ from that used in resolving a case after a hearing. On summary judgment, the ALJ does not make credibility determinations, weigh the evidence, or decide which inferences to draw from the evidence, as would be done when finding facts after a hearing on the record. Rather, on summary judgment, the ALJ construes the evidence in a light most favorable to the non-movant and avoids deciding which version of the facts is more likely true. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). The Board also has recognized that on summary judgment it is appropriate for the ALJ to consider whether a rational trier of fact could find that the party's evidence would be sufficient to meet that party's evidentiary burden. *Dumas Nursing & Rehab., L.P.*, DAB No. 2347 at 5 (2010). The Secretary has not provided in 42 C.F.R. pt. 498 for the allocation of the burden of persuasion or the quantum of evidence required to satisfy the burden. However, the Board has provided some persuasive analysis regarding the allocation of the burden of persuasion in cases subject to 42 C.F.R. pt. 498. *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 Fed. App'x 181 (6th Cir. 2005).

There is no genuine dispute as to any material fact in this case related to the nature of the criminal proceeding against Petitioner or the fact that he did not report the result of that criminal proceeding in his revalidation application. The issues in this case that require resolution are issues of law related to the interpretation and application of the regulations

that govern enrollment and billing privileges in the Medicare program and application of the law to the undisputed facts of this case. Summary judgment is appropriate as to both the basis for revocation and the effective date of revocation.

2. Certifying as true information on an enrollment application or on an application to maintain enrollment that is misleading or false, is a basis for revocation of Medicare enrollment and billing privileges. 42 C.F.R. § 424.535(a)(4).

3. There is a basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4) because he failed to report as a final adverse action the results of the 2005 Texas criminal proceeding when submitting his revalidation application on March 24, 2014, and certifying that the information in that application was true.

4. Revocation of Petitioner's Medicare enrollment and billing privileges is effective June 19, 2016, 30 days from the date of the May 20, 2016 notice of initial determination to revoke. 42 C.F.R. § 424.535(g).

a. Facts

The material facts are not disputed.

On about December 17, 2004, Petitioner was indicted by a Texas grand jury of two counts of sexual touching of a child younger than 17, not his spouse, in violation of Texas Penal Code § 21.11(a)(1), second degree felonies that occurred on about July 30, 2004. CMS Ex. 7 at 1-2. On March 22, 2005, Petitioner pleaded guilty to the charges in exchange for an order of deferred adjudication, ten years community supervision, and a $1,000 fine. The court accepted the guilty pleas but deferred entering an adjudication of guilty. The court required Petitioner to register as a sex offender. CMS Ex. 7 at 3-7. On April 22, 2015, Petitioner was discharged from the community supervision and the case was dismissed. CMS Ex. 7 at 21.[3]

There is no dispute that on March 24, 2014, Petitioner filed an application to revalidate his enrollment in Medicare using the CMS Provider Enrollment, Chain, and Ownership

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[3] P. Exs. 2 through 6 contain copies of the same documents related to the Texas criminal case that are included in CMS Ex. 7.

System (PECOS). CMS Ex. 1. Petitioner did not list a final adverse legal action in the revalidation application. CMS Ex. 1 at 3. Novitas notified Petitioner on July 8, 2014, that his revalidation application was approved. CMS Ex. 6. Petitioner does not dispute that he did not list the Texas criminal proceeding or its result in his March 24, 2014 revalidation application. Petitioner also does not dispute that by submitting the March 24, 2014 revalidation application he certified its contents as true.

b. Analysis

Petitioner was obliged to submit a complete Medicare enrollment application for revalidation with accurate and truthful responses to all information requested and to ensure that his enrollment information was updated to remain complete, accurate, and truthful. 42 C.F.R. §§ 424.510(d), 424.515, 424.516. The PECOS revalidation application Petitioner completed on March 24, 2014, required the entry of information regarding any final adverse actions. CMS Ex. 1 at 3. Pursuant to the 2013 revision of 42 C.F.R. § 424.502 in effect on March 24, 2014, when Petitioner filed his revalidation application:

> *Final adverse action* means one or more of the following actions:
>
> (1) A Medicare-imposed revocation of any Medicare billing privileges;
>
> (2) Suspension or revocation of a license to provide health care by any State licensing authority;
>
> (3) Revocation or suspension by an accreditation organization;
>
> (4) A conviction of a Federal or State felony offense (as defined in § 424.535(a)(3)(i)) within the last 10 years preceding enrollment, revalidation, or re-enrollment; or
>
> (5) An exclusion or debarment from participation in a Federal or State health care program.

(Emphasis in original.) In this case, the fourth definition is at issue. The elements of the fourth definition of a final adverse action are: (1) the provider or supplier was convicted; (2) the conviction was of a federal or state offense; (3) the offense was a felony; and (4) the felony conviction was during the period ten years preceding the date of enrollment, revalidation, or re-enrollment. The definition refers to 42 C.F.R. § 424.535(a)(3)(i) for the definition of "conviction of a Federal or State felony offense."

The revision of 42 C.F.R. § 424.535(a)(3)(i) effective February 3, 2015 (79 Fed. Reg. 72,500 (Dec. 5, 2014)), which was applicable at the time of both the initial and reconsidered determinations in this case, incorporates the following definition of conviction from 42 C.F.R. § 1001.2:

> *Convicted* means that—
>
> (a) A judgment of conviction has been entered against an individual or entity by a Federal, State or local court, regardless of whether:
>
> (1) There is a post-trial motion or an appeal pending, or
>
> (2) The judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;
>
> (b) A Federal, State or local court has made a finding of guilt against an individual or entity;
>
> (c) A Federal, State or local court has accepted a plea of guilty or *nolo contendere* by an individual or entity; or
>
> (d) An individual or entity has entered into participation in a first offender, deferred adjudication or other program or arrangement where judgment of conviction has been withheld.

42 C.F.R. § 1001.2. (Emphasis in original). The 2013 revision of 42 C.F.R. § 424.535(a)(3)(i) in effect on March 24, 2014, when Petitioner filed his revalidation application, did not incorporate by reference 42 C.F.R. § 1001.2, but provided as follows:

> (3) *Felonies*. The provider, supplier, or any owner of the provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the program and its beneficiaries.
>
> (i) Offenses include—

> (A) 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.
>
> (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.
>
> (C) Any felony that placed the Medicare program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.
>
> (D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

(Emphasis in original.)

Petitioner does not deny that he did not list the results of the March 22, 2005 Texas criminal proceedings as a final adverse action in his revalidation application submitted through PECOS on March 24, 2014. Petitioner argues that he was not required to report in his March 24, 2014 revalidation application that he received a deferred adjudication in the Texas criminal proceedings, because it was not a conviction under Texas law and not a final adverse action within the meaning of 42 C.F.R. § 424.502. P. Br. at 2, 18. Petitioner does not deny that the offenses to which he pleaded guilty were felonies in Texas.

Petitioner advances three arguments in his defense.

> 1. Petitioner argues that the revision of 42 C.F.R. § 424.535(a)(3), which incorporates by reference 42 C.F.R. § 1001.2 that was applied by the hearing officer on reconsideration (CMS Ex. 3 at 3-4), is invalid because it "contradicts Congress's unambiguously expressed intent and ignores the definition of conviction under State law." P. Br. at 2-3, 6-16.
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> 2. Petitioner argues that the application of the revision of 42 C.F.R. § 424.535(a)(3), which incorporates 42 C.F.R. § 1001.2, is an impermissible retroactive application of the regulation because that revision, which was intended to clarify the definition of the term convicted to have the same definition as that in 42 C.F.R. § 1001.2, was not effective until February 3, 2015 (79 Fed. Reg. 72,499, 72,510 (Dec. 5, 2014)). P. Br. at 2-3, 16-18.

> 3. Petitioner also argues that even if Petitioner's deferred adjudication in Texas was a conviction, it occurred more than ten years prior to the June 18, 2016 revocation and for that reason it is not a proper basis for revocation. P. Br. at 3, 18-19.

Petitioner relies upon the language of Act § 1866(b)(2)(D) (42 U.S.C. § 1395cc(b)(2)(D)) as the basis for his position that treating a deferred adjudication under Texas law as a conviction violates the intent of Congress. The section provides that the Secretary may refuse to enter an agreement, may refuse to renew, or may terminate an agreement with a provider or supplier if the Secretary:

> (D) has ascertained that the provider has been convicted of a felony under Federal or State law for an offense which the Secretary determines is detrimental to the best interests of the program or program beneficiaries.

Petitioner argues that the statute should be read to require that the definition of convicted turns on state law for a state case and federal law for a federal case. Petitioner points to no authority in support of his argument but simply asserts that is what the plain language of the statute requires. Petitioner wants to apply the definition of conviction under Texas law which he asserts does not include a deferred adjudication such as his. Petitioner does not mention that in Act § 1128(i) (42 U.S.C. § 1320a-7(i)), Congress specifically defined conviction as follows:

> **(i) "Convicted" defined**
>
> For purposes of subsections (a) and (b) of this section [42 U.S.C. § 1320a-7], an individual or entity is considered to have been "convicted" of a criminal offense—
>
> (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
>
> (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
>
> (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or

> (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

(Emphasis in original.) Petitioner offers no explanation for why Congress would intend for the term convicted to be defined differently under two different sections of the Social Security Act. Petitioner argues that prior Board decisions addressing this issue, specifically *John Hartman, D.O.*, DAB No. 2564 at 1-2 (2014) and *Lorrie Laurel, PT*, DAB No. 2524 at 4 (2013), are simply wrong. Petitioner's analysis is not nearly as persuasive as that of the Board in *Hartman* and *Laurel*. Congress in Act § 1128(i) (42 U.S.C. § 1320a-7(i)) specifically defined the term convicted, whether by a federal, state, or local court, to include an accepted guilty plea or a deferred adjudication, both of which apply in this case. I find Congress's express definition of convicted in Act §1128(i)(42 U.S.C. § 1320a-7(i)) a far clearer expression of Congressional intent than that yielded by Petitioner's tortured plain language analysis of Act § 1866(b)(2)(D)(42 U.S.C. § 1395cc(b)(2)(D)). Finally, when Petitioner filed his revalidation application on March 24, 2014, the version of 42 C.F.R. § 424.535(a)(3)(i) (2013) then in effect stated that guilty pleas and adjudicated pretrial diversions were to be treated just like convictions that would justify the Secretary refusing to grant enrollment, denying renewal of enrollment, or revoking a provider's or supplier's enrollment in Medicare. I conclude that Petitioner's argument that his deferred adjudication is not a conviction under Texas law, even if correct, is without merit because it is the definition of conviction under the Act that controls. Congress in the Act and the Secretary in his regulations treat an accepted guilty plea and a deferred adjudication the same as a conviction for purposes of enrolling and maintaining enrollment in Medicare.

Petitioner argues that the revision of 42 C.F.R. § 424.535(a)(3), that incorporates by reference 42 C.F.R. § 1001.2, which was effective February 3, 2015, should not be applied in his case. I need not resolve Petitioner's argument that to apply the amended regulation is an impermissible retroactive application of the regulation. To ensure no prejudice to Petitioner through a potentially impermissible retroactive application, I apply 42 C.F.R. § 424.535(a)(3)(i) (2013), as set forth above, the version of the regulation in effect when Petitioner filed his revalidation application on March 24, 2014. Pursuant to 42 C.F.R. § 424.535(a)(3)(i)(A) (2013), felony convictions that are a basis for revocation of Medicare enrollment and billing privileges include a conviction of a felony against persons, including guilty pleas and adjudicated pretrial diversions. The regulation provides:

> (i) Offenses include—

> (A) 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)(i)(A) (2013). On March 22, 2005, Petitioner pleaded guilty to two counts of sexual touching of a child younger than 17, not his spouse, in violation of Texas Penal Code § 21.11(a)(1), second degree felonies that occurred on about July 30, 2004. CMS Ex. 7 at 1-2. Petitioner pleaded guilty to the charges in exchange for an order of deferred adjudication, ten years community supervision, and a $1,000 fine. The court accepted the guilty pleas and deferred entering an adjudication of guilty. CMS Ex. 7 at 3-4. The initial determination to revoke was made by Novitas on about May 20, 2016. CMS Ex 5. Because the guilty plea was entered on March 22, 2005, the ten-year limitation on revoking pursuant to 42 C.F.R. § 424.535(a)(3) had elapsed. This fact explains why Novitas elected to revoke pursuant to 42 C.F.R. § 424.535(a)(4) based on Petitioner's failure to report the guilty plea and deferred adjudication in Texas as a final adverse action in his March 24, 2014 revalidation application.

Petitioner's third argument is also without merit. Petitioner argues that even if Petitioner's deferred adjudication in Texas was a conviction, it occurred more than ten years prior to the June 18, 2016 revocation and it is not a proper basis for revocation. P. Br. at 3, 18-19. Petitioner is confused. It is March 24, 2014, the date Petitioner filed his revalidation application, not June 18, 2016, that controls. The 2013 revision of 42 C.F.R. § 424.502 in effect on March 24, 2014, when Petitioner filed his revalidation application, specified that a final adverse action included a conviction of a felony within the last ten years preceding the enrollment, revalidation, or re-enrollment. Therefore, in this case Petitioner was required to report as a final adverse action on his revalidation application any felony conviction, including a guilty plea or deferred adjudication, that occurred after March 24, 2004. Petitioner's guilty pleas to the felony offenses and deferred adjudication in Texas occurred in 2005, during the ten-year period preceding his filing of his revalidation application.

I conclude that Petitioner's guilty pleas to felony sex offenses and deferred adjudication in Texas on March 22, 2005, was a final adverse action that occurred during the ten years preceding the filing of Petitioner's revalidation application on March 24, 2014. Petitioner was required to submit complete, accurate, and truthful responses to all questions on his revalidation application. 42 C.F.R. §§ 424.510(d)(2)(i), 424.515(a). By submitting his revalidation application, Petitioner certified that the information was complete, accurate, and truthful. 42 C.F.R. §§ 424.510(d)(3); 424.515(a). Petitioner failed to list his guilty pleas and the deferred adjudication in Texas on March 22, 2005, as a final adverse action on his March 24, 2014 revalidation application. Because he did not list the guilty pleas and deferred adjudication, Petitioner certified as true on his revalidation application that

he had no final adverse action to report. Accordingly, I conclude that there is a basis for revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(4).

Having found that there is a basis for revocation, I have no authority to review the exercise of discretion by CMS to revoke Petitioner's Medicare enrollment and billing privileges. *Dinesh Patel, M.D.*, DAB No. 2551 at 10 (2013); *Fady Fayad, M.D.*, DAB No. 2266, at 16 (2009), *aff'd, Fayad v. Sebelius*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 at 16-17, 19 (2009), *aff'd, Ahmed v. Sebelius*,710 F. Supp. 2d 167 (D. Mass. 2010).

Summary judgment is also appropriate as to the effective date of revocation. Pursuant to 42 C.F.R. § 424.535(g), revocation becomes effective 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, except under certain facts not present in this case. The notice of the initial determination to revoke was dated May 20, 2016. CMS Ex. 5. It is not subject to dispute that the thirtieth day after May 20, 2016, was June 19, 2016, not June 18, 2016, the effective date announced in the notice of initial determination and approved on reconsideration. CMS Exs. 3, 5. Accordingly, I conclude that June 19, 2016, is the correct effective date of revocation.

Novitas imposed a three-year bar to reenrollment. CMS Exs. 3, 5. When a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c). There is no statutory or regulatory language establishing a right to review of the duration of the re-enrollment bar CMS imposes. Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.535(c), 424.545; 498.3(b), 498.5. The Board has held that the duration of a revoked supplier's re-enrollment bar is not an appealable initial determination listed in 42 C.F.R. § 498.3(b) and not subject to ALJ review. *Vijendra Dave, M.D.*, DAB No. 2672 at 10-11 (2016).

To the extent that Petitioner's arguments may be construed as a request for equitable relief, I have no authority to grant such relief. *US Ultrasound*, DAB No. 2302 at 8 (2010). I am also required to follow the Act and regulations and have no authority to declare statutes or regulations invalid. *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 14 (2009).

III. Conclusion

For the foregoing reasons, Petitioner's Medicare enrollment and billing privileges are revoked pursuant to 42 C.F.R. § 424.535(a)(4). The effective date of revocation is June 19, 2016.

/s/
Keith W. Sickendick
Administrative Law Judge